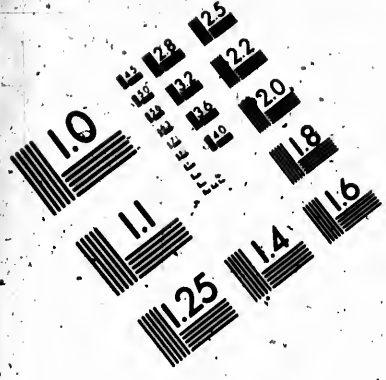

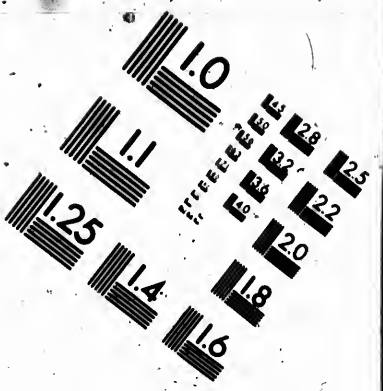

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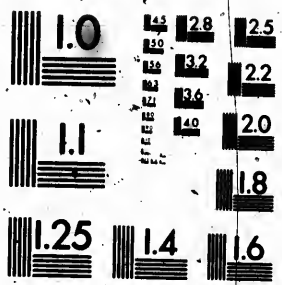

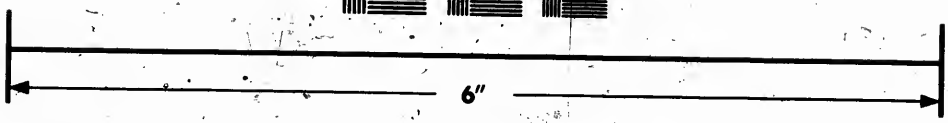

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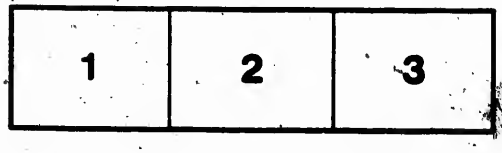

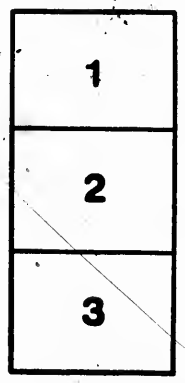

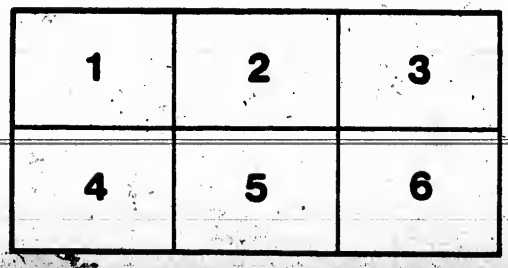

61

THE

MONTREAL LAW REPORTS.

COURT OF QUEEN'S BENCH.

JAMES KIRBY, Editor.

CASES DETERMINED IN THE COURT OF QUEEN'S BENCH, MONTREAL,

1887.

(With some cases of previous years.)

CONTRIBUTORS (*Reports distinguished by initials.*) { L. E. PANNETON, Q.C. JAMES KIRBY. H. J. KAVANAGH.

VOL. III.

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1887.

JUDGES

OF THE

COURT OF QUEEN'S BENCH,

1887.

THE HON. SIR ANTOINE AIMÉ DORION, KT., *Chief Justice.*

" SAMUEL CORNWALLIS MONK,
" ULRIC JOSEPH TESSIER,
" ALEXANDER CROSS,
" LOUIS FRANÇOIS GEORGES BABY,
" L. RUGGLES CHURCH,

} *Puisne Judges.*

Attorney General:

THE HON. H. MERCIER, Q.C.

Solicitor General:

THE HON. G. DUHAMEL, Q.C.

Clerk of Appeals:

L. W. MARCHAND.

TABLE OF CASES REPORTED,

IN VOL III.

Allan et al. & Pratt.....7, 322
Allen & Merchants Marine Insurance Co..... 293
Archambault, Jodoin &..... 1
Archambault & Lalonde.... 486

Baker et al., Schwob &..... 191
Banque du Peuple, The Exchange Bank of Canada & 232
Banque Nationale (La), Beckett &..... 274
Barnard & Molson..... 348
Baylis, Foster &..... 421
Beaudry & Courcelles Chevalier..... 159
Beaudry & Dunlop..... 278
Beckett & La Banque Nationale..... 274
Beckett & Merchants Bank of Canada..... 381
Berthiaume, *Reg.* v..... 143
Blondin & Lizotte..... 496
Boxer v. Judah..... 320
Bradstreet, Girard & 69
Bradstreet Company & Carsley..... 83
Brewster & Mongeon..... 20
Brunette et vir, Fraser &... 310
Burroughs & Wells..... 492

Cadieux, Canadian Pacific Ry. Co. &..... 315
Canadian Pacific Railway Co. & Cadieux..... 315
Canadian Pacific Ry. Co. & Chalifoux..... 324
Carle, Exchange Bank of Canada &..... 61
Carsley, Bradstreet Co. & 83
Chalifoux, C. P. R. Co. & 324
Chaussé, Stephens &..... 270
Cité de Montréal, Joyce & 200
Cité de Montréal, La Compagnie de Navigation de Longueuil &..... 172
Cleveland & Exchange Bank 30
Commissaires d'Ecole d'Hochelaga & Montreal Abattoirs Co..... 116
Compagnie (La) de Navigation de Longueuil & La Cité de Montréal, & Taillon..... 172
Comté d'Yamaska & Durocher..... 219
Corporation de la paroisse de St-Aimé, Massue &. 319
Corporation de St. Aimé, Massue & 263
Corporation du Comté d'Yamaska & Durocher..... 219
Corporation Episcopale C. R. du diocèse de St. Hyacinthe & E. T. Bank 225
Corporation of Sherbrooke & Short..... 50
Coté, Pinkerton &..... 133
Courcelles Chevalier, Beaudry &..... 159

De Bellefeuille & Desmarteau 303
Denoon et al., Marchildon & 12
Desmarteau, De Bellefeuille & 303
Diocèse de St. Hyacinthe & E. T. Bank..... 225
Dorion & Dorion..... 155
Dougall et al., McLeish v... 313
Downie, Reg. v..... 360
Dufresne, Webster &..... 43
Dunlop, Beaudry &..... 278
Durocher, La Corporation du Comté d'Yamaska & 219

Eastern Townships Bank, La Corp. Episcopale C. R. du diocèse de St. Hyacinthe &..... 225
Evans, Skelton &..... ... 325
Exchange Bank of Canada & Carle..... 61
Exchange Bank of Canada, Cleveland & 30
Exchange Bank of Canada, Goodall &..... 430
Exchange Bank of Canada & La Banque du Peuple 232

Foster & Baylis.. 421
Foster, Ulster Spinning Co.& 396
Fournier, Leger & 124
Fraser & Brunette..... 310

Gendron, Taylor &..... 38
Gilbert et al., Gilman &..... 402
Gillespie, Stephens &..... 167
Gilman & Gilbert et al..... 402
Gilmour & Paradis..... 449
Girard & Bradstreet..... 69
Goodall & Exchange Bank of Canada..... 430
Griffin & Merrill et al..... 130
Grothé & Saunders 208

Jeffery & Webb..... 147
Jodoin & Archambault 1
Joyce & La Cité de Montréal 200
Judah, Boxer v..... 320

Lalonde, Archambault &.... 486
Lancashire Ins. Co., The Rasconi Manufacturing Co. &..... 317
Leger & Fournier..... 124
Lemay, St. Lawrence Steam Navigation Co. &..... 214
Lizotte, Blondin &..... 496
Longueuil, La Compagnie de Navigation de & La Cité de Montréal..... 172
Lowrey et al. & Routh..... 364

McGillivray & Watt 249
McLeish v. Dougall et al... 313
Marchildon & Denoon et al. 12

Massue & La Corporation de la Paroisse de St-Aimé..... 263, 349
Merchants Bank of Canada, Beckett &..... 381
Merchants Marine Ins. Co., Allen &..... 293
Merrill et al., Griffin &..... 130
Molson, Barnard &..... 348
Mongeon, Brewster &..... 20
Montreal Abattoirs Co., Les Commissaires d'Ecole d'Hochelaga &..... 116

O'Brien & Semple..... 55
Ouimet dit Bastien, Tassé & 310

Paradis, Gilmour &..... 449
Paul et al., Ross & 299
Pinkerton et al. & Coté. ... 133
Pratt, Allan et al. &.....7, 322
Prendergast, Shea &..... 439

Rasconi Woolen and Cotton Manufacturing Co. v. The Lancashire Ins. Co. 317
Reg. v. Berthiaume..... 143
Reg. v. Downie..... 360
Ross & Paul et al..... 299
Routh, Lowrey &..... ... 364

Saunders, Grothé &..... 208
Schwob & Baker et al. 191
St. Hyacinthe, Diocèse de & The Eastern Townships Bank..... 225
St. Lawrence Steam Navigation Co. & Lemay..... 214
St. Aimé (Corp. de la paroisse de), Massue & 263, 319
Schlbach & Stevenson..... 391
Semple, O'Brien &..... 55
Shea & Prendergast 439
Sherbrooke (Corp. of) & Short..... 50
Short, Corp. of Sherbrooke & 50
Skelton & Evans..... 325
Stephens & Chaussé..... ... 270
Stephens & Gillespie..... 167
Stevenson, Schlbach &..... 391

Taylor et al. & Gendron.... 38
Tassé v. Ouimet dit Bastien 312

Ulster Spinning Co. & Foster 396

Waldron & White..... 375
Watt, McGillivray &..... 249
Webb, Jeffery &..... 147
Webster et al. & Dufresne et al..... 43
Wells, Burroughs &..... 492
White, Waldron &..... 375

Yamaska, La Corp. du Comté d' & Durocher..... 219

The Mode of Citation of the Volumes in the Two Series of the MONTREAL LAW REPORTS, for 1887, is as follows:—

In the Queen's Bench Series,
M. L. R., 3 Q. B.

In the Superior Court Series,
M. L. R., 3 S. C.

TABLE OF CASES CITED.

Name of Case.	Where Reported.	Page.
Armstrong v. Northern Insurance Co.	4 Leg. News, 77	290
Banque d'Hochelaga v. M. P. & B. Rail'y Co.	M. L. R., 1 S. C. 150	28
Banque Jacques-Cartier & Ogilvie	19 L. C. J. 100	340
Beardsly v. Tappan	5 Blackford, 497	101
Bell v. Hartford Ins. Co	1 Leg. News, 100	206
Bonacina v. Bonacina	4 L. C. J. 148	277
Brandt v. Bowlby	2 B. & Ad. 932	252
Bright, Ex parte	L. R., 10 Ch. D. 566	305
Brodie v. Cowan	7 L. C. J. 96	378
Bull v. Robinson	24 Law J. Ex. 164	41
Burland & Larocque	12 L. C. J. 292	489
Carsley v. The Bradstreet Co	M. L. R., 2 S. C. 33	101
Clayton's Case	1 Merivale, 608	34
Collette v. Lanier	13 Can. Sup. Ct. Rep. 563	140
Compagnie du Chemin de Fer Central & Legendre	11 Q. L. R. 106	23
Cornell v. Liverpool & London Ins. Co	14 L. C. J. 256	298
Corporation de la Paroisse de St. Jérusalem v. Quinn	3 L. C. J. 234	120
Doyle & Gaudette	20 L. C. J. 134	33
Dudley & Darling	M. L. R., 2 Q. B. 458	401
Edmonstone & Childs	2 L. C. J. 192	119
Field v. Carr	5 Bingham, 13	34
Foster v. Mackinnon	38 Law J., C. P. 310	64
Girard v. Bradstreet	M. L. R., 3 Q. B. 69	100
Graham v. Morissette	5 Q. L. R. 346	120
Grand Trunk Ry. Co. & Brewster	6 Leg. News, 34	495
Harrison v. Bush	5 Ell. & Blackburn, 348	112
Hogan v. Bernier	21 L. C. J. 101	495
Hudon & Marceau	23 L. C. J. 45	131
Jobin & Shuter	21 L. C. J. 67	506
Landa v. Pouleur	1 Leg. News, 614	490
Liggett & Tracey	20 L. C. J. 313	494
MacCraken & Logue	6 Leg. News, 90	462
McDonnell & Goundry	1 Leg. News, 50	495
Maurice v. Des Rosiers	7 Leg. News, 361	491

Name of Case.	Where Reported.	Page.
Miller & Deschêne	8 Q. L. R. 18	275
Mirabita *v.* Imperial Bank	L. R., 3 Ex. Div. 164	261
Morey *v.* Gaherty	2 Leg. News, 108	120
Ogdensburg Towing Co. & Lambe	M. L. R., 1 Q. B. 123	190
Pacaud & Rickaby	1 Q. L. R. 245	462
Park *v.* Rivard	M. L. R., 1 S. C. 291	275
Parker & Felton	21 L. C. J. 253	495
Provincial Insurance Co. *v.* Ætna Ins. Co.	16 U. C. Q. B. 135	298
Reg. *v.* Davies	10 Cox C. C. 239	145
Reg. *v.* Fletcher	L. R., 1 C. C. 320	364
Reg. *v.* Leonard	3 Leg. News, 211	362
Reg. *v.* Mason	29 U. C. Q. B. 431	364
Robertson *v.* Plympton	25 N. Y. Rep. 484	371
Rousseau *v.* Royal Insurance Co.	M. L. R., 1 S. C. 395	296
Shepherd *v.* Harrison	L. R., 4 Q. B. 197	252
Stirling et al. *v.* Darling	1 L. C. J. 161	349
Tansey & Bethune	M. L. R., 1 Q. B. 28	284, 286
Towle *v.* White	21 W. R. 465	395
Williams *v.* Rousseau	12 Q. L. R. 116	491
Whyte *v.* Western Insurance Co.	22 L. C. J. 215	296

TABLE OF STATUTES CITED.

IMPERIAL. PAGE.

B. N. A. Act, 1867, s. 92..... 183

Canada before Confederation.

41 Geo. III, ch. 7, s. 2.....275, 7
10-11 Geo. IV, ch. 28 181
8 Vic. ch. 76, s. 5..... 181
10-11 Vic. ch. 56..... 181
14-15 Vic. ch. 128..... 178
14-15 Vic. ch. 128, s. 58..... 186
18 Vic. ch. 143..... 181
C. S. L. C. ch. 83, s. 68.....275, 7
24 Vic. ch. 68, s. 6..... 182
30 Vic. ch. 30..... 229

Dominion Statutes.

32-33 Vic. ch. 21..... 145
R. S. ch. 135, ss. 40, 42..... 319

Statutes of Quebec.

PAGE.

33 Vic. ch. 17, s. 2.....279-292
35 Vic. ch. 6, s. 10..... 362
37 Vic. ch. 6..... 311
37 Vic. ch. 51.....172-191
37 Vic. ch. 51, s. 185..... 207
38 Vic. ch. 7..... 2
39 Vic. ch. 52.....172-191
41 Vic. ch. 14, s. 1..... 478
42-43 Vic. ch. 53, s. 12.....200-208
44-45 Vic. ch. 35..... 23
45 Vic. ch. 10, s. 2..... 466
45 Vic. ch. 23.....121, 122
46 Vic. ch. 9.....449-485
47 Vic. ch. 8..... 362
48 Vic. ch. 22, s. 14..... 120

ARTICLES OF CODES CITED.

Civil Code of Lower Canada. [PAGE

Art. 6 378
29 ..... 275, 277
165 130
1,025 253
1,053 ..... 75, 110, 343
1,064 ..... 16, 273
1,105 15
1,107 15
1,118 15
1,141 ..... 443, 448
1,161 30–38
1,171 56
1,190 490
1,234 396
1,317 130
1,323 381–390
1,447 508
1,472 253
1,474 253
1,506 505
1,507 505
1,508 505
1,511 505
1,532 506
1,535 505
1,549 126
1,550 126
1,591 504
1,626 343
1,629 ..... 325, 347
1,727 14
1,731 ..... 14, 16
1,899 287
1,963 321
1,994 ..... 278, 293, 304, 307
1,995 ..... 304, 307
1,973 418
2,023 349
2,184 293–297
2,293 246
2,354 246

Code of Civil Procedure, P.Q. [PAGE

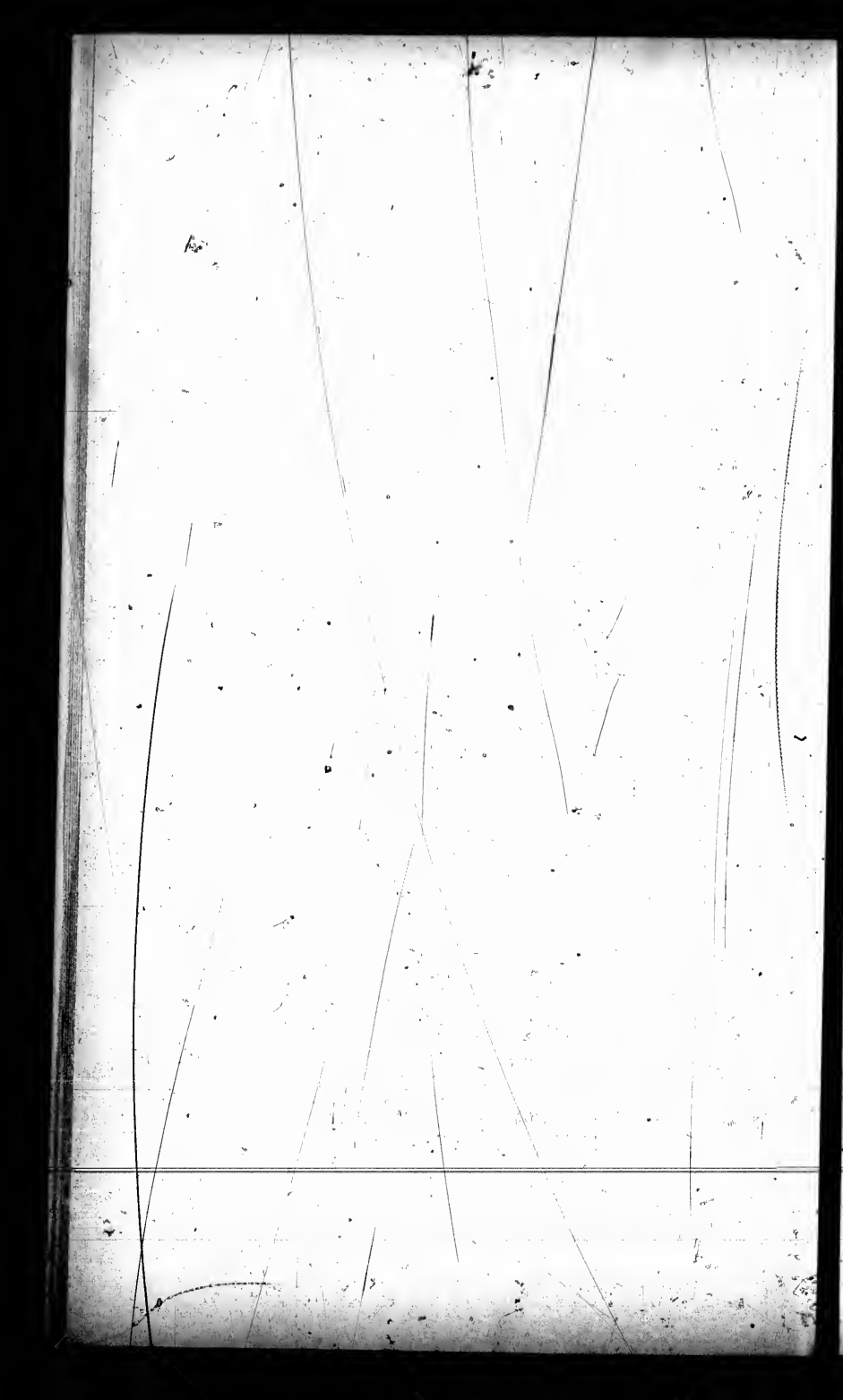
Art. 22 4
148 313
371 ..... 313, 314
606 ..... 278, 293
708 506
709 506
710 506
711 506
714 ..... 496, 504
728 285
753 348–359
763 305
768 305
772 305
834 156
1,124 367
1,143 283
1,146 283
1,181 322

Municipal Code, P.Q.

Art. 549 186
550 186
810 223
904 ..... 263, 268
932 219–224

Code Napoléon.

Art. 1,273 57
1,275 57
1,293 490
1,382 75
1,442 385
1,991 445
2,092 351
2,093 351



CASES REPORTED IN VOLS. I—III

WHICH HAVE BEEN CARRIED FURTHER.

[Q. B. refers to Montreal Law Reports, Queen's Bench Series.]

Banque d'Epargnes & Banque Jacques-Cartier, 2 Q. B. 64; reversed by Privy Council, 11 L. N. 66.

Black & Walker, 1 Q. B. 214; confd. by Supreme Court.

Brady & Stewart, 2 Q. B. 272; confd. by Supreme Court, 10 L. N. 324.

Brunet & L'Association Pharmaceutique, 2 Q. B. 362; confirmed by Supreme Court, 10 L. N. 108.

Corporation du Comté d'Ottawa & La Compagnie du Chemin de Fer de Montréal, Ottawa & Occidental, 1 Q. B. 46; confd. by Supreme Court.

Cross & Windsor Hotel Co., 2 Q. B. 3; confd. by Supreme Court, 9 L. N. 243; 12 Can. S. C. R. 624.

Dansereau & Letourneux, 1 Q. B. 357; confd. by Supreme Court, 12 Can. S. C. R. 397.

Dominion Abattoir Co. & Hedge, 1 Q. B. 376; confd. by Supreme Court, 9 L. N. 410.

Dorion & Dorion, 1 Q. B. 483; confd. in part by Supreme Court, 13 Can. S. C. R. 193.

Exchange Bank of Canada & La Banque du Peuple, 3 Q. B. 232; confd. by Supreme Court, 10 L. N. 362.

Fairbanks & Barlow, 2 Q. B. 332; confd. by Supreme Court, 10 L. N. 108.

Grégoire & Grégoire, 2 Q. B. 228; confd. by Supreme Court, 9 L. N. 410; 13 Can. S. C. R. 319.

Leger & Fournier, 3 Q. B. 124; confd. by Supreme Court, 10 L. N. 324.

Lord & Davison, 1 Q.B. 445; confd. by Supreme Court, 13 Can. S.C.R. 166.

Macfarlane & The Corporation of the Parish of St. Césaire, 2 Q. B. 160; confd. by Supreme Court, 10 L. N. 108.

Molson & Lambe, 2 Q. B. 381; confd. by Supreme Court, 11 L. N. 151.

Morris & Connecticut & Passumpsic Rivers R. R. Co. 2 Q. B. 303; confd. by Supreme Court.

North British & Mercantile Ins Co. & Lambe, 1 Q. B. 122; confd. by Privy Council, 10 L. N. 258.

Reg. & Exchange Bank of Canada, 1 Q. B. 302; reversed by Privy Council, 9 L. N. 130.

Robinson & Canadian Pacific Railway Co., 2 Q. B. 25; reversed by Supreme Court, 14 Can. S. C. R. 105.

St. Lawrence & Chicago Forwarding Co. & Molsons Bank, 1 Q. B. 75; confd. by Supreme Court.

Stephens & Chausse, 3 Q. B. 270; confd. by Supreme Court, 11 L. N. 90.

Stephens & Gillespie, 3 Q. B. 167; confd. by Supreme Court, 10 L. N. 362.

Wadsworth & McCord, 2 Q. B. 129; reversed by Supreme Court, 12 Can. S. C. R. 466.

Wheeler & Black, 2 Q. B. 159; confd. by Supreme Court, 10 L. N. 107.

Wylie & City of Montreal, 1 Q. B. 367; reversed by Supreme Court, 12 Can. S. C. R. 384.

REPORTS OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH

IN APPEAL,

MONTREAL.

November 23, 1886.

Coram DORION, CH. J., MONK, RAMSAY, TESSIER, CROSS, JJ.

JEAN-BTE. JODOIN,

(*Plaintiff in Court below*),

APPELLANT;

AND

JOSEPH N. A. ARCHAMBAULT,

(*Defendant in Court below*),

RESPONDENT.

Secretary-treasurer — Notice of action — C. C. P. 22 — Quebec Election Act, 38 Vic., ch. 7—Transmission of duplicate of electoral list to Registrar.

HELD:—1. (Affirming the decision of TASCHEREAU, J., M. L. R., 1 S. C. 323):—A public officer is not entitled to notice of action under C. C. P. 22, where the action is for a penalty for failing or omitting to do what the law requires him to do.

2. (Reversing the decision of TASCHEREAU, J., *supra*). The fact that the electoral list was still under the consideration of the Council, is not a valid ground of defence, where a secretary-treasurer is sued for a penalty for not transmitting a duplicate of the list to the registrar of the registration division, within eight days after it came into force, as required by 38 Vict. (Q.) ch. 7, and the penalty may be recovered even where the secretary-treasurer does not appear to be in bad faith.

The appeal was from a judgment of the Superior Court,

1886.
Jodoin & Archambault.

Montreal (TASCHEREAU, J.), March 5, 1885, dismissing an action against a secretary-treasurer, for a penalty. (See M. L. R., 1 S. C. 323, for report of the judgment appealed from.)

September 18, 1885.]

F. X. Choquet for the appellant.

J. L. Archambault, Q. C., for the respondent.

CROSS, J. :—

The appellant, Jean-Bte. Jodoin, prosecuted the respondent, Joseph N. A. Archambault, for the recovery of a penalty of $200 for alleged violation of section 38 of the Quebec Election Act of 1875, 38 Vic., chap. 7, which reads as follows:—"One of the duplicates of the list of electors "shall be kept in the archives of the municipality and "shall there remain of record. The other duplicate shall be "transmitted to the registrar of the registration division "in which is situated the municipality, within eight "days following the day upon which such list shall have "come into force, by the secretary-treasurer or by the "mayor, under a penalty of $200 or of imprisonment for "six months, in default of payment, against each of them "in contravention of this provision."

The violation complained of was that the secretary-treasurer had failed to transmit to the registrar the duplicate list of electors within eight days after it came into force.

The respondent met the action first, by an exception *à la forme*, claiming that the respondent, as a public officer, was entitled to a month's notice of action. This exception was dismissed.

The respondent also pleaded an *exception dilatoire*, claiming delay to call in the municipality as his *garant*. This was dismissed for the very good reason that the municipality was not his *garant* in the matter.

The respondent then pleaded to the merits, besides a *défense en fait*, an exception, alleging the want of notice to him as a public officer, also alleging that he was but the employee of the municipality, subject to their order and

control; that the council had commenced the examination of the list in April, and had not finished it by the 5th of May, to which time they had adjourned or held a meeting, at which time they realized the fact that the list had come into force the 13th of April previous, that is, thirty days after the 13th of March, the day of the first publication of the notice announcing the preparation and deposit of the list; that while it was so under the consideration of the council, he (the respondent) could not transmit the duplicate to the registrar, but he did so as soon as possible after the 5th of May, viz., on the 7th of May; that he acted in good faith, and the public interest had not suffered.

The appellant replied, denying the sufficiency of the excuse.

Admissions were given of the facts sufficient to establish the date at which the list came into force, that is, on the 13th of April, so that the transmission of the duplicate to the registrar on the 7th of May was outside of the eight days allowed for that purpose after the coming into force of the list, that is, more than eight days beyond the 13th of April. It was also admitted that the mayor of the municipality was being prosecuted for a like penalty for the default of not transmitting the duplicate of the list to the registrar in an action then still pending.

The learned judge of the Superior Court ruled all the points so raised adversely to the pretentions of the respondent, save as regards the excuse given for the non-transmission of the duplicate of the voters' list to the registrar within the eight days of the coming into force of the list, he holding that during their consideration of it the list was under the control of the council, and was not then in the power of the secretary-treasurer to transmit it to the registrar, nor could he without stating a falsehood have made or subscribed the certificate, form B in the appendix to the statute, required to be by him inserted in the list so soon as it came into force, to conform to sec. 37 of the statute; he consequently dismissed the action.

1896
Jodoin
&
Archambault.

This Court upon the present appeal in consequence requires to solve the following questions:—

1. Was the respondent under his claim of being a public officer entitled to a month's previous notice of the present action?

2. Was it a valid excuse on his part the pretension that he could not transmit the duplicate of the voters' list to the registrar while it was under consideration by the council?

On the first point it is only necessary to refer to the terms of Art. 22 of the C. P. C. to be convinced that the notice does not apply to a case like the present. This article declares the cases in which, according to the terms of the article, notices are required, viz., actions of damages for acts done by the public officer in the exercise of his functions; it does not at all events extend to acts of omission. The present action is for a penalty for an omission of duty and is not an action of damages. According to English precedents, under a like rule, it would not apply to a case like the present, and it has been so held under a like rule in Ontario, as is borne out by the cases cited by the hon. judge in the Court below.

On the second point this Court is of opinion that the duty required of the secretary-treasurer by sec. 88 of the Quebec Election Act is a duty personal to himself in respect of which he is not under control of the council, and he was bound, as soon as the voters' list came into force, to insert at the end of the list on the duplicate thereof the certificate set forth in form B; that his declaration in the said certificate at that time, that it had not been examined by the council within the thirty days after the publication of the notice required by section 21 of the Act, would not have been a false declaration, and it was no more an obstacle to his inserting said duplicate at the end of the list so soon as it came into force than it was to make the like certificate when he transmitted the list to the registrar on the 7th of May following; that his transmission of the list on the 7th May was too late and after the penalty had been incurred.

1886.

Jodoin & Archambault.

The opinion, therefore, of this Court is that the prosecutor has made out his case; that the judgment of the Superior Court must be reversed, and the respondent condemned in the penalty of $200, as prayed for in the prosecutor's declaration.

RAMSAY, J.:—

In all these cases of suits for penalties I am particularly vigilant to see that every formality has been complied with, and that nothing is left to the imagination. The position of the appellant is not a very favorable one, and I have examined the case in every shape and form with the greatest attention. The result is that I fully concur in the judgment about to be rendered. The respondent says, I could not transmit the duplicate because the list was in the possession of the Council; but this was not a valid excuse for making the return. It was no doubt an error of judgment on his part, but the law says nothing about good faith.

DORION, Ch. J.:—

There is an important question arising out of the want of notice of action. The Code, art. 22, merely requires notice to be given of actions of damages. One of the objects of the law is that when a public officer is notified of an action of damages he may have an opportunity of offering amends. But the article has no application to an action for a penalty. Further, notice is only required when the action is for an act done by the officer in the exercise of his functions. It does not apply when he is sued, as in this case, for an omission to do something.

The judgment of the Court is as follows:—

"La cour, etc.....

"Considérant qu'il appert par la preuve en cette cause, que l'intimé, défendeur en cour de première instance, était, aux époques mentionnées dans la déclaration en cette cause, le secrétaire-trésorier de la municipalité du village de Varennes, et que notamment il était le secrétaire-trésorier

1886.
Jodoin & Archambault.

de la dite municipalité pendant l'année écoulée entre le 1er janvier et le 1er décembre de l'année 1884 ;

" Et considérant que pendant la dite année 1884, la liste des électeurs parlementaires pour la dite municipalité du village du Varennes a été préparée en vertu des dispositions de l'Acte Electoral de Québec, 38 Vict. ch. 7, et des actes qui l'amendent ;

" Et considérant qu'en sa qualité de secrétaire-trésorier de la dite municipalité, le dit intimé était tenu de transmettre au Régistrateur de la division d'enregistrement du comté de Verchères dans laquelle la dite municipalité était alors située, un double de la dite liste électorale dans les huit jours qui suivaient la mise en vigueur de la dite liste électorale ;

" Et considérant qu'il est prouvé que le dit intimé a négligé de transmettre au Régistrateur du comté du Verchères, un double de la dite liste électorale dans le dit délai de huit jours après l'entrée en vigueur de la liste électorale, et que le Maire de la dite municipalité n'a pas non plus transmis au Régistrateur du dit comté de Verchères un double de la dite liste électorale, et que de fait nul double ni copie de la dite liste électorale n'a été transmis au dit Régistrateur dans le dit délai de huit jours après l'entrée en force de telle liste ;

" Et considérant que le dit intimé a, par l'omission de transmettre un double de la dite liste électorale dans le dit délai de huit jours, encouru la penalité ou amende de $200 imposée par la section 38, du dit Acte Electoral de Québec ;

" Et considérant qu'il y a erreur dans le jugement rendu par la cour de première instance le 5ème jour de mars, 1885, qui a renvoyé l'action de l'appelant ;

" Cette cour casse et annule le dit jugement du 5 mars, 1885, et condamne l'intimé à payer à l'appelant la penalité ou amende de $200 imposée par la dite section 38 de l'Acte électoral de Québec, avec les dépens encourus tant en cour de première instance que sur le présent appel ; et à défaut de payer la dite amende de $200, condamne le dit intimé à être emprisonné dans la prison commune de ce district

pendant l'espace de six mois, ou jusqu'à ce que la dite somme de $200 soit payée dans le cas où elle serait payée avant l'expiration des dits six mois."

Judgment reversed.

L. R. X. Choquet, attorney for appellant.

Archambault, Lynch, Bergeron & Mignault, attorneys for respondent.

(J. K.)

March 18, 1887.

Coram DORION, CH. J., TESSIER, CROSS, BABY, JJ.

ANDREW ALLAN ET AL.
(*Defendants in Court below*),
APPELLANTS;

AND

JOSEPH PRATT,
(*Plaintiff in Court below*),
RESPONDENT.

Master and Servant—Personal Injuries—Negligence of Foreman.

The plaintiff (respondent) was employed in one of two gangs of men who were engaged in discharging defendants' steamship. After the gang to which plaintiff belonged had been dismissed for lunch, the foreman of the other gang called for volunteers to assist in removing a heavy iron girder. The respondent volunteered, and while assisting, was injured in consequence of the girder toppling over. The accident was attributable to the negligence of the foreman in charge.

HELD:—(affirming the decision of TORRANCE, J.) 1. That masters and employers are responsible for the fault and negligence of the foreman placed in authority by them, whether the damage be caused to a fellow servant or not.

2.—The fact that the plaintiff, while in the employment of the defendants, volunteered for the particular service in which he was engaged when injured, does not relieve the employer from responsibility.

The appeal was from a judgment of the Superior Court, Montreal, (TORRANCE, J.) Dec. 30, 1884, maintaining the respondent's action for damages for personal injuries. In rendering the judgment of the Court below, Torrance, J., made the following observations:—

1887.

Allan & Pratt.

The action was to recover compensation from defendants for a broken limb and consequent injury through their negligence. The defendants pleaded that the plaintiff was voluntarily at the place of accident, which occurred through no fault of theirs, but through the fault of plaintiff.

The accident occurred on the 14th July, 1883. The defendants were discharging and landing from a ship some heavy girders, weighing each about 3,000 lbs. The plaintiff was quitting his work at noon when he was called upon, with others, to assist in dragging a girder across the wharf and railroad track. The girder was placed upon a truck, to which ropes were attached, and a gang of some 40 or 50 men were engaged in pulling the girder over the track. Plaintiff, at the moment of the accident, was at the right hand side of the girder. An attempt was being made to haul the girder over the rails, which were raised a few inches above the track. While the men were pulling in front, a piece of iron in the truck gave way, and the girder rolled over on the plaintiff. The evidence is contradictory as to whether the plaintiff was at the side of the girder by order of defendants' foreman or against orders. His witnesses say he was there by orders, in order to steady the load as it went over the track. The foreman denies this, and says he should have been in front, pulling on the rope. I do not consider it necessary to decide this question. Judging by the facts of the case and the manner of the accident, I consider that it was imprudent to attempt to force the girder over the rail as was done;—that there was negligence on the part of those in charge in not making the way smooth and level over the track, which could easily have been done, and that the defendants are liable therefor. This is a pure question of evidence. Then comes the delicate question, at what amount should plaintiff's damages be estimated. The man's thigh is permanently shortened, about three-fourths of an inch. The medical testimony is that he will have completely recovered his strength within 30 months from the 14th July, 1883. I cannot value his work at more than that of

1887.
Allan
&
Pratt.

an ordinary labourer, nor can it be said that during all these 30 months he will be unable to work. The medical testimony is that his strength should increase from day to day. I think I am doing justice in finding his damages at $1,100, with costs.

Jan. 20, 1887.] *L. N. Benjamin*, for the appellants.
Lamothe, for the respondent.

CROSS, J.:—

On the 14th of July, 1883, two squads of men were employed in discharging the steamer *Canadian*, one of the steamers of the Allan line. The respondent was in one of these squads. The squad to which respondent belonged had been dismissed for lunch, the other was engaged in removing a heavy iron girder, weighing about one and a half tons. It was mounted on a low truck, and being about thirty feet in length, the rear end dragged on the ground, which being soft from the effect of recent rains made its progress difficult. McDermid, the foreman of this squad, called for volunteers from the dispersing gang. The respondent, answering the call, placed himself with some others on the forward end of the girder to balance the other end off the ground, or at least ease the friction. About forty men applied themselves to the rope for dragging the truck forward; it proceeded until it came into contact with the rails of the Grand Trunk Railway. The wheels of the truck were low and sunk in the mud. When the truck, dragged forward with such force, struck with impetus against the rails, something had to give way. The king-bolt, connecting the forward pair of wheels, snapped, the girder toppled over; the respondent, who was on top of it, came to the ground with it, and by its rolling over he was thrown partially under it, and his thigh was crushed by its falling on him. He was a long time in hospital, suffered great pain, and remains crippled for life. He brought his action for damages against the owners of the steamer, contending that the injury he sustained was due to their negligence. The court awarded him $1,100, which judgment is now questioned by the present appeal.

1887.

Allan & Pratt.

The cause assigned in the declaration is insufficiency of the truck and imperfection in the kingbolt by which it was connected with the wheels. This is not borne out by the proof. The bolt as well as the truck seem to have been sound and sufficient.

It was urged as an excuse by the appellants, that the respondent was not really employed for the work in question, which was under the direction of a foreman and another squad of men, and that he of his own accord, placed himself in peril by volunteering to assist a separate squad of men to the one in which he was really employed. We do not think that this made any difference; he was still in the employ of, and doing duty for, the appellants, under the directions and orders of one of their foremen, and entitled to such protection as the appellants were bound to afford to one of their servants.

It is again urged that the appellants are not liable for the fault of one of their servants committed towards a fellow servant in the same employ. This may be so, but Art. 1054 of the Civil Code makes masters and employers responsible for the damages caused by their servants and workmen in the performance of the work for which they are employed. They are responsible for the fault of the foreman put in authority by them, who had charge of the workmen, including the respondent.

From what has already been stated, it will be apparent that the real and direct cause of the injury to the respondent was the act of unreasonably forcing the truck with its heavy load against the raised rails of the railway, without adopting the reasonable and customary precaution of bridging the approach to the rails, that is, rendering the necessary lift or ascent easy, by placing pieces of plank or other material so as to make an inclined plane, rising gradually to the level of the top of the rails, so as to render easy the ascent of the truck and facilitate its passing over. It is in evidence that there was material ready at hand that might have been used, and which it was customary to use for this purpose. It was the duty of the foreman to have taken this precaution, and his failure to do so was a fault,

and negligence for which his employers are responsible.

We think there is nothing in the point taken by the respondents that the truck was too small and insufficient to carry the load placed on it. It would be unreasonable to expect shipowners to provide carriages to exactly suit every varying piece of merchandise or machinery they are called upon to transport in their ships.

The amount awarded is larger than I would have given, but we are in a measure precluded from revising the discretion of an inferior court in respect to the measure of such damages. As regards the parties who suffer in this instance, they have personally done no wrong, and are at most made liable for a neglect of a person in their employ, almost a pure accident. The compensation awarded in such cases should be moderate, but we do not conceive it to be within the proper exercise of our functions to modify the amount which has been measured by the discretion of a competent tribunal.

The judgment is in accordance with law, and must be confirmed.

Judgment confirmed.

L. N. Benjamin, attorney for appellants.

Trudel, Charbonneau & Lamothe, attorneys for respondent.

(J. K.)

December 31, 1886.

Coram DORION, Ch. J., MONK, TESSIER, CROSS, BABY, JJ.

CHARLES J. MARCHILDON
(*Plaintiff in Court below*),
APPELLANT;

AND

WILLIAM DENOON ET AL.
(*Defendants in Court below*),
RESPONDENTS.

Insolvency— Assignment—Sale of stock by assignee—Assignee not agent of creditors.

HELD:—That creditors, by assenting to and ratifying a deed of assignment by an insolvent trader, do not become liable to warrant the acts of the assignee. They do not act jointly and severally in appointing a common mandatary, but each simply gives his sanction, *quoad* his individual interest, to the appointment of the assignee by the insolvent as his agent and administrator. And so, where the assignee sold the stock of an insolvent, and the purchaser was unable to obtain possession, it was held that an action of damages did not lie by the purchaser against creditors who had assented to the appointment of the assignee.

The judgment appealed from was rendered by the Superior Court, Montreal (PAPINEAU, J.), Nov. 29, 1884, dismissing the appellant's action. The judgment was in the following terms:—

"La Cour, etc...

"Considérant que le demandeur poursuit les défendeurs en restitution de la somme de $400, payée au défendeur Samuel C. Fatt, à compte du prix de la vente en date du 15 décembre, 1882, du fonds de magasin du nommé O. Frêchette, et pour $1000 de dommages résultant au demandeur de l'inexécution de cette vente, par la faute et négligence du dit Fatt, mandataire des deux autres défendeurs, et par la faute de ces derniers qui auraient conspiré et se seraient entendus avec Fatt pour empêcher la livraison au dit demandeur du dit fonds de commerce;

"Considérant que le demandeur allègue que Fatt était

le mandataire des autres défendeurs, en vertu d'un acte de cession, que le dit Fréchette, insolvable, avait consenti de ses biens au dit Fatt, le 27 de novembre, 1882, pour le bénéfice de ses créanciers au nombre desquels se trouvaient les défendeurs Denoon et Morton, qui avaient approuvé et ratifié le dit acte de cession, par lequel Fatt était autorisé à vendre par encan ou à vente privée, après annonces ou autrement, le dit fonds de commerce pour en distribuer le prix aux dits créanciers ;

"Considérant que les défendeurs ont plaidé que Fatt n'était pas constitué leur mandataire par l'acte de ratification du premier de décembre 1882, allégué par le demandeur ; que le demandeur avait lui-même signé, en sa qualité de créancier du dit Fréchette, de la même manière et au même effet que les défendeurs Denoon et Morton ; qu'ils n'étaient pas parties à l'acte de vente du 15 décembre 1882, consenti par Fatt au demandeur, et que Fatt n'avait jamais été par eux autorisé à faire la dite vente pour le prix y mentionné ; que la seule vente que les défendeurs Denoon et Morton avaient autorisé était une vente qui devait se faire sans garantie, pour le prix de $2,500, et qui n'avait pas été effectuée ; que le demandeur savait dès avant la passation de l'acte de vente en question qu'il éprouverait des difficultés de la part de Fréchette quant à la livraison des choses vendues ; qu'il n'a jamais entendu tenir les défendeurs Denoon et Morton responsables de l'inexécution de la dite vente ; qu'il ne les a jamais mis en demeure de l'exécuter et qu'ils ne sont pas plus responsables que le demandeur lui-même qui a signé comme eux, et comme tous les autres créanciers de Fréchette, la ratification et approbation de la cession faite à Fatt, et que le demandeur doit s'en prendre à lui-même s'il n'a pas eu et conservé la possession des choses vendues ;

"Considérant que les défendeurs ont prouvé les allégations essentielles au maintien de leurs défenses ;

"Considérant que le demandeur n'a prouvé ni entente, ni conspiration entre les défendeurs pour empêcher la livraison du fonds de commerce en question ; qu'il n'a pas prouvé que le défendeur Fatt fut le mandataire des défen-

1886.
Marchildon & Denoon.

deurs Denoon et Morton, plus que du demandeur lui-même et des autres créanciers de Fréchette qui ont signé l'acte de ratification du 1er de décembre 1882;

"Considérant que si toutefois les défendeurs pouvaient être tenus responsables, leur responsabilité serait conjointe avec celle du demandeur et les autres créanciers de Fréchette qui ont signé le dit acte de ratification, et que le demandeur n'a pas établi la proportion de telle responsabilité qui retomberait sur les défendeurs Denoon et Morton;

"Considérant que le demandeur n'a pas prouvé les allégations de sa demande à l'encontre des défendeurs Denoon et Morton;

"Maintient les défenses des défendeurs Denoon et Morton et renvoie la demande quant à eux avec dépens contre le demandeur."

Nov. 19, 1886.] *C. Beausoleil*, for the appellant:—

Nous pouvons dire qu'il n'existe entre l'appelant et les intimés que deux questions de droit: 1. Les intimés sont-ils responsables des actes de Fatt? 2. Et si oui, cette responsabilité est-elle solidaire?

1o. Les intimés, par l'acte du 30 novembre, 1882, ont nommé et constitué Fatt leur mandataire pour la réalisation des biens de leur débiteur Fréchette, et ils l'ont spécialement autorisé à vendre ces biens, en bloc ou en détail, avec ou sans annonce, à vente publique ou à vente privée suivant qu'il le jugerait à propos.

Le mandat est exprès et défini, et les intimés sont responsables envers les tiers de tout ce que peut faire leur mandataire dans les limites du mandat qu'il a reçu, suivant le texte formel des Articles 1727 et 1731 du Code Civil du Bas-Canada.

Article 1727. "Le mandant est responsable envers les "tiers pour tous les actes de son mandataire faits dans "l'exécution et les limites du mandat.

Article 1731. "Il est responsable des dommages causés "par la faute du mandataire conformément aux règles "énoncées en l'article 1034."

Car, ainsi que l'exprime si parfaitement Clamageran, du mandat, Des obligations du mandant, paragraphe 2, n. 329 :

" Le mandataire agit non-seulement pour le compte du " mandant, mais en son nom ; il est son organe, rien de " plus, *nudus minister*. De là cette règle, *qui mandat ipse* " *fecisse videtur*. La conséquence est, que le mandant est " tenu de toutes les obligations contractées par le manda- " taire dans la limite de ses pouvoirs, et il en est tenu " comme s'il les avait contractées lui-même."

Pour répudier cette responsabilité, il faudrait donc que les intimés auraient établi, ou que Fatt n'était pas leur mandataire ou qu'il n'avait pas agi dans les limites de son mandat, ce qui était également impossible en face des termes mêmes de l'acte du 27 et du 30 novembre, 1882.

Donc, cette responsabilité, les intimés ne peuvent la répudier, et le premier point reste hors de tout doute.

2o. La question de la solidarité de cette responsabilité présente plus de difficultés, surtout en vue du fait que l'appelant a consenti avec les intimés à ce que Fatt exerçât les pouvoirs qui lui sont conférés par l'acte du 27 et du 30 novembre 1882.

Néanmoins, en étudiant la question de près, la Cour, nous l'espérons du moins, en viendra à une conclusion affirmative.

L'appelant ne parait pas devant le tribunal en qualité de créancier de Fréchette. Il se présente comme partie à un contrat dans lequel ses intérêts ont souffert à raison de l'infidélité de l'autre partie.

Il se plaint de ce que diverses personnes réunies entre elles par un lien d'intérêt commun, ayant choisi un seul et même mandataire pour une transaction commercial commune à tous, lui ont causé un tort considérable, et il s'adresse à l'une d'elles pour se faire indemniser du tout, quitte à celle-ci de s'en prendre aux autres, chacune pour sa proportion, suivant les articles 1105, paragraphe 3, 1107 et 1118 du Code Civil.

Les signataires de l'acte du 27 et du 30 novembre 1882, sont dans la position d'une société qui aurait été formée

1886.

Marchildon & Denoon

pour un objet particulier. Est-ce à dire qui si cette société commettait un tort à l'égard de l'un de ses membres dans une transaction, celui-ci se trouverait privé de son recours solidaire contre la société ou contre aucun de ses membres? Il semblerait absurde de le prétendre.

La solidarité est indéniable et la seul objection que l'on fait valoir à l'encontre, ne résiste pas l'examen, puisque les contrats commerciaux engendrent solidarité, excepté dans les cas régis différemment par les lois spéciales (C. C., art. 1105). Or, les intimés n'ont aucune loi spéciale de ce genre à invoquer.

Quelque soit, d'ailleurs, la nature du contrat qui a été violé en la présente instance les arts. 1731, 1054 et 1106, combinés ensemble, ne laissent aucun doute sur l'existence de cette solidarité reconnue expressément par les auteurs et notamment par Pothier, au n. 453, Traité des obligations; Marcadé et Pont, vol. 8, du Mandat, p. 602, n. 1062.

W. W. Robertson, Q.C., for the respondents:—

The respondents submit in the first place that the assignee or trustee, Fatt, was not the agent of the creditors but of the insolvent merely. In the absence of an insolvent act in case of bankruptcy each creditor was left to exercise his legal remedy independently of all others, and the result was that the distribution of insolvent estates was frequently hampered by very extensive litigation. To obviate this as far as possible, it became a custom for creditors to intervene and consent to the insolvent assigning his estate to a trustee, who thus acquired no other status than the assignee of the debtor for the purpose of realizing his estate and applying it as far as possible in discharge of his debts.

Even adopting the peculiar hypothesis that the assignee Fatt was the mandatary of the creditors, appellant's position that the creditors were *jointly* and *severally* bound by his acts, is, respondents urge, utterly untenable. There could not be even a *joint* liability, for the creditors were not co-contractors at all. Each creditor had a claim against the insolvent, and these claims arose at different times and

under widely diverse circumstances. The creditors did not consent in a body, or appear as one party to the assignment. Each consented in his individual capacity, and the fact of names appearing on the same sheet of paper did not impart to them any community of interest or impair their individual contracting capacity.

In the third place, respondents respectfully direct the attention of the Court to the fact that the appellant Marchildon was also a creditor of the insolvent Fréchette, and that he, too, consented to the assignment to Fatt. Appellant appears as signing the consent which he invokes as the ground of respondents' liability for Fatt's acts. If Fatt is respondents' agent because they signed a consent to the assignment to him, he is equally the agent of appellant who signed the same deed. Thus we have appellant coming into Court and making the unique demand that the respondents be held to indemnify him for the acts of his own agent.

CROSS, J. (for the Court):—

On the 27th November, 1882, Onezime Napoléon Fréchette, a trader at Batiscan, being insolvent, made an assignment of his estate to Samuel C. Fatt, to be realized and the proceeds distributed among his creditors. The assignment was made in a customary form, giving ample power and discretion to Fatt as to the manner of sale, as evidenced by a clause contained therein, in terms following: "To sell and dispose of the whole or any portion of "the assets of the said estate, *en bloc*, or in detail, by public "or private sale, after advertisement or otherwise, as the "said party of the second part may deem best."

On the 30th November, 1882, the creditors of Fréchette, including the respondents and the appellant himself, signed a ratification and approval of the deed of assignment; said ratification being in the terms following: "Who, having "taken communication of the assignment made and exe- "cuted by the said Onezime Napoléon Fréchette to Samuel "C. Fatt, of the said city of Montreal, accountant, and "passed before the undersigned notary, the 27th day of

1886.

Marchildon & Denoon.

"November instant, do severally approve of and ratify "the same, and do severally consent and agree that said "assignment have its full force and effect, and that the "said Samuel C. Fatt, as said assignee, in trust, have and "exercise all, each and every, the powers conferred upon "him by and in virtue of said assignment, to which said "deed of assignment these presents are annexed."

On the 30th November, 1882, Fatt, in virtue of the powers thus vested in him, executed a deed of sale of Fréchette's estate, property and effects to Marchildon, the appellant for the consideration of $2,250, whereof $400 was paid, and the balance was made payable on terms of delay. Difficulty occurred which prevented the delivery of the property so sold. It appears that Fréchette refused to allow the sale by Fatt to be carried out; he kept possession and expelled the appellant and Fatt's employees. By this means, the matter was protracted until the stock of goods was sold by the sheriff under execution. The appellant on the 18th May, 1883, protested, demanding the delivery of the property, declaring further that he held the creditors signing the deed responsible for Fatt's failure to fulfil the conditions thereof and deliver the property.

Failing to get delivery of the property, the appellant sued Fatt, together with the respondents, Denoon and Morton, (the first of the series of creditors who signed the consent to the assignment) for the $400 paid on account and $1,000 damages for the non-execution of the sale, claiming that Fatt was the *mandataire*, agent, of the creditors, who were jointly and severally responsible for his acts, and that Fatt and the respondents had conspired to prevent the delivery to him, the appellant, of the property so sold to him.

The present appellants severed in their defence from Fatt, and pleaded that Fatt was not their *mandataire*; that he, Fatt, had never been authorized to make such a sale, that the respondents had, only as creditors, consented to the assignment to Fatt, severally, with the other creditors, including appellant, each in respect to his separate interest; that they, the respondents, could not be any more

liable than the other creditors, including the appellant himself, and were not liable; and that they had not conspired; and, further, if appellant had not had delivery of the property, it was by his own fault and neglect.

The Superior Court found that the respondents had not conspired with Fatt and were not liable.

This Court confirms that view of the case, and finds that the respondents were not as creditors the warrantors of Fatt's act in executing said sale.

In my view of the case each creditor, in giving his assent to such an assignment, acts from the standpoint of being a creditor, and representing his interest as such, and no more. He is making no joint and several appointment, that is, he is not acting jointly and severally with the other creditors in appointing a common *mandataire*, or agent, to act jointly for them all, but is simply giving his sanction *quoad* his own individual interest, to the appointment made of an agent and administrator by Fréchette, who makes the assignment and constitutes an agent or *mandataire* to in his place administer, and distribute his property and assets among his creditors. Each creditor for himself comes forward, and in effect declares that he has no objection to this arrangement. In this instance the matter is made more clear from the fact that the language of their consent in the deed is expressly declared to be several. They, consequently, could not be held jointly and severally, and inasmuch as Fatt is not their agent for the fact complained of, they cannot be held for anything. When a trader becomes insolvent, he does not by that act alone lose the administration of his estate. The law forbids him to grant a preference, but does not immediately divest him of administrative power. His resort to the assignment of his estate for the benefit of his creditors affords them a kind of assurance that he does not contemplate any preferences, and the acts of administration he could himself do, while left in possession of his estate he can fairly authorize his assignee to perform in the interest of his creditors, more especially if, as in this instance, done with their consent.

We are all of opinion that the judgment of the Superior

1886.
Marchildon & Denoon.

Court should be confirmed, and it will be ordered accordingly.

Judgment confirmed.

Mercier, Beausoleil & Martineau, attorneys for Appellants.
Maclaren, Leet, Smith & Rogers, attorneys for Respondents.
(J. K.)

January 19, 1887.

Coram DORION, CH. J., TESSIER, CROSS, BABY, JJ.

CHARLES BREWSTER,
(*Opposant in Court below*),
APPELLANT;

AND

CYRILLE MONGEON,
(*Plaintiff in Court below*),
RESPONDENT.

Railway company—Expropriation—Failure of company to comply with legal formalities—Rights of Proprietor.

HELD:—Where land has been taken by a Railway Company, without observing the formalities prescribed by the Railway Acts for the expropriation of lands for the use of the railway, that the owner is entitled to oppose the sale of such land under an execution against the railway company, and to claim its withdrawal from seizure by an opposition *à fin de distraire*.

The appeal was from a judgment of the Superior Court, Montreal (CARON, J.), June 22, 1885, dismissing the appellant's opposition *à fin de distraire*. The judgment in the Court below was in the following terms:

"La Cour, etc.....

"Considérant que l'opposant n'a pas prouvé les allégations essentielles de son opposition, et qu'il ne s'est pas opposé à la prise de possession de son dit terrain par la défenderesse, laquelle en jouit à sa convenance depuis plus de quatre ans;

1887.

Brewster & Mongeon.

"Considérant que le chemin de fer a été construit sur ce terrain par la défenderesse sans objection de la part de l'opposant, et qu'il est d'une valeur considérable ;

"Considérant que la contestation de la dite opposition par le demandeur est bien fondée ;

"Maintient la dite contestation et renvoie la dite opposition de l'opposant avec dépens, distraits, etc."

Nov. 22, 1886.] *R. Laflamme, Q. C.*, for the appellant :—

As appears by the judgment, the contestation in the Court below related to the right of the appellant to oppose the sale of a railway, the property of the company defendant, on the ground that the company had taken possession of this land without any tender, valuation or payment.

The opposition was to the sale of the portion of the land belonging to the appellant by way of opposition *afin de distraire*.

The opposant alleged the illegality of the seizure of that portion of the property on the following grounds :

That he was owner and proprietor of two lots in the parish of Longueuil, known as numbers 118 and 114 of sub-division 154 of the cadastral plan and book of reference of the parish of Longueuil, each of said lots containing 100 feet in front by 120 feet in depth, and therein described. That the defendants took possession of the said lots for the purposes of their railway. That the defendants gave no notice to the opposant of their intention to take the same, having made no deposit of any amount as compensation therefor with the opposant, and having complied with none of the requirements of the statute in such case made and provided for the indemnity, to which the said opposant is entitled as the value of his land. That the defendants have acquired no title or right to the said two lots of land, and opposant appellant is entitled to demand that the same be subtracted from the seizure, such seizure to be declared null with respect to this portion of the land.

The titles of the opposant to the property in question were filed.

1887.
Brewster & Mongeon.

The plaintiff contested this opposition, denying the allegations of the opposition, and alleging that at the date of the seizure, the company defendant were in possession of the land in question, and had so been for several years. That whilst the company was constructing its road, it took possession of the land as a part thereof, to the knowledge, and with the consent of the opposant. That the company was authorized by law to take possession of, and appropriate land for the purposes of their railway. That proprietors are not allowed to retain possession of their lands, mentioned on the plans as required by law for the construction of their railway, and have no other alternative but to receive the indemnity, the amount of which must be settled amicably, or by arbitration, according to the forms prescribed, and cannot maintain any right to property after having allowed possession of the property to be taken by the company, for the purpose of constructing their railway.

The opposant (the present appellant) proved the ownership of the land in question, and no attempt was made to prove that the company defendant had ever followed the provisions of the law respecting expropriation for the purposes of a railway, according to the Railway Act. The only fact, therefore, upon which the judgment rests, is the possession taken by the company of the property in question, without any notice, or tender, on the supposition of a consent on the part of the opposant, which is in no manner proven, and which would amount to nothing but a tacit acquiescence. The opposant cannot be presumed to have renounced to his right of property and cannot be bound to protest by violence against its usurpation.

The principle affirmed by the judgment is, that the bare possession and embodiment in the railway of any land belonging to other parties becomes irrevocably the property of the railway without any remedy left to the proprietor, except judgment against an insolvent company, without any lien or privilege on the property so taken, which remains as an asset to the privileged creditors of the company only.

1887.

Brewster & Mongeon.

The contrary principle has been established by this Court, in the case of *La Compagnie du Chemin de Fer Central & Legendre*, (11 Q. L. R. 106), wherein it was held that the company became proprietor of the land taken for the railway, only upon condition of a regular tender or agreement between it and the proprietor, or after regular arbitration proceeded with for the purpose of valuing the land after regular tender and notice.

A. Gagnon, for the respondent :—

Les seules questions maintenant soumises au jugement de cette Cour, vu le défaut de preuve de la part de l'appelant, sont :

1o. La défenderesse avait-elle le droit de s'emparer, comme elle l'a fait, des terrains en question pour y construire sa ligne de chemin de fer?

Cela ne peut pas souffrir de doute.

La défenderesse a été dûment incorporée par acte de la Législature Provinciale, passé en 1881—44 et 45 Vict. ch. 35 des Statuts de Québec. Par cet acte elle a tous les pouvoirs conférés par l'Acte Refondu des chemins de fer de Québec, 1880.

Cet acte accordait le pouvoir à la défenderesse de s'emparer, même sans le consentement des propriétaires et par voie d'expropriation forcée, de tous les terrains nécessaires à la construction de son chemin de fer ; mais dans ce dernier cas, elle est tenue à certaines formalités, telles que, nommer des experts, et faire un dépôt en conformité à la cl. 9 du dit acte. Dans la présente cause il ne s'agit pas d'expropriation forcée, mais bien de prise de possession des terrains de la défenderesse avec le consentement de l'appelant. En effet, dans sa déposition il admet avoir eu des pourparlers avec un des agents de la défenderesse, au sujet de l'acquisition par cette dernière des dits terrains ; Qu'il n'a pu faire d'arrangements définitifs, parce qu'il y avait procès mu entre lui et la Compagnie du Grand-Tronc au sujet de ces terrains, et aurait consenti à en laisser prendre possession par la défenderesse, à ses risques ; Qu'il a eu connaissance de la prise de possession des dits terrains par la défenderesse, et de la construction du chemin de

1887.
Brewster & Mongeon.

fer sur iceux, et qu'il ne s'y est pas opposé ; Qu'il a laissé la défenderesse en jouir paisiblement pendant plusieurs années sans en réclamer la propriété, ni fait aucun procédé pour les obtenir.

La défenderesse ayant pris possession des dits terrains à la connaissance de l'appelant, et sans objections ni opposition de la part de ce dernier ; mais au contraire avec sa permission et son consentement, sinon conventionnel, du moins tacite ; et y ayant construit sa ligne de chemin de fer qui est en opération depuis plusieurs années, au vu et su de l'appelant : ce dernier peut-il maintenant réclamer la propriété du dit terrain, comme il le fait par son opposition en cette cause ?

Je n'ai pas d'hésitation à dire que non.

En effet, par la prise de possession des terrains en question, pour la construction du dit chemin, la nature de ces terrains a été changée ; Qu'une propriété unique et spéciale a été formée par la réunion d'un grand nombre de terrains, et que cette propriété, le "chemin de fer de la défenderesse," ne peut être maintenant détruite par le démembrement d'icelle. Le chemin de fer une fois complété ne forme plus qu'un seul corps, et n'est plus susceptible d'être possédé que pour les fins pour lesquelles il a été fait. Ce n'est plus une propriété privée ordinaire seulement, mais une propriété tenue pour des fins d'utilité publique, et régie sous le contrôle de l'autorité souveraine. Les particuliers ont bien le droit d'empêcher la Compagnie de prendre possession de leurs propriétés avant de leur avoir payé une indemnité ou compensation, ou, au moins, avant de leur avoir offert légalement la somme fixée par arbitres : mais s'ils ont consenti à laisser prendre possession de leur propriété, ou s'ils ont laissé la compagnie en prendre possession, sans opposition, ils n'ont plus droit de réclamer celle-ci, ils n'ont plus qu'un recours contre la compagnie pour se faire indemniser.

L'appelant n'ayant pas pris les moyens que la loi lui donnait, lors de la prise de possession de ses terrains par la défenderesse, pour l'empêcher d'y construire son chemin, avant d'être payé, il ne peut plus aujourd'hui la

forcer à enlever son dit chemin, lorsqu'il le lui a laissé faire.

En résumé: à l'époque de la saisie pratiquée en cette cause la défenderesse était depuis plus d'un an en possession, à titre de propriétaire, des terrains en question. La défenderesse a pris possession de ces terrains avec le consentement du propriétaire pour y construire son chemin. L'appelant admet dans son opposition que le terrain qu'il réclame est incorporé à la ligne de chemin de fer saisie en cette cause, et ne forme plus qu'un corps avec cette dernière. La nature de ces terrains a été changée: une propriété unique et spéciale a été formée par la réunion de ces terrains joints à un grand nombre d'autres, sous le nom de "Ligne du Chemin de Fer de Montréal et Sorel." Le sol et le chemin de fer forment un seul tout, une voie publique subventionnée par le gouvernement, dans l'intérêt du commerce du pays, et le propriétaire du sol ne peut forcer la défenderesse à enlever son chemin de fer et tronquer la ligne, son droit se réduit à une réclamation en une somme d'argent.

CROSS, J. (for the Court):—

The respondent having obtained judgment against the Montreal & Sorel Railroad Company, caused the line of railway of that company, extending from Sorel to St. Lambert, to be taken in execution under his judgment and advertised to be sold by the sheriff.

The appellant opposed the sale of this line of railway in so far as it concerned two lots of land included within the description, being lots Nos. 113 and 114 of subdivision No. 154, as shown on the cadastral plan and book of reference for the parish of Longueuil, which the appellant claimed, as being owner thereof, therefore prayed that the seizure thereof should be declared null, and that said lots should be withdrawn from the seizure and awarded to him as owner thereof.

He alleged in his opposition that the railway company had taken possession of said lands and appropriated them for the purposes of the railway without any notice to

1887.

Brewster & Mongeon.

the appellant or offering him any indemnity, or complying with any of the formalities in that behalf prescribed by the Railway Acts for the expropriation of said lands for the use of the railway.

The respondent contested this opposition, alleging that the defendants had been duly incorporated as a railway company, that they had taken possession of the lands in question for the construction of their railroad which was built thereon, and said lands had been possessed by them for said purposes for a number of years up to and at the time of the seizure; that they had become incorporated in their road, and by destination had changed their nature so as to form part of a distinct property under the name of the Montreal & Sorel Railroad, a property in which the public had an interest; that the company had a legal right to expropriate the property which was on their line of road and marked on the plans deposited as required by law. Individual owners had no right to dispossess the company, although they might claim indemnity; that at the time the road was made, the company and the appellant had agreed on the terms of indemnity for said lands, and appellant had consented to the company taking possession.

It is not disputed and is proved that at the time the railway was built, the appellant owned the lands in question, and that they were taken and used by the company in its construction.

It is equally clear that no proceedings were taken to expropriate these lands for the use of the railway, nor was any indemnity ever paid or offered for them.

Brewster, the appellant, being examined as a witness for the respondent, admits that when the company took possession of these lands, he was spoken to by a Mr. Cooper, one of the company's employees, to whom he told that he was at the time in litigation with the Grand Trunk Railway Company, relative to the lands in question, and was not in a position to convey them nor to make any bargain relative to them; also that if the company took the land they would have to do so at their own risk.

1887.

Brewster & Mongeon.

By the judgment of the Superior Court, the opposition was dismissed. The present appeal has been taken from that judgment.

This Court is of opinion that the judgment appealed from is erroneous; that the right of the company to expropriate, offering and paying an indemnity, was the means prescribed by law for enabling them to acquire property without the consent of the proprietor, and that the property in question never was by them expropriated, nor any other of the requirements fulfilled to entitle them to enter into possession of the appellant's property; that so far as the title depended upon the appellant's consent, it did not extend beyond the terms of that consent; that is, if the company took possession of the property, they did so at their own risk; that is, that he would not be debarred from exercising his rights when he should find himself in a position to do so. It is evident from the appellant's testimony, that he would not object to the property passing to the company, provided he was paid for it, but this willingness does not defeat his title, nor effect a transfer to the company defendant without either expropriation or a voluntary conveyance, and he himself expresses the reasonable view that if he does not claim his property, he has little chance of being paid for it.

It is true that he says in his examination that he knew nothing of the opposition, and had not seen any lawyer about it, but the opposition has been made on his behalf, and he has not disavowed his agents; on the contrary, he says: "I did not want them to sell my land, for if they sell my land at sheriff's sale, I will whistle for my money." It seems to me that a gross injustice and a violation of law and right would be perpetrated, if the judgment appealed from were allowed to stand.

This Court has come to the conclusion to reverse the judgment, and award to the appellant the land claimed by him. This will not prevent the appellant being dispossessed by a regular expropriation, if that can still be done; that is, if the company are within time, and in a condition to exercise that right.

1887.

Brewster & Mongeon.

Our attention has been called to the case of *La Banque d'Hochelaga* v. *The Montreal, Portland & Boston Railway Company*, and *Hibbard*, opposant. (1) The circumstances of that case were quite different from the present. There, a contractor, who was bound to furnish the land, had bought it in his own name for the road, built the road on it, and when the road was placed under seizure, he claimed to withdraw the lands under a title which we considered really the title of the railway company themselves.

The judgment of the Court is as follows :—

"The Court, etc.....

"Considering that the appellant proved the material allegations of the opposition by him made in this cause, and more especially that he was and still is owner of the immoveable property therein claimed by him, to wit, Nos. 13 and 14 of subdivision No. 154 of the cadastral plan and book of reference for the parish of Longueuil, occupied by the Montreal and Sorel Railway Company for the use of their railroad, and included in the property seized in this cause under the description given in the minutes of seizure of the lands and tenements of the defendant, schedule B, annexed to the writ of *fieri facias* issued in this cause ;

"Considering that the said Montreal & Sorel Railway Company possessed themselves of the said two lots Nos. 113 and 114 of said subdivision No. 154 of said cadastral plan, without adopting any proceeding in expropriation, or offering any compensation, or observing any of the formalities required by law and the statutes in that case made and provided as preliminary to the right of the said Montreal & Sorel Railway Company to take possession of said land, nor does it appear that the said appellant ever consented to alien his said land to the said Railway Company without payment or otherwise ;

"Considering, therefore, that there is error in the judgment rendered in this cause by the Superior Court, at Montreal, on the 22nd of June, 1885, the Court of our Lady the Queen now here doth cancel, annul and set

(1) M. L. R., 1 S. C. 150.

aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth declare the two lots situate, etc., included in the property seized in this cause as part of the railway of the said defendant, and described in the *procès-verbal* of seizure annexed to the writ of *fieri facias* issued in this cause, to be the property of the said appellant, and doth order that the same be subtracted, *distraits* from the said seizure.

"And the sheriff is hereby ordered not to proceed with the sale of the said two lots Nos. 113 and 114 of subdivision 154, parish of Longueuil;

"And it is further ordered that the said respondent do pay to the said appellant the costs incurred by him as well in the Court below as in the Court here."

Judgment reversed.

Laflamme, Laflamme & Richard, attorneys for the appellant.

A. Gagnon, attorney for the respondent.

(J. K.)

January 21, 1887.

Coram DORION, Ch. J., TESSIER, CROSS, BABY, JJ.

HENRY C. CLEVELAND ET AL.
(*Defendants in Court below*),
APPELLANTS;

AND

EXCHANGE BANK OF CANADA
(*Plaintiffs in Court below*),
RESPONDENTS.

Imputation of payments—C. C. 1161—*Note discounted by Bank—When held to be paid.*

HELD:—That the rule contained in Art. 1161 C.C. (that the imputation of payment is made upon the oldest debt) applies to an account between a bank and a customer; and so, where the amount of a note discounted by a bank for the endorser was charged on maturity to the endorser's account, and the deposits subsequently made by the endorser, as shown by the books of the bank, were more than sufficient to cover his indebtedness to the bank at the time the note matured, such note must be held to have been paid, and the bank has no action thereon against the maker who has paid the endorser (but without obtaining possession of the note); and the fact that the endorser's aggregate indebtedness to the bank has continued to increase does not affect the question of payment of the note referred to, in the absence of a reserve of recourse by the bank thereon.

The appeal was from a judgment of the Superior Court, Montreal (TASCHEREAU, J.), maintaining the respondents' action on a promissory note. The judgment of the Court was as follows:—

"La cour, etc.

"Considérant que les défendeurs n'ont pas établi en preuve les allégations de leur défense à l'effet que le billet promissoire sur lequel la présente action est portée aurait été payé lors de son échéance ou depuis, soit par les dits défendeurs, soit par les endosseurs John Taylor & Co. à la dite banque demanderesse;

"Considérant que si les dits défendeurs ont fourni aux dits John Taylor & Co. des fonds ou des valeurs pour payer

et racheter le dit billet, il appert que les dits John Taylor & Co. ont négligé de faire emploi des dits fonds ou valeurs pour payer à la demanderesse, porteur et créancière du dit billet, le montant porté en icelui, et que le dit billet est toujours resté en souffrance;

"Rejette la défense et condamne les défendeurs, conjointement et solidairement à payer à la banque demanderesse (au nom de laquelle la présente action est portée par les liquidateurs d'icelle banque, suivant la loi) la somme de $101.08, savoir: $97.20, montant du billet promissoire fait et signé à Montréal par les dits défendeurs, associés sous le nom de "Cleveland & Hall", le 5 février 1883, et par lequel les dits défendeurs ont promis de payer, à deux mois de date, pour valeur reçue, à l'ordre de John Taylor & Co., à la banque de Montréal, la dite somme de $97.20, le dit billet subséquemment endossé par les dits John Taylor & Co. et par eux remis à Taylor, Robertson & Co., et, par ces derniers, endossé et remis à la demanderesse, et $3.88 pour les intérêts accrus, etc."

A. W. Atwater, for appellants:—

The plaintiffs (respondents) base their action upon a promissory note for $97.20 signed by defendants and payable to the order of John Taylor & Co. at the Bank of Montreal, in Montreal, four months from the 5th February, 1888.

Defendants (appellants) pleaded that the note had been paid, and that when this note matured, they had sent to Taylor & Co., or their successors, Taylor, Robertson & Co., $38 on account and a renewal note for the balance, with interest amounting to $68.15, and that this renewal note had been so accepted by the Bank, plaintiffs, and at its maturity had been paid by defendants.

At trial it was clearly proved that defendants had paid the note sued upon to Taylor, Robertson & Co., but they could not establish that the note for $68.15 was accepted by the Bank from Taylor, Robertson & Co. as a renewal, and the question then came to be whether the Bank, plaintiffs, had been paid the amount of the note sued upon, by Taylor & Co.

1887.

Cleveland & Exchange Bank

When plaintiffs' books were produced in Court, defendants moved to file a supplementary plea, urging payment to the Bank by Taylor & Co. by the imputation of amounts collected by the Bank and credited to Taylor's account subsequent to the date the note sued upon was charged to that account. This plea was allowed, and the defendants contend it has been fully established, and in law furnishes a complete defence to the action.

The note sued upon was held by the Bank, plaintiffs, and credit had been given by them to Taylor & Co. for its proceeds when it was placed there. Defendants had no accounts or dealings with the Bank, all entries respecting these notes being made through an account kept in the name of Taylor & Co. The note in question matured on the 9th April, 1883, and was charged by the Bank to the account of Taylor & Co. on the 10th April. After charging the note, the balance due by Taylor & Co. to the Bank amounted to $11,937.19.

Appellants contend that having paid the note to Taylor & Co., they have the right to have any sums or moneys collected by the Bank for the account of Taylor & Co. or paid by them, imputed in extinction of this indebtedness of theirs on the 10th April, 1883, before being imputed to any subsequent debts contracted towards the Bank by Taylor.

It is clearly proved that the amounts of money received by the Bank from or on account of Taylor & Co. subsequent to the 10th April, 1883, exceeded their indebtedness on that date, and in the absence of any proof or even allegation of any special imputation of these moneys, they must be imputed in extinction of the oldest part of the account.

It may be true, as the witnesses say, that the account of Taylor & Co. was being continually drawn upon and continued steadily to increase, and that they are now much more heavily indebted to the Bank than they were on the 10th April, 1883, but it is incontestable that such amounts as went to their credit reduced the amount of the oldest indebtedness. As between Taylor and the Bank it might be simply a question of establishing the amount of the

overdraft, but when the rights of others (as the defendants here) are concerned, it becomes necessary to inquire what portion of Taylor's indebtedness was discharged by each credit given him, and defendants think it undoubted that the oldest item to the debit of the account should be discharged by the first credit, (C. C. 1161), so that until the indebtedness existing on the 10th April, 1883, had been discharged, no payments subsequent to that date, could, in the absence of any specific agreement, be imputed upon any subsequent indebtedness of Taylor & Co.

If then the amounts collected, subsequent to the 10th April, 1883, were sufficient to discharge Taylor's indebtedness as at that date, defendants' note has been paid to the bank. Sebire & Carteret, Vo. Compte Courant, §4, No. 26 and Nos. 33-4; Parsons on Contracts, Vol. 2, pp. 630-3; Morse on Banking, pp. 32-3 and cases *loco cit.*

It is submitted that a further principle of the imputation of payments may be invoked by defendants, viz., that payments made by a debtor should be imputed first in discharge of a secured debt in preference to those which are not secured.

In this case, the Bank, plaintiff, gave credit for the note and charged it to Taylor, and they were secured by the liability of defendants upon the same note, and having paid the note to Taylor, defendants have a right to claim the imputation of such payments as were made by Taylor to the Bank in extinction of the secured debt, before their imputation upon any subsequent indebtedness: C.C. 1161; 4 Aubry & Rau, § 320, p. 167; *Doyle & Gaudette*, 20 L. C. J. 134.

There is no evidence whatever on the part of the Bank, nor is it pleaded by them, that any special imputation was made by them of amounts subsequently paid by Taylor in payment of debts incurred by him subsequent to the maturity of the note sued upon, and in the absence of such pleading and proof, defendants have the right to invoke the principles of law relating to the imputation of payments.

1887.

Cleveland & Exchange Bank

The cases of *Field* v. *Carr*, 5 Bingham, 13, and *Clayton's* case, 1 Merivale, 608, were relied on.

J. N. Greenshields, for the respondents:—

The question arises, was there at any time between the date of maturity of the note sued on and the suspension of the Bank, a balance to the credit of Taylor, Robertson & Co., because, in that event, such a balance would have been imputable to the amount due on the note. The evidence of Varey, ledger-keeper of the respondents, shows that during that period, their indebtedness was constantly increasing.

It was contended by the appellant that the deposits and discounts put to the credit of Taylor, Robertson & Co's. account after the note in question was charged, were sufficient to extinguish the debit balance and pay the note. No deposits were made to pay the debit balance, but rather the evidence is that any deposits made were made to take up maturing paper the day when made, and amounts put to the credit of the account or discounts were withdrawn the same day, and usually in greater amounts than put to the credit of the account. Deposits and discounts were immediately withdrawn, and the debit balance kept constantly increasing. There was no payment of the debit.

CROSS, J. (for the Court):—

The Exchange Bank of Canada, or its liquidators, sue Cleveland & Hall, the now appellants, as makers of a note for $97.20, payable two months after its date, which is the 5th of February, 1883, endorsed to Taylor & Co., or to their successors, Taylor, Robertson & Co., and by them discounted at the Exchange Bank.

The appellants, Cleveland & Hall, rely for their defence on a plea of payment.

In proof, they show that when the note in question matured, they sent in cash to Taylor, Robertson & Co. $38 and a renewal note for 68.15 to take it up. It does not appear that Taylor, Robertson & Co. applied the means so placed in their hands to take up the note now sued upon. It, however, appears that they discounted the note for

$68.15, at the Exchange Bank. It was paid at maturity and is produced by the appellants, Cleveland & Hall, in their defence.

John Taylor, one of the firm of Taylor, Robertson & Co., examined as a witness for the appellants, states that the note of $97.20 was, by the bank, charged to their account, but he was never called upon to pay it.

Whether or not Cleveland & Hall paid Taylor, Robertson & Co., such payment, if made, could have no effect in discharging their liability to the bank.

The question remains to be determined whether there is evidence to establish that the bank was paid the note of $97.20.

There is no proof of a specific payment of this sum, but it is contended that on a debtor and creditor account between the bank and Taylor, Robertson & Co., as kept by the former, this note of $97.20 was liquidated by the imputation of payments, which would apply to the extinction of this debt, and it is proved in the manner following:—This note fell due on the 9th of April, 1883, and was charged by the bank to Taylor, Robertson & Co. on the day following, at which date, Taylor, Robertson & Co. owed the bank a balance of $11,987.19, as shown by the evidence of R. G. Varey, at the time ledger-keeper in the bank, and by the same evidence, it appears that Taylor, Robertson & Co. made deposits in the bank, which were credited to them in the bank books to an extent exceeding $12,000. On a further examination, he says that the deposits and discounts together would more than cover the over-draft on the 9th of April.

It is true that it is also shown that the indebtedness of Taylor, Robertson & Co. to the bank, in place of diminishing, continued always to increase, but no proof is made of any of the advances being special or confined to particular transactions, nor that any reserve or recourse was made by the bank respecting the note now sued upon.

On this state of facts, the respondents claim to support the judgment in their favour by the usual course of business and practice of the bank to keep as collateral security

1867.

Cleveland & Exchange Bank

and retain their recourse upon all bills discounted by their customers, treating each transaction separate by itself, so that no such bill would be considered paid unless specific value was appropriated by the debtor for that purpose.

The appellants, on the contrary, contend that a banker's account forms no exception to the general rule of mercantile accounts, that they are entitled to the imputation of the credits given generally in the books of account of the bank, these credits going first to extinguish the earliest debts, and according to this rule of imputation, the note sued upon must be considered paid.

The Court is disposed to take the appellant's view of the law and the facts of this case. It is quite possible, I will even assume the probability of the transactions of the bank being for the most part special, and each confined to itself, if explained, might show that the deposits consisted of notes discounted, the money being advanced specially on each particular bill, and not applicable as deposits to general account; but without any sufficient explanation or a reserve of recourse on the bill in question, the Court sees no escape from the conclusion that the bill sued on in this case is paid, and Cleveland & Hall's liability thereon extinguished by the imputation of the deposit credits to the earliest debts of Taylor, Robertson & Co., and as the bill sued on, on this principle would be covered by these credits, we must hold it paid, by which means the judgment appealed from must be reversed, and respondent's action dismissed.

The judgment of the Court is recorded as follows:—

"The Court, etc.....

"Considering that the appellants have proved the material allegations of their plea, more especially that the amount of the promissory note for which the present action has been brought, had been and was before, and at the time of the institution of the present action compensated and paid by the monies and credits which the firm of Taylor, Robertson & Co. became entitled to, and were placed to their credit in the books of the said bank where the said Taylor, Robertson & Co. had discounted the said

note, and in which account the said promissory note had been and was by said bank charged to the said firm of Taylor, Robertson & Co.; 1887. Cleveland & Exchange Bank

"Considering that by the law regulating the imputation of payments, said credits were applicable to the extinction of the amount of said promissory note, and that said promissory note was paid and the indebtedness of the appellants thereon thereby extinguished;

"Considering, therefore, that in the judgment rendered in this cause by the Superior Court sitting at Montreal, on the 7th September, 1885, there is error, the Court of our Lady the Queen, now here doth cancel, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth dismiss the said action of the Exchange Bank with costs as well of the said Superior Court as of this Court."

Judgment reversed.

Atwater & Cross, attorneys for Appellants.

Greenshields, McCorkill, Guerin & Greenshields attorneys for Respondents.

(J. K.)

March 22, 1887.

Coram DORION, Ch. J., TESSIER, CROSS, BABY J J.

WALTER TAYLOR ET AL.
(Defendants in Court below),
APPELLANTS;

AND

JEAN H. GENDRON
(Plaintiff in Court below),
RESPONDENT.

Sale—When goods cease to be at risk of Vendor—Inferiority of quality—Right of Purchaser to recover difference in value.

HELD:—Where flour was sold at Toronto, Ontario, to a purchaser in Sherbrooke, province of Quebec, at $4.85 per barrel, delivered at Sherbrooke and Arthabaskaville, that the flour was at the risk of the vendor until delivered, and that the purchaser (who had paid cash, and who did not examine the flour until a quantity had been sold in small lots to his customers), was entitled to recover from the vendor the difference in value between flour of the quality ordered and that which had been received.

The appeal was from a judgment of the Superior Court, district of St. Francis (BROOKS, J.), maintaining an action brought by the respondent to recover the difference in value between flour of the quality ordered and that which had been received. The judgment of the Court below was in the following terms:—

"The Court, etc.....

"Considering that plaintiff hath established the material allegations of his declaration, and particularly that it is proved that the flour sold by defendants to plaintiff, to be delivered at Sherbrooke in the month of June, 1884, and which was then delivered at Sherbrooke and Arthabaskaville, was when so delivered of inferior quality; was injured to such an extent, that had the plaintiff known of said injury and defect he would not have bought the same; that he was unable to dispose of said flour as of the quality and brand sold to him by defendants; that a large portion

thereof was returned to him by persons to whom he, plaintiff, had re-sold said flour, as unmerchantable and of inferior quality, as, in fact, it was; that the plaintiff, within a reasonable time after he became aware of the quality and condition of said flour, notified defendants thereof, and declared his intention of returning the same to the defendants, but they replied that said flour was delivered in good order and condition, and in fact declined to receive the same, or to consider any settlement or arrangement with plaintiff as to receiving back or re-paying the price or any part thereof;

"And further, considering that the said flour was so defective and inferior in quality that the plaintiff could not a[illegible]d not realize the price paid by him, to wit: $4.85 per [illegible] but that said flour was not, in fact, worth as much by $1.50 as the price paid therefor by plaintiff, and that plaintiff is justified in calling upon defendants to refund the difference between the value of said flour and the price paid by plaintiff to defendants, to wit: the sum of $1.75 per barrel, save and except the 175 barrels sold to Booth, on which should be deducted the sum of $1 per barrel;

"And considering further that plaintiff was not able to obtain delivery of said flour until he had paid therefor, and that he was not bound immediately on receiving the same to have it inspected, but defendants were bound to deliver it in good order and condition, which they failed to do, doth, in consequence adjudge and condemn defendants, jointly and severally, to pay to plaintiff, as the difference between the price paid by plaintiff to defendants for said flour, and the value thereof when received by him, except the 175 barrels sold to Booth, on which should be deducted the sum of $1 per barrel, the sum of $625, with interest, etc., and costs of suit, etc."

H. B. Brown, for the appellants:—No attempt has been made by the respondent to establish that the defect in the flour went back to the date of shipment. On the other hand, the whole of the testimony clearly shows that the defect must have arisen from the carriage of the flour

1887.
Taylor
&
Gendron.

during midsummer weather in heated cars. The grade of flour furnished was even superior to that contracted for. The deterioration took place after it had been shipped from Toronto; and the loss should fall not on the appellants, but on the respondent. He accepted the flour and paid for it, and never inspected it until at least a week after it was delivered at Sherbrooke.

H. R. Fraser, for the respondent:—If the flour was heated on its passage from Toronto, the appellants would, under their contract, be responsible to respondent. They undertook to deliver the flour at Sherbrooke and Arthabaskaville, and not at Toronto. This is manifest from the evidence, from their plea, and from their invoice of the goods wherein they give credit for the freight paid by the respondent. By their plea, they allege that they sold respondent 475 barrels, at $4.85 per barrel *delivered*. This could not mean delivery at Toronto, for if so, respondent would not have been entitled to credit for the freight paid. The respondent did not immediately examine the flour, nor was he legally bound to do so. He had bargained for good flour, and he had a right to assume that he was getting good flour, and he was under no obligation to open and test the quality of 475 barrels of flour any more than he would, had there been 10,000 barrels instead of 475.

Cross, J. (for the Court):—

In June, 1884, the appellants, Taylor et al. sold to the respondent, Gendron, 475 barrels Warrior mills flour, to be delivered at Sherbrooke, the price to be $4.85 delivered. It was shipped by bill of lading with draft at sight attached, so that delivery could not be had without payment of the draft, which was duly honored by payment on the 25th June. Gendron did not immediately examine the flour, part of which, viz., 175 barrels, was directed to Arthabaska, but having supplied his customers with parcels of it, they found it bad and returned it to him, whereupon he notified the appellants on the 14th July, but they maintained that the flour was good, in good order and condition, having been inspected.

Gendron retained the flour but brought the present action to recover the difference in value between good flour of the quality he ordered and the flour in question, which had proved bad. He alleged in his declaration that the flour was sour when delivered, and of less value.

Taylor et al. maintained that the flour was good and of the quality sold, and at the risk of the purchaser from the time it was shipped at Toronto.

On proof had, the Superior Court gave Gendron judgment for $625, difference of value understood to be established between sound flour of the quality sold and inferior damaged flour, which this proved to be. It is from this judgment that the appeal is taken.

It is contended that the flour was at the risk of the purchaser from the time it was shipped on the cars at Toronto, on the selection by the vendor of flour to make up the parcel agreed to be sold.

It is further urged that the quality of the flour was not objected to in time and repudiated by Gendron as the purchaser.

This last objection is really not put in issue and need not be seriously considered; nevertheless, in such a case as the present, where the quality of the flour was only ascertained in the usual course of business by portions which Gendron had sold being returned to him, and when he retains the flour at its actual value, claiming only for the inferiority of quality, it may be doubted if this objection would apply with any great force, if even full diligence had been exercised in putting it forward.

On the main point at issue we are against the appellants. The bargain was to deliver flour of a certain quality and description at Sherbrooke; until it arrived there, it was under the control and disposal of the vendor, who might have changed its destination and offered other flour in place of it.

The authorities cited by the appellants are not applicable. There is, however, one case cited, viz., that of *Bull* v. *Robinson*, 24 Law Journal, Exchequer cases, p. 164, which might seem to call for particular remark. Damage to iron

1887.
Taylor & Gendron.

in the course of its voyage from the vendor to the purchaser, before its delivery, was adjudged to be borne by the purchaser; but that case differs from the present in the fact that the iron was specially manufactured for and on the order of the purchaser, and thus identified from the time of shipment as the particular iron which the vendor had sold, and the damage was only such as was incident to the ordinary voyage on the particular route, therefore had in contemplation by the purchaser in giving the order. I am not quite sure that even qualified in this manner the decision would be entirely satisfactory under our system. At all events, it differs from, and does not control the present case.

We are of opinion that the judgment appealed from is well founded and should be confirmed, and we order accordingly.

Judgment confirmed.

Ives, Brown & French, attorneys for Appellants.

Camirand, Hurd & Fraser, attorneys for Respondents.

(J. K.)

February 22, 1887.

Coram DORION, CH. J., MONK, TESSIER, CROSS, BABY, JJ.

JOHN H. WEBSTER ET AL.
(*Defendants par reprise d'instance*),
APPELLANTS;
AND
JOSEPH DUFRESNE ET AL.
(*Plaintiffs in Court below*),
RESPONDENTS.

Principal and Agent—Money deposited by lender with her Notary—Responsibility for default of Notary—Evidence.

HELD:—Where the amount of a loan was deposited by the lender with her notary, with instructions to hold it until the obligation to be given for it was executed and registered, that the responsibility for the default of the notary to pay over a portion of the money, must fall upon the lender; and it made no difference whether the notary was to pay over the amount to the borrower, or (as in the present case) was to apply it to the discharge of certain debts in accordance with a list furnished to him by the borrower.

2. That the borrower's acknowledgment in the deed, that he had received the whole amount, might be contradicted by the lender's admission that she had paid the money to her notary, and the notary's admission that he had not paid over a portion of the amount.

The appeal was from a judgment of the Court of Review, Montreal (JOHNSON, DOHERTY, BOURGEOIS, JJ.), Sept. 30, 1885, reversing a judgment of the Superior Court (TASCHEREAU, J.), March 5, 1885.

The judgment of the Superior Court was as follows:—

"La Cour, etc.

"Attendu que le demandeur *es qualité* réclame de la défenderesse la somme de $346.49, que cette dernière lui redevait sur le montant d'une obligation de $2,000 consentie par le demandeur *es qualité* à la défenderesse, le 1er août 1884, à Montréal devant Isaacson, notaire, pour prêt de pareille somme, le dit demandeur alléguant que sur ce montant de $2,000 la défenderesse n'aurait réellement dé-

1887.
Webster & Dufresne.

posé et payé ou fait payer au demandeur ou à ses créanciers à son acquit que $1,653.51, laissant encore due la dite balance de $346.49;

"Attendu que la défenderesse a nié généralement les allégations de la dite action et a de plus allégué sur défense spéciale, que du consentement du dit demandeur *es qualité*, elle avait déposé la dite somme de $2,000 entre les mains du dit notaire Isaacson que le demandeur avait spécialement chargé comme son mandataire, de payer les divers créanciers dont les réclamations devaient être satisfaites au moyen du dit emprunt; que le demandeur avait considéré le dit dépôt comme équivalent à la remise faite à lui-même de la somme prêtée, ainsi qu'admis d'ailleurs par lui dans l'acte constatant le dit prêt et dans lequel il reconnait que la dite somme lui a été remise en especes, et que sous ces circonstances, la défenderesse n'était pas responsable de l'emploi qu'avait pu faire le dit Isaacson des deniers ainsi à lui remis;

"Considerant que la défenderesse a prouvé les allégations de son dit plaidoyer, et qu'il en résulte que, si le dit Isaacson, mandataire du dit demandeur *es qualité* pour le paiement et la distribution des dits deniers à qui de droit, a manqué à ses obligations ou est redevable au demandeur de quelque balance provenant du dit prêt, le demandeur *es qualité* n'a pas d'action contre la défenderesse, mais u'a recours que contre le dit Isaacson en vertu du dit mandat special;

"Maintient les défenses et déboute le demandeur *es qualité* de son action, avec dépens distraits, etc."

JOHNSON, J., delivering the judgment of the Court of Review, made the following observations:—

"The plaintiff represents that by a deed of obligation which he produces, he is made the debtor of Louisa Webster, for the whole sum of $2,000; whereas $346.49 of the money remains unpaid, and for that sum he brings his action.

"The defendant pleaded that she had deposited the whole amount with the notary who passed the deed, in the plaintiff's presence, and the whole was paid as ac-

knowledged by the terms of the deed itself; and further, she pleaded that the plaintiff and the notary arranged and agreed between themselves as to the various sums to be paid to discharge different claims due by the Estate Lozeau.

"The judgment dismissed the action, on the ground that the notary was, by the plaintiff's own act, made his agent, and he has only his recourse against him, and not against the defendant, who is acknowledged in the deed to have paid the money. The notary has the money still—(that is to say, his own fees and an amount of $286—due to one Mdme. Geoffrion, and not yet paid to her, make up the amount that is now sued for).

"The questions are whether he acted as the plaintiff's agent, in receiving this $2,000; and whether the plaintiff has proved the non-payment of the money. The defendant had to prove the agency of the notary for the plaintiff, which she alleged; and she has examined the notary himself. In the first place, I do not think parole evidence can be given of the fact. In the second place, if such evidence could be given, it would be, in its nature, evidence to exculpate himself by one interested as the defendant's *garant*, and would not be sufficient proof. The defendant on *faits et articles*, and also as a witness, admits that she employed the notary: she calls him her notary, and says he has been so for twenty years: that she told him not to pay the money until the plaintiff had signed and registered the deed. This is the same thing as if she had kept the money in her own hands until these conditions had been observed. Therefore, the position of the parties is this: A lender takes an obligation for money, and admits she has instructed her agent to pay it when certain things have been done by the borrower. These things the borrower has done: What more can he be called upon to do before the money is paid? It is true the mode of payment of the money was mentioned and agreed to; and the plaintiff confided in the lender to pay it through her agent the notary, in a certain way; but that makes no difference. It was owing to her instructions to her notary that the

1887.
Webster & Dufresne.

money was not paid till the borrower signed. Therefore, his signature is no proof that he got the money; but only that he conformed to the conditions on which he was to get it. The lender was bound to see that the money was paid to the borrower in some way. She cannot divest herself of that obligation by entrusting it to another. The plaintiff was willing that the whole sum should be paid in a certain way; but the whole has never been paid at all. The defendant's agent keeps a part of it in his hands, either as her agent, or with the plaintiff's consent. He fails to prove any such consent. Indeed, he only contends there was a consent that he should pay it: not that he should keep it. If he can do that without the consent of the plaintiff, he can do it with the entire amount. This judgment, therefore, is revised; and goes for the plaintiff for the amount claimed."

The written judgment of the Court of Review was in the following terms:—

"The Court, etc.

"Considering that the plaintiff represents by his present action that by a deed of obligation which he produces, he is made to appear debtor of Louisa Webster, (the original defendant), for the entire sum of $2,000, the amount of the said obligation, whereas $846.49 of that sum has not been paid to, nor received by him;

"Considering that the defendant pleaded in substance that she had deposited with the notary who executed the deed, the whole sum of $2,000, and that the whole of it was paid to plaintiff as acknowledged by the terms of the deed itself; and further that the plaintiff agreed personally with the notary as to the payment of the various sums due to different creditors of the estate Lozeau;

"Considering that the said sum claimed by the plaintiff has been retained and is still in the hands of the notary;

"Considering that the defendant, Louisa Webster, was bound to pay or cause to be paid to the plaintiff the whole sum of $2,000, which she has not done, but instead thereof appointed the notary, her agent, to pay the same after the

plaintiff should have signed and registered the said deed and in the manner agreed upon;

"Considering that the plaintiff both signed and registered the said deed, and was not required to do anything more before the payment in the manner agreed upon of the whole amount;

"Considering that the evidence of the notary to prove by parole the agency of the notary for the plaintiff is inadmissible; and if admitted, would not constitute, seeing his interest, sufficient proof;

"Considering that under the instructions admitted by the said Louisa Webster to have been given by her to her agent, the said notary, not to pay the money until the deed should be signed and registered, the signature of the plaintiff has the effect of proving, not that the plaintiff received the whole sum of $2,000; but only that he conformed to the conditions imposed by her, and upon which he was entitled to get it;

"Considering that the said Louisa Webster could not divest herself of the obligation to pay or cause to be paid the whole sum of $2,000, by any instructions to her agent or any mere act of her own;

"Considering therefore, that there is error in the said judgment of the 5th of March, 1885, dismissing plaintiff's action, doth reverse the same, and proceeding to render the judgment which the said Superior Court ought to have rendered in the premises, doth adjudge and condemn the defendants *par reprise d'instance* in their said quality, to pay to the plaintiff *es qualité* the said sum of $346.49, with interest from the 1st of August, 1884, and in case the said defendants *par reprise d'instance* should not pay the said sum and interest, and costs of these presents, the same shall be deducted from said obligation, and the present judgment shall serve and avail as an acquittance for so much, the whole with costs."

Sept. 27, 1886.] *F. E. Gilman*, for the appellants, relied upon the acknowledgment contained in the deed of obligation, Aug. 1, 1884, by which the plaintiff, respondent, acknowledged "to have had and received of and from the

1867.
Webster & Dufresne.

"said Louisa Webster, to his full and entire satisfaction, "etc.," the sum of $2,000; and upon the evidence of the notary that he still held the amount due to Madame Geoffrion.

Jodoin, for the respondent, submitted that the notary was acting as the agent of Miss Webster, and that the loss resulting from the failure of the notary to pay over the whole or any part of the amount, must fall upon her.

The case was subsequently re-heard before the Court constituted as above mentioned.

CROSS, J. (for the Court):—

Miss Webster agreed to lend Dufresne, tutor to certain minors, $2,000, which Dufresne required for the payment of certain debts due by the minors, and for the borrowing of which he was authorized by a judge in order to pay said debts. Miss Webster paid the money into the hands of Isaacson, her notary, who, by her instructions, was not to part with it until the obligation to be given for it was executed and registered, which appears to have been satisfactorily accomplished, but the money, in place of being paid over to Dufresne, was by Isaacson paid over to the different creditors of the minors, of whom a list was furnished him by Dufresne, or the notary acting for him. He paid the creditors with one exception—a Madame Geoffrion, who was a creditor for a sum of $346.49. The money for her not being forthcoming Dufresne brought the present action against Miss Webster for the payment of this sum, or in default of its payment, to have the obligation reduced *pro tanto*. The Superior Court dismissed the action, but in Review this decision was reversed and judgment given in favor of Dufresne. Miss Webster died during the proceedings, and the present appeal against the judgment in Review is being prosecuted by her representatives.

The question to be determined is, at whose risk the money was in the hands of Isaacson and until paid over by him. Isaacson was, undoubtedly, the notary of Miss Webster, selected by her to have things made secure

1887. Webster & Dufresne.

before money would be parted with. It is true he paid the creditors on a list furnished him by Dufresne, and he had Dufresne's consent to pay the creditors indicated, but as far as Dufresne was concerned, Isaacson did not get instructions from him to receive the money from Miss Webster on his (Dufresne's) account and pay it over to the creditors. He was borrowing the money for the purpose, and even Miss Webster had an interest in seeing that it was paid to the Dufresne creditors, although, perhaps, not bound to so direct it. And clearly Dufresne was entitled to have it on hand to himself, or to the creditors in his discharge; until so paid, it had not been advanced pursuant to Miss Webster's obligation, and until then the money remained at Miss Webster's risk, in the hands of her notary, whom she had chosen as her agent. The matter would have seemed more clear, but for the fact that Dufresne, in his declaration, alleges that the sum he seeks to recover had never been paid by Miss Webster to Isaacson, while the proof clearly shows that it was paid to Isaacson; but, although paid to Isaacson, Dufresne never received it, nor was it ever paid to anyone authorized to receive it on his behalf, and, as Dufresne is fairly entitled to take this position, the allegation referred to may be treated as surplusage—not necessarily material to Dufresne's right to recover.

It was argued that Miss Webster had proof in her favor by an authentic document, which could not be contradicted, but by an inscription *de faux*. This objection is unfounded. The document, of course, forms a presumption in her favor, but that presumption is reversed by her own admission on oath that she deposited the money with Mr. Isaacson, who afterwards admitted it was not paid over.

We have come to the conclusion that the judgment must be confirmed, and order accordingly.

Judgment confirmed.

Gilman & Oughtred, attorneys for the appellants.

Pelletier & Jodoin, attorneys for the respondents.

(J. K.)

February 22, 1887.

Coram DORION, Ch. J., TESSIER, CROSS, BABY, JJ.

CORPORATION OF THE CITY OF SHERBROOKE
(*Defendants in Court below*),
APPELLANTS;

AND

JOHN SHORT
(*Plaintiff in Court below*),
RESPONDENT.

Municipal Corporation—Responsibility—Condition of Streets—Extraordinary Circumstances—Serment Supplétoire.

HELD:—1. That a municipal corporation is not bound to make extraordinary exertions, out of proportion to the means at its disposal, in order to keep the streets free from snow and ice, but only to such extent as is reasonable, taking into consideration the means at its disposal.

2. Where there is no evidence of the cause of the accident, it is not a proper case for submitting the *serment supplétoire*, and thus permitting the case to be proved entirely by the plaintiff's oath.

The appeal was from a judgment of the Superior Court, St. Francis (BROOKS, J.), March 27, 1885, maintaining an action of damages for personal injuries sustained by the respondent through the alleged negligence of the Corporation, appellant. The judgment of the Court below was in the following terms:—

"The Court, etc.

"Considering that the plaintiff hath proved the material allegations of his declaration, and that on or about the 14th of April, 1883, the sidewalk on London street, in the North Ward of Sherbrooke, was not kept by defendants, as they were by law bound to do, in good repair and free from obstacles and impediments, but, on the contrary, was allowed to be and remain completely blocked and obstructed by snow, so that foot passengers were unable to travel them, and those persons passing along said street were driven to walk in the street or highway;

1887.
Sherbrooke & Short.

"And considering that the said street or highway was not by defendants kept free from holes, cavities, &c., but that the snow had been allowed to accumulate thereon and remain, in consequence whereof at said point it had become full of holes, slopes, incumbrances and impediments, and unsafe as well for the passage of animals as for foot passengers;

"And considering that the plaintiff, on or about the 14th of April, 1883, having to pass, said sidewalk being impassable, and owing to the unsafe condition of said street or road, of which defendants were or should have been aware, and which they should have prevented, in passing along said street or highway on his way homeward, met with the accident complained of by him in his declaration, by which his ankle was sprained, and suffered loss and damage thereby;

"And considering that said accident occurred through the negligence of defendants in not keeping said sidewalk open to the public and in good repair, and said road free from holes, cavities, ruts, slopes, incumbrances and impediments, as they were bound to do, and that plaintiff hath thereby suffered damage to the extent of $300, doth, in consequence adjudge and condemn the defendants to pay to the plaintiff the said sum of $300, with interest, etc."

Nov. 24, 1886.] *H. B. Brown*, for the appellants, contended that the supplementary oath was illegally submitted to the plaintiff (respondent) without allowing the parties to be heard thereon; and that the circumstances were not such as to warrant the Court in submitting the decision of the case to the oath of the plaintiff, there being no commencement of proof. Secondly, even with the evidence given by the plaintiff, the action ought to have been dismissed. The season of the year, place of the accident, and the cause, must all be taken into consideration. The law does not expect the corporation to do impossibilities.

W. White, Q.C., for the respondent:—The sidewalks had not been ploughed out, nor had the snow been removed during the whole winter, so that the sidewalks were perfectly impassable. Pedestrians were forced to take the

1887.

Sherbrooke & Short.

middle of the street. In the street, the snow had drifted and been allowed to accumulate in such a manner that one side of the road was much higher than the other, leaving the street very slanting and uneven. There were a good many holes in the street, some of them having been there for a long time; others were more recent. The bad condition of the street had existed for so long a time that the appellants were bound to know of it.

CROSS, J.:—

The respondent, John Short, who is deputy prothonotary at Sherbrooke, left the court house on the evening of the 14th April, 1883, to walk to his home, passing by way of London street. When he arrived home he was suffering from a sprained ankle, which he accounted for from having slipped into a hole in the middle of the street, made apparently by a horse sinking through snow softened by a thaw, and afterwards becoming hard and slippery by succeeding frost. He was confined to his house for some weeks, suffered considerable pain and inconvenience, was attended by a doctor, consequently was caused outlay, bodily and mental anguish, inconvenience and loss of time.

He brought his action against the corporation for $1,000. No person being present to see the manner of the accident, he could not prove it. After hearing the parties, the presiding judge saw fit to have the proof completed by the supplementary oath of the respondent, and gave him judgment for $300. The corporation have appealed and contend:—

1. That there is no proof to charge them with fault or negligence.

2. That the judge ought not to have taken the supplementary oath of the respondent, there being an entire absence of proof without it.

3. That the parties ought to have been notified to be present.

4. That the parties ought to have been heard upon the case after the supplementary oath was taken.

5. That there was no proof sufficient to charge the appellants with neglect of duty or liability for any cause by which the respondent received his injury.

6. That any obstruction in the street on the 13th April, 1883, was caused by climatic influences against which they could not reasonably contend.

After a good deal of hesitation, the Court have come to the conclusion that the judgment appealed from ought not to be allowed to stand.

Without questioning the right of the judge to act as he did in the taking of the supplementary oath of the respondent, and receiving it even without notice to the opposite party or hearing thereon, and admitting that he may have exercised a reasonable discretion in that respect, we nevertheless think that the proof falls short of establishing a cause of responsibility against the corporation.

In such cases, the party complaining should himself be free from the imputation of blame. He is bound to take all reasonable precautions on his own behalf to avoid danger. It does not follow that because a man slips and falls in the street, and so injures himself, that the fault is necessarily that of the corporation which has charge of the street. Slips and falls take place by pure accident where no obstructions are met with; true, they are more frequent where there are obstructions. What can be said is, that they are less frequent where no obstructions exist, but if you allow the cause to be proved by the oath of the party complaining, you thus authorize him to sustain his whole action by his own declaration, given, of course, on oath, while it is against the spirit of our law to allow any person to make a case for himself by his own oath.

But the principal ground upon which we rest our judgment is that the Corporation of Sherbrooke were not bound in April, 1883, to extraordinary exertions to keep London street free of ice and snow—exertions out of proportion to the circumstances of the case and the means at their disposal. Every resident of this province knows that contending with these obstructions is warring against the forces of nature, at times wholly ineffective, and at

1887.
Sherbrooke & Short.

other times only partially successful, and the extent to which exertions should be applied must be in proportion to the reasonableness of the case, and the means at disposal. For instance, London street appears to be a suburban locality, likened more to a country road than to a city street. There had been heavy storms and a great thaw a short time before the accident, followed by a severe frost, hardening the melted snow to a rock consistency, and rendering it slippery and dangerous for foot passengers to pass in the middle of the street. The witnesses examined on the subject say that these obstacles could be suppressed, but at an expense altogether disproportioned to their importance or what is customary for the corporation to do, and we know that a few hours' thaw would operate a change which thousands of dollars could not effect. Besides, the respondent had other roads open and in good order by which he could have passed. He had seen the condition of London street in the morning, and might have taken a safer route to return, one more consistent with the season of the year and the obstructions which the forces of nature at that time cast broadcast over the land. He was an old man, 75 years of age.

The respondent is a sufferer, but for a cause for which the corporation is not reasonably responsible. We so determined in the case of *Lulham* v. *The Corporation of Montreal*.

We consequently reverse the judgment appealed from, and dismiss respondent's action.

DORION, C. J. :—

Every case of this nature has to be decided on its own merits. The respondent in this case passed through the street in the morning, and must have been aware of its condition. It would be hard to hold a corporation responsible for every change which must occur in the spring of the year. We think that under the circumstances the action should not have been maintained.

The judgment of the Court is recorded as follows :—

"Considering that the respondent has failed to prove that the injury of which he complains was caused by the fault or negligence of the appellants ;

1887.
Sherbrooke & Short.

"Considering that the condition of London street, in the city of Sherbrooke, on or about the 14th of April, 1883, to which the respondent attributes the injury he sustained, was the result of climatic causes against which the appellants could not, in reason, have provided, and the danger to be apprehended therefrom the respondent might have avoided by the exercise of ordinary prudence and caution;

"Considering, therefore, that there is error in the judgment rendered by the Superior Court at Sherbrooke in this cause on the 27th March, 1885;

"The Court of our Lady the Queen, now here, doth cancel, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth dismiss the action of the respondent, with costs to the appellants against the respondent, as well in this Court as in the said Superior Court."

Judgment reversed.

Ives, Brown & French, attorneys for Appellants.

Hall, White & Cate, attorneys for Respondent.

(J. K.)

February 22, 1887.

Coram DORION, CH. J., TESSIER, CROSS, BABY, JJ.

WILLIAM O'BRIEN,
(Defendant in Court below),
APPELLANT;

AND

JOHN H. SEMPLE,
(Plaintiff in Court below),
RESPONDENT.

Novation—Extinction of obligation by granting a term to substituted debtor—C.C. 1169.

The appellant, being indebted to the respondent, settled by giving his own note (paid at maturity) for part of the debt, and for the balance he gave an order or draft on the St. H. Company, which was accepted. But, instead of exacting immediate payment of the draft (which was payable forthwith), the respondent took from the St. H. Company their two promissory notes payable at one and two months respectively, and before these notes matured, the St. H. Company became insolvent.

1887.

O'Brien & Semple.

HELD:—That novation was effected by the acceptance of the new debtor in the room of the old, when it was intended to discharge, as it was, effected by the term granted by the creditor to the substituted debtor without the concurrence of the former debtor.

The appeal was from a judgment of the Superior Court, Montreal, (PAPINEAU, J.) Oct. 31, 1886, maintaining the respondent's action, in the following terms:—

"La cour, etc.....

"Considérant que le demandeur poursuit le défendeur pour la somme de $300, partie du montant d'un compte entre les parties le 20 de mars 1885, pour lequel le défendeur a donné un billet de $207 52, cours actuel, et un ordre ou traite de $300 sur la *St. Henry Carriage Leather Company* qui devait alors au défendeur une somme à peu près égale;

"Considérant que le demandeur en acceptant la traite du défendeur sur la dite compagnie n'a pas déchargé le défendeur ni expressément, ni tacitement, mais qu'il a seulement accepté un débiteur additionnel pour une partie de sa créance;

"Considérant que le défendeur n'a pas prouvé son plaidoyer, et que le demandeur, en donnant délai à la dite compagnie, n'a pas changé ni empiré la condition du défendeur;

"Renvoie le dit plaidoyer, et donnant acte au demandeur de son offre de remettre au défendeur les deux billets en date du 24 mars 1885, récités dans la déclaration, condamne le dit défendeur à payer au dit demandeur la susdite somme de $300, avec intérêt etc."

Jan. 27, 1887.] *Thos. Fortin*, for the appellant:—

Dans l'espèce, s'il y a novation, c'est celle qui s'opère par la substitution d'un nouveau débiteur, substitution qui peut s'opérer sans le concours du premier (C.C. 1171).

Nous n'hésitons pas à soutenir l'affirmative.

Nous examinons les faits et les circonstances, puisqu'il s'agit de rechercher l'intention de l'intimé, à l'époque de son acceptation des billets de la compagnie.

L'appelant donne cette traite à l'intimé, à Montréal, payable comptant, et s'en retourne chez lui, à Papineauville.

Que fait l'intimé quand la compagnie lui offre ses billets, au lieu de payer la traite qu'elle avait acceptée? S'empresse-t-il de demander à l'appelant s'il consent à cet arrangement? L'informe-t-il au moins de ce fait?

Pas le moins du monde.

Il accepte les billets et les fait escompter, et n'en avertit l'appelant qu'après la faillite de la compagnie.

Est-ce ainsi qu'un créancier agit quand il veut conserver un premier débiteur? Est-ce que la prudence la plus élémentaire ne suggère pas alors de demander au premier débiteur son consentement?

N'est-il pas évident que l'intimé consentait à ce changement de débiteur qui lui donnait une compagnie à fonds social pour débiteur au lieu d'un simple particulier?

Il est impossible, croyons-nous, de rencontrer un cas où l'intention de libérer un débiteur et d'en accepter un autre, se manifeste d'une façon plus claire. L'intimé a traité avec cette compagnie comme avec son seul débiteur: point de demande de concours à l'appelant, point d'avis de cette transaction: en un mot, l'intimé agit comme s'il n'avait jamais eu d'autre débiteur que la compagnie.

Le Code Napoléon diffère un peu de notre Code Civil sur cette matière de la novation. L'art. 1273, correspondant à notre art. 1171 exige que la *volonté de l'opérer résulte clairement de l'acte*; ce qui semblerait exiger une manifestation de volonté dans un *acte*, dans un *écrit*. L'art. 1275, correspondant à notre art. 1173, exige encore, pour qu'il y ait novation par suite de la délégation, que le créancier ait *expressément déclaré qu'il entendait décharger son débiteur qui a fait la délégation.*

Sous notre Code tout se réduit à une question d'intention; il n'est pas nécessaire qu'il y ait déclaration expresse, formelle.

Cependant malgré cette exigence plus grande du Code Napoléon, on n'hésite pas à déclarer que la manifestation de cette volonté peut résulter des circonstances.

Demolombe t. XVIII no. 312, pp. 219 et seq. et les autorités citées par lui.

Dalloz Vo. Obligation nos. 2393, 2452, et 2457.

1887.
O'Brien & Semple.

Et voici une espèce où la cour de cassation a décidé qu'il y avait novation. *La dame de la Faye* v. *Bonnault* Sirey, 1828. 1. 394.

H. J. Kavanagh, for the respondent:—

The appellant's case rest on the pretension that there was novation of the debt due respondent.

To sustain this plea, it was necessary for appellant to prove two things:—

1st.—That the company bound themselves to fulfil O'Brien's obligation to Semple

2nd.—An intention on Semple's part to discharge O'Brien.

There is no evidence that the Company accepted an order on them to pay on demand. The only indication of what the Company undertook to do, is found in their two promissory notes.

The order is not produced, and appellant made no attempt to produce it: and this being the state of the evidence on this point, the respondent respectfully submits that, in the absence of proof that the Company ever accepted an order to pay on demand, the production of these promissory notes shows only that they accepted an obligation with a term. Yet this is the acceptance relied on. The appellant's case might be different, if the facts were that the Company first undertook the payment of O'Brien's debt to Semple and that, subsequently, Semple consented to a delay.

As to the second point:—Article 1171 of the Civil Code specially provides that, "Novation is not presumed. The "intention to effect it must be *evident*." See Pothier, Ed. Bugnet, vol. 2, p. 313.

CROSS, J.:—

On the 20th March, 1885, O'Brien owed Semple $502.52. O'Brien had a claim against the St. Henry Carriage & Leather Company, to the amount of $300, for bark he had sold them. They settled as follows:—O'Brien gave Semple his note for $202 which he paid at maturity. He gave, further, a draft on the St. Henry Carriage & Leather Co.

for $300, which that Company accepted for $297.05. In place of doing diligence on this draft, Semple took from the Company two promissory notes of theirs, each for $148.50, payable respectively at one and two months from date, and thus postponed the day of payment of O'Brien's claim without his consent. Before either of these notes fell due, viz, on the 15th of April, the Company failed. Semple brings his action for the $300, represented by the amount of the draft, and offers O'Brien the two notes he had received from the St. Henry Carriage & Leather Company.

O'Brien meets the action by a tender of $3, the difference between the draft he gave and the Carriage Company's acceptance of it, represented also by the two notes that Semple accepted from that Company, offering also costs before return of action, and thereupon contends that Semple took the two notes from the Carriage Company at his own risk, that he thereby novated his claim and accepted a new debtor in the room of O'Brien, whom he discharged.

We think his plea was well founded, and is sustained by the proof. The new debtor here was not substituted by the delegation of him by O'Brien, but was voluntarily accepted by Semple to the prejudice of O'Brien's recourse, who, but for the delay given, might have claimed his debt immediately from the Carriage Company, and as he contends, might have had a privilege on the bark he sold the Company. It is clear that by his own act and without the concurrence of O'Brien, Semple novated his claim and accepted a new debtor in the room of O'Brien, whom he discharged. We, therefore, think that the judgment appealed from should be reversed, and the action dismissed.

We don't know on what principle the appellant offered costs before the return of the action, but the balance of $3 being so inconsiderable, we think the question of costs should not affect the result, but whatever tender is made will be declared valid.

The judgment of the Court is as follows:—

"The Court, etc.

"Considering that the appellant proved the material

1887.

O'Brien & Semple.

allegations of his plea produced in this cause, more especially that the *demande*, for which the respondent brought his present action in the Court below, was novated and extinguished, save [illegible] the small amount of $8, by the failure on the part of the respondent to exercise diligence for the collection of the draft drawn by the appellant upon the St. Henry Carriage & Leather Company, for $300, and accepted by the said Company for $297, by giving delay for the payment of said draft, and accepting on account thereof, two promissory notes of the said Company for $148.50 each, payable respectively one and two months after date, without the sanction or concurrence of the appellant, and to the prejudice of his recourse against the said St. Henry Carriage & Leather Company, thereby accepting a new debtor in the room and in discharge of the appellant;

"Considering that the tender made by the appellant, as stated in his plea, was amply sufficient to cover the small difference between the amount of said draft and the acceptance thereof by the said St. Henry Carriage & Leather Company;

"Considering, therefore, that there is error in the judgment rendered in this cause by the Superior Court at Montreal, on the 31st of October, 1885, the Court of our Lady the Queen now here doth reverse, cancel and annul the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth declare the tender herein made by the appellant good and valid, and doth dismiss the action of the respondent with costs, as well of this Court as of said Superior Court."

Judgment reversed.

Robidoux & Fortin, attorneys for the appellant.

Henry J. Kavanagh, attorney for the respondent.

(J. K.)

February 22, 1887.

Coram DORION, Ch. J., TESSIER, CROSS, BABY, JJ.

THE EXCHANGE BANK OF CANADA
(Plaintiff in the Court below),
APPELLANT;

AND

LUC CARLE
(Defendant in the Court below),
RESPONDENT.

Promissory Note—Signature obtained by Fraud—Action by Transferee—Knowledge of Fraud—Proof of Consideration.

HELD:—Where the defendant's signature to a promissory note was obtained by fraud under circumstances which, in the opinion of the Court, were matter of public notoriety at the time the note was transfered to B. (for whom the plaintiff was *prête-nom*), that it was incumbent on the plaintiff to prove that B. gave consideration for the note.

The appeal was from a judgment of the Court of Review, Montreal, (DOHERTY, JETTÉ, LORANGER, JJ.) March 31, 1885, reversing a judgment of the Superior Court, Montreal (MATHIEU, J.), Sept. 3, 1884, and dismissing an action brought upon a promissory note.

The judgment of the Court of first instance was as follows;—

"La Cour, etc.

"Considérant que le dit défendeur, Carle, n'a pas prouvé que, lorsqu'il a mis son nom sur le billet qui fait la base de l'action de la demanderesse, il entendait, et qu'il lui avait été représenté que c'était un ordre pour avoir des effets pour la vente desquels il était constitué agent, mais qu'il n'entendait pas signer un billet promissoire, et que c'était à lui, le dit Carle, à faire cette preuve;

"Considérant que le dit défendeur Carle n'a pas non plus prouvé que la demanderesse, lorsqu'elle est devenue porteur du dit billet promissoire connaissait la fraude dont le dit Carle se plaint;

1887.

Exchange Bank & Carle.

"Considérant que la demanderesse a prouvé qu'elle est devenue porteur, pour valeur reçue, avant l'échéance, du dit billet, et que sous ces circonstances, elle a le droit de recouvrer des défendeurs le montant du dit billet; a renvoyé et renvoie les défenses du dit défendeur, Carlé, et a maintenu et maintient l'action de la demanderesse, et a condamné et condamne les défendeurs conjointement et solidairement à payer à la demanderesse la somme de $225, montant du billet suscité, savoir le billet promissoire fait et signé à Shawenegan, le 1er octobre, 1882, par le dit Luc Carle, payable à douze mois de la dite date, à l'ordre de C. B. Mahan & Co., au bureau de poste de St. Boniface et par les dits C. B. Mahan & Co. endossé et rémis au dit défendeur Baxter, et par ce dernier endossé et livré à la dite demanderesse: avec intérêt, etc."

The judgment of the Court of Review, reversing the decision of MATHIEU, J., was as follows:—

"La cour, etc.

"Attendu que la demanderesse réclame des défendeurs la somme de $225, montant d'un billet que le défendeur Luc Carle aurait consenti à Shawenegan le 1er octobre 1882, à l'ordre de C. B. Mahan & Co., payable à douze mois de date, pour valeur reçue, lequel billet aurait été endossé par les dits, C. B. Mahan & Co. en faveur de l'autre défendeur James Baxter, qui à son tour le transporta à la demanderesse aussi pour valeur reçue;

"Attendu que le défendeur James Baxter a fait défaut sur la présente action;

"Attendu que le défendeur Luc Carle a plaidé qu'il n'a point reçu considération pour le billet en question; que ce billet a été obtenu par fraude; qu'à la date du dit billet il a fait avec les dits C. B. Mahan & Cie., un contrat d'agence pour la vente d'instruments aratoires; qu'au lieu de lui, signer ce contrat d'agence les dits C. B. Mahan & Cie. lui ont fait mettre son nom sur le billet en question pour lequel il n'a reçu aucune considération,—les dits C. B. Mahan & Cie. ne lui ayant même pas expédié les instruments qu'il devait vendre pour eux;

"Considérant qu'il est prouvé que lorsque le billet en

question a été signé par le défendeur Luc Carle, il n'avait été question entre lui et les dits C. B. Mahan & Cie. représentés par leur agent, J. E. Vincent, que d'un contrat d'agence en vertu duquel le dit défendeur Luc Carle s'engageait à vendre pour les dits C. B. Mahan & Cie. certains instruments aratoires énumérés dans un écrit produit au dossier, lesquelles instruments aratoires devaient être expédiés au dit défendeur, et que c'est ce contrat d'agence et non le billet sur lequel il est poursuivi qu'il a entendu et voulu signer; que la signature du dit défendeur Luc Carle sur le dit billet a été obtenu par surprise et par la fraude des dits C. B. Mahan & Cie. représentés comme susdit par le dit J. E. Vincent, leur agent autorisé à ce faire;

"Considérant que le défendeur Luc Carle n'a jamais donné son consentement au contrat sur lequel il est poursuivi par la présente action;

"Considérant que les dits C. B. Mahan & Cie., qui ont obtenu par fraude le billet en question, n'ont pu transférer aucun titre valable à la propriété du dit billet à l'autre défendeur James Baxter, qui n'est censé être que leur agent; qu'il incombait à la demanderesse, vu ce que ci-dessus établi, de prouver que le dit Baxter a donné considération pour le dit billet aux dits C. B. Mahan & Cie., ce qu'elle n'a pas fait;

"Considérant qu'il est prouvé qu'à l'époque où le dit billet a été transporté à la demanderesse par le dit James Baxter, les fraudes commises par les dits C. B. Mahan & Cie., qui avaient, sous le même prétexte, et les mêmes circonstances obtenu par surprise la signature de plusieurs autres personnes, étaient de notoriété publique, que le fait avait été publié dans deux journaux de cette ville; qu'il était également connu que les dits Mahan & Cie. s'étaient enfuis du pays pour se soustraire aux conséquences de cette fraude; que la demanderesse connaissait ces faits lorsqu'elle a accepté les dits billets;

"Considérant qu'il ressort de la preuve que la demanderesse n'est dans la présente cause, que le prête-nom du dit James Baxter, qui a remboursé à la demanderesse une

1887.
Exchange Bank & Carle.

partie des avances qu'elle a faites sur les dits billets, et qu'elle possède un recours certain pour le reste contre le dit Baxter dont elle a elle-même prouvé la solvabilité ;

"Considérant que le défendeur, Luc Carle, a prouvé les allégués de sa défense, et qu'il y a erreur dans le jugement dont la révision est demandée ;

"La cour renverse le dit jugement du 3 septembre, 1884, et procédant à rendre le jugement qui aurait dû être rendu, renvoie l'action de la demanderesse, avec dépens tant de la Cour Supérieure que de cette Cour de Révision, distraits, etc."

LORANGER, J., in the Court of Review, made the following observations :—

La question de droit qui se présente n'est plus nouvelle. La Cour Supérieure et la Cour d'appel ont donné à l'article 2287 sa véritable interprétation : il n'a d'application que pour le porteur de bonne foi, et si la preuve démontre que le billet a été obtenu par fraude, c'est au cessionnaire porteur d'un titre vicié dans son essence à prouver qu'il ignorait la fraude et a donné considération pour le transport. La fraude empêche tout lien de se former, et celui qui la commet n'acquiert aucun titre et ne peut en transporter aucun. On a même jugé dans la cause *Foster & Macktinnon* rapportée à la page 310 du 38e vol. du Law Journal, Common Pleas, No. 5 : *That in an action by a bona fide holder for value of a bill of exchange against defendant as indorser, if the defendant's signature was obtained upon a fraudulent representation that the instrument was a guarantee, and the defendant signed it without knowing that it was a bill, and under a belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing, he was entitled to the verdict. The note (p. 315) is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature : in other words that he never intended to sign the contract to which his name is appended.*" Voir aussi Daniel, Negotiable Instruments, Nos. 848, 84[illegible] suivants.

Le jugement déclare que le défendeur n'a pas prouvé

le défaut de considération non plus que la fraude qu'il a allégué et la connaissance que la demanderesse a pu en avoir. Je crois que la Cour a erré dans l'appréciation de la preuve. La position du défendeur était difficile ; il était seul avec Vincent, l'agent de Mahan, lorsque la convention eut lieu, et se trouvait ainsi à la merci de ce dernier. Ce fait à lui seul était suffisant, si l'on songe que les fraudes commises par Mahan et ses agents, dans des cas analogues, sont non-seulement de notoriété publique, mais sont consignés pour la plupart dans nos annales judiciaires, pour que la plus grande latitude fût accordée. Il est établi que pendant que le nommé Vincent opérait dans le district du défendeur, d'autres agents de Mahan faisaient des dupes ailleurs. La transaction était partout la même, c'est-à-dire promesse d'expédier les instruments agricoles qui n'ont pas été livrés ou ne l'ont été qu'en partie ; puis signature de la personne dupée sur une commande pour ces mêmes objets ainsi qu'au bas d'un certificat établissant sa solvabilité et d'un billet pour reçu, quand rien encore n'avait été livré. Or dans la plupart de ces cas, les cours ont jugé l'opération frauduleuse. La similitude des faits et des circonstances, jointe au fait important que le témoin principal dans la présente cause, le nommé Vincent, avait été entendu dans quelques-unes de ces causes, crée dans mon opinion une présomption qu'il en a été du défendeur dans toute cette affaire, comme des autres dupes de Vincent et ses compères dans les causes en question. Cela étant, la déposition de ce dernier devait être reçue avec la plus grande réserve. La nature de la transaction telle que l'expliquent les écrits signés par le défendeur démontrent que le plaidoyer de ce dernier est vrai. Ce n'est pas une vente, mais un contrat d'agence qu'il a signé, et Vincent n'a pas dit la vérité lorsqu'il a juré que le billet a été consenti pour les effets qu'il avait vendu au défendeur. Or s'il a juré faux sur ce point essentiel de la cause, comment le croire lorsqu'il affirme que le défendeur savait qu'il signait un billet ? Un témoin que ce nommé Vincent a voulu engager à commettre une fraude précisément à propos d'un billet

1887.

Exchange Bank & Carle.

semblable qu'il voulait faire signer par un cultivateur, jure que le dit Vincent n'est pas croyable sous serment. Ce témoignage unique contredit par quelques témoins qui le croient digne de foi sous serment, ne serait peut-être pas suffisant à lui seul, mais il est soutenu par le témoignage de Vincent lui-même. Les contradictions de ce dernier sur des faits essentiels, l'invraisemblance de sa version et les écrits eux-mêmes qui comportent à leur face une transaction différente de celle qu'il raconte, sont autant de preuves contre lui.

Le défendeur, je le répète, n'était que l'agent de Mahan; et alors pourquoi ce billet pour des objets sur lesquels il n'acquérait aucun droit de propriété? Il me paraît évident que le défendeur a été victime d'une fraude, et qu'il n'a pas entendu signer le billet sur lequel il est poursuivi. Vient maintenant la question de la connaissance que Baxter a dû avoir de cette fraude. L'honorable Juge Casault dans le jugement élaboré qu'il a rendu *in re* Bilodeau pose nettement la règle qui doit guider le juge dans l'examen de cette question, c'est aussi celle que posait la Cour d'Appel quelques mois plus tard in re *Bélanger* (voir le Legal News, vol. 6, page 413). *La preuve qu'un endosseur a acquis par fraude une lettre de change ou un billet, crée une présomption que celui auquel il l'a cédé ne lui a pas fourni de valeur pour son endossement, et oblige celui-ci à prouver le contraire pour se faire un titre de l'effet de commerce qui n'en était plus un entre les mains de son cédant.* On verra par les précédents cités dans la cause *Bilodeau* que cette règle de droit anglais, est reconnu dans le nôtre. Baxter, qui tient de Mahan son billet que celui-ci a obtenu frauduleusement du défendeur, est censé n'être lui-même que l'agent du preneur frauduleux, et il incombait à la demanderesse de prouver qu'il avait donné considération pour le billet.

Elle a essayé de faire cette preuve, mais par Baxter lui-même, et son témoignage ne peut pas être reçu. Outre que les fraudes de Mahan étaient de notoriété publique, lorsque Baxter a reçu ce billet, qu'il était connu que Mahan était un fugitif de la justice du pays, Baxter est en réalité la partie intéressée dans la présente cause, et la

demanderesse n'est que son prête-nom. En effet quel intérêt peut avoir la demanderesse à poursuivre en son nom? Elle a prêté $3,000 à Baxter et celui-ci lui a transporté pour $6,000 environ des billets Mahan, comme sûreté collatérale. Or Baxter est solvable; la demanderesse en a fait la preuve; il a même remboursé une partie des $3,000; pourquoi la banque au lieu de multiplier des poursuites contre des personnes dont elle ne connaît même pas la solvabilité, n'exécute-t-elle pas le jugement qu'elle a obtenu contre Baxter? Son intérêt ne va pas au-delà du remboursement de la somme qu'elle a prêté avec les intérêts.

1887. Exchange Bank & Carle.

Quant à la connaissance que la demanderesse elle-même a pu avoir des fraudes de Mahan, elle s'infère comme pour Baxter de la notoriété publique, des lettres publiées dans un journal de cette ville dénonçant les fraudes de Mahan et son départ frauduleux du pays. Il y a plus, ses soupçons ont dû être éveillés par la nouveauté de la transaction, et la forme inusitée dans les usages des banques des billets eux-mêmes. Baxter en a cédé un grand nombre, tous de même forme; aucun timbre n'était apposé sur le billet du défendeur et il y a bien lieu de croire qu'il en était de même des autres; or à cette époque les timbres étaient requis sur les billets antérieurs à la date du 4 mars 1882. Les billets portent sur l'endos un certificat imprimé de la solvabilité du défendeur. Il y avait en tout cela suffisamment pour éveiller l'attention d'un caissier prudent. La demanderesse, je le répète, me paraît agir dans les intérêts de Baxter sur la présente poursuite, et n'est exposée à aucune perte en raison de la solvabilité de ce dernier.

Nov. 26, 1886.]

J. N. Greenshields, for the appellant.

P. G. Martineau, for the respondent.

BABY, J. (for the Court) :—

Nous avons à juger ici une de ces causes résultant des fameuses transactions de Mahan et Cie., et nous avons lieu d'espérer que celle-ci sera la dernière.

1887.

Exchange Bank & Carle.

La Cour de première instance a maintenu l'action pour la raison que Carle n'avait pas prouvé qu'il ignorait signer un billet promissoire en faisant celui en question, et, de plus, que la banque ne connaissait pas au moment où il lui a été passé, qu'il avait été obtenu de Carle par fraude et que d'ailleurs, elle en était devenue porteur pour valeur donnée dès avant l'échéance.

Cependant, la Cour de Révision a infirmé ce jugement, pour les motifs suivants :—Que le billet avait été obtenu par surprise et par la fraude de Mahan et Cie. représentés par le témoin Vincent, leur agent autorisé, et que Carle n'avait jamais donné son consentement au contrat sur lequel il était poursuivi ; que Mahan et Cie. qui n'avaient ainsi obtenu le billet que par la fraude n'avaient pu transférer aucun titre valable à Baxter, leur agent, et que dans les circonstances il incombait à la banque d'établir que Baxter avait donné considération pour ce billet, ce qu'elle n'avait pas fait ; qu'à la date du transport du billet à la banque par Baxter dont elle est le prête-nom, les fraudes de Mahan et Cie. étaient de notoriété publique, ainsi que la fuite des personnes qui y avaient pris part—faits que la banque ne pouvait ignorer.

C'est de ce dernier jugement que la banque appelle. Disons-le de suite, nous ne voyons pas en quoi et sur quoi cette Cour pourrait l'infirmer. Par l'ensemble de la preuve, il est évident que Carle n'a jamais cru signer le billet que l'on cherche à recouvrer de lui. Le seul témoin produit pour contredire son affidavit est le nommé Vincent dont la véracité est certainement mise en doute et qui bien sûr ne saurait être réhabilité aux yeux de cette Cour, du moins, par le témoignage de gens de son espèce. Ces personnes ont l'audace de dire que Vincent était bien vu et jouissait de l'entière confiance et de l'estime de Mahan et Cie. et, qu'en conséquence, elles le croiraient sous serment. Comment aurait-il pu en être autrement, cet homme faisait si bien leurs piètres affaires ! Evidemment, ces témoins ne peuvent guère distinguer ce qui est immoral de ce qui ne l'est pas et leurs dires, au sujet de la crédibilité de quelqu'un, ne sont d'aucun poids.

Maintenant, quant à la bonne foi de la banque au temps où le billet est passé entre ses mains—le seul point d'appui qu'elle peut avoir ici—il est impossible de l'admettre. Baxter, dont elle n'est que le prête-nom, savait—cela était de notoriété publique—que de grandes fraudes avaient été pratiquées sur la classe agricole dans nos campagnes par Mahan et Cie. et leurs agents, et même que Mahan était en pleine fuite. Les journaux s'occupent de la chose, le public s'en empare et tout le monde en parle, et dire qu'elle n'est pas parvenue aux oreilles de Baxter et des autorités de la banque, c'est admettre qu'il n'existe pas une telle chose que la notoriété publique. Enfin, Baxter a pris ce billet, comme tant d'autres dont nous avons eu connaissance, à ses risques. Il l'a ensuite passé avec d'autres à la banque pour sûreté collatérale du paiement de son propre billet qu'elle a escompté. Elle a donc son recours contre lui, mais non contre Carle. Le jugement est donc confirmé avec dépens.

Judgment of C. R. confirmed.

Greenshields, McCorkill & Guerin, attorneys for appellants.

Mercier, Beausoleil & Martineau, attorneys for respondent.

(J. K.)

February 15, 1875.

Coram DORION, Ch. J., MONK, TASCHEREAU, SANBORN, JJ.

HENRY GIRARD,
(*Plaintiff in Court below*),
APPELLANT;

AND

HENRY BRADSTREET ET AL.,
(*Defendants in Court below*),
RESPONDENTS.

Libel—Report of mercantile agency to subscribers—Malice.

HELD:—That where the report of a mercantile agency to its customers concerning the standing of a person in business, is true, and no malice is proved, an action of damages for such publication will not be maintained.

1875.
Girard & Bradstreet.

The appeal was from a judgment of the Superior Court, Montreal (MACKAY, J.), April 30, 1873, dismissing the appellant's action.

MACKAY, J., delivering the judgment in the Court below, said:—

The plaintiff sues for $10,000, damages for libel by the defendants. The defendants carry on the business of collecting information as to the standing and solvency of merchants. This, they print in a book which they communicate to persons asking for it, subscribing (as it is called) to their agency, by payments annually of money, fifty dollars, and so forth. These subscribers they put under terms of treating the information they receive and the book as confidential. The book is printed every six months. At the time of the libel alleged by plaintiff, the defendants' book circulated to the extent of several thousand in the Dominion, and to the extent of three hundred copies in Montreal. The book communicated its information by numbers set opposite the names stated in it of merchants and others, a key accompanying the book to explain the numbers. Thus, 41 meant failed, 44 meant assigned as an insolvent, 47 meant asked extension of time, 40 meant obtained extension, etc. Plaintiff charges that defendants, in their book of March, 1872, classified him wrongly; that he was falsely represented by it as having "failed," whereas he had not, nor even compounded with his creditors; that his (plaintiff's) notes became undiscountable in consequence of defendant's reports, and he was ruined. The defendants plead that their classification was correct; that they were honest in making it, not moved by malice; that their communications to their customers, or subscribers, were confidential and privileged, and they deny the damage.

At the argument, the dangers of supporting such pleas as defendants' were represented as very serious; it was argued that the defendants were claiming a license full of danger to traders who, honest and well-to-do, might nevertheless choose not to pay money to defendants, nor

subscribe to their book; that this class would be placed under an espionage for the benefit of an organisation liable to be abused; that every or any trader would be exposed, under defendants' system, to risk of being ruined by secret and perhaps wickedly hostile hand, etc.

The defendants, on the other hand, argue that, commerce being carried on by credit, there is absolute necessity for such agencies as theirs, and they have not failed to lead witnesses to prove this. "Defendants' informations are a necessity of trade," says Smart. That part of defendants' case may as well be disposed of first, by which they claim that such books and communications as theirs, are to be called confidential communications and held privileged. This claim cannot be allowed. "Le prétendu caractère confidentiel de ces communications ne pouvait être sérieusement allégué; il est, en effet, de principe incontesté que la distribution, à un certain nombre de personnes, de documents même confidentiels pris séparément, fait perdre à ces communications leur caractère originaire." So it has been held in France. (See Dalloz of 1869,) in a case in which also it was said in the judgment: "Qu'il importe peu que les inculpés aient recommandé à leurs abonnés de ne pas communiquer leur écrit, alors que la divulgation, provenant de leur fait, avait une extension qui eût rendu cette recommandation puérile et oiseuse." Defendant's recording and printing untrue statements, in a book circulated to thousands, though under such an agreement for secrecy as they are in the habit of making, must be liable to actions for damages. False reports, in books like defendants', are far more hurtful than false newspaper reports; for the latter are seen at once and can be corrected. The former circulate in secret.

There remain the questions: Did defendants print statements about plaintiff or his standing? were these true? had defendants right to print them? has plaintiff been damaged by them?

I hold it not to be unlawful, when a commercial house suspends or fails, to publish the fact in a circular, or even

1875.

Girard & Bradstreet.

in a newspaper. It is done every day. The defendants published that plaintiff had failed. Had he "failed?" Upon this, evidence *pro* and *con* has been taken, and witnesses swear to the word failed, meaning one thing, while others swear to its meaning another thing. The French witnesses say that the word is equivalent to the French "failli," and that plaintiff had not "failli." Other witnesses, French and English, say that when a trader allows notes to be protested; when, owing money, he is called upon to pay, from time to time, during months, and puts off, losing credit, so, with those who are dunning him; when, afterwards, he asks extension of time for a term of years, from his creditors generally, to pay, without interest, he may be held to have "failed." As to plaintiff, he was in difficulties even before 1872. Gagnon, and J. P. Clark, and others prove it. Before March 1872, he had called upon his creditors generally, and obtained an extension of time to pay in, but not to pay in full. It was a composition. The deed about it was finally completed only on 11th April, but the fact that the creditors had agreed about it before March, is proved. [Here the Judge read from the deed]. I have not a doubt that this arrangement and agreement were made before March 1872. Plaintiff, before it, was in poor credit. When defendants printed what they did, they had a right to print it; what they printed was true; plaintiff had "failed;" so I hold, upon the proofs before me. No malice is proved against defendants and they are not liable in any damages. The action is dismissed.

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

"The Court, etc.....

"Considering plaintiff's allegations material not proved, and that what defendants printed was true, and not malicious, and that defendants are not liable, under what is proved, in any damages, doth dismiss said plaintiff's action, with costs *distraits* to Messrs. Abbott & Wotherspoon, attorneys for defendants."

Trudel & Taillon, for the appellant:—

Si donc, comme le dit le savant juge, la publication des

rapports des défendeurs n'est pas d'une nature confidentielle, il en résulte (et logiquement le jugement aurait dû en arriver là), que les défendeurs n'auraient pas dû les publier, fussent-ils vrais ; autrement, on arriverait à dire que tout ce qui est vrai du prochain peut être dit et publié. Le principe contraire est trop élémentaire pour qu'il doive être appuyé d'autorités ; et d'ailleurs, l'honorable juge en première instance en a cité quelques-unes qui ont été suivies dans notre jurisprudence, et auxquelles nous ajouterons Sirey 1843, 2e partie, p. 121, id. 1844, 2e partie, p. 471.

Mais bien plus, et la lecture des témoignages, qui dénotent du côté des défendeurs un étrange mélange de contradictions, nous offre la preuve que la qualification de "failed," dans la supposition où les défendeurs auraient eu le droit de le publier, n'était pas celle qui convenait au demandeur, soit qu'on prenne le mot "failed" dans sa signification grammaticale, scientifique ou populaire.

Fleming et Tibbins, Vo. *failed and failure* ; Acte de faillite de 1869 ; Guyot, Rep. Vo. banqueroute, pp. 149, 151 ; Nouv. Denizart, Vo. faillite, p. 402 ; Robertson's Reports, New-York, S. C. 3, 284, *Edsall* v. *Brooks*.

Quant aux témoignages, les témoins de la défense, malgré leur résistance à vouloir l'avouer, ont presque tous été obligés de dire que, quand ils voient publier qu'un homme a "failed," ça veut dire qu'il est failli et qu'il a discontinué ses affaires.

Jamais, d'après toutes les autorités possibles, on ne parviendra à démontrer qu'au premier de mars 1872 jusqu'au 7 mai 1872, date de l'action, le demandeur était failli. Au mois de mars 1872, il avait demandé une extension de temps qui lui a été accordée virtuellement et qui a été signée le 11 avril suivant. Les défendeurs, qui avaient toute facilité de connaître ces choses, en s'informant aux créanciers, et non en prenant les bruits courants les rues, comme le dit Glass, auraient dû, [illegible] être vrais, classer le demandeur, le premier mars, [illegible] le No. 47 qui veut dire : "*asked an extension of time* ;" et après le 11 avril, ils auraient dû le classer, par leurs feuilles hebdomadaires,

1875.
Girard & Bradstreet.

sous le No. 40 qui veut dire "*obtained extension.*" Il ne faut pas beaucoup de science pour comprendre que cette classification eut été moins préjudiciable ; et pourtant, il a fallu, pour forcer quelques témoins de la défense, qui prétendent que celui qui retarde à payer un billet est "*failed,*" à l'avouer, leur demander si, quand on dit qu'un homme est malade, cette nouvelle ne laisse pas plus d'espoir que de dire qu'il est mort.

Il est donc résulté de cette qualification erronée que le demandeur, homme honnête, actif, intelligent, a perdu son crédit et s'est trouvé presque ruiné. Mais on a essayé à prouver que, lors du 1er mars, son crédit était faible. Mais qui l'avait affaibli, si ce ne sont les défendeurs, qui, dès avant le 1er mars, donnaient des informations en ce sens, puisque ces informations avaient été recueillies au moins quinze jours avant le 1er mars, car on a eu le temps de les faire imprimer en volume à New-York. Et quand même le crédit du demandeur eût été faible, c'est justement pour cela que les défendeurs sont plus coupables et qu'ils lui ont fait plus de tort ; et parce qu'un commerçant honnête est aux prises avec des difficultés financières qu'un bon crédit peut relever, ce n'est pas une raison pour le faire succomber.

La preuve démontre des dommages considérables, eu égard à la position du demandeur, son commerce, ses entreprises, et le besoin de crédit qu'il avait et sur lequel il comptait. Il a été impossible, comme il l'est toujours dans ces sortes d'affaires, de prouver au juste combien le demandeur a pu souffrir ; mais, comme l'a jugé la Cour de Rouen, le 24 mai 1844, par un arrêt rapporté par Sirey, à l'art. 1149, Code Nap., et confirmé maintes fois par nos tribunaux : "La difficulté de déterminer exactement l'é-
" tendue du préjudice souffert et l'absence de base maté-
" rielle pour en fixer le chiffre, ne sont pas des motifs
" suffisants pour ne pas allouer des dommages-intérêts à
" celui dont le droit à ces dommages est reconnu incon-
" testablement ; le juge doit, en ce cas, en faire l'apprécia-
" tion d'après les règles de l'équité. S. V. 44. 2. 550. D.
" p. 44. 2. 175. P. 44. 2. 584."

1875.
Girard & Bradstreet.

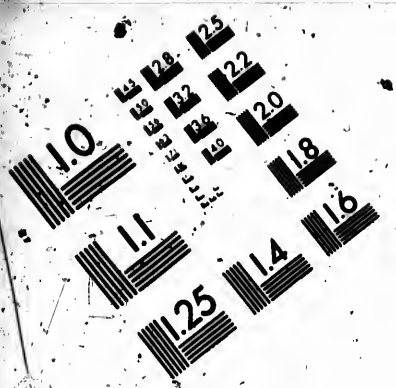
Or, il ne peut exister de doute [illegible] soignages, que le demandeur a souffert des [illegible] usieurs milliers de piastres.

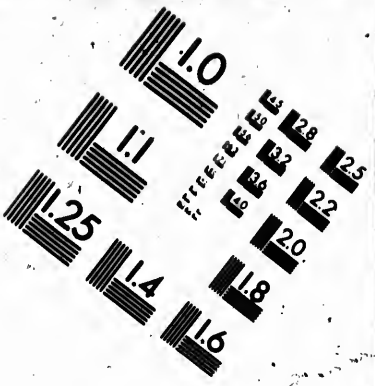
Les défendeurs sont donc resp[illegible]lement parce qu'ils sont coupables de qua[illegible]que, comme dit Grelet-Dumazeau, p. 161, Nos. 2[illegible] 259, ceux qui agissent dans un but lucratif doivent répondre de leur faute légère, théorie qui a été consacrée dans la cause de *Starnes* v. *Kinnear*, 6 L. C. R., p. 410, mais encore, parce qu'il y a, chez les défendeurs, une négligence telle qu'elle constitue un délit. *Magna negligentia, culpa est.* Loi 226, § de V. S., Rapport de Jurisprudence, Vo. Prise à partie, p. 785 et Journal des Audiences, 1806, p. 492. C'est ce qui a été exprimé par l'hon. juge Mackay lui-même, dans une cause de *Monette* v. *DeLorimier*. L'illégalité d'un acte équivaut à malice. *Wilson* v. *Morris* et *Ravaria*, S. C., 1 L. C. J., p. 237. Or les défendeurs, d'après le savant juge Mackay lui-même, n'ont pas droit de faire ainsi des enquêtes publiques, puisque leurs communications ne sont pas confidentielles et non privilégiées ; ils font donc, suivant Larombière, vol. 5, p. 690, un acte illégal. Et quand même ils en auraient le droit, ils doivent prendre leurs précautions, être prudents, prendre les informations nécessaires et aux sources, être à la hauteur de leur mission, en apprenant ce que veut dire le mot "failed" au moins. L'intention de nuire, dit Larombière, vol. 5, p. 692, n'est pas nécessaire au point de vue civil ; la loi civile oblige toute personne à réparer le dommage qu'il cause par sa faute. Cour de Cassation, 12 août 1842, Dallol, p. 42, 1892. Code Civil du Bas-Canada, 1053. Code Nap., art. 1382-2. 11 Toullier, No. 116, qui dit que ces articles du C. N. ont le sens le plus étendu.

C'est aussi notre jurisprudence. *Starnes* v. *Kinnear* et al., déjà cité ; *Lenoir-Rolland* v. *Jodoin*, 16 L. C. R., p. 387, 2 L. C. J., p. 20 ; *Coté* v. *Gaspé*, 16 L. C. R., p. 381.

C'est la loi et la jurisprudence anglaise et américaine. Blackstone, liv. 3, c. 8, Jurist, Digest., 1861, 1865. Vo Diffamation, 1864, p. 65. Id. 1861, p. 53. V. Defamation.

Pour toutes ces raisons, et se fondant sur les autorités





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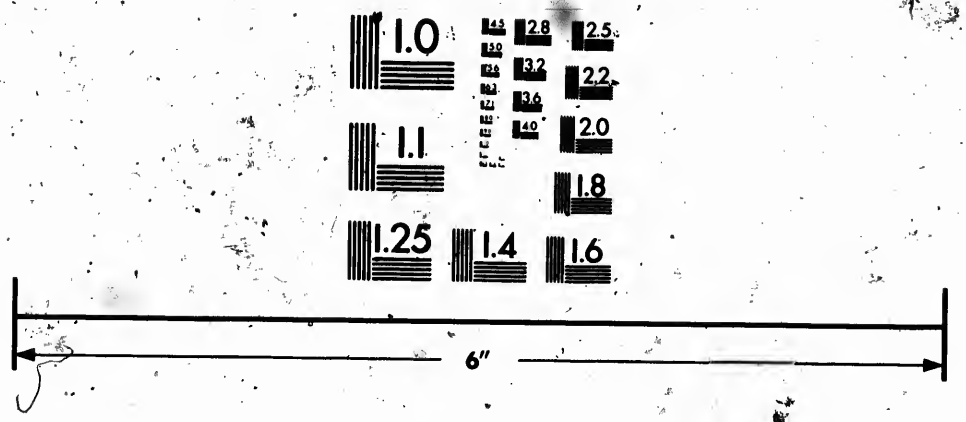

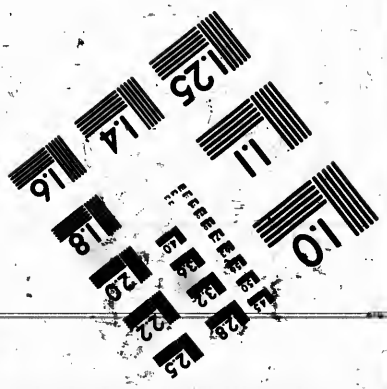

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1875.

Girard & Bradstreet

citées, l'appelant soumet respectueusement que le jugement de la Cour Inférieure est mal fondé tant en droit qu'en fait, et doit être infirmé; et le dit appelant a droit au montant de dommages qu'il réclame par son action.

F. W. Terrill, for the respondents:—

Respecting the intent with which the respondents reported appellant's failure, it was absolutely necessary for the appellant both to allege and to prove malice. So important is this allegation that Starkie says it is "essen- "tial to a complete declaration." Starkie on Slander, p. 433, part 1. "Malice in some sense is the gist of the ac- "tion." Starkie on Slander, note *r*, p. 221, part 1, 2nd Eng. edition of 1830. (Hartford Edition of 1858.)

Lord Ellenborough observed:—"The main question "here is *quo animo* the defendant 'published.'"

In his precedents of declaration Starkie always uses the words "wickedly and maliciously intending to injure," or words of similar import, notably so on page 380 of the Appendix of Starkie on slander, where a case like the present is presented, as well as on pages 374, 375, 377. 378, 379, and numerous others. "Dans la diffamation la "possibilité du préjudice est beaucoup moins à prendre "en considération que l'intention de l'agent." Grellet "Dumazeau, Traité de la diffamation. Liv. 1, ch. 1, sec. IV, 86; do. Liv. III, ch. 11, 527.

"On ne doit pas regarder comme une injure celle qui a "été faite sans aucun dessein d'offenser." Guyot, rep., vol. 9, vo, injure, p. 237.

"L'intention de nuire est l'élément moral du délit de diffamation." Grellet Dumazeau, tr. de la diffamation. Liv. 1, ch. 1, sec. VI, § I, No. 224, p. 147.

Upon the principle that one may not prove what he has not alleged, the appellant was scarcely in a position even to attempt to make evidence of malice, for his allegations upon this point are contradictory and insufficient. In one place he says the evil was done through malice or neglect of the respondents or their agents, whereas it should have been positively asserted that it was done through the malice of the respondents who are not neces-

sarily responsible for the malice of their agents, and who, if they offended through negligence, did not also offend through malice,—negligence and malice being a contradiction of terms.

Absence is sometimes taken to indicate want of malice, (See Starkie on Slander, part 2, p. 34,) and all the respondents were absent from Montreal at the date of the book and at the time the information was procured. In making this report they were pursuing a regular and legitimate business, established a quarter of a century ago by the father and father-in-law of the respondents, a business which, the moment it became subservient to malice would cease to have the support of the commercial public, who, at present, so highly esteem it, that, of the leading merchants examined as witnesses in this cause, the opinion is invariably expressed that agencies in the nature of respondents' are absolutely necessary to the life and prosperity of commerce, inasmuch as without them credit sales would be limited to the merchant's necessarily small acquaintance, whereas at present he may safely sell to persons he never saw, living in places he never visited. This is the testimony of the largest manufacturers and merchants in the Dominion. Not only could there have been no malice on the part of the respondents personally, but Mr. Gagnon, the agent here, who made up the report in question, declares that so far from bearing any malice to the appellant he is his personal friend, but that he never allows friendship to interfere with the performance of his duty. Mr. John Glass, the respondents' principal agent here, also testifies that there was no malice in making the report, and that his principals are personally unacquainted with the appellant. It may, however, be said that there was constructive malice, to meet which pretension and to show that the respondents had a right to make the report, and were not bound to favor the appellant at the sacrifice of truth and of their employers' interest, the following authorities are respectfully submitted:—

"The right of the calumniated individual to receive a

1875.
Girard & Bradstreet.

"compensation must, in all cases, obviously depend on "the consideration that by the fraud of another he has "been deprived of that which he was otherwise justly entitled to enjoy." Starkie on Slander, preliminary discourse, XLVI.

"By way of illustration, let it be supposed that a banker, "being reduced to the brink of bankruptcy by unavoidable misfortunes, a friend, in ignorance of his circumstances, offers to deposit in his hands a large sum of "money, but that the friend is prevented from doing so "in consequence of a report from some third person that "the banker is insolvent. Ought the latter to recover "damages? What has he lost but an opportunity of "committing a gross deception, by receiving the money "under a fraudulent concealment of his circumstances? "If he could not honestly have availed himself of the "other's ignorance of the real state of his affairs, it is obvious that he has not sustained any moral, still less "any legal injury from the disclosure." Do. do LV. Do do. LIV.

"Communications, where they are made honestly and "*bona fide*, with a view to the exigencies of s[illegible], are "privileged on principles of policy and co[illegible]ence, "though the party who made them was mistaken." Do. do. LXXXIII.

"This principle, therefore, includes all cases where the "communication is made in confidence to another on a "subject in which he possesses an interest, as where a "party gives a character of a servant, or makes the communication in the way of admonition or advice, or in "the fair and *bona fide* furtherance of the interests of "others, or even of his own. In respect, therefore, of this "class of cases, that is, where an occasion exists which, "if fairly acted upon, furnishes a legal protection to the "party who makes the communication, the *actual intention* of the party affords a boundary of legal liability. "If he had that legitimate object in view, which the "occasion supplies, he is neither civilly nor criminally "amenable." Do. do. LXXXIII.

"Nor is he liable *civilly* in an action for damages for "any communication made by him affecting the character "or the credit of another, though it be *false* or *erroneous*, "provided it be made on an occasion in which his own "interests or the interests, or the business, or even the "convenience of others require it to be made, and that "he act in good faith, without malice, the *bona fides* being "presumed until the contrary be shown by proof." Introduction to Starkie on Slander, p. 20.

Plea: "That the publication alleged to be libellous is "a letter written by him in answer to an enquiry as to "the character of the plaintiff as a servant. This would "be a good and perfect defence to the action if not "rebutted by proof of malice."—Do. do., p. 23.

"If *malice* be used as a descriptive term, it must be un- "derstood of malice, in a technical and artificial sense, as "merely signifying the absence of any legal justification "or excuse."—Starkie on Slander, part I, p. 3.

"This further requisite of malice, that is, of malice in "the *legal sense* of the term, precludes litigation in all "cases where the party has acted in the discharge of any "legal or moral duty, or in the fair and conscientious "performance of his part in any transaction arising out "of the ordinary business of life, without a deviation for "malevolent purposes, and confines the action to those "instances in which the mischief is attributable either "to mere malice of heart or to a wanton and guilty dis- "regard of the feelings and interests of others."—Do. do., part I, p. 170.

"But in actions for such slander as is, *prima facie*, ex- "cusable on account of the cause of speaking or writing "it, as in the case of servants' characters, confidential ad- "vice, or communications to persons who ask it, or have "a right to expect it, malice in fact must be proved by "the plaintiff." Do. do., note *r*, p. 221.

"For words spoken confidentially, upon advice, no ac- "tion lies, unless express malice can be proved."—Do. do. do., p. 221.

"So, where the person *to whom* the communication is

1875.
Girard
&
Bradstreet.

"made is interested, as in the case of *Cleaver* v. *Sarande*, "above quoted, no action is maintainable without proof "of express malice."—Starkie on Slander, part I, p. 324.

"The defendant may also show in defence that the "plaintiff himself procured the act to be done of which "he complains."—Starkie on Slander, part II, p. 87.

The appellant is in this condition; he procured the doing of the very act of which he complains, having been for a considerable time one of the respondents' principals or subscribers, as appears by defendants' exhibit No. 6, which contains the following:—"Montreal, November "2nd, 1867. The undersigned hereby employ J. M. "Bradstreet & Son, to furnish good and reliable informa- "tion, to the best of their ability, of the credit and stand- "ing of merchants, bankers, manufacturers, etc., about "whom we may inquire; and we to pay to them the "sum of fifty dollars for their services from 1st Novem- "ber, 1867, to 1st November, 1868, and they to loan us "Volume 21 of their Commercial Reports of Canada and "(Lower) Provinces, without extra charge, and agree to "return said Volume Twenty-one to said J. M. Bradstreet "& Son at the expiration of this subscription, or when "we shall cease to subscribe to their agency, as they "may elect.

"And in consideration of the foregoing, it is hereby "agreed that the volume or volumes, and the written or "verbal reports furnished to us shall be for our exclusive "use, and be held in strict confidence; and that we will "not convey to other parties the information furnished "to us, nor will we permit it to be done; nor will we "ask for information on behalf of other parties."

(Signed,) "GIRARD & FRÈRE."

This document shows the appellant's knowledge that the respondents do not *publish*, but *confidentially communicate*, information, which is not warranted perfect, but only "good and reliable, to the best of their ability;" that this information is not volunteered by the respondents with intent to injure and defame, but is sought

and requested by subscribers for their "exclusive use," to be "held in strict confidence." If it were otherwise, respondents' occupation would be gone; for who would pay for what was already public? The appellant well knew that there was not, and could not be, any publication, and he has upon this point established only that the rating was seen by two persons, John Smart and Ephrem Hudon, *fils*, neither of whom was affected by it, and neither of whom spread the information.

By signing the above recited document the appellant recognized the principle, that the great interests of commerce are of such paramount importance that the individual must gracefully submit to enquiries regarding otherwise private affairs, and that confidential communications, in good faith, for business purposes, are not to be construed as malicious and libellous publications.

Appellant's main hope of a favorable judgment rests upon a nice verbal distinction between the expressions "*failed*," "*suspended payment*," and "asking an extension." He first assumed that no one is to be styled failed who has not made an assignment under the Insolvent Act, forgetting that there were failures long before that Act came into force, and that in fact failures were the occasion for the Act.

In general, one must have failed before he can be compelled to assign, and "if," (as in this case), "a debtor "ceases to meet his liabilities generally *as they become* due, "any one or more claimants upon him for sums exceeding "in the aggregate $500, may make a demand * * * * "requiring him to make an assignment."—Insolvent Act of 1869, sec. 14.

According to the Civil Code of Lower Canada, the respondents would have been justified in using even a harsher word than "failed," for by article 17, No. 23 of the Code, "by *bankruptcy* is meant the condition of a trader "who has discontinued his payments."

To support the pretension that "*failed*" means "*assigned*," and that as the appellant was not named among the insolvents in the Court Register, he had a good action for

1875.

Girard & Bradstreet.

$10,000 for being said to have "failed," the appellant called several gentlemen to interpret the word, and they all agreed that it meant "assigned," but upon cross-examination it turned out that the vernacular of these witnesses was French, in fact, several of them had declined to be examined in English, declaring that they did not understand it. In ordinary cases the meaning of words is not the subject of evidence, and this case is only exceptional in two respects. First—The report is accompanied by a key, in which the meanings of the several numbers are given, and by which all lawful holders of the book are guided in their appreciation of the ratings, and secondly in the respect that the book only reaches merchants and bankers, and in so far as not self-interpreted, is to be taken to mean what commercial men, who know the English language, would understand by it.

S'il s'élevait des doutes sur la véritable acceptation des paroles ou de l'écrit ; *quisque in dubio bonus creditur*.—Grellet-Dumazeau, Liv. I, ch. I, sec. VI, § 1, No. 229, p. 150.

PER CURIAM :—

This is an action of damages against a mercantile agency for wrong rating and injury to credit. The Court is disposed to agree with the Court below that there was no privilege. But the appellant has not proved any damages, and it does not appear that the report as to his standing was incorrect. The judgment will therefore be confirmed.

Judgment confirmed.

Trudel & Taillon, attorneys for the appellant.

F. W. Terrill, attorney for the respondents.

(J. K.)

May 26, 1887.

Coram DORION, CH. J., CROSS, BABY, CHURCH, JJ.

THE BRADSTREET COMPANY,
(*Defendant in Court below*),
APPELLANT.;

AND

SAMUEL CARSLEY,
(*Plaintiff in Court below*),
RESPONDENT.

Libel and slander—Mercantile agency—Circulating erroneous information of a damaging nature—Privileged communication—Damages.

The appellant, a mercantile agency, sent a circular to its subscribers, with the words "call at office" in reference to the respondent, a dry goods merchant of Montreal. Those who enquired at the appellant's office, including a newspaper correspondent who was not a subscriber, were informed by the appellant's employees that the respondent's firm had applied for an extension of time on a large indebtedness to their English creditors. This information was untrue, and was based upon a report which the appellant had not verified. The circulation of the report by the appellant injured the respondent's credit, and embarrassed him in the management of his business, several orders for goods being cancelled, or suspended until the report was shown to be unfounded.

HELD:—(Affirming the decision of LORANGER, J., M. L. R., 2 S.C. 33) that the manager of a mercantile agency comes under the general rule (C. C. 1053), which makes every person capable of discerning right from wrong responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill, and that the appellant was guilty of negligence in circulating through his employees a report of an injurious nature without verifying it, and also in communicating it by circular and verbally to persons who had no interest in being informed of the standing of respondent.

2. It being proved that the circulation of the report was damaging to respondent, it was competent to the Court below to estimate the amount of damages, and the judgment should not be disturbed.

March 29, 1887.]

W. H. Kerr, Q. C., for the appellants:—

The appeal is taken from the judgment of the Superior

1887.
The Bradstreet Co. & Carsley.

Court at Montreal, (LORANGER, J.) rendered on the 20th of November, 1885, by which the present appellants were condemned to pay to the respondent the sum of $2,000 currency, damages, with interest and costs.

The facts of the case are as follows:—

The appellants are a commercial agency, carrying on business in Canada, United States and England. They have a large number of subscribers, and the contract between them and their subscribers is, that the appellants shall furnish "information concerning the responsibility "and character of mercantile persons enquired for;" in consideration of being paid a certain annual sum, and that "the information whether printed, written or verbal, "furnished to the person contracting, shall be held in "strict confidence, and shall never be revealed to the per- "sons reported; that the subscribers shall not ask for in- "formation for other parties, nor permit it to be done."

It is the custom and habit of these agencies to issue sheets of changes and corrections in the books furnished to the subscribers. On or about the 16th June, 1884, a circular was sent by the appellants to about 600 of their subscribers, which was received by some of them, and opposite the name of "Carsley & Co., the respondent therein appearing, were the words "call at office."

This, it is pretended, was intended by the appellants "to "convey to their subscribers the information that they "were aware of something detrimental to the respon- "dent's position and standing, and was a warning to all "subscribers and persons not to deal with the respondent "without calling at the appellants' office for such infor- "mation, and that by reason of such notice, divers influ- "ential persons in Montreal and elsewhere, did call for "information on the 17th June, 1884, and the appellants "then and there unlawfully, without probable or reason- "able cause, and maliciously informed such persons, and "divers other persons, at divers other places than the "said office, both verbally and in writing, that respondent "had asked for and obtained an extension of time for the "payment of a large sum of money, £60,000 sterling, or

"thereabouts, due by respondent to his creditors, thereby "causing a general belief that the respondent was in "straitened circumstances, and unable to pay his debts "as they became due, all which was false and untrue."

That such publication injured respondent's credit, and and the information given by appellants to persons, became generally known and was published in the newspapers in Montreal, Toronto, and elsewhere.

That respondent suffered loss thereby to the extent of $50,000, for which sum a condemnation was prayed.

The appellants by their pleas set up:—1o. Their incorporation. 2o. That no such inference as that set out in the said declaration could be drawn from the words in the circular. 3o. The contract with their subscribers as hereinbefore mentioned. 4o. That the circular in question was transmitted to them alone; and 5o. That they were not guilty of the offence charged.

The evidence in the case (under objection on the ground of the communication being privileged) shows:—

1st. That the circular in question was received by a small number of subscribers to the appellants' agency, not exceeding ten.

2nd. That certain subscribers to the Agency, not exceeding eight, either by their clerks or themselves personally, received the following information from the office of the appellants at Montreal, "Carsley & D., G., Montreal, "Que. It is stated that an extension of time is being "asked for from creditors in the old country upon liabi-"lities of some $300,000."

3rd. That Mr. Bell, manager of the appellants, meeting Mr. Penfold, manager of the Bank of British North America (a subscriber) in the street, gave him the same information.

4th. That Mr. Wallace, a correspondent of the *Mail* newspaper, not being a subscriber, entered the office of the appellants and asked Mr. Bell if it was true that Mr. Carsley had asked for an extension of time from one of his largest creditors in London, as he had heard he had done so, to which Mr. Bell replied, "Yes, he understood so."

1887.

The Bradstreet Co. & Carsley.

The points arising in this case then are :—

1st. Are the words appearing in the sheet of changes, etc., "call at office," opposite the respondent's name, libellous, or not ?

2nd. Was the verbal or written communication to subscribers calling for information "that there was a rumour that S. Carsley had applied for an extension of time from his creditors in the old country of some $300,000," or words to that effect, defamatory, or were they privileged ?

3rd. Was the communication by Bell to Penfold, in the street, a slander by the appellants upon the respondent ?

4th. Were the communications to Wallace and the clerks of subscribers slanderous ?

5th. Was the communication above set forth a slander or libel upon the respondent ?

A. With respect to the first point, it is clear that the words "call at office" are not in themselves libellous. Such being the case, it falls upon the respondent to show by extrinsic proper evidence, that they are libellous, but where the words relied on as libellous are susceptible of many innocent interpretations, it is unreasonable that the only bad one should be seized upon to give a defamatory sense to the words.

B. With respect to the second point, it is clear that the test by which to decide the question as to a communication being privileged, or not, is to enquire whether there was any duty or obligation upon the person making it to make such communication.

If there be such duty or obligation, the communication is *prima facie* privileged, and the principle is carried so far, that the rule is laid down, "Every one owes it as "his duty to his fellow-men to state what he knows "about a person when enquiry is made, even if the duty "be one of imperfect obligation, and even if the person "giving the information thinks that he is discharging a "moral or social duty, such communication is privileged."

Applying the foregoing principles of law to the facts of this case, it is clear that there is nothing immoral in the agreement between the appellants and their subscribers,

so as to prevent such an agreement from being a valid contract binding upon both parties. Being a contract, the appellants were under an obligation to give the information they had agreed to give, and would have been liable in damages had they failed in fulfilling that obligation, therefore they, in making the communication, were merely discharging a duty—fulfilling a legal obligation—and consequently, such communication was privileged if made *bona fide*.

So far as the *bona fides* of the appellants is concerned, there can be no difficulty, for the existence of the rumors previous to the publication of the circular of the 16th June is proved by a number of witnesses.

Moreover the information upon which the communication to the subscribers was made after the 15th June, was founded upon positive information obtained by Mr. Priestman at Toronto and transmitted to the Montreal office.

C. Moreover the communication was not positive, it was merely to the effect that there was a rumor, strictly in accordance with the information received.

D. The communication to Penfold in the street, by Bell, is not a slander by the appellants. A verbal communication made by an officer of a corporation, even though he be acting honestly for the benefit of the Company and within the scope of his duties, unless it can be proved that the corporation expressly ordered and directed that officer to say those words, is not a communication by the corporation, for a slander is the voluntary and tortious act of the speaker.

Wallace was the only person, not a subscriber or clerk to a subscriber, to whom any communication was made, but that communication was not of the rumor—Wallace was already in possession of the rumor, and he asked Bell whether Carsley had asked for an extension, as he had heard Carsley had done, to which Bell answered "Yes; he understood so."

Even if Bell did tell Wallace, it was not an act within the scope of his powers, as Wallace was not a subscriber, and had no right to any information, and the principle above laid down applies.

1887.
The Bradstreet Co. & Carsley.

E. As for clerks receiving the information where banks or other corporations are concerned, communications to them must be made through their officers; as to ordinary trades or partnerships, the communication, when made to the clerks, was in the usual course of business affairs, and consequently in neither case is the privilege lost.

F. The appellants submit that no slander or libel of any kind was ever either uttered or published by them of or concerning the respondent.

Should this Court, however, be of opinion that the communications as proved were slanderous or libellous, the appellants submit that the damages given by the judgment are excessive, and should be reduced to a merely nominal sum.

H. Abbott and *C. A. Geoffrion* for the respondent:—

The appellants carry on the business of Bradstreets' Mercantile Agency, and the respondent is a dry goods merchant, of Montreal, Carsley, who by great industry and ability has built up, not only a large wholesale, but probably the largest retail dry goods business in the Dominion. The respondent by his action claimed that the appellants had caused him serious damage, by having maliciously and without probable cause, inserted in a circular published by them at Montreal, on the 16th of June last, the firm name of the respondent and after the name the words, "call at office," and having informed persons who did call, that respondent had asked for an extension of time for the payment of a large sum of money due by him to creditors in England. The Superior Court awarded the respondent damages to the extent of $2,000, and the present appeal is from that judgment.

The declaration of respondent, in substance, stated that he was an importer of large quantities of goods from foreign parts, and was possessed of ample credit and of good reputation, and carried on a large dry goods business at Montreal, and required such credit and reputation to carry on said business.

That the appellants carried on a mercantile agency, and

held themselves out as keeping up a system of commercial enquiry, and as giving honest, correct and strictly confidential reports concerning the commercial standing of merchants.

That the respondent was never a subscriber to such mercantile agency;

That at Montreal, on or about the 16th of June, 1884, the appellants, without having made any previous enquiry of or from the respondent concerning his business, maliciously and without any probable or reasonable cause, caused the firm name of the respondent to be inserted in a certain circular printed and published by them in the city of Montreal, under said date, styled "Sheet of changes and corrections," and put after such firm name the words "call at office," and published and circulated the sheet among their subscribers, and among the customers of respondent and others throughout Canada, the United States and Europe;

That the words "call at office" in appellants' circulars, according to their custom and practice, signified that the persons against whose name these words were inserted were persons about whom they had something to communicate detrimental to their position and standing, and such words were a warning to all persons receiving said circulars that they should not deal with such traders without calling at appellants' office to obtain such information; and that in this case, the words meant and intended to convey, and did convey to the persons receiving the circular, that the appellants possessed information regarding the respondent which injuriously affected his standing, credit and position; and that divers influential persons at Montreal and elsewhere were induced to call at the office of the appellants for information, and did call and were informed that respondent had asked for an extension of time for the payment of a large sum of money, to wit, £60,000 0s. 0d. or thereabouts, which appellants alleged was due by respondent to creditors in England; and by means of such information appellants caused divers persons at Montreal and elsewhere to believe that they

1887.

The Bradstreet Co. & Carsley.

were in straitened circumstances and unable to pay their just debts as they became due, the whole of which statements were false and untrue.

The appellants by their first plea admitted that they were a corporation, incorporated as set forth in respondent's declaration; and that they had for several years been carrying on business as a commercial agency, their business being to furnish subscribers and others information concerning the financial position and standing of merchants and others throughout the province of Quebec and elsewhere; and that they did on or about the 16th of June, 1884, publish, print, and send to their subscribers, a circular, known as their sheet of changes and corrections, wherein, referring to the respondent, occurred the following, to wit:—"Montreal, Carsley & Co., dry goods; call at office," but denied that they falsely and maliciously caused the same to be published and printed and distributed as alleged by respondent.

By a second plea, the appellants, after making the same admissions, alleged that they had contracts in writing, founded upon valuable consideration, with their subscribers, which contracts required the appellants to seek for, and furnish their subscribers any report of change in the financial standing or otherwise of merchants that might come to the knowledge of appellants;

That in furtherance of said agreement, and on and prior to the 16th of June, 1884, appellants had been in the habit of issuing to said subscribers only, for their sole use and benefit, and in strict confidence, circulars or sheets, similar in all material respects to the one particularly mentioned and referred to in said complaint;

That on the 16th of June, 1884, in pursuance of said agreement, appellants having received certain information concerning respondent of interest to their customers, appellants caused to be printed and delivered to their subscribers only, the aforesaid circular or sheet, bearing date on that day, wherein, referring to the respondent, was the following:—"Montreal, Carsley & Co., dry goods; call at office," but appellants expressly denied that by

said circular they meant in any way to state to their subscribers, or to have their subscribers know and understand that the respondent in some way or manner had become financially embarrassed in his business; or that his credit and good name as a merchant had become impaired; or to indicate anything detrimental to his position or standing; or to warn their subscribers not to deal with respondent without calling at the office of appellants;

That all that was meant to be conveyed by said circular, and which they did convey, and which their customers understood them to convey, was that they had certain confidential information of the respondent which they would confidentially, and by word of mouth convey to any of their subscribers, directly interested in respondent and his affairs, providing said subscribers would call at the office of appellants, at the city of Montreal, and make personal inquiry therefor.

A commission was taken to England by respondent and certain of his creditors were there examined; after which the trial took place under the "enquête and merits" system before Judge Loranger, and a judgment was given in favor of respondent for $2,000.

The respondent's evidence discloses the fact that he was in good financial standing and first class credit at the time of the publication of this circular, and of the representations made by the appellants, to those who in response thereto called at their office, for information.

This being the position of the respondent's credit and business on the 16th June, 1884, we have now to consider what the appellants did, and what representations they made regarding the respondent and his business position and credit. The appellants admit by their plea that they published, printed and sent to their subscribers the circular in question. Thomas Bell, the superintendent of the appellants, states that the circular was addressed to about 600 persons, amongst whom were those engaged in all the different trades known in commerce, and that it was sent to Toronto and New York.

The respondent alleges in his declaration that the words

1897.

The Bradstreet Co. & Carsley.

"call at office" were intended to mean and did mean that appellants had information to convey which injuriously affected the respondent's credit, and this allegation is amply proved by the evidence of record. Mr. MacFarlane says that these words would have the effect of shaking his confidence in the standing of the firm. Mr. Robertson says that a remark of that kind always "causes alarm" and would have a "very injurious" effect upon the respondent's credit. Mr. Elliott, manager of the Molsons Bank, says he would understand these words to be "something detrimental to the credit of the party opposite to whose name these words were." Mr. Penfold, manager of the Bank of British North America, says that he would look upon these words as a "danger signal," and that their effect would be a suspension of credit until enquiry was made. The witnesses who have been asked the question, and there were a number of them, are agreed in saying that they would transact no further business with the respondent until they ascertained what these words meant.

There has been no serious attempt to contradict the evidence of the respondent's witnesses as to the meaning and effect of these words, and it is perfectly plain that their effect was nothing less than to bring about an absolute suspension of credit. They constituted a notice, to all those to whom the said circular was sent, that appellants had something detrimental to respondent's credit to communicate, and a warning not to have any more dealings with respondent, until they had called at the appellants' office and ascertained what such information was.

We have now to see what information the appellants did give concerning the respondent in answer to inquiries made in response to such circular. In some cases the information was given in writing and in others orally. The general tenor of it was that respondent had asked for an extension of time from creditors in the Old Country for liabilities of some $800,000. To the Bank of British North America they gave a report in writing on the 18th

June to the following effect: "It is said that an extension "of time is being asked for, from creditors in the Old "Country for $300,000." The same report in writing was given to Messrs. Robertson & Linton, and a somewhat similar one seems to have been given to Mr. Alexander Walker.

The witnesses who testify to the oral representations they received at the appellants' office, are not always able to give the precise words, but the information seems to have been of a similar character. To Mr. Finlayson, on behalf of Messrs. Lonsdale, Reid & Co., the appellants stated that the respondent was asking for an extension from one of his largest English creditors. To Mr. David Lewis, on behalf of Messrs. Crathern & Caverhill, they stated that Carsley & Co. were seeking to obtain an extension from some of their largest creditors, and the amount mentioned to the best of his recollection was $300,000. Mr. John Ogilvie was informed by Mr. Bell that appellants had information from London, that respondent was in difficulties, and was asking one large creditor for an extension of time. Mr. Wallace, correspondent of the Toronto *Mail*, who was known to Mr. Bell as such, had heard on the street the rumor circulated by the appellants, and called to make enquiries as to whether the rumor was correct, and Mr. Bell confirmed the information that Carsley had asked for an extension of time from one of his largest creditors in London, and that the amount was $300,000.00. In some instances, the appellants went out of their way to give the information; Mr. Penfold says that he got similar information as that contained in the report from Mr. Bell on the street some days before the publication of the report. Mr. Elliot says that one of the gentlemen connected with the appellants came to the bank, and gave him information that made him believe that Mr. Carsley was asking for an extension from his creditors.

The appellants contended that they had only communicated their information through the subscribers in the regular way, under a contract in which it was stipulated

1887.

The Bradstreet Co. & Carsley.

that the information was confidential. They stated in their plea that by the words "call at office" they only intimated to their customers that they had certain information of the respondent which they would convey to any of their subscribers "*directly interested*" in the respondent and his affairs. But the Court will perceive, on examining the evidence, that they adhered to no such rule, as the information was given indiscriminately. Not only was it open to all their own clerks, of whom they have from 12 to 15, but they gave the information to parties who were not subscribers, amongst others, to Mr. Duncan Finlayson, Mr. Thomas Carnegie, Mr. James Stroud, Mr. David Lewis, and more especially to Mr. Wallace, who was not only not a subscriber, but a newspaper correspondent, and who got the information, as they must have known, for the purpose of communicating it to his newspaper in Toronto. They also gratified the curiosity of Mr. John Ogilvy, who was in no way interested in respondent or his affairs, and who states that he called "partly as a matter of curiosity, and having an interest in the general state of commerce of the country."

It is impossible to estimate what damage was caused to the respondent by the publication of the circular and by spreading this false report. The respondent does not ask for special damages, but he has put of record several instances where special damage was suffered. For instance, so deep an impression did the report make upon Mr. Penfold of the British Bank, that when in August following the respondent applied to him for the advance he was accustomed to get from him at that season, he had great hesitation about granting it. He says that on Mr. Carsley's verbal statement, the uneasiness was removed to a very great extent, but still he thought it necessary to cable to the other side to remove all possible doubt, which might exist, as to this rumor, and it was only on obtaining a cable that the rumor was totally unfounded, that the respondent obtained the usual advance.

Mr. Alexander Walker states that he had a letter from a firm of Walker & Co., of Paisley, in Scotland, saying

1887.

The Bradstreet Co. & Carsley.

that they had an order from Carsley, but on account of a report that he was asking for time, they would not send the goods. Mr. James Bartlett, Carsley's buyer, ordered some goods from a firm of James Richer & Co., of New York, through their traveller in Montreal, but received a letter from that firm, dated July 14th, 1884, declining the order, and on Carsley writing to ask the reason of the refusal, a reply was sent that the firm could not obtain a satisfactory report of Carsley's credit. The witness states that this was the result of the information received at Bradstreet's office. Mr. Mander, the bookkeeper of respondent says, that if he can judge from figures, the respondent suffered damage, as he noticed a falling off from that date to the end of the year of $50,000.

There is no doubt that the rumor which the appellants thus circulated reached England. The evidence taken under the commission in England, establishes that the appellants had an agency in London, and an agent there by the name of Priestman. Mr. Leaf states that there was a rumor current in England, in the month of June, 1884, to the effect that the respondent was asking for an extension of time on his payments; that he heard the rumor first from Mr. Howes of Cooke, Son & Co., who called at his office and asked him if he had heard it, and that subsequently he received a call from Mr. Bennett of R. T. Dunn & Co. (another Mercantile Agency) who stated that they had a telegram to the effect that *another agency* was circulating such rumor. Mr. Howes says that no such rumor was to his knowledge current in London, or elsewhere in Great Britain, previous to the 16th of June, 1884. Mr. King says that he was informed, by some of the persons whom he represented, that the rumor came from Bradstreets', and Mr. Peel says a gentleman called upon him stating that it was reported in Montreal that respondent was in difficulties, and that Messrs. Bradstreet had circulated a report that he had asked for an extension of time from his creditors. The examination of the evidence of these witnesses will, the respondent thinks, satisfy the Court that there was no rumor regard-

1887.
The Bradstreet Co. & Carsley.

ing him in Great Britain, prior to the issuing of the circular in question, and that everything pointed to the appellants as being the authors and responsible for the rumor which was circulated subsequent to that date.

The appellants have tried to prove as a justification of their conduct that there was a rumor in May, 1884, in Montreal, that the respondent was asking for an extension of time.

Mr. Priestman, of Toronto, manager of the appellants, after saying that Carsley was not a subscriber to the agency, and had, during the witness's connection therewith, evinced a very active spirit of unfriendliness towards agencies, goes on to say that there were reports current within the first week in May, 1884, about Carsley having obtained or asked for an extension. He wrote to Bell, the superintendent at Montreal, but got no confirmation. The reports still circulated in Toronto, and on or about the 16th or 17th of June he sent a communication to the Montreal agency, stating that information had been received by an agent of a creditor of Carsley & Co., stating that they had obtained or asked for an extension on liabilities of about £60,000, or $300,000. The witness says he received this information from a reporter of the Toronto office named Brown. He was impressed with the idea that the information was correct, and says that the report in question was suppressed immediately on learning that Mr. Carsley denied the truth of it. The Court here asked the witness the very pertinent question whether he acquainted the subscribers of the suppression of the report, to which he replied that he could not say that every person that had heard the report heard the denial of it. In cross-examination, the witness was asked to produce, but was unable to do so, a letter addressed by Carsley to his agency in November, 1876, requesting them not to publish his name in any future reference books or reports or to use it in any way whatever in regard to his business, but the witness admitted that the letter expressed the spirit with which he treated agencies. The result of this witness's evidence is to show that the

appellants knew Carsley was not one of their subscribers, and did not approve of their methods, and did not want his name reported on, and that, moreover, the only justification the witness had for sending the report to Montreal, which was subsequently published here, was the statement made by one of his reporters that a telegram had been received by an agent of a creditor of respondent. It does not appear that the witness saw the agent or the telegram.

Mr. Bell testifies that he heard the rumor early in May, that he wrote to their superintendent in London, England, on 10th May, to the following effect :—

"SUPERINTENDENT LONDON OFFICE,

"A rumor has been current here for a day or two, that Messrs. Carsley & Company, of Montreal, have obtained some indulgence from creditors in England, thought extension of time; some do not credit this, but some believe it. The firm cannot be approached. Can you get some ideas for us in London, say, Cook, Sons & Co., they should know."

Mr. Bell says no answer was received to this letter.

This witness in cross-examination admits that Mr. Priestman's letter, from Toronto, was the first he heard of the rumor, except what he calls an "intimation" before then.

This letter to London shows that the appellants were merely groping about for information, that they had heard nothing definite, they had heard a rumor that respondent was asking for "some indulgence," and knew that some believed it and some did not.

It is unfortunate for them that they did not wait for information from Cook, Sons & Co. before publishing this rumor.

Mr. Brown, the reporter employed by appellants in Toronto, who gave Priestman the information about the alleged cable, says that at Toronto, on the 16th June, 1884, he saw a Mr. Toshack, who represented an English house, name of which he forgets, and he relates the interview as follows :

"On Monday I met Mr. Toshack and I said : 'What was that you were going to tell me?' and he said : 'Is

1887.

The Bradstreet Co. & Carsley.

there anything new about Carsley & Company, of Montreal?' I said: "I have not heard anything, I have been away in the North-West for some time, but I would enquire.' So we came along to the office, and I went in and examined our report of Carsley & Company, and returned and said: 'No, we have no recent information about him.' 'Well,' he said, 'I have a cable from my people in the old country.'"

He said: "I had a cable saying that Carsley & Company were asking for an extension of time," and I said: 'Is that so?' and he said: 'Yes.' I said: 'Did you hear anything about the liabilities?' and he said: 'Yes, on liabilities of sixty thousand pounds." And I said to him: "Are you interested with it yourself?"

The witness then states that he told Mr. Priestman word for word what Mr. Toshack had told him. In answer to the Court, he said he found no new information, in appellants' office in Toronto, about respondent, on the 16th. He further states: "The reason I remember the date was Monday the sixteenth, our change comes out on that day, and before going to press, I went to Mr. Toshack's office about two o'clock, and he was not in, and I returned at three o'clock and I found Mr. Toshack in, and I asked him then if he had anything new, and I said, "We have sent to Montreal and we have not got it confirmed," and Mr. Toshack said to me: "Well, his bankers must know about it." However, he said, "I will have full particulars by the Cunard next week." Neither the man Toshack nor the telegram referred to are produced, nor did the witness Brown, or any one connected with appellants, ever see the cablegram.

The foregoing reference to the evidence shows how unfounded the pretension of the appellants is that they were justified in circulating the report on account of a previous rumor. If there was such a rumor, as they pretend, early in May, they evidently did not think it sufficiently supported to act upon; and it only aggravates their position that they should have allowed a month to go past without getting correct information from reliable

sources open to them. Why did they not get information from Cook, Sons & Co., as they suggested to their London agent, or from some of respondent's other creditors, or from their bankers, as suggested by the man Toshack, if there is such a man, or, as he suggested, they might have waited till he got the full particulars he expected by the Cunard mail the next week, or they might have approached the respondent himself, whose place of business is but a few minutes walk from their own. But although getting no confirmation from England of the May report, and no confirmation from Montreal of the Toshack report, they acted upon the latter without even seeing the cablegram, with so little thought as to be unable to give the name of the person who sent it, and with so much haste that, although their final interview with Toshack took place at 3 p. m. on the 16th, the respondent's name appeared in circular of that date, published at Montreal. It was clearly the duty of appellants to have produced Mr. Toshack and the cablegram, and upon their failure to do so, the Court would be justified in treating both as myths.

The appellants, however, claim that as they had a contract with their subscribers, founded on valuable consideration, to furnish them with information of the character in question, on condition of the same being held confidential, they were privileged to do what they did.

A form of contract has been filed, printed in very small type. The following is the portion material to this case.

"The undersigned hereby employs The Bradstreet Company from "..... 188 , to..... 188 , to procure to the best of its abil- "ity, within the territory represented by the volumes loaned, information "concerning the responsibility and character of mercantile persons en- "quired for, said enquiries not to exceed..... except as herein- "after agreed. In consideration of such service, including the loan "of the..... 188 , ... 188 , ... 188 , and "..... 188 volumes of its Reports, the undersigned hereby "agrees to pay The Bradstreet Company the sum of..... dollars, "at the commencement of the said subscription term, and for each en- "quiry exceeding the..... before mentioned ..... on de- "mand. It is further expressly agreed by the undersigned, that all in- "formation, whether printed, written or verbal, furnished by the Brad-

1887.

The Bradstreet Co. & Carsley.

"ployer Company to the undersigned, shall be held in strict confidence "and shall never be revealed to the persons reported; that the under- "signed will neither ask for information for the use of other parties, nor "permit it to be done; that the said Company shall not be liable for any "loss or injury caused by the neglect or other act of any officer or agent "of the Company in procuring, collecting and communicating said infor- "mation; that the said Company does not guarantee the correctness of "the aforesaid information." * * *

There is no legal evidence of record of the existence of a contract in this form between the appellants and each of their subscribers, but admitting there was, it could not possibly have given the appellants a privilege to do what they did in this case. It will be observed that the appellants expressly stipulate that they are not to be held liable for loss caused by any neglect or other act in procuring or communicating information; and that they *do not guarantee the correctness of the information they give.*

The respondent feels that it is only necessary to state the pretension of the appellants on this point to secure its instant rejection. He ventures to think no Court will hold that because of such a contract, or because of the nature of the business carried on by appellants, they could be privileged to circulate falsehoods about honest traders which were calculated to ruin them.

This question came before our Courts in the case of *Girard* v. *Bradstreet*. Girard was a subscriber to the agency, and sued the appellants for having classified him in their book under a certain number which meant "failed." Mackay, J., dismissed the action in the Superior Court. Girard appealed and this Court confirmed the judgment on the 15th February, 1875.(1) The present case is stronger, in that respondent is not a subscriber and cannot be said to have acquiesced in or availed himself, of appellants' mode of doing business, and, moreover, in this case, the information is proved to have been false. Numerous authorities can be found to support the view taken upon the question of privilege in Girard's case. The respondent would refer to Dalloz 1869, pt 2, p. 84; 1 Dareau, p. 120; 36 Dalloz, *verbo*, "Presse outrage, p. 601; 20 Laurent,

(1) M. L. R., 3 Q. B. 69.

No. 480–1. And Journal du Palais, 8 & 9, Livraisons mensuelles de 1885, p. 21 (Jurisprudence Etrangère), where it was by the Cour d'Appel de Liège: Jugé:— "L'agence de renseignements qui transmet à ses corres- "pondants des notes défavorables et inexactes sur la sol- "vabilité et l'honorabilité d'un commerçant, commet une "faute engageant sa responsabilité envers ce commerçant. "Vainement l'agence se retrancherait derrière le principe "de l'inviolabilité du secret des lettres et la nature con- "fidentielle de ses informations."

1887. The Dominion Co. & Carsley.

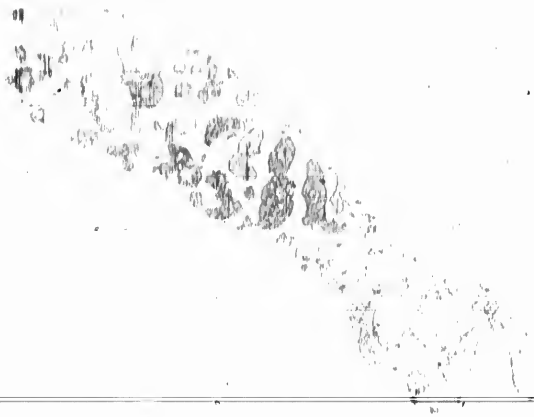
The principle of the English law is the same. *Vide* Odger, part II, pp. 196–7–8–208, 216, 233, 237, 238.

The American law is well stated in *Beardsly* v. *Tappan*, 5 Blackford, p. 497.

Other authorities upon the question of privilege from both French and English law were referred to in the able and exhaustive judgment of Mr. Justice Loranger in the present case, reported in Montreal Law Reports, 2 S. C. 33.

Considering the whole conduct of the appellants towards the respondent, as disclosed by the evidence in this cause, and seeing that the respondent was not a subscriber to the agency, and that appellants had reason to know that respondent did not approve of their methods and did not wish to have his name mentioned by them in any of their publications, the respondent thinks that he is justified in charging the appellants with actual malice.

Odger, p. 276, says: "The plaintiff is not restricted to "extrinsic evidence of malice; he may rely on the words "of the libel itself and the circumstances attending its "publication; or in the case of slander, upon the *exag-* "*gerated language used, on the fact that third persons were pre-* "*sent who were not concerned in the matter*," *etc.* And again at p. 277: "If, indeed, there were means at hand for as- "certaining the truth of the matter, of which the defen- "dant neglects to avail himself and chooses rather to "remain in ignorance when he might have obtained full "information, this will be evidence of such wilful blind- "ness as may amount to malice."



1887.
The Bradstreet Co. & Conley.

Not only did the appellants circulate this rumor without having made proper enquiry, when the means of enquiry were at hand, but they grossly exaggerated the actual condition of respondent, by stating that he owed in the old country $300,000 when as a matter of fact, he only owed half of the amount, and appellants, moreover, went out of their way to give this exaggerated report to persons having no interest, such as to a newspaper correspondent, when they knew it would be most damaging to respondent. It appears to the respondent that the circumstances stated by Mr. Odger to constitute malice are present in this case.

CROSS, J., for the Court:—

The appellants are a commercial agency carrying on business in Canada, United States and England, with branches in the principal cities of the Dominion. They have a large number of subscribers to whom they undertake to furnish information concerning the responsibility and character of commercial persons enquired for, in consideration of being paid a certain annual subscription.

The respondent is a very extensive importer, as well as retail dealer in fancy dry goods, in the city of Montreal.

The respondent brought the present action against the appellants, in which he, in substance, alleges that he is an extensive importer and dealer, with ample credit and reputation, which he required and used in the carrying on of his business; that about the 16th of June, 1884, the appellants maliciously and without any reasonable or probable cause, caused the name of the respondent to be inserted in a circular published by them at Montreal, styled "sheet of changes and corrections," and put after his name the words "call at office," which they published and circulated among their subscribers, and amongst the respondent and others throughout Canada, the United States and Europe; that the words "call at office," according to the custom and practice of appellants, signified that the persons against whose name they

were inserted, were persons about whom they had something to communicate, detrimental to their position and standing, and were a warning to all persons receiving said circulars that they should not deal with such persons without calling at appellants' office to obtain such information; and that in this case, the words meant and intended to convey, and did convey to the persons receiving the circular, that the appellants possessed information regarding the respondent which injuriously affected his standing, position and credit; that divers influential persons had, in consequence, called and been informed that respondent had asked for an extension of time for the payment of a large sum, to wit, about £60,000 sterling, due to creditors in England, whereby divers persons at Montreal and elsewhere were caused to believe that respondent was in straitened circumstances and unable to pay his debts as they fell due, the whole of which statements were false; that such publication injured respondent's credit, and the information so given by appellants became generally known, being published in the newspapers in Montreal, Toronto and elsewhere. Respondent thereby suffered loss to the extent of $50,000 for which he asked a condemnation.

The defendants, by their pleas, contended that no such inference as that set out in the declaration could be drawn from the words in the circular; that they had a contract with their subscribers, whereby they agreed to furnish them information concerning the responsibility and character of mercantile persons enquired for, in consideration of being paid a certain annual sum, and that the information, whether printed, written or verbal, furnished to the person contracting, should be held in strict confidence, and should never be revealed to the persons reported; that the subscribers should not ask for information for other parties, nor permit it to be done.

The parties went to proof on these issues. The extent of respondent's business and his credit ranking first-class is proved. Further, it appears to be established that the circular was issued by the appellants as alleged, and con-

1887.

The Bradstreet Co. & Carsley.

tained the words complained of as stated in the declaration. It was issued and sent to about 600 persons; also that a number of persons, for the most part commercial men and subscribers, called at the office of the appellants in Montreal in response to the circular and were informed, some verbally and some by written memorandum,—"It "is stated that an extension of time is being asked for from "creditors in the old country upon liabilities of some $300,-"000," and that the firm was in difficulties.

It is well established that the reports as to respondent's asking for an extension of time and his being in straitened circumstances were without foundation.

The effect of this information was to cause the Bank of British North America, with whom the respondent did business, to decline their usual advances to Carsley & Co. until they had satisfied themselves, through enquiries at London, England, that the rumor was without foundation. It nevertheless caused hesitation and delay on their part. Mr. Penfold, their manager at Montreal, said it occasioned them uneasiness. It had also the effect of causing orders for goods to be refused. The agent of an English firm, Reichter & Co., had solicited an order from the English buyer of Carsley & Co., at London, on the 4th of June. The order was given on the 5th. After some delay, the execution of the order was declined on the 14th July, after the rumor in question had been circulated, generally understood to have proceeded from appellants' establishment; and goods purchased for respondent from a firm of Cowleshaw, Nicol & Co., of Manchester, were also detained in consequence of the rumor, as well as goods purchased from a firm of Walker & Co., of Paisley, in Scotland; and various other circumstances are adduced to show that the respondent suffered in his business and reputation.

Most of the persons to whom the information or rumor was communicated were subscribers to Bradstreet & Co.'s institution, but not all in the same line of business, nor all creditors. John Ogilvy, partner in a firm in Montreal and in another in Toronto, was not a subscriber otherwise

than through his firm in Toronto; he seems not to have received a circular, but went to Bradstreet's partly as a matter of curiosity and partly as having an interest in the general state of the commerce, to enquire if the rumor he had heard about Carsley & Co. was correct, and was informed by Mr. Bell, their manager, that they had information from London that Carsley & Co. were in difficulties, and were asking one large creditor for time, or rather that this was his inference from the information they gave him. George Wallace, the Montreal correspondent of the Toronto *Mail*, a newspaper extensively circulated throughout the Dominion, and as such well known to Mr. Bell, appellants' manager at Montreal, having heard of the circular, called on Mr. Bell to enquire if the rumor was correct, and was informed by Mr. Bell, in answer to his enquiries, that it was true they had issued the circular in question, and that he understood respondent had asked for an extension of time from one of his largest creditors in London; he communicated the information so obtained to the *Mail* newspaper, and it was published therein on the 18th of June. It also, posterior to the issue of the circular, found its way into certain Montreal newspapers. Mr. Wallace was not a subscriber to Bradstreet's institution; he seems to have asked and obtained the information for his newspaper, the *Mail*. He states that he heard the rumor prior to the issue of the circular in question.

It seems to be established that the statement made by Mr. Bell, which some of the witnesses qualify as a rumor, got currency through the enquiries made of him chiefly by Bradstreet's customers to whom the circular was sent, but also through one or more not so invited. The appellants contend that they were protected by their agreement which their customers signed, and that the information was given by them in good faith under the belief that it was true, and was confidential for the use of their customers only, the agreement, which was produced, showing that they agreed to furnish information concerning the responsibility and character of mercantile

1887.

The Bradstreet Co. & Carsley.

persons enquired for in consideration of being paid a certain annual sum, and that the information, whether printed, written or verbal, furnished to the person contracting, should be held in strict confidence and should never be revealed to the persons reported, that the subscriber should not ask information for other parties nor permit it to be done.

As regards the innuendo alleged in the declaration, that the words "call at office" were intended to convey, and did convey, to the persons receiving the circular, that the appellants possessed information regarding the respondent which injuriously affected his standing, credit and position, Mr. Penfold, manager of the British bank, and a number of leading mercantile men, say that they would look upon it as a "danger signal," and would be understood to mean something detrimental to the credit of the persons against whose name the words were placed. I notice no specific proof of any amount of actual loss or damage, although the inference from the proof is that there was undoubtedly damage suffered by respondent. Mr. Walker, a leading wholesale dealer, gives it as his opinion that if Mr. Carsley had not been very well supported, and not pretty well off, it would have ruined him.

The appellants have examined Mr. Priestman, their manager at Toronto, who states that about the 16th of June, he communicated to the Montreal office that information had been received by a creditor of Carsley's in Toronto. A cable message had been received by an agent of a creditor of Carsley & Co., stating that they had obtained or asked for an extension on the liabilities of about £60,000 stg. or $300,000, which he communicated to Mr. Bell, manager at Montreal. He got this information from one of their reporters named Brown. Brown being examined, says that he got the report from a Mr. Toshack, an agent at Toronto for English manufacturers, on the Saturday before the 14th of June, who said he had a cable from his people in the old country, saying that Carsley & Co. were asking for an extension of time on liabilities of

£60,000 stg. Brown communicated this at once to Priestman. He says he had previously had information from Toshack, and always found it correct. Toshack was not examined, nor any cable produced. Priestman describes Carsley as being very hostile to Bradstreets; he also says that he had previously heard the like rumor about Carsley & Co. as early as the month of May; in this he is corroborated by several other witnesses.

Bell to a certain extent contradicts Wallace as regards what passed at their interview. He is an interested witness and admits enough to satisfy one that he gave Wallace the information that his subscribers had got from him.

The judge who tried the case in the Superior Court found the appellants liable and condemned them to pay respondent $2,000, besides interest and costs. From this judgment they have appealed, and contend: 1. That the words in the circular, "Call at the office," were not libellous; 2. That their communications respecting respondent to their customers were confidential and privileged; 3. That the information given by them was in fulfilment of a legal obligation lawfully contracted by them; 4. It was information of interest to their subscribers, which they believed, and in good faith communicated as they had received it.

It may be conceded that the words "call at the office" against Carsley's name in the circular were not in themselves libellous, and if enquiry be made as to the significance of their use on the occasion in question, it might be implied that the news to be communicated might as readily be favorable as unfavorable. No one would doubt that under the circumstances they indicated that something interesting to the parties addressed was known and would be communicated to them at the intelligence office. What kind of news would people so addressed under the circumstances naturally expect? The most of them had paid for the information; they would be much less likely to expect an accession of capital or credit to Carsley's already established first class credit and stand-

1887

The Bradstreet Co. & Carsley.

ing than some warning of disaster, misfortune or other cause whereby his credit would be injuriously affected. If the news were good there would be no reason for secrecy, and it would be comparatively unimportant, as Carsley's trade was very large, and his credit first class. He had paid his bills, a stroke of good fortune would add little or nothing to his punctuality; but their greater interest was to hear of any misfortune, ill luck, or other cause for loss of credit which might lessen his ability to pay them. It was, then, more natural for them to expect unfavorable than favorable news, and the fact of that expectation would alone and of itself affect his credit with those who had communication of the circular, hence the reason for Mr. Penfold and others considering the words employed in the circular opposite the name of the respondent, a signal of danger and detrimental to his credit.

2. The communication respecting respondent made by the appellants to their customers might, according to the English ruling, be considered privileged, provided all their customers to whom it was communicated had such dealings with respondent as gave them an interest in having information that might affect his standing.

3. If the information was given in good faith in the form received, with proper precautions exercised as to the authenticity of its source, it might, according to the same ruling, be deemed privileged.

4. If their subscribers had, or proposed to have, dealings with the respondent they, or so many of them as were likely to be so interested, were entitled to ask and obtain correct information of the like nature.

The present action charges the appellants with having committed a libel on the respondent by the publication of the circular complained of. 2. For having thereby intended to convey to divers persons, intelligence to the effect that they, the appellants, had something to communicate to the persons to whom the circular was addressed detrimental to the commercial standing and credit of the respondent. 3. For having intimated and publish-

ed, to divers persons, false and slanderous information to the effect that the respondent was asking time from one of his largest creditors in England.

It combines an action for libel with one for slander. These charges are proved. It is indisputable that respondent's case is made out *prima facie*. It is only questionable how far the appellants have pleaded and proved a sufficient justification of their conduct.

The excuse urged is to the effect that the words in the circular were not in themselves libellous, that the information furnished by the appellants was so in good faith, they believing it to be true, and was given in fulfilment of a lawful obligation contracted in favor of their subscribers. It seems to me that the natural inference from the terms of the circular and the object with which it was written, was that it suggested something detrimental to the reputation of the respondent, that reasonable persons would be likely to arrive at that conclusion, especially when taking into consideration the attending facts and circumstances. It is proved that it was so understood by Mr. Penfold, manager of the Bank of British North America, with whom respondent did his banking business. It was also so understood by Mr. Walker, Mr. Ogilvy and others, and that for the time, together with the extraneous fact of the rumor regarding the asking for time from a principal creditor in England, had the effect of suspending respondent's usual advances from the said bank. The same effect was also produced on Mr. Walker, Mr. Ogilvy, Mr. Reichter and others.

Unlike the inference to be drawn from the words of the circular, doubtful as to their libellous character, the information communicated to the after callers, to the effect that Carsley & Co. were in financial difficulties and were asking for time from a principal creditor, left no doubt as to their injurious nature; they were clearly imputations which if made public and credited were calculated to seriously affect the credit and reputation of Carsley & Co., and were without doubt actionable unless privileged.

There is proof of actual curtailment of credit, although

1867.
The Bradstreet Co. & Carsley.

very little in the way of serious pecuniary loss; but on the other hand it might, as Mr. Walker says, have ruined the respondent; he was exposed to considerable danger and had to exert himself to sustain his reputation.

The authorities cited from Dalloz, 1869, Part 2, p. 84, and from Laurent, vol. 20, p. 480 and 481, show that in France and Belgium commercial agencies are held responsible, to parties who may be injured thereby, for false information propagated by them, and that these appellants would be held to a measure of responsibility at least equal to that held by English and American precedents. These certainly do commend themselves to the practical common sense of the tribunals, and the appellants cannot complain if they are allowed all the benefit of the more liberal view of their case, applying to them the advantages of the English precedents.

No doubt, shades of difference will be perceived between the law of libel and slander governing us under the civil law system derived from France, and the English system where the subject has undergone much scrutiny, but the difference will be found more in the practical application of the law than in the principles themselves. With us the basis of liability in these cases will be found to have its origin in the Art. 1053 of the Civil Code, providing the general rule,—that every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill. Under this system whatever tends to inflict injury to the reputation or honor of a person is considered defamatory, and if done by writing is deemed to be of greater gravity than when it consists of only words spoken. There is nothing to prevent both being prosecuted for in the same action, and one may be alleged as an aggravation of the other. Under the English system a sharp distinction is drawn between libel and slander; they are not usually, if ever, made together the subject of complaint in one and the same action, and an action of slander is only given for the grosser kind of

1887.

The Bradstreet Co. & Carsley.

words, such as impute positive crimes or charge a person with contagious disorders which tend to expel him from society. But under our system the rules of law applicable to the two are absolutely identical, save that written defamation is deemed of greater gravity than words spoken, so that there can be no objection to their being, as in the present case, included in the same complaint, that is in the same action. While the circular complained of may be treated as written defamation, the information given verbally in answer to the enquiries it elicited, considered as verbal slander, is yet appropriately joined in the same complaint. Again, as regards defence. What in France would be considered a confidential communication would not give a title to a claim for reparation unless dictated by actual malice (1), while in England the same idea has given rise to a multitude of fine distinctions elaborated by the judges under the term of privileged communications.

Such commercial agencies are conceded to be a necessity of modern commerce and, if conducted within reasonable limits, the occupation is said to be lawful and commendable, but there is no special rule of law or exemption applicable to them which is not the common right of others. In general, an action lies for the publication of statements which are false in fact and injurious to the character of another. Such publications are presumed to be malicious, but such presumption may be removed by proof for the defence that they were fairly made in discharge of some public or private duty, legal or moral, or in matters where required for the protection of the defender's own interest. Under the English system, if the statements are fairly warranted by any reasonable occasion or exigency and honestly made, such communications are held to be privileged and are protected for the common convenience and welfare of society. It should nevertheless be borne in mind by such institutions that they conduct a business of peculiar delicacy,

(1) Examples of this will be found in 1 Dareau, Traité des Injures p. 126.

1887

The Bradstreet Co. & Carsley.

on which the reputation and fortunes of those engaged in trade may depend, and it behooves them to be especially guarded in treating of the character and standing of those on whom they report, and as to the persons to whom they communicate their estimate of their standing. They are employed to fulfil the *role* of moral and financial detectives, to ferret out the loss of strength in persons and firms, and give forewarning of impending disasters or difficulties likely to render hazardous giving to them credit. It therefore becomes highly important to determine to what extent this doctrine of privilege can fairly be invoked by them, and whether that doctrine would give them complete immunity under the circumstances of the present case. It may be assumed that privileged communications are such as would be considered defamatory if not made on occasions which rebut the presumption of malice; that such privilege is not absolute, but qualified, and may be rebutted by proof of actual malice; also that every defamatory publication implies malice, but subject to be rebutted.

In reference to the present case take Lord Campbell's definition of privilege in the case of *Harrison* v. *Bush*, 5 Ellis and Blackburn's Reports, p. 348: "A communication made *bona fide* upon any subject matter in which "the party communicating has an interest, or in reference "to which he has a duty, is privileged if made to a per"son having a corresponding interest or duty, although "it contained criminatory matter which without this "privilege would be slanderous and actionable." It may be said that in this case the interest and duty existed in the party communicating the information, and the interests existed in some although not in all of those to whom it was communicated. As regards the *bona fides* of the communication, this depended upon the question how far the appellants were warranted in giving currency to the rumor; whether they exercised reasonable precaution in ascertaining what foundation existed for it, and whether they confined themselves strictly to the terms of the information as received by them, or added anything to its

credibility by its adoption and propagation by them. The proof shows that only a small number of the six hundred to whom the circular was sent, and only a few of those to whom the after-communications were made, had any interest in the credit or standing of Carsley & Co. Both as regards this point and the question of *bona fides*, Judge Allison, of Philadelphia, in the case of the *Commonwealth* v. *Stacey*, remarks: "There is no great hardship imposed on an agency of this kind if they are required to know beforehand that their statements are "true, and that the persons to whom they are sent have "an interest in receiving the information, and this could "be accomplished by requiring every subscriber to furnish the agency from time to time the names of the "persons with whom they had established business relations or who may have applied to them for credit."

I think the appellants gave additional credit to the rumor in question by its adoption and propagating it without giving its origin, and were guilty of imprudence in accepting it without sufficient precaution. They got it from one of their reporters, who says he got it from a Mr. Toshack, from whom he had previously got information which proved to be correct. It is only the reporter who, in this limited sense, suggests the possibility of the source of the information being credible. The appellants themselves do not, and fail to resort to Mr. Toshack's evidence, who alone could have spoken as to the rumor or its credibility. They do not themselves communicate the origin of the report, but take the responsibility of giving it currency by the declaration, "it is said," thereby assuming that they had credible information, which they did not possess. They, therefore, had small and, to my mind, insufficient grounds for propagating a rumor which might have caused ruin to respondent's extensive and apparently prosperous business.

In a case of *Eber* v. *Dun*, which much resembles the present, tried in the Circuit Court of the United States before Caldwell, D.J., in charging the jury the judge said: "This sheet was distributed to persons having no

1887.

The Bradstreet Co. & Carsley.

"interest in being informed of the condition of plaintiff's "firm. This fact robs it of the protection of a privileged "communication, and it contains a libel on the plaintiff. "The defendant cannot escape responsibility for such a "libel on the plea that it was a privileged communication "to their subscribers."

Although there are features in the case favorable to the defence, and the appellants are to some extent protected by the privileged nature of their communications, I think a liability for libel and slander is established against them: First, from having issued the circular above alluded to, placing respondent's name there in connection with an equivocal announcement whereby respondent suffered damage to his credit with his bankers, who were subscribers to appellants' company and were one of the recipients of the circular. 2. In having admitted to Mr. Wallace and others, non subscribers, that the circular had been issued by them, the appellants. 3. From the innuendo resulting from the terms and publication of the circular, as alleged in respondent's declaration, being proveable and proved by sufficient evidence. 4. From damage resulting from the publication of the circular, and the false rumor as to respondent's credit and standing being proved. 5. From the imprudence of the appellants in propagating a false rumor injurious to the credit and standing of the respondent, without the exercise of reasonable precaution to satisfy themselves as to its truth or falsehood before adopting and propagating it as useful information. 6. From having communicated the rumor and damaging information to persons having no interest in the standing of the business firm of Carsley & Co. 7. From having published damaging statements in excess of the information they themselves pretend to have received as to the credit and standing of the respondent.

There is much resemblance between the case of the *Capital Counties Bank* v. *Henty*, but in my opinion it differs in the particulars involving liability as above stated. The inference that the circular suggested some-

thing detrimental to the reputation of the respondent was one that reasonable persons would be likely to draw, and the attending facts and circumstances showed that it was understood in the sense of an injurious imputation against the reputation of the respondent, it was actually interpreted in this sense. This together with the extraneous facts connected with it, including the information afterwards given, go to show that the effect was to cause damage to the respondent, and it is actually proved that it did so cause him damage. There is but little proof in the way of any serious pecuniary loss by the respondent. I do not myself think that it was great, but on the other hand it might have ruined him, as Mr. Walker says. He was exposed to considerable danger, and had to exert himself to sustain his reputation. There is evidence of damage; the Judge of the Superior Court was competent to estimate the amount, and I do not think we should criticise his measure of the damages. We are, therefore, of opinion that the judgment of the Superior Court should be confirmed.*

Judgment confirmed.

Kerr, Carter & Goldstein, attorneys for appellant.

Abbott, Tait, Abbotts & Campbell, attorneys for respondent.

(J. K.)

* A similar judgment was rendered in the case of *The Bradstreet Company*, appit, and *Carsley et al.*, respdts.

February 22, 1887.

Coram DORION, CH. J., TESSIER, CROSS, BABY, JJ.

LA CORPORATION DES COMMISSAIRES D'ECOLE D'HOCHELAGA,
(*Defendant in Court below*),
APPELLANT;

AND

THE MONTREAL ABATTOIRS Co.,
(*Petitioner in Court below*),
RESPONDENT.

Pleading—Misnomer—45 Vict. (D.) ch. 23, S. 20—Commercial companies—Proceedings against company after order for liquidation.

HELD:—1. A misnomer is ground for an exception *à la forme*, and cannot form the subject of a plea to the merits,—more particularly where the error complained of is trivial and unimportant, *e. g.*, the description of the defendant as "La Corporation des Commissaires d'Ecole d'Hochelaga" instead of "Les Commissaires d'Ecole d'Hochelaga."

2. The Act 45 Vict. ch. 23, (D.) applies to incorporated commercial companies, the *erratum* distributed by the Queen's Printer with the statutes, which supplied an omission in section one, forming an integral part of the Act in question.

3. Under section 20 of said Act, when a winding-up order has been made, no proceeding can be taken against the company in liquidation without the permission of the Court, and therefore in the present case the immoveables of the company could not be sold in ordinary course for school taxes without such permission.

The appeal was from a judgment of the Superior Court, Montreal (BOURGEOIS, J.), Sept. 13, 1886, maintaining a writ of injunction, to prevent the sale of respondent's lands. The judgment was in the following terms:—

"La Cour, après avoir entendu la requérante et les défendeurs en cette cause par leurs avocats au mérite de la requête libellée de la requérante, etc.

"Considérant que la dite requérante a fait la preuve des allégations de sa requête libellée;

"Considérant que la réponse en premier lieu produite à l'encontre de la requête et demande de la dite requérante par les commissaires d'école d'Hochelaga est mal

fondée en autant que la dite réponse est de la nature d'une exception à la forme qui aurait dû être produite dans les quatre jours du rapport de la dite requête en Cour, que les irrégularités dont se plaignent les dits commissaires ont été couvertes par le défaut des dits commissaires de les invoquer en temps utile, et que les dits commissaires ne peuvent obtenir le renvoi de la dite requête pour les raisons mentionnées en la dite réponse;

"Considérant que la dite compagnie requérante a été légalement mise en liquidation, en vertu d'un statut qui s'appliquait aux compagnies de la nature de la dite compagnie requérante;

"Considérant que les dits commissaires d'école sont mal fondés dans la seconde et la troisième réponses par eux produites à l'encontre de la dite requête de la dite compagnie requérante;

"Renvoie les dites première, seconde et troisième réponses des dits commissaires d'école d'Hochelaga produites à l'encontre de la dite requête et demande de la dite requérante, déclare le bref d'injonction émané en cette cause bon et valable, et les annonces, publications et autres procédures faites et adoptées par les défendeurs, les commissaires d'école d'Hochelaga et le dit défendeur, Charles A. Vilbon en sa qualité de secrétaire-trésorier du conseil municipal du comté d'Hochelaga, pour la vente de l'immeuble de la dite requérante, savoir du lot No. 148, du plan officiel et livre de renvoi du Village d'Hochelaga, nuls et de nul effet et enjoint aux défendeurs, les commissaires d'école d'Hochelaga et Charles A. Vilbon en sa dite qualité de secrétaire-trésorier du conseil municipal du comté d'Hochelaga, de cesser toutes procédures sur la vente et mise en vente du dit immeuble, le tout avec dépens contre les commissaires d'école d'Hochelaga, distraits, etc."

Jan. 26, 1887.] *Pagnuelo, Q.C.*, for the appellant:—

L'intimée demandait par sa requête un bref d'injonction dirigé contre l'appelante et Charles A. Vilbon, en sa qualité de secrétaire-trésorier du conseil municipal du comté d'Hochelaga, pour empêcher la vente par le dit

1887.

Commissaires d'Ecole & Montreal Abattoirs Co.

Charles A. Vilbon *ès-qualité*, pour taxes scolaires d'un immeuble appartenant à l'intimée.

Un bref d'injonction temporaire fut émané la veille du jour fixé pour la vente, et ce bref fut maintenu par le jugement final actuellement porté en appel.

Les commissaires d'école d'Hochelaga, erronément assignés sous le nom de "La Corporation des commissaires d'Ecole d'Hochelaga" ont produit trois plaidoyers à l'encontre de la requête.

Par le premier, ils disent: qu'il n'existe pas de corporation sous le nom de "La Corporation des Commissaires d'Ecole d'Hochelaga" et que le nom de la dite corporation est: "Les Commissaires d'Ecole d'Hochelaga," en vertu du statut de 1884, 47 Vict. chap. 30.

Par le deuxième plaidoyer, il est dit: que la compagnie requérante a été, mal à propos et sans droit, mise en liquidation le dix juillet 1883, sous les dispositions de l'Acte du Canada, 45 Vict. chap. 23, et que le dit Philip S. Ross a été mal à propos nommé liquidateur de la dite Compagnie.

Qu'à la date du dix juillet, 1883, le dit Statut ne s'appliquait pas aux compagnies industrielles, de la nature de la compagnie requérante, et que tous les procédés pour mettre la dite compagnie en liquidation, sous le dit Statut, sont radicalement nuls; que la Cour Supérieure et les Juges de la dite Cour n'avaient aucun pouvoir ni autorité de la mettre en liquidation sous les dispositions du dit Acte;

Par le troisième plaidoyer, les Commissaires admettent qu'ils ont transmis, suivant la loi, au secrétaire-trésorier du conseil municipal du comté d'Hochelaga, une liste des taxes scolaires dues par la compagnie requérante, sur l'immeuble décrit en sa requête, et que les dites taxes étaient dues suivant la loi. Ils admettent aussi que le dit immeuble a été annoncé pour être vendu conformément au Code Municipal et à la loi;

Qu'en supposant que la Compagnie ait été valablement mise en liquidation, sous l'autorité du Statut invoqué par elle, le dit Statut n'empêche pas la défenderesse de pro-

céder à la vente, suivant la loi et d'après le mode adopté par elle, de la propriété de la compagnie requérante, pour défaut de paiement des taxes scolaires et ne l'obligeait pas à suspendre cette vente ;

Que le dit Statut n'a pas l'effet de purger les hypothèques sur le dit immeuble ;

Que le liquidateur peut vendre le dit immeuble sujet aux hypothèques et que la défenderesse, créancière hypothécaire, sera toujours obligée d'adopter les moyens légaux de faire vendre le dit immeuble, pour se faire payer de sa créance au moyen d'une vente pour purger les hypothèques ;

Que toute disposition, du dit Statut du Canada, qui aurait pour objet d'empêcher les créanciers hypothécaires de procéder, d'après le mode prescrit par la loi, à la vente des immeubles affectés au paiement de leur créance serait nulle et inconstitutionnelle.

Que le liquidateur de la compagnie requérante n'a pris aucun procédé pour faire vendre le dit immeuble, et que le dit statut ne contient aucune disposition pour permettre aux créanciers hypothécaires de le forcer à le faire, et que, par conséquent, les créanciers hypothécaires sont libres de procéder à la vente du dit immeuble suivant le mode établi par la loi.

Le Juge a renvoyé la première exception en disant que ce moyen aurait dû être plaidé par exception à la forme. Nous soumettons qu'il pouvait être plaidé au mérite, parce que la poursuite se trouvait dirigée contre une corporation non existante.

Ceci a déjà été jugé plusieurs fois. Nous mentionnerons d'abord les causes du Grand Tronc, dont le titre français est : "La Compagnie du Grand Tronc de chemin de fer du Canada," poursuivie plusieurs fois sous le nom de "La Compagnie du chemin de fer du Grand Tronc du Canada."

Il a été jugé que cette désignation était illégale et que la compagnie ne pouvait être poursuivie sous ce titre.

Nous citerons de plus la cause de *Edmonstone & Chias*, 2 L. C. J. p. 192.

1887.

Commissaires d'Ecole & Montreal Abattoirs Co.

Il fut jugé que les défendeurs, poursuivis comme associés sous le nom de "*Montreal Railroad Car Company*," peuvent sur une défense en fait prouver que la compagnie est incorporée.

Dans une cause de "*La Corporation de la Paroisse de St.-Jérusalem* v. *Quinn*," 8 L. C. J. p. 234, Smith, J., il fut décidé qu'une corporation ne pouvait pas poursuivre sous le nom de "La Corporation de la paroisse de..... représentée par le Conseil Municipal de la paroisse de..... et que même on ne pouvait pas amender en retranchant les mots; "représentée par le Conseil Municipal de la paroisse de.....". Le juge Smith déclare en rendant son jugement qu'il a consulté aussi plusieurs précédents, et il en mentionne quelques-uns dans son jugement.

Dans une cause de *Morey* v. *Gaherty*, 2 L. N. p. 108.—Action contre une société, plaidoyer que la société n'existe pas: preuve d'un nom social mais non composé tel qu'allégué; cette action a été déboutée par le juge Johnson.

Dans *Graham* v. *Morissette*, 5 Q. L. R. p. 346.—Action dont la moitié de la pénalité retourne à la corporation municipale—cette corporation est désignée sous le nom de 'Corporation Municipale de.....; action déboutée parce que la corporation est mal désignée.

Le troisième plaidoyer consiste à dire que le syndic ne pouvait pas empêcher la vente de ces propriétés par le secrétaire trésorier du comté, pour taxes scolaires ou municipales, ni la vente par le shérif; que la vente par le syndic ne purge pas les hypothèques, ce qui est prouvé abondamment, par le fait qu'un statut a été passé depuis, par la Législature de Québec en 1885 [48 Vict. chap. 22, sec. 14] établissant que la vente faite par le syndic, nommé en vertu du chap. 28 des statuts du Canada 45 Vict., aurait l'effet de purger les hypothèques, si cette vente était faite avec les formalités prescrites par le statut provincial.

Le statut 45 Vict. permet au syndic de vendre les immeubles sujets aux hypothèques. Les créanciers hypothécaires seraient toujours dans ces cas obligés d'adopter les moyens légaux pour faire vendre les immeubles pour

être payés au moyen d'une vente qui purgerait les hypothèques.

1887.

Commissaires d'Ecole & Montreal Abattoirs Co.

Le liquidateur de la compagnie requérante n'avait pris aucun procédé pour faire vendre le dit immeuble, et le statut 45 Vict. ne contient aucune disposition pour permettre aux créanciers hypothécaires de le forcer à le faire. En conséquence les créanciers hypothécaires étaient libres de procéder à la vente du dit immeuble d'après les voies établies par la loi.

Béique, Q. C., for the respondent.

BABY, J. (for the Court) :—

Cette cause se présente devant nous sous forme d'injonction à l'effet d'enjoindre aux appelants d'avoir à cesser toutes procédures pour la vente d'un immeuble sur lequel il leur est dû des taxes scolaires. Le jugement en première instance a maintenu cette injonction et c'est dont on se plaint.

La requête de l'intimée allègue en somme : Qu'en vertu d'un certain ordre rendu par l'honorable juge Mathieu, en date du 10 juillet 1883, l'intimée, à la requisition de la Banque Ville-Marie, sa créancière, dut liquider ses affaires, sous les dispositions du statut 45 Vict. chap. 23, et que Philip S. Ross fut nommé liquidateur ;

Que subséquemment, en décembre 1884, l'appelante a requis le secrétaire-trésorier du comté d'Hochelaga d'annoncer et mettre en vente, aux enchères publiques, l'immeuble appartenant à l'intimée—étant le No. 148 du plan officiel du ci-devant village d'Hochelaga—pour le paiement d'une somme de $1,140 due pour taxes scolaires, et cela sans en avoir, au préalable, obtenu la permission, tel que la loi l'exige ;

Que le secrétaire-trésorier en question a, en effet, annoncé et mis en vente l'immeuble dont il s'agit pour le 4 mars 1885 ;

Que l'appelante a été requise de suspendre ses procédés mais qu'elle a refusé d'obtempérer à cette demande.

Les commissaires d'écoles comparurent le 9 mars, et le

1887.

Commissaires d'Ecole & Montreal Abattoirs Co.

26 du même mois, ayant été requis de plaider au mérite, ils se défendirent en alléguant :—

1o. Il n'existe pas de telle corporation que "La Corporation des Commissaires d'Ecoles d'Hochelaga," et, par conséquent, votre bref d'injonction émané contre elle est nul.

2o. La compagnie requérante a été mal à propos et sans droit mise en liquidation sous les dispositions de l'acte 45 Vict. chap. 23, vu que celui-ci ne peut s'appliquer à une compagnie de la nature de celle-ci.

3o. Le syndic Ross ne pouvait empêcher la vente de l'immeuble pour taxes scolaires et municipales non plus qu'une vente faite par le shérif du district, en d'autres termes, que les dispositions du statut ci-haut cité qui prohibe ces ventes, après l'ordre de liquider donné, sont inconstitutionnelles.

Cette cour est contre les prétentions de l'appelante sur les trois points invoqués par elle dans ses plaidoieries.

1o. Elle est venue trop tard plaider le *misnomer* dont elle se plaint et, l'eut-elle fait, par exception à la forme, de graves doutes existeraient à l'encontre, car, après tout, l'intimée n'a fait que faire précéder les mots "*commissaires d'écoles d'Hochelaga*" par ceux de "*la corporation des*", ce qui de fait est correct en soi, "*les commissaires d'écoles d'Hochelaga*" étant, en loi, une corporation.

2o. Le statut fédéral, 45 Vict. chap. 23, s'applique aux compagnies commerciales, et l'intimée, par conséquent, tombe sous ses dispositions. Il parait que par une erreur d'omission, les mots et "aux compagnies de commerce incorporées" ont été oubliés dans la clause 1ère du statut 45 Vict. chap. 23, mais un erratum distribué, en même temps que les statuts eux-mêmes, par l'imprimeur de la Reine, a corrigé cet oubli, et nous sommes tenus d'en prendre connaissance, car il forme partie intégrale du statut en question.

Sur le 3o. point, il suffit de lire la loi pour rejeter de suite la prétention de l'appelante. En effet, les clauses 20 et 21 se lisent comme suit :

"20. Lorsque l'ordre de mise en liquidation a été donné,

"aucune poursuite, action ou autre procédure ne peut "être suivie ni commencée contre la compagnie qu'avec "la permission de la cour et sous les conditions qu'elle a "pu imposer."

"21. Toute saisie mobilière ou immobilière, tout sé-"questre exercé sur les biens de la compagnie, après "l'ordre de mise en liquidation donné, est nul et de nul "effet."

C'est impératif comme l'on voit. Cette loi peut être rigoureuse, injuste même dans une certaine mesure—et je suis presque porté à le croire—mais elle existe, et cette cour ne peut la mettre de côté, évidemment. Et quant à dire que ces deux dispositions sont inconstitutionnelles, cette prétention a été écartée depuis déjà longtemps par nos tribunaux, sur le principe que le pouvoir qui a le droit de traiter du principal le peut également de l'acces-soire. Le parlement fédéral ayant juridiction exclusive, d'après l'acte de la Confédération, en matière de faillite, il s'en suit qu'il peut alors régler la manière de donner effet à ses lois sur le sujet.

Les trois défenses de l'appelante sont fort ingénieuses assurément, mais nous ne les croyons pas suffisantes pour faire infirmer le jugement dont elle se plaint, et il est, en conséquence, confirmé avec dépens.

Judgment confirmed.

Pagnuelo, Taillon & Gouin, attorneys for the appellant.

Béique, McGoun & Emard, attorneys for the respondent.

(J. K.)

December 31, 1886.

Coram DORION, CH. J., TESSIER, CROSS, BABY, JJ.

ANTOINE LEGER,
(*Defendant in Court below*),
APPELLANT;

AND

PAUL FOURNIER,
(*Plaintiff in Court below*),
RESPONDENT.

Sale à réméré—Term – Notice—Mise en demeure—Chose Jugée.

HELD:—1. Where a property was sold, and the purchaser bound himself to re-convey it to the vendor within three months from the time he (the purchaser) should have completed a house then in course of construction thereon, on being paid $3,000,—that it was the duty of the purchaser to notify the vendor of the completion of the house; and, in default of such notice, the right of redemption might be exercised by the vendor after the expiration of the three months.

2. The exception of *chose jugée* cannot be pleaded where the conclusions of the second action are materially different from those of the first. And so, where by the first action the plaintiff sought to exercise a right of redemption without complying with the conditions agreed on, it was held that the dismissal of such action was not *chose jugée* as regards an action brought subsequently, offering to comply with the conditions.

The appeal was from a judgment of the Superior Court, Montreal, (JETTÉ, J.), June 20, 1885, maintaining the respondent's action. See M. L. R., 1 S. C. 360, for report of judgment in the Court below.

Nov. 20, 1886.

T. C. de Lorimier, for the appellant:—

L'action fut intentée par l'intimé contre l'appelant pour obtenir la rétrocession d'un immeuble vendu à ce dernier, avec faculté de réméré sur paiement de $3,000.

Lors de la vente, l'intimé avait déjà commencé la construction d'une bâtisse sur le terrain réclamé et, se trouvant

incapable de continuer les travaux, il fit la dite vente à l'appelant, se réservant le droit d'exercer la faculté de réméré sur paiement de $3,000 et ce, dans les trois mois de la complétion de la bâtisse.

Le jour même de la passation du dit acte de vente, la déclaration allègue qu'un écrit sous seing privé fut fait entre les parties en vertu duquel l'appelant se serait engagé de compléter et parachever la dite bâtisse suivant les conventions verbales intervenues entre elles ; lequel écrit est adiré et ne peut être trouvé. L'intimé a produit au dossier ce qu'il prétend être une vraie copie du dit écrit, mais n'a fait aucune preuve de la perte de l'original d'icelui.

L'intimé, par sa déclaration, prétend être dans les délais pour exercer sa dite faculté de réméré et, nonobstant le fait y est-il dit que les travaux entrepris par l'appelant ne sont pas terminés, il fait offre de payer les $3,000 susdites sur rétrocession du dit immeuble.

L'intimé a déjà porté devant la Cour inférieure, contre l'appelant, une action de semblable nature le 25 novembre 1879, laquelle action, par jugement de la dite Cour du 7 juillet 1880, fut déboutée et le dit jugement ensuite confirmé par cette Honorable Cour le 22 mai 1883.

L'appelant a rencontré la presente action par trois défenses : 1o. Exception de chose jugée ; 2o. Complétion des ouvrages longtemps avant l'institution de la dite action à la connaissance de l'intimé et, par suite, déchéance du droit d'exercer la faculté de rémérée, vu le délai expiré ; 3o. Enfin supposant à l'intimé le droit d'exercer la dite faculté de réméré, il ne saurait y être admis, sans au préalable payer les impenses et améliorations faites de bonne foi après l'expiration du délai pour l'exercice de ce dit réméré.

L'appelant soumet que le jugement de la Cour de première instance, qui a renvoyé les susdites défenses et donné gain de cause à l'intimé, est erroné et contraire à la loi et doit être renvoyé par cette honorable cour.

Il ne peut y avoir aucun doute que la présente action n'est qu'un renouvellement de la première, et que l'intimé

1886.
Leger
&
Fournier.

avait connaissance parfaite de la complétion des ouvrages entrepris par l'appelant non-seulement plus de trois mois avant l'émanation d'icelle, mais même longtemps avant sa première action qui a été déboutée, puisque c'était là le point principal de la plaidoirie dans la première cause.

L'appelant devait donc réussir sur sa première exception de chose jugée.

Supposant toutefois qu'il pourrait exister le moindre doute dans l'esprit de cette Cour sur ce point, il serait nécessaire pour justifier le jugement dont est appel, que l'intimé prouvât d'une manière légale les divers ouvrages auxquels l'appelant était tenu par cette convention verbale qu'il allègue, mais qui n'est nullement prouvée, car l'intimé ne pouvait d'après ses propres allégations exercer sa faculté de réméré que dans les trois mois après la complétion des dits ouvrages.

Or, tout, dans la preuve au dossier fait voir que les seuls ouvrages que l'appelant ait jamais reconnu être obligé de faire, étaient terminés dès l'automne de 1879.

Il était donc nécessaire pour l'intimé que les travaux inachevés suivant lui, fussent de ceux que l'appelant était tenu de faire, ce dont il n'a fait aucune preuve.

Il ne suffisait donc pas pour l'intimé de se déclarer prêt, comme il le fait par son action, de rembourser à l'appelant, le montant qu'il était tenu de lui payer pour pouvoir reprendre la dite propriété, mais il lui incombait d'exercer son dit recours dans les trois mois stipulés, et non après ce temps ; le délai pour l'exercice de la faculté de réméré était strictement de rigueur aux termes des articles 1549 et 1550 du Code Civil. L'intimé est donc déchu de son prétendu droit d'exercer la dite faculté de réméré à raison de sa négligence de le faire dans le délai stipulé entre les parties.

R. Laflamme, Q.C., for the respondent.

BABY, J., for the Court:—

C'est ici un vendeur qui réclame un immeuble dont il a disposé sous la réserve d'une faculté de réméré à être exercée dans certaines conditions.

1888.
Leger
v.
Fournier.

La déclaration fait voir que le 24 avril 1879, le demandeur-intimé aurait vendu au défendeur-appelant un immeuble situé dans les limites de la cité de Montréal, sur lequel était alors une maison en voie de construction et, de plus, aurait cédé, en même temps, toutes les *ouvertures* et tous les matériaux destinés pour la confection de cette maison, qui étaient alors dans la boutique du vendeur.

Cette vente fut opérée moyennant la somme de $1,250 que l'acquéreur s'obligea de payer à l'acquit du vendeur en la manière à lui indiquée dans l'acte. Il n'est nullement question dans cette vente, tel qu'on le voit, de la faculté de réméré que le vendeur cherche à exercer par sa présente action, mais elle se trouve inclusé dans un document subséquent, fait, sous seing privé, le même jour, et conçu en ces termes:—"Je (l'acquéreur) m'engage par "les présentes à vous (le vendeur) retrocéder à raison de "trois mille piastres que vous me payerez comptant, lors "de la confection du dit acte de rétrocession, en un seul "paiement en aucun temps durant l'espace de trois mois "à compter du jour que j'aurai terminé les bâtisses en "voie de construction sur le lot No. 428 au plan et au "livre de renvoi officiel pour le quartier St. Antoine, en "la dite cité de Montréal, laquelle bâtisse je m'engage "compléter et parachever suivant les conventions verba- "les faites entre nous au sujet de leur confection et para- "chèvement, mais ce délai expiré je serai complètement "libre du présent engagement." Nul doute, c'est là l'acte d'un homme qui, trop pauvre pour pouvoir terminer la construction d'une maison qu'il s'est mis en frais d'ériger sur son immeuble, le transporte à plus riche que lui pour cet objet, s'engageant à payer dans un certain délai fixe une somme stipulée pour le reprendre.

Le 1er juin 1883, un peu plus de quatre ans après, l'acquéreur étant toujours en possession de l'immeuble en question, le vendeur protesta autentiquement son acheteur, lui disant que les travaux de parachèvement qu'il avait faits ne l'étaient pas tels que convenus; qu'il ne lui avait jamais été signifié aucun avertissement que les travaux étaient terminés et qu'il ne savait pas même encore

1880.
Léger & Fournier.

s'ils l'étaient tous. Et, il ajoutait que, cependant, pour éviter tout trouble entre eux, il consentirait à lui rembourser la dite somme de trois mille piastres, plus certains frais énumérés au protêt.

Léger n'ayant pas cru devoir s'occuper de la mise en demeure que lui faisait son vendeur Fournier, celui-ci intenta la présente action.

Le défendeur l'a rencontrée : 1o. par une exception de chose jugée ; 2o. en invoquant une déchéance du droit de rémérer ; 3o. par une réclamation pour impenses faites sur la propriété, après l'expiration des trois mois, s'élevant à, au moins, mille piastres, etc. ; 4o. enfin, par une défense en faits.

Le première question qui se présente—et la seule à peu près sur laquelle l'intimé a appuyé avec un peu de sérieux—est celle de la chose jugée.

En effet, l'appelant a déjà été poursuivi à raison de cette même propriété, mais il est impossible de dire que le jugement le renvoyant de sa demande soit un empêchement à la présente instance. Les deux actions découlent bien du même acte, sont certainement entre les mêmes parties, mais les conclusions sont assurément différentes.

Dans le premier cas, le demandeur-intimé alléguait que Léger avait pris possession de sa propriété, mais, qu'au lieu de finir et parachever les travaux commencés, il les avait abandonnés et discontinués—qu'il l'avait d'abord protesté d'avoir à les terminer, sinon qu'il les ferait faire lui-même, la valeur d'iceux étant de quatre cents piastres—qu'il lui avait, en conséquence, offert deux mille six cents piastres, aux fins de reprendre sa propriété, mais qu'il était prêt à lui payer trois mille piastres, cependant, s'il consentait à terminer les travaux dont il s'agissait, et concluait que son droit de réméré fût déclaré échu.

Dans le cas qui nous occupe, les conclusions sont toutes autres ; le demandeur-intimé déclare au défendeur-appelant qu'ayant actuellement terminé les travaux de parachèvement, il a droit d'en être payé et-il lui offre les trois mille piastres, paiement convenu entre eux pour lui permettre d'exercer sa faculté de réméré. Comme on le voit,

la différence est tangible entre les deux actions. Par la première, le demandeur-intimé voulait exercer son droit de rachat dans des conditions absolument différentes de celles stipulées, tandis que dans la présente, il offre, au contraire, de payer le prix établi ; il se conforme aux termes de son contrat, cette fois, ce qu'il n'avait point fait en premier lieu. La cour supérieure a renvoyé la première action comme non fondée, et son jugement a été confirmé par ce tribunal ; mais elle a maintenu celle-ci et a dit qu'il n'y avait pas chose jugée entre les parties, et nous sommes du même avis. Pour aller au contraire, autant vaudrait dire qu'il y a chose jugée toutes les fois qu'un créancier qui erronément a porté son action sur une obligation non encore échue, et en a été débouté, se reprend ensuite à la véritable échéance ; ce qui n'est guère soutenable, je crois. Pour qu'il y ait chose jugée, me servant de la définition qu'en donne un auteur moderne, il faut que la seconde demande soit en quelque sorte la réflection parfaite de la première. Ainsi, l'appelant-défendeur s'est-il bien donné de garde de produire ici les défenses invoquées par lui dans la première instance.

Quant à la déchéance de la faculté de réméré, prétention soulevée par lui en deuxième lieu, nous ne voyons pas que le défendeur-appelant puisse l'opposer à son adversaire. A lui incombait le devoir et l'obligation de faire connaître au demandeur-intimé—ce qu'il n'a jamais fait—le parachèvement des divers travaux qu'il avait entrepris de faire à la maison en question. Aucun délai particulier ne lui avait été imposé pour les faire ; ce n'était donc pas dans les circonstances au demandeur-intimé à épier le moment où ils seraient terminés, afin de constater le jour d'où devait courir les trois mois dans lesquels il devait exercer le rachat de l'immeuble. D'ailleurs, il est même en preuve que les travaux qu'il s'était obligé d'y accomplir, loin d'être terminés en 1879 ne l'ont été qu'en 1880 et 1881.

Maintenant, au sujet des impenses réclamées par l'appelant-défendeur, nous différons quelque peu d'avec le savant juge de la cour supérieure sur ce point ; d'après

1887.
Leger & Fournier.

l'ensemble de la preuve, nous croyons qu'il a droit à quarante dollars pour améliorations qui ont pu augmenter la valeur de l'immeuble durant sa détention.

En somme sauf cette légère modification, le jugement de la cour de première instance est confirmé avec dépens.

Judgment confirmed.

T. & C. C. de Lorimier, attorneys for Appellant.

Laflamme, Huntington, Laflamme & Richard, attorneys for Respondent.

(J. K.)

Jan. 24, 1887.

Coram DORION, CH. J., TESSIER, CROSS, BABY, JJ.

ELIZABETH GRIFFIN ET VIR,
(*Defendant in Court below*),
APPELLANT;

AND

ESDRAS H. MERRILL ET AL.
(*Plaintiffs in Court below*),
RESPONDENTS.

Husband and wife—Household Expenses—Credit given to wife —C.C. 165, 1317 — *Responsibility of the Wife where nothing remains to the Husband.*

HELD (affirming the decision of Loranger, J., M. L. R., 1 S. C. 335):—Where a wife *séparée de biens*, living with her husband, orders goods for the maintenance of the family, and the goods are charged to her in the books of the vendor, and the husband is without means, the wife is liable for the whole cost thereof, under the provisions of C.C. 1317, notwithstanding the fact that by the marriage contract the husband alone was bound to pay the expenses of the household.

The appeal was from a judgment of the Superior Court, Montreal, LORANGER, J., March 14, 1885, reported in M. L. R., 1 S. C. 335. The opinion of the learned Judge who pronounced the judgment in the Court below fully explains the circumstances of the case.

The case was argued first, Nov. 25, 1886, before the Chief Justice and Justices Ramsay, Cross and Baby; and

1887.

Griffin & Merrill.

subsequently, Jan. 21, 1887, before the Court constituted as stated in the present report.

Jan. 21, 1887.]

Joseph Duhamel, Q.C., for the appellant, referred to *Hudon & Marceau*, 23 L. C. J. 45, and contended that the appellant did not intend to bind herself personally. The account was opened in the name of the husband ten years previously, although the purchases were made by the wife. It was only at a later date that the goods sold were charged to the wife. It was submitted that the wife acted as the agent of her husband, and did not become personally responsible.

Fortin, for the respondents, submitted that under the rule established by the Court of Appeal in *Hudon & Marceau* there could be no doubt as to the responsibility of the wife under the circumstances of the present case.

The Court held that the decision appealed from was correct, and it was affirmed. The following was the judgment of the Court below, which was affirmed in appeal :—

"La Cour, etc.

"Considérant qu'il est prouvé que les achats dont la valeur est réclamée par la présente action, constituent une dette alimentaire contractée pour les besoins de la famille de la défenderesse ;

"Considérant que la défenderesse a fait elle-même les dits achats ; que crédit lui a été donné à elle-même, et qu'ils ont été entrés à la connaissance de la défenderesse et sans protêt de sa part, en son nom propre dans les livres des demandeurs ;

"Considérant qu'il est prouvé que les fournitures ont été livrées au domicile conjugal, où le compte a été expédié au nom de la défenderesse et reçu et accepté sous cette forme, sans protêt de sa part ;

"Considérant que la plus grande partie des fournitures ont été vendues et livrées à la défenderesse à une époque très rapprochée de la faillite de son mari, et que la dite défenderesse qui habitait avec lui était censée connaître le délabrement de ses affaires ; qu'il appert par le compte produit qu'une très grande partie de ces fournitures était

1887.
Grimn & Merrill.

pour des objets qui ne pouvaient servir à la famille qu'à une époque encore très-éloignée, savoir durant la saison de l'hiver suivant; que la défenderesse n'a point dénoncé aux demandeurs l'insolvabilité de son mari; que la présomption à tirer de tous les faits est que la défenderesse savait qu'elle s'obligeait personnellement envers les demandeurs, sinon qu'elle a voulu surprendre la bonne foi des dits demandeurs et commettre une fraude;

"Considérant qu'il résulte des faits ci-dessus que la défenderesse s'est engagée personnellement et non comme agent de son mari envers les demandeurs; et que nonobstant la clause de son contrat de mariage avec son mari, qui met à la charge de ce dernier l'entretien de la famille, il y a lieu à appliquer à la défenderesse les articles 165 et 1317 du Code Civil, et à la tenir ainsi responsable du montant réclamé en cette cause;

"Considérant que la preuve faite par le mari de la défenderesse, le nommé William Dodd, est illégale, attendu qu'il n'est pas prouvé que le dit William Dodd était l'agent de la défenderesse aux époques où les achats ont été faits; que le dit William Dodd ayant déclaré qu'il était muni d'une procuration écrite, cette procuration devait être produite, ce qui n'a pas été fait; que malgré que les demandeurs n'avaient pas demandé le rejet de la dite preuve, il est au pouvoir de la cour de déclarer qu'elle est illégale;

"Considérant que les demandeurs ont prouvé les allégations de leur déclaration, que la défenderesse n'a pas prouvé celles de sa défense;

"Renvoie la dite défense; déclare illégale, nulle et non avenue, la preuve faite par le témoignage du dit William Dodd, et condamne la défenderesse à payer aux demandeurs la somme de $248.99 courant, avec intérêt du 4 octobre 1884, jour de la signification de l'action, et les dépens distraits, etc."

Judgment confirmed.

Duhamel, Rainville & Marceau, attorneys for appellant.

Alf. E. Merrill, attorney for respondents.

(J.K.)

June 30, 1886.

Coram DORION, CH. J., MONK, RAMSAY, CROSS, BABY, JJ.

ROBERT PINKERTON ET AL.,
(*Defendants in Court below*),
APPELLANTS;

AND

LOUIS COTÉ,
(*Plaintiff in court below*),
RESPONDENT.

Patent [illegible]ingement—Measure of Damages.

HELD:—1. A patent of invention of machinery may be infringed by the use of a machine dissimilar in appearance, if the principle patented be interfered with.

2. The measure of damages for infringement of a patent of invention, by using a patented machine purchased of a manufacturer of the invention, and not the inventor, is not the profit which the purchaser derived from the use of the patent. The true measure is the loss suffered by the patentee.

The appellants were sued for an alleged infringement of respondent's patent for an improvement on machinery for trimming or burnishing the edges of soles and heels of boots and shoes, known as "Coté's Sole Edge Trimmer or Burnisher." The conclusions asked that defendants be restrained from further using his invention otherwise as they may be permitted by the plaintiff; that defendants be ordered to account for all goods manufactured by them upon the principle of said patent, and for the profits and all moneys derived from such manufacture or from the sale of such goods; and finally, that the defendants be condemned to pay plaintiff $2,000 and costs.

The action was maintained by the following judgment rendered by JETTÉ, J., Nov. 3, 1884:—

"La Cour, etc.....

"Attendu que le demandeur porteur d'un brevet d'invention en date du 30 décembre 1872, prolongé à cinq

1886. Pinkerton & Coté.

années à compter du 30 décembre 1882, et ayant comme tel le droit exclusif d'exploiter une invention pour la préparation de semelles et talons pour les chaussures connue sous le nom de "Coté's Sole Edge Trimmer and Burnisher," poursuit les défendeurs pour violation de son droit, leur réclamant $2,000 de dommages qu'il allègue avoir soufferts à raison de l'usage qu'ont fait les dits défendeurs depuis plus de deux ans de son invention au mépris de son privilège; et demande en outre,

1o. Qu'il soit enjoint aux défendeurs de cesser l'emploi de la dite invention, et, 2o. de rendre compte au demandeur des marchandises par eux manufacturées, au moyen d'icelle, et des profits réalisés en conséquence;

"Attendu que les défendeurs ont contesté cette demande, disant:

1o. Que le demandeur n'est pas le premier inventeur de la machine par lui brevetée, que ses améliorations prétendues aux machines à raper et polir les semelles et talons de chaussures étaient connues et que le demandeur n'avait pas droit au brevet qu'il a obtenu.

2o. Que le brevet du demandeur comporte trois réclamations principales, dont les deux premières avaient déjà été brevetées aux Etats-Unis, savoir, en 1869 en faveur d'un nommé Burns, et en juin 1872 en faveur d'un nommé Mallory, et que le demandeur ne pouvait en conséquence obtenir de brevet valable sur ces deux premiers points, et que quant à la troisième réclamation du demandeur consistant dans la langue du brevet, dans: "An adjustable gauge E with the recesses O or the equivalent thereof, in combination with the rasping or burnishing sleeve C, the clamping guide D, arbor A, and clamping screw;" les défendeurs ne s'en sont aucunement servis et par suite n'ont pas enfreint le droit du demandeur, concluant en conséquence les dits défendeurs:—

1o. A ce que le brevet du demandeur soit annulé; 2o. à ce que sa demande soit renvoyée.

"Attendu que le demandeur a admis à l'audience que sa demande se borne à la troisième réclamation de son

brevet, laquelle contient les deux premières en substance, et résume toute son invention ;

1886. Pinkerton & Coté.

" Considérant que par suite de ces écritures des parties contenant leurs prétentions respectives et de cette admission du demandeur, la contestation se réduit à la réclamation par le demandeur d'un privilège pour la combinaison d'un conducteur ou d'une réglette ajustable (adjustable gauge) avec une rape circulaire et au pied s'emboîtant entre la semelle et la partie supérieure de la chaussure, le tout supporté par un arbre de couche ; et à la négation par les défendeurs d'aucune infraction de ce privilège par l'usage de la machine par eux employée ;

" Considérant en conséquence que la preuve tentée par les défendeurs de l'existence d'une machine semblable à celle brevetée par le demandeur antérieurement à l'invention de celui-ci est sans application à la contestation telle que liée entre les parties comme susdit ; que d'ailleurs cette preuve ne porte que sur une partie des moyens employés par le demandeur, mais non sur l'ensemble de la combinaison par lui brevetée, qu'elle ne tendrait à établir que la construction de machines imparfaites restées à l'état de tentatives et n'ayant jamais été considérées comme une application pratique et profitable, que cette preuve est de plus incertaine à cause de sa généralité et qu'elle est en outre formellement contredite par nombre de témoins du pays de l'étranger à partie de connaître à l'époque en question les inventions et les plus récentes employées pour la fabrication des chaussures ; lesquelles établissent formellement que l'invention du demandeur a été la première de ce genre, et qu'aucune invention semblable n'était connue auparavant ;

" Considérant que le privilège réclamé par le demandeur tel que limité par ses admissions à l'audience, se trouve garanti tant par son brevet américain que par son brevet canadien, et qu'il n'est pas contesté par les défendeurs qui se bornent au contraire à en nier la violation ;

" Considérant qu'il a été clairement établi en preuve que la machine employée depuis plus de deux ans par les défendeurs est une contrefaçon évidente de la combinai-

1886.
Pinkerton & Coté.

son brevetée par le demandeur, qu'elle se compose d'éléments identiques ou équivalents combinés de la même manière, sauf de légères améliorations pour le fini du travail, améliorations qui ne sauraient être exploitées au détriment du demandeur, et que le fait que cette contrefaçon a été brevetée depuis aux Etats-Unis (en 1877) par le nommé Russell ne pouvait autoriser les défendeurs à s'en servir en fraude des droits du demandeur ;

"Considérant que la preuve faite établit aussi que l'emploi de l'invention du demandeur fait réaliser au fabricant qui s'en sert une grande économie sur le coût de production de la marchandise fabriquée et est par suite une source de bénéfices considérables ;

"Considérant que le défendeur Turner a admis sous serment que les dits défendeurs se sont servis depuis plus de deux ans d'une machine qui d'après la preuve faite est la contrefaçon de celle du demandeur ;

"Considérant que les défendeurs, mis en demeure par l'action de déclarer la quantité de marchandises par eux fabriquée au moyen de cette machine et le profit par eux réalisé en conséquence, ont failli de se conformer à cette demande, et par suite il y a lieu de les condamner à la somme totale des dommages réclamés à moins qu'ils ne préfèrent rendre tel compte devant cette Cour ;

"Considérant en conséquence que le demandeur a établi sa demande et qu'il y a lieu d'y faire droit dans les conditions par lui posées ;

"Renvoie les exceptions et défenses des demandeurs, et faisant droit aux conclusions de l'action du demandeur ; fait défense expresse et formellement aux dits défendeurs de se servir à l'avenir tant par eux-mêmes que par leurs employés, agents, ou proposés, de la machine par eux employée pendant les deux années écoulées avant la date de la présente poursuite, et qui est une contrefaçon de celle du demandeur, et condamne les dits défendeurs conjointement et solidairement à rendre compte au demandeur devant cette Cour et ce sous un délai de 15 jours à compter du prononcé de ce jugement, de la quantité de marchandise fabriquée par la dite machine pendant les

deux années écoulées, immédiatement avant le 22 août 1888, date de la demande et les profits par eux réalisés sur les dites marchandises à raison de l'emploi de la dite machine dans telle fabrication, et à défaut par les défendeurs de rendre tel compte dans le délai susdit, condamne les défendeurs purement et simplement à payer conjointement et solidairement au demandeur la somme de $2,000 avec intérêt du 14 septembre 1888, date de l'action; et condamne les défendeurs aux dépens de la dite action dans tous les cas."

1886. Pinkerton & Coté.

May 17, 19, 1886.]

Geoffrion, Q. C., and *J. N. Greenshields*, for the appellants.

Lacoste, Q. C., and *J. O. Joseph*, for the respondent.

June 30, 1886.]

RAMSAY, J., (for the Court):—

This is an action for the infringement of a patent of invention, praying that the appellants should be restrained from further using the invention patented, unless under license from the plaintiff, respondent—that they should render an account of all the profits made by them by the use of such patent, and that they should be condemned to account to plaintiff for all profits and monies derived by their use of the manufacture or from the sale of goods so manufactured, and that the defendants be adjudged and condemned jointly and severally to pay said plaintiff the sum of $2,000 damages.

The appellants pleaded that the plaintiff was not the first and true inventor of said supposed invention, all his pretended improvements having been known to others long prior to his patent, and his patent being in consequence null and void; that with respect to the first and second claims of plaintiff's patent, they had been patented in the United States before the date of plaintiff's patent, namely, on the 14th December, 1869 (the "Burns" patent) and on the 11th of June, 1872 (the "Mallory" patent) respectively; and lastly, with respect to the third claim of plaintiff's patent, the defendants specially denied that

1886.
Pinkerton & Coté.

they ever used this part of his pretended invention. A general denial was also pleaded.

The infraction complained of is, therefore, the use of a patented machine, and not the manufacture of the article patented.

The judgment appealed from:

"renvoie les exceptions et défenses des demandeurs, et "faisant droit aux conclusions de l'action du demandeur; "fait défense expresse et formellement aux dits défendeurs "de se servir à l'avenir tant par eux-mêmes que par leurs "employés, agents, ou proposés, de la machine par eux "employée pendant les deux années écoulées avant la date "de la présente poursuite et qui est une contrefaçon de "celle du demandeur, et condamne les dits défendeurs con- "jointement et solidairement *à rendre compte au demandeur* "devant cette Cour, et ce sous un delai de 15 jours à "compter du prononcé de ce jugement, de la quantité de "marchandise fabriquée par la dite machine pendant les "deux années écoulées, immédiatement avant le 22 août "1883, date de la demande et les profits par eux réalisés "sur les dites marchandises à raison de l'emploi de la dite "machine dans telle fabrication, et à défaut par les défen- "deurs de rendre tel compte dans le délai susdit, con- "damne les défendeurs purement et simplement à payer "conjointement et solidairement au demandeur la somme "de $2,000 avec intérêt, etc."

The summary of the patent claimed thus describes it:

"1. The first part of my invention relates to a separate rasping or burnishing sleeve, a clamping guide and an arbor, all being arranged, constructed and combined substantially as hereafter described and as represented in the drawings.

"2. The second part of the invention relates to an adjustable gauge, its operative screw and fork, arranged and combined with the rasping or burnishing sleeve, the guide and the arbor all in manner and to operate essentially as specified.

"3. The third part of my invention relates to the adjustable gauge provided with *recesses* to receive the teeth

of the rasping or burnishing sleeve, in order to prevent such sleeve from revolving on and independently of the arbor, so as to revolve the clamp guide and loosen the screw thereof."

It seems that the action was abandoned for the first and second parts of the specifications, and at the argument appellants contended that the third part alone contained no patent and nothing patentable, and that the machine used by him is no violation of this patent. The position seems to be this, that the paragraph 3 sets forth that the invention only relates to the adjustable gauge, provided with recesses, &c., in order to prevent, &c., and that as the invention of the adjustable gauge is abandoned, all that remains is the invention (if it be one) of the recesses for the object specified.

There is something in this as a literary criticism, but it is a very narrow reading of the specifications, and as respondent says, this is but the summary. When we turn to the full specifications and plan, the whole thing appears to be fully described as in the exhibit produced by respondent. It may simply be described as a revolving shaft, grooved in part of its length to permit of a sleeve, revolving with the shaft, and covering a portion of the shaft to be pushed along so as to narrow the portion which can operate on the sole of the shoe to be dressed, and so constructed that there shall be recesses to cover the inner portions of the rasping knives.

Externally, the machine used by appellants is not very similar to the patented machine. In principle, they are identical. The sleeve slides up on the shaft in the one as in the other, and in both there are recesses in the sleeve, so that the knives are exposed more or less as the sleeve is advanced or withdrawn. It was said that one machine is adjustable and the other self-adjusting. But this is really not as important as it looks at the first glance. What we commonly call automatic machines are really adjusted by some force, and whether that force is procured by a spring or a screw, does not appear to me to create a substantial difference. At most it would only

1886.
Pinkerton & Coté.

give a right to patent the difference, or to add it to the patented article.

One other point was made, that the machine used by appellants burnishes the under edge of the sole at the same time that it rasps or pares the edge smooth.

Respondent answers—(1). I am not on the question of rasping or burnishing, except in so far as regards the recesses. (2). The patented machine burnishes quite as well as the other.

That the machine is a useful one is not doubted.

We are, therefore, reduced to the simple enquiry, as to whether the alleged patent was previously known. There are two American patents of adjustable guides in the United States, one in 1865, and the other in 1869, for the same purposes as the two machines before us; but none of them appear to have the recesses claimed by the patent. In connection with this it is remarkable that respondent ceded his patent right to the Burrel Company, and that it was from their agent appellants procured the machine they used. Of course this is not conclusive but it is a significant fact.

I think, therefore, there has been an infringement of Coté's patent, which, however, seems to be a very narrow one, as reduced in this case.

We now come to the damages. That adopted by the Court below is not founded on principle in a case like this, that is where the infraction complained of is using, not manufacturing the patented article. And so it was held both by this Court and the Supreme Court, in the case of *Collette & Lanier*. Our code says that damages *in general* consist of the loss the creditor has sustained, and of the profit of which he has been deprived. The judgment establishes the rule that the creditor's damages in this case are the profits arising from all the appellant's manufactures which passed over this machine, according to the judgment as printed, and according to the more modest explanation of respondent, to all the gain to be derived between the hand operation and the operation of trimming the edges of the soles of shoes. He says, you have

used my property, and all that you have made by the use of my property is mine. 1866. Pinkerton & Coté.

The doctrine is not true in any sense. In the first place, the machine did not belong to plaintiff—but the patent right to construct machines, including a certain mechanical arrangement. In the second place, if the article had been all the property of plaintiff, it would not have given the owner of the article used, a right to all the gains of the other party by its use. Let us suppose a husbandman has a spade and a plough, without a plough-share, and no means of procuring the necessary article he lacks. Without leave and surreptitiously, he takes the plough share of his neighbour and ploughs his field. Could the neighbour claim all the depredator's gain between digging his field and ploughing? If the proposition won't bear that test, it is good for nothing, and I fancy common sense would answer the question in the negative, unhesitatingly.

The measure of damages suggested by appellants is the value of the machine. He says, you were obliged to sell me the machine at a reasonable price, and therefore you can get no greater damages than the reasonable price of the machine.

There is some authority for this measure but, it appears to me, to be even less tenable than the rule suggested by respondent. It seems almost to imply that having paid this price appellants had a right to continue to use the machine. If that is not its meaning it has none. It must be evident, however, that the mere price of the machine when the pirate is caught is not the only damage he causes to the other party. He is destroying the patentee's trade as a manufacturer of the machine.

What measure then is the Court to adopt? The rule for awarding damages is to some extent arbitrary. In a case like the present we have to consider the question of protection to the patentee. At the same time we cannot overlook the fact that the respondent has quietly contemplated the violation of his patent for years, by his own *cessionnaire* in the United States, that the appellants do not

1888.
Pinkerton & Coté.

appear to be in bad faith and only bought what was commonly sold and used openly in the trade. They are not the chief offenders, and from the manufacturer of these machines or the vendor here, he may recover an indemnity based on the more satisfactory rule which cannot be applied in this suit. I am therefore to reform the judgment and to award $750 damages and costs.

The judgment is as follows:—

"La Cour, etc.....

"Considérant que l'intimé a établi que les appelants se sont servis pendant plus de deux ans d'une machine qui d'après la preuve est la contrefaçon de celle pour laquelle le dit intimé a obtenu un brevet d'invention qui était en force lorsque les appelants ont fait usage de la dite machine;

"Et considérant que l'intimé a souffert des dommages qui doivent être estimés d'après l'importance de l'invention du demandeur, la valeur de la machine et les pertes qu'il a éprouvées par l'usage que les appelants ont fait de la dite machine, et non d'après les profits que les appelants ont pu faire en se servant de la dite machine, en sorte qu'il n'y a pas lieu d'ordonner que les appelants rendent compte de la quantité de marchandises fabriquées au moyen de la dite machine;

"Et considérant que les dommages que l'intimé a soufferts par l'usage que les appelants ont fait de la dite machine à son préjudice ne peuvent être estimés à moins de $750;

"Cette Cour confirmant le jugement rendu le 8 novembre 1884, par la Cour Supérieure siégeant à Montréal, excepté quant à cette partie du dit jugement qui a ordonné aux appelants de rendre compte de la quantité de marchandises qu'ils ont fabriquées avec la dite machine pendant les deux années écoulées immédiatement avant le 22 août 1883, et qu'à défaut de rendre tel compte dans le délai de quinze jours ils soient condamnés à payer à l'intimé la somme de $2,000 avec intérêt du 14 septembre 1883, renvoie les exceptions et défenses des appelants et leur fait défense expresse de se servir à l'avenir tant par

eux-mêmes que par leurs employés, agents, préposés, de la machine dont ils ont fait usage pendant les deux années écoulées avant la date de l'institution de l'action en cette cause, et ce sous toutes peines que de droit, et condamne les appelants à payer à l'intimé la somme de $750 de dommages avec intérêt à compter de la date du dit jugement du 3 novembre 1884, avec en outre les dépens encourus en Cour de première instance, chaque partie payant ses propres frais sur cet appel."

1886. Finlayson & Cote.

Judgment reformed.

Greenshields, McCorkill, Guerin & Greenshields, attorneys for appellants.

Doutre, Joseph & Dandurand, attorneys for respondents.

(J. K.)

September 25, 1886.

Coram DORION, CH. J., RAMSAY, TESSIER, CROSS, BABY, JJ.

THE QUEEN v. BERTHIAUME.

Larceny as a Bailee—32-33 Vict. ch. 21, s. 3—Deposit of sum of money—Evidence.

The prisoner was indicted for larceny, as a bailee, of a sum of money. The complainant produced a receipt, taken at the time of the deposit in the hands of the prisoner, by which it appeared that the deposit was made "en attendant le paiement qu'il pourrait faire d'une même "somme à R. A. Benoit."

HELD:—That this receipt implied that the prisoner was to pay a similar sum, and not actually the same pieces of money, and that there was no larceny.

2. That parol testimony could not be admitted to vary the nature of the transaction.

On Reserved Case, stated by BABY, J., in the following terms:—

At the September Term of the Court of Queen's Bench (Crown side), Frs. X. Napoléon Berthiaume was tried for larceny as a bailee.

The facts of the case as proved by the Crown were the following:—

1886.

Reg. v. Berthiaume

Previous to the year 1868, one Joseph Roy bought from one Adolphe Benoit a property upon which there existed a mortgage created in favor of certain absentees.

Later on, his widow, Rosalie Larocque, the prosecutrix, being desirous of paying part of the purchase money then due, repaired with her then *procureur*, since dead, to the prisoner's house in St. Bruno, and there, meeting Benoit, offered him her money in payment provided the property was at once purged of the mortgage in question. Benoit told her that it was impossible for him to do so for the present, but offered her an hypothecary guarantee that she would not be troubled in regard to it, which she declined to accept. Whereupon she placed the sum of $504.67, the greater part in Bank Bills, in the hands of Berthiaume who was the parties' notary, and entrusted the same to him with the strict condition that he would place on the Monday following (the interview taking place on a Saturday), this money in the Savings Bank in Montreal, without stating in whose name, so that it might bear interest until Benoit had cleared the property, and therefore be in a position to claim his due. Berthiaume gave her then a receipt which she took and which is hereto annexed. A few days after, Berthiaume, notwithstanding the prosecutrix's positive instructions to the contrary, went over to Benoit and gave him $460.00 out of the $504.67 so entrusted to and deposited with him, taking from him his note payable to bearer, Berthiaume thus retaining and appropriating to himself $44.67 out of the $504.67.

Benoit sold also another piece of land to this Berthaume, the deed of which, however, was subsequently passed in his wife's name.

Subsequently, he claimed from Berthiaume what was then due on the price, when Berthiaume tendered the note in question in payment, saying that it was now in his wife's hands and that she could offer it in compensation. Benoit acceded to this and gave a receipt to Berthiaume for the amount, the latter returning him his note, since lost.

Benoit then turned round and asked to be paid by widow Roy, who had, to do so, to procure herself the money a second time. Berthiaume, subsequently, told the prosecutrix's *procureur* repeatedly that he would settle the matter and repay widow Larocque both in capital and interest, which he never did.

The counsel for the prisoner upon these facts contended that he could not be convicted under the third clause of 32-33 Vict., chap. 21, the act respecting larceny, on the ground that in this instance Berthiaume was not bound to return the specific coins which he had received from widow Larocque, and therefore that he was not a bailee under the statute.

I however intimated to him to proceed with his defence, which he did, as there were facts here that should go to the jury.

In my charge, I directed the jury on this point that, if the sum in question had been entrusted to the prisoner for the specific purpose that it should be put into a Savings Bank on the following Monday, and if he, instead of so doing, fraudulently converted the whole or part of the aforesaid sum to his own use, that the prisoner ought to be found guilty (*Vide Reg.* v. *Davies*, 10 Cox, p. 239).

The jury found the prisoner guilty, and I reserved the point, letting him out on bail until the opinion of the Court of Queen's Bench *in banco* was taken upon the propriety of the conviction.

Montreal, 20th September, 1886.

RAMSAY, J.:—

The prisoner was indicted for larceny as a bailee of a certain sum of money. The receipt given by the prisoner to the complainant, at the time, was in these words: "Reçu, St. Bruno, 9 nov. 1874, de Dame Ve. Joseph Roy, "la somme de cinq cent quatre dollars et soixante et sept "centins, courant, par autant mis en dépôt en attendant le "paiement qu'il pouvait faire d'une même somme à Sieur

1866.
Reg.
v.
Berthiaume.

"A. Benoit," signed F. X. N. Berthiaume. But it was proved that the complainant charged the prisoner to pay the sum on the following Monday into a bank, and that he converted the money to his own use. The prisoner was convicted; and the case, having given the receipt as well as the evidence, leaves to this Court to determine as to the propriety of the conviction. It may here be stated that the evidence of the charge to pay into a bank was produced before the receipt was laid before the Court. Under a statement of a case so special and a reference so general it becomes the duty of this Court to decide on the whole case. We have therefore to determine first as to the value of the verbal testimony. It seems to us that the parties having, by the receipt, reduced the matter to writing the written obligation must determine the nature of the transaction. The receipt appears to us to show clearly that the intention was that the prisoner should pay a similar sum to Benoit, when the condition contemplated should occur. "Le dépôt" is made "en attendant le paiement "qu'il pourrait faire d'une même somme à Sr. A. Benoit." The complainant trusted the solvency of the prisoner. This is not larceny, and it was for that he was indicted. The conviction must therefore be quashed.

DORION, CH. J.:—

The point seems a little technical, yet the difference is clearly stated by the authors. If a man gives another a receipt in this form:—"Received a package containing "$200, which I will return to the owner," it is larceny if he appropriates it. But if he is the depositary of a sum of money, then it is not the identical money which he is bound to deliver, but a similar amount. In the one case the depositor intends to exact the identical thing; in the other he relies upon the credit and good faith of the party receiving the money. In this case we do not find that it was the identical thing deposited that the defendant was bound to return.

The following order was made:—

"It is considered and adjudged and finally determined

by the Court now here, pursuant to the statute in that behalf, that the evidence adduced did not justify a verdict of larceny against the said Frs. X. N. Berthiaume, and that the said Frs. X. N. Berthiaume ought not to have been convicted, and his conviction is therefore quashed and set aside." Baby, J., dissenting. 1886. Reg. v. Berthiaume.

Conviction quashed.

St-Pierre, Q. C., for the prosecution.
Geoffrion, Q. C., for the prisoner.

(J. K.)

June 30, 1886.

Coram DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.

WILLIAM H. JEFFERY,
(*Defendant in Court below*),
APPELLANT;

AND

CHARLES WEBB,
(*Plaintiff in Court below*),
RESPONDENT.

Contract — Modification — Evidence — Statement of account by bookkeeper.

The respondent, by notarial agreement, leased to appellant the right to mine for asbestos, on certain property belonging to the respondent. Subsequently, the respondent agreed to reduce the amount of royalty he was to receive; but to what extent, the appellant and respondent did not agree. The appellant kept no regular books, but his son-in-law and agent, at all events for some purposes, kept full accounts, and the appellant was in the habit of referring those who dealt with him to this agent, and he had even paid respondent on the statements of this agent.

HELD:—That the appellant was bound by the statement of account of such agent, the amount so fixed being less than the respondent would be entitled to under the original agreement.

The appeal was from a judgment of the Superior Court,

1886.
Jeffery & Webb.

St. Francis (BROOKS, J), Dec. 20, 1884, in the following terms:—

"The Court, etc.

"Considering that plaintiff hath wholly failed to establish his right to cancel and annul the deed of lease and agreement entered into by and between him and defendant, of date the 19th July, 1879, as to certain lands therein described, the property of the plaintiff; but considering that plaintiff hath established that the defendant is indebted to him in the sum of $3,764.70, as and for the balance due him, said plaintiff, by said defendant, on the 2nd day of August, 1883, royalty upon asbestos mined by said defendant on said land, and for work and labor done by said plaintiff, in conveying said asbestos from said land to the railway, as stated in the account filed by plaintiff in this cause, and also in the book of accounts kept by defendant's manager, R. L. Thorpe, filed in this cause, doth adjudge and condemn the defendant to pay plaintiff said sum of $3,764.74, with interest from the 5th day of May, 1886, and costs of suit, *distrait*, etc."

The opinions fully state the case.

May 25, 1886.]

Brown, *Q. C.*, for the appellant.

J. N. Greenshields for the respondent.

June 30, 1886.]

CROSS, J., (*diss.*):—

Jeffery was lessee, under a written notarial agreement, of date the 19th July, 1879, from Webb, of a property, for the mining of asbestos. By this agreement, Webb was to receive 20 per cent. of the net profits. Jeffery commenced operations under an agreement he made with an American Company, to whom he agreed to sell the whole produce of the mine at $40 per ton. From the heavy expenses attending the opening of the enterprise, and in consequence of litigation with this American Company, no great margin of profit would have remained to the worker of the mine. During this period, which terminated in September, 1881,

1886.
Jeffery & Webb.

by the American agreement being cancelled, the parties to this suit are agreed that the royalty was fixed at $5 per ton, which Webb consented to take as a substitute for the 20 per cent. specified in the written agreement, but respondent claims $10 per ton for the summer months of 1881, viz., $5 per ton for the months of November, December, January, February and March, and $10 per ton for the months of April, May, June, July, August, September and October, while the appellant claims that he never agreed for $10 per ton; the only agreement made was for $5 per ton, which had not been altered.

The respondent in his evidence says, that he believes the contract was never put in force as regards the 20 per cent. royalty; he presumes the receipts would tell when the change was made; he thinks it was the following fall after the agreement. In the place of the one mentioned in the contract, he was to have five dollars a ton. There is, however, a little confusion in the part of his evidence which follows. He states that the mine was working on these terms, say $5 per ton, up to about the time of the lawsuit with the American Company, and that then some new arrangement was made, to the effect that Jeffery was to pay $5 per ton during five months, and $10 per ton during seven months. He, Webb, told Jeffery that he could have it for $5 a ton in winter, as long as he wanted to keep men there, and $10 in the summer.

There is some uncertainty as to the date which respondent gives as to this arrangement. If taken literally as he gives it, and there is no other explanation of it, the result would justify a deduction of one half of the item of $1,477, charged as of 31st December, 1881, 31st August to 31st October, 1881, 82½ tons @ $10 royalty, $1,477. The respondent may have meant that the $5 per ton held good only to the institution or pendency of the suit with the American Company, and not to its termination. But he should be responsible for the obscurity which he has not cleared up, and having once established an earlier agreement, at $5 per ton, he should be bound by that price until he established that it had been raised. It

1886, Jeffery & Webb.

would seem also, to be contradicted by Webb's receipts of 27th July and 5th August, 1881, and by his receipt of 21st September, 1881, for royalty on 80 tons, at $5 per ton, also by the receipt, dated 3rd May, 1884, for royalty at $5 per ton; receipts dated respectively 12th August, 1880, 10th December, 1880, 29th July, 1881, 5th August, 1881, 28th September, 1881, 12th June, 1883, 25th December, 1883, 12th February, 28th February, and 29th March, 1884. There is, however, one receipt, of date the 28th of November, 1883, for royalty on 4 tons, mined in October, 1883, at $10 per ton, and 6 tons mined in November, 1883. This is the only receipt, or writing, passed between the parties in which the royalty is stated at $10 per ton; it is in the handwriting of Thorpe, appellant's son-in-law, and is explained, as well as the memorandum books in his possession, by his evidence to the effect that in making these, he acted on information given him by Webb, who lived close by the mine where Thorpe was in charge, for certain purposes, but not to keep debtor and creditor accounts between the parties, while Jeffery lived at a distance of twelve miles, and had no personal supervision of what was going on at the mines. Thorpe swears that he was not authorised to make any such admissions as those implied by his entries or this receipt. It is the only evidence we have on the subject. I think we are not warranted in disregarding it. I would hold the agreement for royalty at the rate of $5 per ton proved, and no new agreement for $10 per ton proved, save, perhaps, for the quantity covered by the receipt of the 28th November, 1883, as therein specified at $10 per ton, viz., for the four tons, firstly mentioned in said receipt, and that respondent has not shown, as it was incumbent on him to do, to have the benefit of the increase, that posterior to the agreement for $5 per ton, the royalty was increased to $10 per ton.

I would find that the appellant is entitled to have the items he objects to struck out; that [illegible] reduced one half, save as regards these four tons.

RAMSAY, J. (for the majority of the Court).

This suit is brought by respondent to [illegible] a long

1886.

Jeffery & Webb.

lease of mining rights, and for the amount of royalties unpaid by appellant.

On the 19th July, 1879, respondent leased the right to mine, or quarry, on a lot of land of about twenty-five acres in superficies, for asbestos or other minerals, &c., for the space of twenty years, on certain conditions, one of which being that the appellant should pay the respondent 20 per centum of the proceeds, less the shipping and marketing expenses, the whole working and mining expenses being at the charge of the lessee.

Under this lease, the appellant entered into possession of the rights so leased, and discovered asbestos, which he began to extract in considerable quantities. On the 5th December, 1879, appellant made a contract with the Johns Manufacturing Company to supply them with all the asbestos he could get out of the mine in question, at the rate of $40 a ton delivered free at the nearest railway station. Of all this, respondent was perfectly cognizant; in fact, he did all the work of carting the asbestos from the mine to the railway station, and no difficulty seems to have arisen either with regard to the quantity of asbestos got out, or as to the account for "teaming." But it seems the appellant represented to respondent that he found the royalty of 20 per cent. very high at the selling price of $40, appellant having to pay all the mining expenses, and some modification of the bargain was entered into between the parties. The question the Court has to decide is, what was the modification to which the respondent agreed? Appellant contends that respondent agreed to take a royalty of $5 a ton, respondent says he agreed to take $5 a ton in winter, and $10 in summer. Respondent does not know when this modification of the agreement took place—he presumes the receipts would tell—he thinks three years ago last July, or in September (he was speaking in September, 1884)—he adds, it was after the lawsuit with Johns of New York; "it was either after the lawsuit "or judgment was given, I could not say which."

He was then told he did not understand the question, and he was then asked a question which it would be pre-

1886.
Jeffery & Webb.

sumptuous for any one to pretend is clear. After careful consideration, I come to the conclusion that it was intended to ask Webb when and where he and Jeffery made any agreement as to the royalty. To this question he gives this answer:—"I could not say. It was the following fall from when that was made;" which, being interpreted, means, I suppose: "It was the fall after the making of the original contract."

Respondent then by his testimony admits that the contract was never put into force as far as the royalty was concerned, that subsequently to the contract, he agreed to take $5 a ton, and that subsequently to that, he was to have $5 a ton for all asbestos quarried during five months, and $10 for what was quarried during April, May, June, July, August, September and October.

It is evident that in the absence of a writing or the admission of the respondent, that the royalty must be paid according to the contract, and that no parol testimony is admissible to alter it in any way. But we have an admission of respondent, confusedly worded, it is true, but sufficiently plain, that he was to take $5 a ton, there being at that time a contract with the Johns Manufacturing Company, to pay Jeffery $40 a ton. In reality, the price the Johns Manufacturing Company was to pay was $50 a ton (Appellant's ev., p. 6). This would have given a royalty of $9 a ton net, under the contract. Nevertheless, respondent agreed to take $5. That this was for summer as well as winter is plain by the receipts, plaintiff's exhibits, A. B, C, D, E and F.

This change being established, it evidently falls on respondent to prove that another rate was made to take the place of it. For this he relies on two positions. First, he says, I notified appellant that I should insist, for the future, on $5 for the winter out-put, and $10 for the summer, and that is enough. It amounts to this: I let you off for $5 when you made a poor mouth because you were only getting $40, now, in future, I shall exact my right. This notification appears to me to be sufficient to restore the rule of the contract. We shall see shortly that respondent is asking less than the contract.

1884.
Jeffery & Webb.

Jeffery does not deny the notification. He says (p. 7) "Mr. Webb wished to get an increase to ten dollars a ton, which I objected to. We finally parted without coming to any understanding as to what I should pay." From this it is evident that Mr. Jeffery supposed that Webb should never get more than $5, so long as he objected. But this idea is totally unfounded.

Respondent says, again, not only I notified you, but the transactions went on during 1882-3, and till March, 1884, at the terms of $5 in winter and $10 in summer. As evidence of this he produces an account, proved to be correct, by Mr. Jeffery's managing man, his own son-in-law, tallying perfectly with a book this man kept regularly. Appellant meets this by saying: Thorpe was not my book-keeper; he had no authority from me to keep this book, nor to make these entries; I never saw this book nor knew what was in it, and, specially, he says, accounts were not, to his knowledge, regulated between him and Webb, from time to time. However, he admits that Thorpe's business "was to look generally after the mining, "and keep the men's time, and pay the wages." The books of sales were not kept at the mine, but by appellant at Cleveland.

Thorpe tells a like story; nevertheless, he kept a regular book in which all these transactions were entered. He says he entered the summer sales at $10, because Mr. Webb wished it so. But all this was done "for his own private "information, *that is all.*"

Evidence, to be binding on a court, must have some air of probability about it. This appears to me to have none. I cannot believe that Mr. Thorpe kept a book of this kind for his amusement; nor can I believe Jeffery was ignorant of the existence of this book, or of its contents. A [illegible]y of contradictions exist in addition to the improbability of the story. Appellant tells us first that he keeps no books but a cash-book, and that all his transactions were cash. He should have excepted his transactions with respondent. On the 27th June, 1884, "he never," he says, "made them up." He was asked how they

1886. Jeffery & Webb.

stood down. He could not tell." He was asked, who could tell? He answered: "Mr. Thorpe could *get* it." This is exactly how respondent did get it. In other words, appellant would have got the facts from Thorpe, as respondent did, and he would have [illegible] what he did not wish to admit. Further, it appears Mr. Jeffery paid on the returns of Mr. Thorpe. On the 23rd November he sent an accepted cheque on an account for asbestos, part of which was charged at $10. The receipt which appellant was called on to produce, and did produce, admits this.

Again, we have appellant's voluntary ignorance as to the rates of his sales, the books of which, he tells us, he kept himself at Cleveland, which leaves the Court free to draw the inference that had we been informed as to their contents it would have been seen that respondent was not entitled to so much as $10 a ton under the contract.

One difficulty remains, and it is that 82 tons, the put out in September and October, 1881, was charged a royalty of $10. But that calculation is the basis of all the accounts, and, as we think Thorpe was the book-keeper of appellant, and that the latter is bound by these entries, we are to confirm.

Judgment confirmed, Cross, J., *diss.*

Ives, Lawton & French, attorneys for Appellant.
Hall, White & Cate, attorneys for Respondent.

(J.K.)

17 septembre 1887.

Coram DORION, J. C., TESSIER, CROSS, BABY, JJ.

PIERRE ACHILLE ADÉLARD DORION,
(*Demandeur en Cour inférieure*),
APPELANT;

ET

JEAN-BAPTISTE THÉOPHILE DORION,
(*Défendeur en Cour inférieure*),
INTIMÉ.

Action en reddition de compte—Saisie-arrêt avant jugement.

Dans une action en reddition de compte une saisie-arrêt avant jugement fut émise pour saisir et retenir entre les mains du demandeur le montant d'un jugement que le défendeur avait obtenu contre lui. Trois ans avant l'institution de cette action le défendeur avait recélé certains de ses effets pendant 15 jours pour se mettre à l'abri d'un jugement obtenu contre lui par le défendeur, lequel jugement fut subséquemment renversé. A la même époque le défendeur avait aussi transporté des immeubles à son neveu, sous une condition résolutoire accomplie avant l'institution de la présente action.

JUGÉ:—1o. Qu'un créancier peut saisir avant jugement entre ses propres mains;

2o. Que dans une action en reddition de compte il n'y a pas lieu à une saisie-arrêt avant jugement;

3o. Que, pour les fins d'une saisie-arrêt avant jugement, il faut que le défendeur recèle présentement lors de la date de l'affidavit ou qu'il soit sur le point de recéler.

Le jugement suivant, rendu par la Cour Supérieure, district de Montréal, 15 février 1887 (MATHIEU, J.), relate les faits de la cause:—

"La Cour, etc.....

"Considérant que le demandeur allègue dans sa déposition, sur laquelle a émané le bref de saisie-arrêt avant jugement en cette cause, que le défendeur a vendu, caché et soustrait ses biens, dettes et effets dans le but et avec l'intention de frauder le demandeur; que lorsque le demandeur a obtenu jugement, comme intervenant dans une cause où Pierre Moreau, en sa qualité de curateur de

1887.

Dorion & Dorion.

la substitution de Jacques Dorion, était demandeur, contre le dit défendeur, pour une somme de $14,282.72, le dit défendeur a vendu ses propriétés immobilières à son neveu, et qu'il a alors caché ses meubles et effets mobiliers dans le but de les soustraire aux poursuites du demandeur ;

"Attendu que le dit défendeur, par sa requête demandant main-levée de la saisie-arrêt, allègue que les allégations de la dite déposition sont fausses ;

"Attendu qu'il a été prouvé qu'en effet, lorsque le dit jugement fut prononcé contre le dit défendeur en 1883, condamnant le dit défendeur à payer au demandeur la somme de $14,000, le dit défendeur a transporté hors son domicile une certaine quantité de ses effets mobiliers ;

"Considérant que, bien que ce déplacement des effets mobiliers du défendeur paraisse avoir été fait dans le but de soustraire ses effets mobiliers à l'exécution du dit jugement, cependant il ne constitue pas, non plus que la vente de certains immeubles à son neveu pour le qualifier comme caution, le recel prévu par l'article 834 du Code de Procédure Civile pour justifier l'émanation d'une saisie avant jugement émanée en 1886 ;

"Considérant que les dits effets ne sont restés ainsi en dehors du domicile du défendeur que pendant l'espace d'une quinzaine de jours, et qu'ensuite ils ont été de nouveau transportés au domicile du défendeur où ils sont restés depuis ;

"Considérant que le dit jugement a été sur appel renversé, et l'intervention du demandeur dans la dite cause renvoyée ;

"Considérant que ce n'est qu'après trois ans écoulés depuis, que les faits, que le demandeur prétend constituer le recel, ont eu lieu que le dit demandeur a fait émaner la présente saisie-arrêt avant jugement ;

"Considérant que la requête du dit défendeur et requérant est bien fondée ;

"A maintenu et maintient la dite requête, et a déclaré

et déclare la saisie-arrêt émanée en cette cause nulle, et en donne main-levée au dit défendeur.

1887.
Dorion
v.
Dorion.

20 mai 1887.]

Madore, pour l'appelant.
Pagnuelo, C. R., pour l'intimé.

DORION, C. J. :—

Le jugement de la Cour Supérieure est sur la requête du défendeur pour faire renvoyer une saisie-arrêt avant jugement. Dans sa déposition le demandeur déclare ses différents titres de créance et allègue que le défendeur dissipe et recèle ses effets dans le but de frauder. La requête du défendeur nie l'accusation de recel et attaque la suffisance des raisons données dans l'affidavit. La présente action n'est pas pour recouvrer une somme déterminée ; c'est une action en reddition de compte. Or, après la reddition et le débat de compte, il est possible que le demandeur se trouvera débiteur au lieu d'être créancier. Donc une telle action ne donne pas lieu à la saisie-arrêt avant jugement, puisque le statut ne donnait la saisie-arrêt seulement pour un montant fixe et que l'article 834 du Code de Procédure ne pourvoie à ce remède que "dans le cas où il existe une dette excédant cinq "piastres."

Dans une cause de *Moreau* v. *Dorion*, l'appelant produisit une intervention et obtint un jugement contre l'intimé, le 9 novembre 1883, pour $14,282, lequel jugement peu de temps avant l'institution de la présente cause fut renversé par la Cour Suprême. Quelque temps après le jugement du 9 novembre 1883, l'intimé obtint jugement en appel contre l'appelant pour $2,353. Par la saisie-arrêt dans la présente cause, le demandeur cherche à saisir entre ses propres mains ce montant de $2,353 qu'il est condamné à payer au défendeur. Il n'est pas douteux qu'un créancier peut saisir dans sa possession aussi bien qu'en main tierce. La jurisprudence et les auteurs sont d'accord sur ce point.

Le demandeur allègue deux faits spéciaux au soutien de l'allégation générale de recel :—1o. Qu'en 1883, le de-

1887.

Dorion & Dorion.

mandeur ayant obtenu jugement contre le défendeur pour $14,282, le défendeur alors aurait vendu, caché et soustrait ses biens meubles. La preuve démontre que, vers la date du dit jugement, le défendeur transporta certains de ses effets chez des voisins, et même qu'il en cacha dans un bois près de sa résidence. Peut-être a-t-il ainsi agi en 1883 pour se mettre temporairement à l'abri du jugement contre lui. Mais ces effets ne sont restés en dehors de son domicile que pendant une quinzaine de jours, et ensuite ils ont été transportés de nouveau au domicile de l'intimé, où ils sont restés depuis.

2o. Que lors de ce même jugement contre l'intimé, il aurait vendu ses immeubles. Cette vente, faite à son neveu pour le qualifier comme caution sur l'appel du jugement du 9 novembre 1883, a été faite sous la condition que l'acheteur les lui remettrait aussitôt qu'il serait libéré de son cautionnement. Sur appel à la Cour Suprême ce jugement de 1883 fut cassé, et partant la caution libérée et, la condition résolutoire étant par là accomplie, la vente résolue. Ce transport donc ne constitue pas un recel donnant droit à une saisie-arrêt avant jugement dans la présente cause ; c'était un acte fait ouvertement et publiquement. Le défendeur avait la possession de ses meubles et de ses immeubles à la date de la présente action, et puisqu'il n'y a pas eu recel de la part du défendeur depuis 1883, trois ans avant la date de l'affidavit du demandeur, et que ce recel n'a porté aucun préjudice à l'appelant, puisque lors de la saisie-arrêt l'intimé était rentré en possession des biens qu'il avait alors recelés, et que de plus l'article 834 du Code de Procédure exige un recel présent où l'intention de receler immédiatement, il n'y a pas lieu ici à une saisie-arrêt avant jugement, et le jugement de la Cour Inférieure renvoyant la saisie est confirmé.

Jugement confirmé.

Laflamme, Laflamme, Madore & Cross, procureurs de l'appelant.

Pagnuelo, Taillon & Gouin, procureurs de l'intimé.

(H. J. K.)

20 septembre 1887.

Coram DORION, J. C., CROSS, BABY, CHURCH, JJ.

L'HON. J. L. BEAUDRY,
(*Adjudicataire et contestant en Cour Inférieure*),
APPELANT;

ET

EDOUARD COURCELLES CHEVALIER,
(*Intervenant en Cour Inférieure*),
INTIMÉ.

Filiation—Identité—Preuve.

JUGÉ:—Que l'adjudicataire d'un immeuble substitué, autorisé à garder entre ses mains partie du prix de l'adjudication jusqu'à l'ouverture de la substitution sans condition de la rapporter lors de cette ouverture, est lié par la reconnaissance, faite par ses auteurs, de l'état civil du grevé qui demande le rapport des deniers.

L'extrait suivant du jugement dont est appel, rendu à Montréal, le 3 octobre 1885, par la Cour Supérieure (MATHIEU, J.), fait voir suffisamment les faits de la cause:—

"La Cour, etc.....

"Attendu que les faits suivants ont été prouvés en cette cause:

"Le 22 mars 1831, Joseph Courcelles Chevalier fit son testament solennel par lequel il disposa de ses biens de la manière suivante, savoir: 'Quant à mes biens meubles et immeubles, argent monnayé, dettes actives, actions et généralement tout ce qui m'appartiendra au jour de mon décès, je les donne et lègue à tous mes enfants à diviser également entre eux (les enfants nés ou à naître en légitime mariage de Joseph Courcelles Chevalier, mon fils aîné, né de mon mariage avec feue Josephte Rhéaume, représenteront leur père pour une part, excluant le dit Joseph Courcelles de ma succession), j'ordonne que ma succession mobilière soit investie en acquisition d'héritage ou rente d'abord. Et à l'effet de faire la division de mes

1887.

Beaudry & Chevalier.

biens, d'une manière juste et équitable, je nomme mes amis les Sieurs Charles Simon Delorme, Thomas Philips et Augustin Tullock, fils, ou deux d'entre eux, et les lots seront tirés au sort pour déterminer le lot de chacun de mes dits enfants, et des enfants du dit Joseph Courcelles dit Chevalier, mon fils aîné, auxquels chacun des dits lots ainsi assignés fera leur part dans ma succession, la maison, le terrain et dépendances actuellement en la possession de Marguerite Antoinette fera part de son lot à l'évaluation qui en sera faite par les sus-mentionnés.'

'Et pour assurer à mes dits enfants une subsistance alimentaire et l'entretien pendant leur vie, et procurer à leur famille une éducation honnête, je défends expressément que ces biens soient en aucune manière engagés, aliénés, hypothéqués, non plus que la jouissance, intérêt ou usufruit d'iceux qu'ils retireront pour leur pension, subsistance et éducation de leur famille, sous peine de nullité de tous actes qu'ils feront contraires à mon intention, pour que ces biens retournent à leurs enfants nés en légitime mariage, à diviser entre eux, ou en cas qu'ils décèdent ou aucun d'eux sans enfants, leur part sera répartie entre mes autres héritiers ou légataires, excepté la part de Marguerite Antoinette, ma fille, qu'elle aura en propriété, du jour de mon décès, à perpétuité."

Ce testament fut insinué et enregistré dans les régistres de la Cour du Banc de la Reine pour le district de Montréal, le 19 juillet 1832, et il fut enrégistré dans la division d'enregistrement de Montréal, le 18 juillet 1874, avec un avis déclarant que le lot officiel No. 169 du quartier St-Jacques, et le lot officiel No. 269 du quartier St-Louis, dans la cité de Montréal, étaient affectés par les dispositions du testament. Le dit Joseph Courcelles Chevalier avait épousé en prémières noces Marie Josephte Rhéaume qui était décédée le 14 janvier 1807, laissant un fils unique, Joseph Courcelles dit Chevalier. Il est constaté dans un partage de la succession de Joseph Courcelles dit Chevalier, le 27 mars 1835, qu'il paraît par un certain acte d'échange entre Joseph Courcelles, père, et Joseph Courcelles, fils, du 11 mars 1812, que dès avant ce temps, le

1887.

Beaudry & Chevalier.

dit Joseph Courcelles, fils, s'était établi dans le Haut-Canada, au lieu nommé *Katarakoui* ou Kingston, qu'il serait revenu dans cette province pour régler ses affaires, en l'année 1812, et serait retourné dans le Haut-Canada, où il a résidé le temps nécessaire pour y avoir acquis domicile; qu'il y aurait pris pour femme *Catherine Keatly Skemm*, avec laquelle il aurait vécu comme mari et femme, et dont il reste deux enfants vivants, mais que l'on ne connaissait pas s'il y avait eu mariage légalement contracté entre eux, et même qu'on ne trouvait pas d'extraits de baptême de l'aîné des dits enfants, mais que par un acte de donation, consenti par Joseph Courcelles dit Chevalier, père, aux enfants de Joseph Courcelles dit Chevalier, fils, le 13 août 1821, il était expressément stipulé que la dite donation était faite aux enfants nés et à naître du mariage de Joseph Courcelles dit Chevalier, son fils, avec *Keatly Skemm*, son épouse actuelle, à ce présent et acceptant pour eux, le dit Joseph Courcelles Chevalier, fils, leur père, et que c'était une reconnaissance authentique du mariage du dit Joseph Chevalier, fils, et de la dite *Keatly Skemm*; qu'il s'éleva un doute de savoir si les deux enfants du dit Joseph Courcelles avaient droit de partager dans la succession de leur aïeul paternel, faute de pouvoir prouver qu'il y avait eu un mariage légitime contracté entre leur père et mère; mais qu'il fut convenu, après toutes les raisons mentionnées au partage, que les enfants de Joseph Courcelles, fils, avec *Keatly Skemm* devaient venir au partage de la succession de leur aïeul paternel, à raison d'un cinquième à raison de la part d'enfant allouée à sa veuve Marguerite Gauthier; Joseph Courcelles dit Chevalier, père, a convolé en secondes noces avec Marguerite Gauthier, et il eut trois enfants de ce mariage, savoir: Marguerite Antoinette Courcelles, épouse du Docteur Vallée, Edouard Courcelles Chevalier et Joseph Courcelles Chevalier. Amable Prévost fut nommé curateur à la substitution créée par le testament du dit Joseph Courcelles Chevalier, le 7 septembre 1832.

Par un acte de partage passé à Montréal, le 27 mars

1887.
Beaudry & Chevalier.

1835, le lot No. 269 du quartier St-Louis, en la cité de Montréal fut accordé à Edouard Courcelles Chevalier, un des enfants du dit Joseph Courcelles Chevalier qui était grevé de substitution par le testament. Le 17 février 1873, le lot No. 269 du quartier St-Louis, en la cité de Montréal, fut vendu par le shérif du district de Montréal, en vertu d'un jugement en date du premier avril 1873, dans une cause où la Compagnie de Dépôt et de Prêt du Canada était demanderesse contre Edouard Courcelles Chevalier, du village de Ste-Cécile de Milton, dans le district de Bedford, comté de Shefford, défendeur; la dite créance était basée sur un acte de commutation. Cet immeuble fut adjugé à l'honorable Jean Louis Beaudry pour le prix de $3,100, le 7 avril 1876. Arthur Prévost, en sa qualité de nouveau curateur à la substitution créée par le testament du dit Joseph Courcelles Chevalier, nommé sur avis d'un conseil de famille homologué, et le dit Edouard Courcelles Chevalier, en sa qualité d'usufruitier et grevé de substitution en vertu du dit testament, firent une opposition afin de conserver, par laquelle ils demandaient que par le jugement de distribution à être homologué, il fut déclaré que le dit honorable Jean Louis Beaudry garderait entre ses mains le résidu du dit prix d'adjudication, après le paiement des créanciers mentionnés au certificat du régistrateur, à la condition de payer au dit Edouard Charles Chevalier, la vie durant de ce dernier, l'intérêt au taux de six par cent par an, à compter du 19 février 1876. Le dix mai 1876, le jugement de distribution fut homologué, dans la dite cause, accordant à la demanderesse et à d'autres créanciers le montant de leur créance, et permettant au dit honorable Jean Louis Beaudry, et l'autorisant à garder entre ses mains la balance du prix d'adjudication, savoir, $2,016.24, en donnant bonne et suffisante caution, sous quinze jours du jugement, qu'il en paierait l'intérêt au taux de six pour cent par an, tous les mois, à compter du sept février 1876, au dit Edouard Courcelles Chevalier, la vie durant de ce dernier et qu'au décès de ce dernier et à l'ouverture de la dite substitution avenant par le dit décès, ou autrement,

il rapporterait la dite somme, pour icelle alors être payée à qui de droit.

1887.

Beaudry & Chevalier.

Le premier janvier 1876, le dit Honorable Jean Louis Beaudry fournit le cautionnement exigé par le dit jugement de distribution.

Le dix mars 1884, Edouard Courcelles Chevalier est décédé à Ste. Cécile de Milton.

Attendu que le vingt avril dernier (1885), Edouard Courcelles dit Chevalier, ci-devant résidant à Prescott, Haut-Canada, et maintenant à Boston, Etat de-Massachusetts, présenta une requête en intervention qui fut reçue ce jour là, alléguant qu'il est le seul survivant des héritiers légataires universels institués par son aïeul feu Joseph Courcelles dit Chevalier, et qu'à ce titre il a droit de faire rapporter devant cette Cour, pour distribution, la dite somme de $2,016.24, que le dit adjudicataire a été autorisé à garder entre ses mains par le dit jugement de distribution, avec intérêt à compter du dix mars 1884, date du décès de son oncle Edouard Courcelles dit Chevalier, et concluant à ce qu'il fut ordonné au dit Honorable Jean Louis Beaudry de payer et rapporter devant cette Cour, la dite somme de $2,016.24 avec intérêt comme susdit, pour icelle somme être payée à qui de droit ainsi qu'il sera ordonné par cette Cour ;

Attendu qu'avec son intervention, l'intervenant produisit son extrait de baptême, constatant qu'il est né le 21 février 1826 de Joseph Courcelles Chevalier et de Catherine McMullin, et aussi un acte de tutelle en date du 28 août 1832 par lequel Guillaume Vallée est nommé tuteur aux deux enfants mineurs issus du légitime mariage de Joseph Chevalier et Catherine Akman, savoir : Joseph Chevalier alors âgé de quatorze ans et Edouard alors âgé de six ans.

Attendu que le 23 avril dernier (1885), l'intervenant fit motion demandant l'émanation d'une règle ordonnant au dit adjudicataire de rapporter devant cette Cour la dite somme de $2,016.24 avec intérêt comme susdit, pour être payée et distribuée à qui de droit ;

Attendu que le même jour, jugement intervint accor-

1887.

Beaudry & Chevalier.

dant la dite motion et ordonnant au dit adjudicataire de rapporter la dite somme, tel que demandé, à moins que cause au contraire ne fut montrée, le premier de mai dernier (1885) ;

Attendu que le 27 avril dernier, l'adjudicataire, l'Honorable Jean Louis Beaudry, comparut, et que le dit premier mai dernier il fit une motion demandant qu'il ne fût tenu de répondre à la demande en intervention que lorsque l'intervenant aurait produit les pièces au soutien de sa demande et notamment les actes de décès des grevés de la substitution, l'acte de mariage de ses père et mère et son acte de naissance et tous autres actes et documents qu'il entendait produire à l'appui de ses prétentions ;

Attendu que le dit premier mai dernier l'intervenant produisit le certificat de sépulture d'Edouard Chevalier, décédé le 10 mars 1884 comme susdit ;

Attendu que le 31 août dernier, le dit adjudicataire produisit une contestation de l'intervention du dit intervenant, dans laquelle il allègue que l'intervenant n'est pas intéressé dans la distribution du dit prix d'adjudication vu qu'il n'est pas, ainsi qu'il l'allègue, un des héritiers et légataires universels légaux du dit feu Joseph Courcelles Chevalier ; que les seuls héritiers et légataires universels aujourd'hui existants du dit feu Joseph Courcelles Chevalier, père, sont les enfants de feu J. G. A. Vallée ; que le contestant est bien fondé à croire que l'intervenant n'est pas un enfant né en légitime mariage du dit feu Joseph Courcelles Chevalier, père, avec Josephte Rhéaume ; que l'acte de mariage des père et mère du dit intervenant n'est pas produit ; que rien ne fait voir que l'acte de baptême produit en cette cause soit bien celui de l'intervenant ; qu'ainsi qu'il appert à une quittance passée devant Mtre. Brousseau, notaire, le neuf avril 1884, le contestant a payé le dit prix d'adjudication aux héritiers Vallée qui se sont déclarés être les seuls héritiers vivants du dit Joseph Courcelles Chevalier, père, leur bisaïeul, et conclut au renvoi de la dite intervention ;

"Considérant qu'il paraît évident qu'il y a erreur dans la mention du nom de famille de la mère du dit interve-

1887.
Beaudry & Chevalier.

nant, au dit extrait de baptême, et que cette erreur est suffisamment prouvée et établie par le dit testament, le dit acte de tutelle et les autres documents produits en cette cause ;

"Considérant que cette erreur paraît toute naturelle vu la similitude dans la consonnance du nom porté au dit extrait, et le véritable nom de la mère de l'intervenant ;

"Considérant que sa qualité d'enfant légitime résulte du dit certificat de baptême ainsi que des termes du testament du dit feu Joseph Courcelles Chevalier, père, de la reconnaissance portée au dit acte de partage du 27 mai 1835, ainsi que dans l'acte de tutelle ci-dessus mentionné et dans un acte de reddition de compte fait par l'honorable Louis Hypolite Lafontaine, exécuteur testamentaire de feu Guillaume Jacques Vallée, en date du 28 avril 1845, aussi produit en cette cause, et que le dit adjudicataire et contestant ne peut exiger de l'intervenant une preuve de sa légitimité que le dit testateur n'a pas exigée lorsqu'il a déclaré les enfants alors nés de Joseph Courcelles Chevalier, son fils, ses légataires pour partie de ses biens ;

"Considérant que les documents ci-dessus mentionnés et produits en cette cause sont suffisants pour établir que le requérant a toujours eu la possession d'état d'un enfant légitime du dit Joseph Courcelles Chevalier, fils du testateur ci-dessus mentionné, et que cette possession d'état et qualité ne peut lui être contestée par l'adjudicataire ;

"Considérant qu'en vertu des dispositions de l'article 162 du Code Civil, lorsque l'acte de célébration du mariage des père et mère n'est pas produit, et qu'il existe des enfants issus d'eux, et qu'ils ont vécu publiquement comme mari et femme et qu'ils sont tous deux décédés, la légitimité des enfants ne peut être contestée, sous le seul prétexte du défaut de représentation de l'acte de célébration, toutes les fois que cette légitimité est appuyée sur une possession d'état qui n'est pas contredite par l'acte de naissance ;

"Considérant que l'intervention et la demande du dit intervenant sont bien fondées :—a déclaré et déclare la dite intervention admise, et a déclaré et déclare la règle émanée

1887.
Beaudry & Chevalier.

par le jugement du 28 avril dernier bien fondée, et a ordonné et ordonne au dit adjudicataire, l'honorable Jean Louis Beaudry, de rapporter devant cette Cour, sous un mois de cette date, la susdite somme de $2,016.24, avec intérêt sur icelle à compter du dix mars 1884, pour les dits deniers être ci-après payés et distribués à qui de droit, et a condamné et condamne le dit adjudicataire, l'honorable Jean Louis Beaudry, aux dépens."

22 mars 1887.]

H. Archambault et *C. A. Geoffrion, C. R.*, pour l'appelant.

Laviolette et *R. Laflamme, C. R.*, pour l'intimé.

DORION, J. C. :—

Par son testament, passé en 1831, Joseph Courcelles Chevalier créa deux substitutions en faveur des enfants de ses deux fils, Edouard Courcelles Chevalier et Joseph Courcelles Chevalier. En 1876, l'appelant devint adjudicataire d'un immeuble vendu par le shérif sur Edouard Courcelles Chevalier, oncle de l'intimé, et l'appelant garda entre ses mains $2,016, balance du prix d'adjudication, à la condition de payer l'intérêt au dit E. C. Chevalier, et au décès de ce dernier et à l'ouverture de la substitution, de rapporter en cour la dite somme pour être distribuée à qui de droit. Edouard Courcelles Chevalier, le grevé, est mort en 1884. Alors l'intimé fit une requête en intervention demandant à ce qu'il soit ordonné à Beaudry, l'adjudicataire, de rapporter en cour la dite somme de $2,016, vu que la substitution était ouverte par la mort du grevé. Beaudry contesta cette intervention, alléguant que l'intimé n'avait aucun intérêt, qu'il n'était pas un des appelés à la substitution. Les conclusions de la requête furent accordées, et c'est de ce jugement qu'on appelle.

La seule difficulté est quant à la filiation de l'intimé. Dans son extrait de baptême on le décrit comme étant le fils de Joseph Courcelles, fils, et de *Catherine McMullen*—dans un acte de partage, comme le fils de Joseph Courcelles, fils, et de *Catherine Shamm*, et dans un acte de tutelle, comme issu du mariage de Joseph Courcelles, fils, et *Catherine Akam*. Puis certains actes produits font men-

tion de son domicile en Haut-Canada, et dans sa requête il se dit domicilié aux Etats-Unis. La seule question est l'identité de l'intimé. Le jugement de la Cour Supérieure s'occupe au long de cette question et, en accordant les conclusions, se base spécialement sur le fait que dans plusieurs actes au dossier ses parents ont reconnu qu'il était le fils de Joseph Courcelles Chevalier mentionné dans le testament du père de ce dernier. Le testateur eut plusieurs enfants, et à leurs décès sans enfants, il a fallu faire des partages, et dans chaque partage la qualité de l'intimé est reconnue. Il est le dernier des petits enfants et dans le dernier degré, et nous pensons que la Cour Supérieure a dit avec raison qu'il résulte de la reconnaissance de cet Edouard Courcelles Chevalier par ses parents dans plusieurs actes qu'il est le petit-fils du testateur, et que son état civil doit être reconnu par Beaudry dont les *auteurs* l'ont reconnu comme tel. Nous confirmons le jugement.

Jugement confirmé.

Archambault & Archambault, procureurs de l'appelant.
Laviolette & Berthelot, procureurs de l'intimé.
(H. J. K.)

November 23, 1885.

Coram DORION, Ch. J., MONK, RAMSAY, CROSS, JJ.

ROMEO H. STEPHENS
(*Defendant in Court below*),
APPELLANT;

AND

ROBERT GILLESPIE ES-QUAL.
(*Plaintiff in Court below*),
RESPONDENT.

Account—Settlement between Principal and Agent—Action en réformation de compte.

HELD:—That where a principal, during a long [illegible] of years, has accepted without any objection the accounts [illegible]ed by his agent of his administration, he is not entitled to sue [illegible]plete account of

1885.

Stephens & Gillespie

the entire period of administration. Where errors in the accounts rendered are discovered subsequently, the proper proceeding is an action *en réformation de compte*, asking that such errors be corrected, and that the balance due be paid.

The appeal was from an interlocutory judgment of the Superior Court, Montreal (PAPINEAU, J.), Feb. 28, 1885, condemning the appellant to render an account within one month, or in default to pay $10,000. The judgment of the Court below was as follow :—

" La cour, etc...

" Considérant qu'il est prouvé que le demandeur ès-qualité poursuit le défendeur, son mandataire, en vertu de la procuration mentionnée dans sa déclaration, en reddition de compte de la gestion et administration que le défendeur a acceptée des affaires y mentionnées ;

" Considérant que le défendeur plaide qu'il a, de temps à autres, rendu ses comptes au demandeur qui les aurait reçus et s'en serait déclaré satisfait par sa lettre du 5 de [illegible] 1879, produite en cette cause avec les défenses du défendeur ;

" Considérant cependant que le demandeur allègue spécialement que les comptes qu'il reconnaît avoir reçus ne sont pas complets et de toute la gestion du défendeur, et qu'il indique plusieurs sommes que le défendeur a reçues dans les limites de son mandat, et dont il n'a pas rendu compte, au montant collectif de $2,814.67 ;

" Considérant que le défendeur comme mandataire est tenu de rendre compte au demandeur ès-qualité en justice et sous serment à moins qu'il ne prouve avoir rendu compte, avant l'action, à l'amiable, et que ce compte ait été accepté, ce qu'il n'a pas prouvé ;

" Considérant qu'il résulte de la preuve faite par les admissions du défendeur et par les témoins, qu'il a, en effet, reçu une partie des sommes spécialement indiquées comme susdit dans la déclaration du demandeur, et qu'il n'en a pas rendu compte ;

" La cour condamne le défendeur à rendre compte au demandeur de sa gestion et administration depuis le 26 de janvier 1864 jusqu'au premier de juillet 1881, sous ser-

ment, avec pièces justificatives à l'appui, et à remettre au demandeur tous contrats, actes, comptes, livres de comptes, correspondances et autres [illegible] tenant la dite gestion et administration [illegible] en sa possession, etc."

1885. Stephens & Gillespie.

Sept. 15, 1885.]

Carter for the appellant :—

The only remedy which the respondent has against the appellant, assuming that there are errors or omissions in the appellant's accounts, was an action *en réformation ou rectification de comptes*. The obligation of the appellant was satisfied by his rendering from time to time accounts of his administration, and this put an end to the right which the respondent would otherwise have had, of calling upon the appellant to render such accounts. If any errors exist in the accounts so rendered by the appellant, the respondent by action could obtain a correction of the same and a condemnation for the amount of such errors; but it would be upon such errors only that he could base his action. *School Commissioners of Chambly* v. *Hickey*, 1 L. C. J. 189; *Commis. d'Ecole* v. *Bastien*, 4 L. C. J. 123.

Church, *Q.C.*, and *Nicolls* for the respondent.

Nov. 23, 1885.]

DORION, Ch. J. :—

This is an action to account. The appellant in 1864 was appointed agent of the respondent. He had pretty extensive powers, and his agency continued down to 1881. During these years he rendered fifty-five accounts from time to time. These accounts were approved. The action sets out these facts, and alleges that the appellant rendered accounts which were supposed to be correct, but were not; that certain sums of money were not accounted for. The declaration then proceeds to allege that the respondent is entitled to an account under oath, that the accounts rendered should be set aside, and that the appellant should be ordered to render an account. The appellant pleaded that he had rendered accounts from time to time; that he had now ceased to be engaged in

IMAGE EVALUATION TEST TARGET (MT-3)

1885.
Stephens & Gillespie.

business; that he had destroyed his books, and had no other account to render. The parties went to evidence, and a *prima facie* case was made out that errors existed in the appellant's accounts.

The question is, however, whether the respondent can oblige the appellant to render a new account. A number of authorities have been cited, and among others a case at Quebec (1) in which this court held that where an account had been rendered, the only remedy was an action to have the errors rectified. Here fifty-five accounts were rendered from time to time, and approved of. The errors specified are restricted to five items. Why should the party be obliged to render a new account, instead of confining the discussion to the items in dispute? The court are of opinion that the action should have been *en réformation de comptes*, and the judgment will therefore be reversed.

RAMSAY, J.:—

A man cannot be obliged to account twice any more than he can be called upon to pay twice. If the *oyant compte* received the account he must *débattre*. If the thing offered be not an account at all, then he can insist on an account *en justice*. We held, in Quebec, that where an account was rendered in notarial form, with its vouchers, by a tutor, and the new tutor took cognizance of it, and proceeded to deal with it as an account *à l'amiable*, he could not go back on his proceedings and demand an account *en justice*.

The judgment of the Court is as follows:—

"Considering that the respondent, who has received and accepted the accounts to the number of 55, which the appellant has rendered of his administration of the property of the respondent from the time he was appointed his agent and attorney in 1864 till the 1st of July, 1881, when he ceased to be such agent and attorney, and that without any objection as to the form in which the said accounts were rendered, has no right to ask as he has

(1) *Methot & Dufort*, 3 Dec. d'A. 262. See also *Butler & Pierce*, 3 Legal News, 28.

done by his declaration, that the said accounts be declared null and set aside, and that the appellant be ordered *en justice* to render another and complete account of the whole of his administration;

"And considering that the respondent, upon his allegation that he has discovered errors and omissions in the said accounts, is only entitled to demand that such errors and omissions which he may establish by sufficient evidence, be corrected, and that the appellant be condemned to pay such sums of money as may be found due by him to the respondent, after the correction and reformation of such accounts;

"And considering that there is error in the interlocutory judgment rendered by the Superior Court on the 28th of February last (1885);

"This Court doth reverse the said judgment of the 28th February, 1885, and doth dismiss the action of the respondent with costs as well in the Court below as on the present appeal; the Court reserving, however, to the respondent his recourse against appellant for all sums not accounted for by the said appellant, and for all balances which may be due by the appellant after the reformation of said accounts."

Judgment reversed. (1)

Kerr, Carter & Goldstein, attorneys for Appellant.

Church, Chapleau, Hall & Nicolls, attorneys for Respondent.

(J. K.)

(1) On appeal to the Supreme Court, the appeal was dismissed.

March 26, 1887.

Coram DORION, Ch. J., TESSIER, CROSS, BABY, JJ.

LA COMPAGNIE DE NAVIGATION DE LONGUEUIL,
(*Plaintiff in Court below*),
APPELLANT;

AND

LA CITÉ DE MONTRÉAL,
(*Defendant in Court below*),

AND

L. O. TAILLON, PROC.-GEN.,
(*Intervenant in Court below*),
RESPONDENTS.

Constitutional Law—37 Vict. (Q.), ch. 51—39 Vict. (Q.), ch. 52—Taxation of Ferry Boats—Jurisdiction of Harbour Commissioners.

HELD (affirming the judgment of Loranger, J., M. L. R., 2 S. C. 18):—
1. The Acts 37 Vict. (Q.), ch. 51 [redacted] Vict. (Q.), ch. 52, in so far as they authorized the levying [redacted]x upon ferry-boats, including steamboats, carrying passengers between Montreal and places distant not more than nine miles, are not *ultra vires* of the local legislature, ferries within a province being a subject of exclusive provincial legislation, and being also a matter pertaining to municipal institutions and of a local nature in the province, and, moreover, the power to tax ferry-boats being possessed by the city of Montreal before Confederation.
2. The jurisdiction of the Harbour Commissioners of Montreal within certain limits does not exclude the right of the city to tax and control ferry-boats within such limits.
3. An Act consolidated in similar terms by a subsequent Act is not repealed by such consolidation, but is continued in force thereby.

The appeal was from a judgment of the Superior Court, Montreal (LORANGER, J.), Nov. 20, 1885, dismissing an action instituted by the appellant, in order to have a by-law of the city of Montreal, imposing a tax of $200 on ferry-boats, set aside, and the provincial Act under the authority of which the by-law was passed, declared uncon-

statitutional and *ultra vires*. The judgment of the Superior Court is reported in M. L. R., 2 S. C. 18.

Jan. 21, 1887.]

Dalbec, and *Lafontaine*, for the appellant :—

L'appelante invoque surtout deux motifs à l'appui de ses prétentions :—

1. Que le Gouvernement Provincial ne peut pas déléguer à la Cité de Montréal, le droit d'imposer des taxes en dehors de ses limites ; que le Havre de Montréal est en dehors des limites de l'intimée et que les bateaux de l'appelante ne venant qu'aux quais de Montréal, situés dans les limites de la juridiction exclusive des Commissaires du Havre, n'entrent jamais dans les limites de la Cité de Montréal et sont conséquemment en dehors de sa juridiction.

2. Que la taxe imposée en vertu du règlement attaqué et du Statut qui l'autorise n'est pas uniforme et également distribuée sur tous les propriétaires de bateaux qui transportent à Montréal des passagers ou des denrées.

R. Roy, Q.C., for the City of Montreal :—

Il est évident que le but unique du règlement No. 94 n'est pas d'établir un impôt indirecte, mais au contraire de créer un revenu municipal pour des fins purement locales. C'est une taxe directe, qui tombe sous la juridiction et le contrôle de la Législature locale et qui n'affecte en aucune manière les intérêts généraux *du commerce et de la navigation*.

En imposant une taxe sur les bateaux traversiers, la Cité n'affecte en rien les pouvoirs conférés aux Commissaires du Hâvre, et si les limites de la ville s'étendent jusqu'au fleuve St. Laurent, elles doivent comprendre tout le territoire qui longe le côté nord-ouest du cours d'eau et par conséquent les quais de la compagnie demanderesse, et les travaux de nivellement et de remblai, qui ont été faits pour faciliter l'abordage des vaisseaux.

Le préambule du dit règlement ne réfère qu'au statut 37 Vict., chap. 51, s. 78, qui a été rappelée et ne fait aucune mention de l'acte 39 Vict., chap. 52, s. 1, qui a été

1887.

Cie. de Nav. & Cité de Montréal.

substituée à ce dernier, et on prétend que c'est fatal à la validité des dispositions qu'il contient.

Le statut 37 Vict. chap. 51, ne comprend que la refonte de la charte de la Cité, et les divers actes passés subséquemment pour l'amender sont censés en faire partie ; lorsqu'une section est amendée, on lui en substitue une autre sous le même numéro ou la même dénomination ;

C'est ainsi que l'on trouve à la première section de l'acte 39 Vict. chap. 52, le numéro 78 reproduit, indiquant que la clause substituée porte la même dénomination que la clause abrogée.

J. L. Archambault, Q.C., for the Attorney-General :—

L'appelante a tenté de justifier son action en l'appuyant sur deux motifs principaux :—

1. Le commerce et la navigation sont du ressort du Gouvernement de la Puissance du Canada, et dans l'espèce c'est la Législature de la Province de Québec, qui a prétendu donner à la ville de Montréal l'autorité de passer un règlement imposant une taxe sur les bateaux traversiers de la demanderesse.

2. La taxe en question est une taxe indirecte qui n'est pas du ressort de la Législature locale, qu'elle n'est pas uniforme ou répartie également sur les affaires du commerce. Quelques mots suffiront pour répondre à ces moyens.

Il est évident que le but de ce réglement a été de prélever un revenu pour un objet purement locale. C'est une simple taxe d'affaires, une question de réglementation intérieure pour un besoin qui échappe au contrôle et à la compétence de l'autorité fédérale.

C'est donc une taxe directe et la législature locale avait le pouvoir de la créer et de déléguer au corps municipal son droit de l'imposer pour des fins de revenu.

D'un autre côté le réglement attaqué n'affecte nullement les intérêts généraux du commerce et de la navigation. Il s'agit dans l'espèce d'une entreprise purement locale, d'une association ou corps qui fait affaire à un endroit particulier dans la province. Les bateaux traversiers de l'appelante font un commerce et un trafic tout à

fait restreints. Une distance de deux ou trois milles à peine sépare les deux rives du fleuve St. Laurent entre Longueuil et Montréal, les deux points d'arrivée et de départ des bateaux. Peut-on dire qu'il y ait là un intérêt suffisant pour justifier l'application des lois relatives au commerce et à la navigation générale ? C'est impossible. Il suffit de citer la clause 92 aux sections 2 et 10 de l'acte de l'Amérique Britannique du Nord, 30 et 31 Victoria chap. 3, pour se convaincre de cette assertion.

Les besoins de l'impôt municipal, la création de moyens de transport utiles et avantageux au public, établissent ici une compensation indirecte pour les profits et les bénéfices que l'appelante retire de l'exercice de ses privilèges. Mais tout cela est limité et circonscrit à d'étroites bornes.

Il n'y a donc lieu de soumettre les opérations de l'appelante qu'à l'action du pouvoir législatif de la province. Partant, l'imposition d'une taxe directe par la ville de Montréal sur ses bateaux traversiers n'a rien de contraire dans les circonstances à ce droit souverain de la province de promulguer des lois favorables à la répartition juste et équitable de l'impôt public.

Le réglement attaqué indique clairement que l'intention du législateur a été d'atteindre un but spécial relevant de sa juridiction immédiate.

CROSS, J. (*diss*) :—

The appellants brought the present action to set aside a by-law of the corporation of the city of Montreal, designated as No. 4, or No. 94, of their by-laws, and made for the purpose of imposing an annual tax of $200 upon all proprietors of steam ferry-boats plying for hire for the conveyance of travellers to the city of Montreal.

The declaration of the appellants comprises the following allegations: That by sec. 78 of the Statute of Quebec, 37 Vict. chap. 51, which constituted the city charter, it was enacted that the council of the city of Montreal could make by-laws for, among other purposes, to impose and levy an annual tax on ferrymen plying for hire, for the conveyance of travellers by water to the said city, from any place not more than nine miles distant from the same;

1887.

Cie. de Nav. & Cité de Montreal.

that this provision was abolished and replaced by subsecs. 2 and 3 of sec. 1 of the Statutes of Quebec, 39 Vic., chap. 52, conferring somewhat similar powers. The council of the city of Montreal, claiming to act under said 37 Vic., passed a by-law on the 21st April, 1876, by sec. 2 whereof they imposed an annual tax on steamboat companies, or their agents, doing business in the city of Montreal. That by sec. 23 of the said by-law they imposed another annual tax to the amount of $200 on the proprietor or proprietors of all steam ferry-boats plying for hire, for the conveyance of travellers by water to the said city, from any place not more than nine miles distant from the said city. It is mainly the second of these taxes that is contested, but the first is also objected to.

That said sub-sec. 13 of sec. 78 of said 37 Vic., chap. 51, and sub-sec. 3 of sec. 1 of said 39 Vic., chap. 52, both Statutes of Quebec, are unconstitutional, *ultra vires*, illegal, unjust and null; and said sec. 23 of said by-law No. 94 of the said city of Montreal, as well as all dispositions authorizing the same, is and are *ultra vires*, unjust, illegal, null and void. That the tax was illegal, unequal and unjust, and obliged appellants to pay a tax that other proprietors of steamboats were not obliged to pay. That it was an indirect tax and unconstitutional, more especially as it interfered with trade and navigation, which were exclusively under the control of the Federal authorities; also, unconstitutional and *ultra vires* as purporting to authorize the city to impose and levy a tax beyond the city limits.

That the Harbor Commissioners were a corporation distinct from and independent of the city of Montreal, with powers and attributes and territorial limits of their own, derivable from and subject to the legislative control of the Federal authorities only. That the territory under their control was beyond and outside the limits of the city of Montreal, and it was to them, and to them only, that all harbor and wharfage dues were payable, and they only had the power to impose taxes or dues on vessels entering the harbor or touching at those wharves.

That the provisions in question of said by-law 94 were claimed to be passed under the authority of sec. 78 of 37 Vic., chap. 51, which had been repealed before the passing of the by-law.

That sec. 126 of said 37 Vic., chap. 51, still remaining in force, contained the proviso that all by-laws contrary to any law or statute in force in the province should be null and void.

That appellants were proprietors of steamboats affected by said sec. 28 of by-law 94.

The constitutionality of the Quebec acts being thus questioned, the Attorney-General as well as the city of Montreal were made defendants in the cause.

Both defendants pleaded to the action, and both maintained the constitutionality of the statutes of Quebec. The city corporation further contended that the right of action, if any had existed, had been prescribed by the lapse of more than three months since the adoption of the by-law before action brought, a limit imposed by sec. 12 of the statute of Quebec, 42-43 Vic., chap. 53. This last objection could have no force if the by-law was *ultra vires*. This was declared by the judgment of the Superior Court now appealed from, and I think is indisputable.

The facts appear to be established in accordance with the pleadings. This leaves the main question to be determined, whether on the 21st April, 1876, when the City Council passed the by-law in question, they had power to do so; and the enquiry to be made from whence that power proceeded.

There were but two principal sources from whence that power could have been derived: 1. The local Legislature of the Province of Quebec, with limited authority. 2. The Legislature of the Province of Canada before Confederation, having unlimited control over the subject.

It is contended that the authority conferred by sec. 78 of the Statute of Quebec, 37 Vic., chap. 51, cannot be invoked, as that was repealed before the passing of the by-law in question, and stood repealed at the time; and

1887.

Cie. de Nav. & Cité de Montréal.

although it was actually replaced by the first section of the Statute of Quebec, 39 Vic., chap. 52, the City Council did not base their authority on the latter law, but claimed only to act under the 37 Vic., chap. 51. This, indeed, seems a formidable technical objection, difficult to be got over, but it would be much to be regretted if a case so important as the present should have to be controlled by this difficulty.

'But suppose this difficulty overcome. Authority is claimed under the Quebec Act, 39 Vic., chap. 52, passed 4th December, 1875. It gives power to the City Council corporation of Montreal to make by-laws; among other things to impose an annual tax (to be called the business tax) on ferrymen or steamboat ferries plying for hire for the conveyance of travellers to the city, from any place not more than nine miles distant from the same. It is doubtful whether this in terms would authorize the passing of the by-law in question by the City Council, the statutory authority being to make by-laws to tax ferrymen or steamboat ferries, and the by-law being made to impose a tax on proprietors of steamboats. But suppose both to be sufficient in form; it is obvious that two objections may be raised to the by-law: 1st. That it authorizes the taxation of subjects outside the limits and jurisdiction of the city of Montreal; and 2nd. That it may be an interference with navigation beyond the control of the local Legislature, that is, the taxation of steamboat ferries.

It may be replied that it is only a renewal of a power conceded to the city corporation by its early charter, contained in the Statutes of Canada, 14-15 Vic., chap. 128, passed 30th August, 1851, before Confederation, and renewed by subsequent statutes down to Confederation; that, although it authorized the taxation of subjects outside the city limits, and might have interfered with navigation, it was competent for the Legislature possessed at the time of unlimited power to concede such authority.

Each and all of these propositions may be questioned for the following reasons: 1. Because the concession of power by the 14-15 Vic., chap. 128, and subsequent acts of the

Legislature of Canada was more restricted in its terms than that of the 39 Vic., chap. 52. 2. Because the rights of navigation and control over the river had been previously conceded to other bodies, and the concession to the city corporation was subject to the prior existing rights. 3. At the time of the concession of the right to the city of Montreal, the city was possessed of a river frontage where vessels arriving touched the city limits. It was to ferrymen plying to such limits, and to no other, that the city had power to issue licenses; and by the competent authority of the Legislature, the shores of the river adjoining the city of Montreal were afterwards put under the control of and vested in the Harbor Commissioners, whereby they became an interposed jurisdiction between the city and the river, entirely cutting off the jurisdiction over ferrymen who could not thenceforward ply to or arrive at the city of Montreal.

In support of the first of these reasons, it may be remarked, that the concessions of power regarding the tax in question, contained in the statute 14-15 Vic., chap. 128, as well as in all the statutes of the Province of Canada, are in similar terms, viz., power to make by-laws to impose a duty upon, and exclusive power to license persons acting as ferrymen to the said city, or plying for hire for the conveyance of persons by water to the said city, from any place not more than nine miles distant from the same. Also that the first provision on the subject made by the Quebec Legislature after Confederation, contained in the 37 Vic., chap. 51, is in like terms. The power thereby granted to impose the tax in question was on ferrymen plying for hire for the conveyance of travellers by water to the said city from any place not more than nine miles distant from the same.

These laws were evidently at first made to suit the state of things existing at the time the power was conceded; they were meant to apply to ferrymen personally who exercised a minor kind of traffic, and not to owners of vessels of a magnitude that might include them in the designation of being employed in navigation. Three purposes

1887.

Cie. de Nav. A. Cité de Montréal.

were to be effected concerning them by the statute 14-15 Vic., chap. 128. They were to be licensed and regulated, and a duty might be imposed on them, besides which the corporation were to assign them landing places. The corporation had also imposed on them the duty of making a tariff for them. The by-law made at the time for their regulation and the tariff will show what kind of ferrymen were in contemplation of the law.

It is entitled chap. 14, by-law relating to ferries. Sec. 4. Every person obtaining a license shall keep in his service at least three able men, one canoe and one bateau, two setting poles, two oars and one paddle for each canoe, and four oars and one large paddle for each bateau, etc. In all other respects the by-law and tariff were in accordance with the then existing statutes, and if a case could still be framed and tried on this by-law for the testing of the validity of the tax, it would come up embarrassed with less complication than the present and might, perhaps, be received as the measure of the power possessed by the corporation over the subject, save in so far as interfered with by the statutes granting authority to other bodies. But the matter did not rest here; the Statute of Quebec, 39 Vic., chap. 52, was passed 24th December, 1875, indicating to my mind a disposition to extend and usurp power not previously possessed or claimed. Its language is, on steamboat ferries plying for hire for the conveyance of travellers to the city from any place not more than nine miles distant from the same. It is to my mind doubtful if this language justifies the by-law now called in question. The authority is to tax steamboat ferries, and the by-law imposes a tax on proprietors of steamboats; but if it does, it is only in that the terms of the statute exceed the terms of the 14-15 Vic., chap. 128, and the other acts of the Parliament of Canada originally conferring the authority. The tax here indicated is not as originally on ferrymen plying for hire, but on steamboat ferries plying for hire, not that steamboats may not be used for ferries, but that such property being without the city of Montreal, cannot be taxed by authority to tax ferrymen, and because steam-

boats were not contemplated in the original power to tax, and pertain to navigation previously assigned to another jurisdiction, and which could not be affected save by Dominion legislation.

In support of the second reason, the following may be urged :—The first body created with jurisdiction over the river was the Trinity House, incorporated by the statute 45 Geo. III, chap. 12, for Quebec, with extensive jurisdiction over the river from the Lachine rapids downwards, including the harbor of Quebec, its powers extending generally to the control of navigation on the river, especially in regard to the navigation of vessels. A separate Trinity House was afterward created for Montreal by the statute 2 Vic., chap. 19, in 1839.

This corporation was ultimately dissolved and its powers transferred to the Harbor Commissioners by the statute 35 Vic., chap. 61.

The Harbor Commission was originally created by the statute 10-11 Geo. IV, chap. 28, to improve the harbor of Montreal according to the plan of Captain Piper. Its powers were extended by 1 William IV, chap. 11, and by 2 William IV, chap. 66, including the power of making a tariff and levying dues.

The limits of the harbor of Montreal under the control and management of the Harbor Commissioners were defined by the statute 8 Vic., chap. 76, sec. 5. From the lower extremity of the Lachine canal wharf downwards to the lower extremity of the revetment wall, at the point where it joined the Government works at the Commissioner's store, and on the side of the city it adjoined the revetment wall.

The statute 10-11 Vic., chap. 56, passed in 1847, extended the limits downwards to the lower extremity of the Victoria Road.

By the statute 18 Vic., chap. 148, sec. 5, in 1855, the limit extended downwards to the Ruisseau Migeon, and included the beach up to high water mark, and the reserve for a road above high water mark. This completely excluded the city corporation from any river frontage, and

1887.
Cie. de Nav. & Cité de Montréal.

consequently rendered it impossible for them to fix or assign any landing places for ferrymen licensed by them to convey persons or travellers to the city, and equally rendered it impossible for such ferrymen to convey persons to the city, as the wharves of the Harbor Commissioners intervened.

This supports as well the second as the third reason above given.

The right of regulating navigation was first given to the Trinity House, afterwards transferred to the Harbor Commissioners. The right to regulate ferries given to the city was subject to this prior right and was intended to be of a very limited description, as above explained, not at the time inconsistent with the jurisdiction of the Harbor Commissioners. To remove all doubt from this point, I quote from the statute 24 Vic., chap. 68, sec. 6 (18th May, 1861), which declares; That, notwithstanding anything contained in the acts incorporating the city of Montreal or amending the same, no by-law of the corporation of the said city, shall restrict or affect in any manner the exercise of the power conferred upon the Harbor Commissioners of Montreal under the various acts relating to the said harbor.

It is thus shown that the Harbor Commissioners have an entirely separate and independent jurisdiction from that of the city of Montreal; they in fact levy tonnage and wharfage dues on all vessels entering the harbor. Their limits are guarded by a separate police. I am informed that the city police are not even allowed to make an arrest on the wharves. They are interposed between the city and the river. The city corporation cannot pass over them and levy on vessels outside of their limits; they cannot license ferrymen to ply to the city, because in so plying they do not come within the limits of the city nor within the city's jurisdiction. Concurrent jurisdiction in such a case would be an inconsistency, and in a collision of jurisdiction the minor interest, that of a ferry, would have to concede to, or be merged in the major interest of navigation. The Quebec Parliament could not

legislate to affect that interest. It would be inconsistent and unreasonable that steamboats crossing the river or going up or down only some miles should pay double dues, that is, both to the city and to the Harbor commission, while those going ten miles or upwards would not be subject to double taxation. The claim to jurisdiction beyond the city limits is of an unusual and exceptional nature, and would require clear authority to support it, and must be subordinate and give way to an authority of a higher order.

The British North America Act assigns navigation and shipping, as well as ferries between a province and any British and foreign country, or between two provinces, to the control of the Federal Legislature, but says nothing about inland ferries, leaving them to be regulated and licensed under par. 9 of sec. 92, but manifestly such power to license would have to give way to the major interest of navigation already established, or in case the Dominion Legislature at any time made a law in regard to navigation interfering with a ferry. Mr. Doutre, in his book on the Constitution, at page 237, gives an instance wherein an act of the Legislature of Nova Scotia, incorporating a company with right to cross rivers, was disallowed because it might interfere with navigation, although it made no reference to navigable rivers.

From these remarks, I think it must be apparent that the power conferred on the city corporation prior to Confederation, when the Parliament of Canada had jurisdiction, is different from and less than the power attempted to be conferred by the Quebec Legislature after Confederation, when that Legislature had no authority or pretext for interfering with navigation, and when the jurisdiction of the city corporation no longer extended to the river.

I think the judgment rendered by the Superior Court in this case, maintaining the constitutionality of the provisions of the statutes impeached in this case, and the validity of the by-law of the Montreal City Council passed by the authority of said statutes, in so far as it purports to impose a tax on proprietors of steamboats, is erroneous.

1867.

Cie. de Nav. & Cité de Montréal.

I would reverse the judgment and annul the by-law complained of.

BABY, J. :—

La seule question à peu près qui se présente ici et que nous avons à juger, est de savoir si la Cité de Montréal avait le droit de passer et mettre à exécution le Règlement dont l'appelante se plaint. La cour de première instance a donné une décision affirmative et c'est de celle-ci qu'on appelle.

Afin de mieux élucider cette question, voyons de suite quelle est la loi sur laquelle s'appuie l'intimée pour faire maintenir sa prétention.

Le statut de la législature de Québec 37 Vict. chap. 51 (1874) intitulé : " Acte pour réviser et refondre la charte de la Cité de Montréal et les divers actes qui l'amendent, " donne pouvoir au Conseil, par la 78 clause, § 13, de faire des règlements pour imposer et prélever une taxe annuelle (dite " taxe d'affaires ") sur, entre autres, " les traver- " siers qui transportent, dans la cité, moyennant rétribu- " tion, les voyageurs de tout endroit situé à une distance " de pas plus de neuf milles de la Cité ".....

Subséquemment, par le statut 39 Vict. chap. 52 (1875), sect. 1, la dite 78 clause ci-dessus en partie relatée fut entièrement abrogée et remplacée par une autre au même effet qui donnait pouvoir au dit Conseil de passer et promulguer un ou des règlements pour les objets suivants, entre autres : § 3. " Pour imposer et prélever une taxe an- " nuelle sur les traversiers ou bateaux-à-vapeur traver- " siers, qui transportent à la Cité, moyennant rétribution, " les voyageurs de tout endroit n'étant pas à une distance " de plus de neuf milles de la Cité ", etc.

On le voit, le langage de ce paragraphe diffère quelque peu du précédent surtout en ce qu'il se sert, après le mot " traversiers ", des suivants *ou bateaux à vapeur traversiers* qui ne s'y trouvaient point, c'est-à-dire, que le législateur a inclus non seulement les traversiers à la rame, à la voile, ou par *horse-boat*, telle que la chose se pratiquait autrefois entre Longueuil et le " Pied du Courant," mais encore les bateaux-à-vapeur traversiers.

1887.

Cie. de Nav. & Cité de Montréal.

Conformément à cette disposition de la loi, le 21 avril 1876, le Conseil de la Cité de Montréal passa un règlement connu et désigné sous le No. 94 et qui contient ce qui suit : " Sect. 23, une taxe annuelle de deux cents " piastres est par le présent imposée et sera prélevée sur " le propriétaire ou les propriétaires de tout et chaque ba- " teau-à-vapeur traversier qui transporte à la Cité, moy- " ennant rétribution, les voyageurs de tout endroit n'étant " pas à une distance de plus de neuf milles de la dite " Cité."

C'est contre ce règlement que l'appelante s'insurge aujourd'hui, elle veut arrêter et suspendre, par son bref d'injonction, les procédés adoptés par l'intimée pour recouvrer la taxe en question—et demande qu'elle soit déclarée non recouvrable en loi.

Les raisons principales qu'apportent l'appelante au soutien de ses prétentions, sont :

1o. La législature de Québec n'a pas pouvoir de régler en quoi que ce soit ni taxer d'aucune façon la navigation exclusivement réservée par l'acte de l'Amérique Britannique du Nord au gouvernement fédéral et, par conséquent, ne pouvait déléguer ce pouvoir à la Cité de Montréal ; en un mot, que cet acte était inconstitutionnel et *ultra vires*.

2o. Que la commission du Hâvre de Montréal forme une corporation étrangère à la Cité de Montréal et qu'elle est propriétaire des quais auxquels l'appelante amarre ses bateaux, et que c'est à cette corporation que sont dûs les droits de quaiage pour tel amarrage.

Examinons d'abord si le statut en question de la législature de Québec est *ultra vires ?*

D'après l'acte de l'Amérique Britannique du Nord, de 1867, le parlement du Canada a bien la jurisdiction exclusive sur "la navigation et les bâtiments ou navires (*shipping*)," mais rien n'empêche que les législatures provinciales ne puissent légiférer sur tout ce qui a trait aux institutions municipales (celles-ci étant de leur domaine particulier) qui peuvent avoir un rapport indirect ou éloigné avec le sujet, et c'est ce que la jurisprudence du pays a consacré à maintes reprises différentes.

1887.

Cie. de Nav. & Cité de Montréal.

D'après le droit commun municipal, les conseils locaux ou de comté, selon le cas, ont le droit de régler les passages d'eau, déterminer la somme à payer et les conditions à observer pour l'octroi d'une licence de passage d'eau et fixer ou approuver les taux payables pour passer sur les passages d'eau dans un bateau, un vapeur ou toute embarcation, arts. 549, 550 C. M. Les cités et les villes, par leurs chartes respectives, ont les mêmes droits. Tous les passages d'eau tombent donc sous le contrôle absolu des autorités municipales dans la Province de Québec. Une seule exception est faite à ce droit des municipalités de contrôler ainsi tous les passages d'eau, et on la trouve dans l'Acte de l'Amérique Britannique du Nord, sect. 91, par. 13, qui place " les passages d'eau (*ferries*) entre une Pro-" vince et tout pays britannique ou étranger, ou entre " deux provinces " sous l'autorité exclusive du Parlement du Canada. Or, ici il n'est pas du tout question de cela, la chose est apparente, il ne s'agit que de l'imposition, par la Corporation de la Cité de Montréal, d'une taxe sur chaque traversier ou bateau-à-vapeur qui transporte des passagers à la Cité d'un endroit en dedans des neuf milles et *vice versa*. C'est un règlement fait pour des fins municipales et du revenu seulement, et qui n'intervient en aucune façon avec ce que l'on entend à proprement parler par le mot *shipping*. La législature de Québec avait donc le pouvoir d'autoriser le Conseil de la Cité de Montréal de le passer, si elle le trouvait bon.

D'ailleurs, dès avant la Confédération, la Cité de Montréal, par sa charte, 14 et 15 Vict. chap. 128 (1861) sect. 58, avait le pouvoir de " taxer, cotiser et imposer des droits " sur toutes personnes agissant comme traversiers à la dite " cité ou faisant pour gage le transport par eau de per-" sonnes à la dite cité, de tout endroit n'étant pas à une " distance de plus de neuf milles de la cité."

S'appuyant sur cette loi, le Conseil de la Cité, il y a au-delà de vingt-cinq ans, faisait le règlement suivant concernant les taxes et cotisations: sect. 29. " Une taxe " annuelle de deux cents dollars sera payée par le pro-" priétaire ou les propriétaires de chaque bateau-à-vapeur

1887.

Cie. de Nav. & Cité de Montréal.

" traversant pour gain à la cité des personnes d'aucune
" partie des paroisses de Laprairie de la Magdelaine et de
" Longueuil, ou de tout quai tenant à la rive des dites
" paroisses, etc." Le langage de ce document ne diffère en rien de celui qui nous est actuellement soumis, on le remarquera.

Il est donc évident que ce droit d'imposer une taxe sur les vapeurs traversiers n'est pas une nouveauté, un empiètement graduel sur le pouvoir fédéral, ainsi qu'il a été prétendu, mais existait dès avant l'entrée en vigueur de l'Acte de l'Amérique Britannique du Nord.

Avant cette époque, il est certain, la Corporation de la Cité de Montréal avait ce pouvoir et elle l'a exercé. Or, d'après la sect. 129 du dernier acte précité, toutes les lois en force au Canada lors de l'union ont continué d'exister comme si la confédération n'avait pas eu lieu, et cela même dans le cas, d'après les nombreuses décisions déjà rendues, où ces lois auraient été renouvellées (*re-enacted*) ou refondues, ainsi que nous l'avons jugé tout particulièrement dans les causes Major & La Corporation de la Cité des Trois-Rivières, et Barras & La Corporation de la Cité de Québec. En supposant donc qu'il pourrait y avoir un doute sur le pouvoir de la législature de Québec de conférer à la Corporation de la Cité de Montréal le droit de passer un tel règlement, depuis la confédération—ce que je n'admets pas—ce doute disparaît ici entièrement et nous sommes d'opinion, en conséquence, que la loi de 1874 qui autorise le Conseil de la Cité de Montréal à imposer la taxe en question, par le règlement dont il s'agit, n'est pas *ultra vires*. Mais, dit-on, ce dernier acte ne se servait pas du mot bateau-à-vapeur, et il a été ajouté dans la refonte, ce qui ne peut conférer à la Corporation de la Cité de Montréal un pouvoir qu'elle n'avait pas auparavant. Admis, mais le mot *traversier* que l'on rencontre dans le dit acte de 1874, aussi bien que dans tous les autres sur le sujet s'entend tout aussi bien de la personne qui effectue le passage de l'eau que de l'embarcation dont elle se sert pour y parvenir, que cette dernière soit mue par la vapeur, le vent, la rame ou tout autrement. C'est l'inter-

1887.
Cie. de Nav. & Cité de Montréal.

prétation constante qui a été donnée à cette disposition, comme nous l'avons fait voir par les citations faites ci-dessus des règlements adoptés sur le sujet. Nous le savons, une corporation n'est autorisée à prélever des taxes qu'en autant que ce pouvoir lui est expressément conféré par sa charte, mais aussi faut-il bien donner une interprétation aux termes qui confère ce même pouvoir qui ne soit pas d'un rigourisme tel qu'il puisse détruire et mettre à néant l'intention du législateur.

Maintenant, quant à la seconde prétention mise de l'avant par l'appelante, elle n'est pas mieux fondée. Il est bien vrai que la Corporation des Commissaires du Hâvre de Montréal a jurisdiction sur le St. Laurent et ses grèves, entre certains points indiqués dans le statut, mais cela n'est pas à l'exclusion de la Corporation de la Cité de Montréal. Ses attributions, ses pouvoirs sont d'une nature toute différente à ceux de celle-ci. Elle s'occupe du bon gouvernement du Hâvre, du mouillage, de l'encrage, etc. des vaisseaux—elle règle l'endroit qu'ils devront occuper—contrôle l'usage des lumières et des feux, le déchargement des vaisseaux, etc., etc. C'est notoire, elle a remplacé l'ancienne Corporation de la Maison de la Trinité dont l'origine remonte au commencement du siècle, mais jamais cette dernière n'a eu le contrôle, en vertu de la loi, des passages d'eau. Au contraire, tel que je l'ai fait voir ci-dessus, la Corporation de la Cité de Montréal l'avait de par sa charte, et les divers statuts passés subséquemment jusqu'à aujourd'hui ne le lui ont point enlevé. Plus, la Corporation des Commissaires du Hâvre n'a jamais prétendu avoir aucune jurisdiction sur ces passages d'eau, et, l'aurait-elle voulu, qu'elle ne l'aurait pas pu, car le Parlement fédéral par l'acte de 1878, chap. 61, sect. 28, qui l'autorise à prélever certains droits, lui défend impérieusement de les faire peser—les en exemptant complètement, au contraire—sur les personnes et les voitures allant à la Cité de Montréal, ou en revenant sur aucun traversier entre la dite Cité et Longueuil ou Laprairie, etc. Ce qui est la reconnaissance implicite si non explicite du pouvoir réclamé ici par la Corporation de la Cité de Montréal, assurément.

1857.
Cie. de Nav. & Cité de Montréal.

Il est de toute évidence que ce sont deux corporations distinctes qui ne s'excluent d'aucune manière cependant, et qui ont chacune leurs pouvoirs définis, leurs attributions et prérogatives particulières, et elles les exercent l'une pour les fins de la navigation proprement dite (*shipping*), l'autre pour les fins municipales et dans un cadre beaucoup plus restreint tant sur le St. Laurent que sur ses rives. D'ailleurs, devons-nous ajouter, en terminant, si la législature de Québec, sans agir *inconstitutionnellement* —et nous venons de voir qu'elle ne l'a point fait—a octroyé à la Corporation de la Cité de Montréal le pouvoir d'imposer la taxe en question pour les fins municipales, ce n'est pas un statut du Parlement du Canada qui pourrait implicitement ou explicitement le lui enlever, quoiqu'on en ait dit.

Un autre point a bien été soulevé par les plaidoiries de l'appelante, à savoir : qu'elle est placée, par le règlement dont elle se plaint, sur un pied d'inégalité avec les autres compagnies de navigation. Tel n'est pas le cas, le règlement impose la taxe de deux cents piastres sur *tous* les bateaux-à-vapeur traversiers qui transportent les voyageurs de tout endroit n'étant pas à une distance de plus de neuf milles de la Cité. Elle taxe ainsi tous les bateaux à vapeur de cette catégorie, sans exception aucune, et elle n'avait aucun droit d'en taxer d'autres. C'eût été une illégalité flagrante de sa part que d'aller au-delà. Mais ce moyen aurait-il été fondé que l'appelante n'aurait plus été en temps utile de le faire valoir.

Sur le tout, la majorité de cette Cour est d'opinion que le Conseil de la Cité de Montréal avait le pouvoir de passer le règlement en question et d'imposer la taxe qu'il renferme, et que le jugement de la Cour Supérieure qui le maintient est bien fondé et, il est, en conséquence, confirmé avec dépens contre l'appelante.

DORION, Ch. J. :—

If it were not for the importance of this case, I should not be disposed to add a word to what has been said. But in view of the constitutional question which has been raised, I may state briefly the reasons why it seems

1887.
Cie. de Nav. & Cité de Montréal.

to me that the judgment should be confirmed. In the first place, ferries between two points within a province, are under the jurisdiction of the local legislature. This is quite clear from the terms of article 13 of section 91, B. N. A. Act, by which ferries between a province and a foreign country, or between two provinces, are placed under the jurisdiction of the Dominion legislature. It follows that ferries between points within a province come under the powers conferred upon the local legislatures. But that is not all. By paragraph 16 of section 92, "generally all matters of a merely local or private nature in the province" are assigned to the local legislatures. A ferry between two points in a province is surely a matter of a local or private nature. It also appears, on reference to the statutes, that the city possessed the power to tax ferries prior to Confederation, and that law has never been repealed. There can be no doubt, therefore, that the provincial legislatures have the right to regulate ferries within the province.

As to the by-law being passed under the 37 Victoria, although the original acts are replaced by the new act, the provisions of the old acts are not considered as repealed. The consolidation is a continuation of them.

As to the jurisdiction of the Harbour Commissioners, that does not interfere with the control of the city. The Harbour Commissioners by their charter are excluded from levying a tax upon ferry-boats plying within nine miles from the city. What was the object of that exception? It was because these boats were already subject to taxation by the city of Montreal. The Harbour Commissioners have power to tax proprietors of vessels who bring such vessels to the Harbour of Montreal. The corporation of the city have a right to tax the owners of properties extending to the river.

Further, it has been decided by the majority of this Court that the legislature of the province has the right to tax the proprietors of foreign vessels doing business within the province.[1] If so, it certainly has a right to tax

[1] *The Ogdensburg Towing Co. & Lambe*, M. L. R., 1 Q. B. 123.

ferry companies running boats between points within the province.

I am, therefore, of opinion that the judgment should be confirmed, first, because this was an act relating to a matter of a local and municipal nature; it was the exercise of a power existing before Confederation, and never repealed; and, moreover, the right of the local legislatures to tax ferries within the province is clear from the terms of the B. N. A. Act itself.

Judgment confirmed, Cross, J., *diss.*

Dalbec & Madore, attorneys for Appellant.

R. Roy, Q.C., attorney for the City of Montreal.

J. L. Archambault, Q.C., attorney for the Intervenant.

(J. K.)

June 30, 1886.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

MOÏSE SCHWOB,

(*Defendant in Court below*),

APPELLANT;

AND

JOEL C. BAKER ET AL., ES-QUAL.,

(*Plaintiffs in Court below*),

RESPONDENTS.

Action—Property registered in name of owner's agent—Costs.

HELD:—That while a creditor has a right of action against the agent of his debtor, in whose name real estate of the debtor is registered, to have it declared that such property really belongs to the debtor, yet where it appears that the action is unnecessary, the judgment maintaining it will be confirmed without costs in either Court.

The appeal was from a judgment of the Superior Court, Montreal (JETTÉ, J.), April 10, 1885, in the following terms:—

1886.
Schwob
v.
Baker.

"La Cour ayant pris communication des pièces composant le dossier de la présente cause aux fins d'adjuger sur le mérite de la dite cause remise à cette Cour par les demandeurs et le défendeur, sur *factums*, le dit défendeur n'ayant pas plaidé à l'action et la mise en cause ayant déclaré s'en rapporter à justice, dûment considéré la preuve faite et délibéré ;

"Attendu que les demandeurs ès-qualité sont créanciers par jugement en date du 13 novembre 1877, de Dame Marie-Joséphine Pelletier, veuve Jackson, pour une somme de $100 avec intérêts et frais ;

"Attendu que la dite Dame Pelletier est propriétaire d'un terrain, situé en la paroisse de St-Vincent de Paul, dans le comté de Laval, connu et désigné sous le No. 91 au plan et livre de renvoi officiels de la dite paroisse ;

"Attendu que cet immeuble apparait néanmoins aux régistres du bureau d'enregistrement du dit comté, au nom et comme propriété du défendeur et que les demandeurs ne peuvent en conséquence le faire saisir et vendre, dans l'état actuel des choses, sur la dite Dame Pelletier ;

"Attendu que les demandeurs *ès-qualité*, vu le refus du défendeur de laisser saisir et vendre le dit terrain comme propriété de la dite Dame Pelletier, et de déclarer volontairement qu'il n'en est pas le véritable propriétaire, se sont pourvus par leur présente action pour demander qu'il soit déclaré et adjugé que le dit immeuble est véritablement la propriété de la dite Dame Pelletier, et non pas celle du défendeur ; que le dit défendeur n'a pas contesté cette demande, et qu'il appert à la preuve et aux écrits et déclarations du défendeur, produits à l'enquête, qu'il n'est pas le propriétaire du dit immeuble, lequel appartient en réalité à la dite Dame Pelletier ;

"Accorde les conclusions de la dite demande et déclare que le dit immeuble No. 91, du cadastre de la dite paroisse de St-Vincent de Paul, est bien et véritablement la propriété de la dite Dame Pelletier, et non celle du défendeur ; en conséquence, ordonne au défendeur de signer aux demandeurs toute déclaration requise à l'effet de reconnaître ce que dessus, et à défaut par lui de ce faire,

ordonne que le présent jugement soit pris et considéré comme telle déclaration du défendeur et serve aux mêmes fins ; la présente sentence devant être enregistrée partout où besoin sera, pour sortir et valoir son plein et entier effet, à toutes fins que de droit ;

1886. Schwob & Baker.

"Et condamne le dit défendeur aux dépens distraits, etc."

May 21, 1886.]

D. Girouard, Q. C., for the appellant :—

Les intimés, exécuteurs de feu Wm. Workman, allèguent dans leur action que le 13 novembre 1877, ils ont obtenu jugement contre Dame Joséphine Pelletier, pour $100, intérêt et frais ; que leur débitrice est propriétaire du No. 91 de la paroisse de St-Vincent de Paul ; mais qu'ils ne peuvent le saisir, parce qu'il se trouve au nom de l'appelant sur les livres du bureau d'enregistrement ; *that in point of fact the defendant is not proprietor, but at most is a mortgage creditor.*

Puis les intimés, sans autre allégation, concluent que le dit immeuble soit déclaré la propriété de la dite Dame Joséphine Pelletier, et que l'appelant soit tenu de signer une déclaration à cet effet afin qu'ils puissent le saisir, et qu'à défaut de cette déclaration le jugement en tienne lieu, le tout avec dépens.

Cette action fut intentée le 21 juin 1884.

Comme la propriété en question était de petite valeur, environ $400, et avait déjà été l'occasion de beaucoup de frais, l'appelant n'a pas cru devoir plaider à l'action, ayant confiance qu'il réussirait sans cela à faire voir qu'elle était mal fondée.

Remarquons d'abord que l'action intentée n'est pas l'action paulienne. Aucune fraude n'est alléguée par les intimés.

Les intimés n'ont examiné qu'un témoin, l'appelant lui-même.

Plusieurs documents et la correspondance entre les parties ont été produits et nous allons nous permettre de les analyser ainsi que le témoignage de l'appelant.

1886.
Schwob & Baker.

Par un acte de vente du 22 mars 1875, Brault, notaire, enregistré par bordereau le 4 mars 1880, Philip Henry vendit à Dame Marie-Joséphine-Cordélia Pelletier, veuve de John H. Jackson, l'immeuble en question et les meubles qui s'y trouvaient. Au même acte il y a reconnaissance d'une hypothèque existante en faveur du frère de l'appelant, Alfred Schwob, pour $400 et intérêts et pour sûreté du paiement de cette hypothèque, l'acquéreur hypothéqua de nouveau le dit immeuble.

Par acte du 22 mars 1875, Brault, notaire, enregistré le 6 avril 1875, Marie-Joséphine-Cordélia Pelletier vendit l'immeuble et le ménage à Madame Ovide Ste-Marie.

Par acte du 30 septembre 1876, Kittson, notaire, enregistré le 2 mars 1877, Madame Ovide Ste-Marie vendit les mêmes biens à l'appelant. Prix $1 et aussi à la charge de "certain charges and incumbrances well known to "the purchaser."

Le même jour l'appelant donnait la contre-lettre qui suit à Dame Marie-Joséphine-Cordélia Pelletier, veuve de John H. Jackson, mariée en secondes noces à G. W. Kenny.

"Montreal, September 30th, 1876.

"Dear Madam,

"This is to acknowledge that the sale this day made to me of the St. "Vincent de Paul property by Mrs. Ste-Marie, was so made in your "interest and on your behalf, that I act simply as your agent in the "matter, it being understood that I am to sell the property at the best "possible advantage, pay off all existing mortgages, taxes, etc., out of "the proceeds of the sale; return you the balance, the price being left "entirely to my discretion."

"Yours truly,

"M. SCHWOB."

Plus tard, le 21 déc[illegible], par acte devant Kittson, enregistré le 18 mars 1880, l'appelant obtint de Marie-Henriette Gauthier, veuve d'Henry Jackson, les droits d'usufruit qu'elle avait sur le dit immeuble.

Pendant que tout ceci se passait, le cadastre était mis en force dans le comté Laval.

Le 28 février 1880, les intimés faisaient enregistrer leur jugement contre Madame Kenny sur l'immeuble en ques-

tion, connu sous le numéro 91 de St-Vincent de Paul, bien que la vente qui lui en fut faite le 22 mars 1875 ne fut pas enregistrée.

Quelques jours après, 4 mars 1880, un bordereau de la dite vente fut enregistré, avec mention et reconnaissance de l'hypothèque d'Alfred Schwob.

Telle était la position des parties, lorsque des négociations commencèrent pour arriver à un arrangement à l'amiable. Mais il paraît que les choses allaient lentement. Le 3 mars 1881, l'appelant agissant tant pour Alfred Schwob, dont il est le procureur, que pour la maison Schwob Frères, qui est créancière de Madame Kenny pour $175 en sus de ce qu'elle doit à Alfred Schwob, écrit qu'il attend le retour de son avocat, M. Würtele, d'Ottawa, pour clore l'affaire. Le 24 mars 1881, M. Barnard adresse une lettre à l'appelant lui demandant une déclaration que l'immeuble ne lui appartient pas. L'appelant lui répond qu'il le verra le lendemain. On ne sait trop ce qui se passa depuis cette époque jusqu'à l'été de 1884. Le 3 juin 1884, le soussigné adressait la note suivante à M. Barnard :

Montréal, 3 juin 1884.

Cher Monsieur,

Nous avons reçu instructions de M. Schwob, de faire vendre par le shérif la propriété "Jackson," à St-Vincent, sur laquelle vous avez hypothèque pour votre client Workman *et al.*, pour $108.77, intérêt du 13 janvier 1870, et les frais. Mon client a une hypothèque antérieure à la vôtre de $450 et les intérêts. Ces $450 représentent toute la valeur de la propriété. Voulez-vous consentir à radier votre hypothèque sur paiement de vos frais, et alors on disposera de la propriété par vente privée.

Bien à vous,

D. GIROUARD.

E. BARNARD, Ecr., C. R.

Le 6 juin, l'appelant recevait un état de la réclamation de la succession Workman, se montant à $314.60, y compris les intérêts depuis le 12 janvier 1870, les frais et les intérêts sur ces frais.

Le 7 juin, l'appelant répond : "A ces conditions-là, il "vaut mieux que la propriété soit vendue au shérif. L'hy- "pothèque de notre client et l'avocat prendront tout. J'ai "le certificat du bureau ici. Vous n'avez qu'à venir le

1886.

Schwob & Baker.

"voir ou l'envoyer chercher, et vous serez convaincu du "fait."

Le certificat et les papiers furent de suite transmis à M. Barnard, qui le 13 juin, répond : "Je vous renvoie les "papiers dans l'affaire de Schwob-Workman. J'ai pu de "nouveau reprendre tous les fils de cette querelle, dans "laquelle il y a plus de complications que de profit pour "personne, excepté les avocats. Et ça ne vaut pas la peine "même pour eux." Puis M. Barnard suggère que M. Schwob remette la propriété à Madame Kenny, par une déclaration qu'il ferait enregistrer.

Le 20 juin, M. Barnard demande une réponse. "Mon "cher Girouard, une réponse, s. v. p., à ma dernière lettre, "afin que nous sachions où nous en sommes. Vous avez "réveillé l'animal qui dormait. Je ne me rappelle pas "trop si l'animal auquel le dicton s'applique, est un chat "ou un lion."

Le même jour, 20 juin, M. Girouard, envoie la réponse suivante : "Je n'ai pas de conseil à vous donner. Vos frais "sont payés, me dites-vous. Alors je poursuis en décla- "ration d'hypothèque, d'autant plus que je ne vois pas "comment vous pouvez saisir."

Effectivement Alfred Schwob poursuivit de suite Moïse Schwob, en déclaration d'hypothèque, lequel délaissa l'immeuble qui fut sans délai saisi par le shérif. Mais les intimés ont arrêté la vente au moyen d'une opposition. En même temps, les intimés procédèrent par l'action qui fait l'objet du présent appel. Avant de juger la cause au mérite, le tribunal inférieur (LORANGER, J.) ordonna la mise en cause de Madame Ovide Ste-Marie, qui déclara "qu'elle n'a aucun intérêt à opposer, et qu'elle ne s'op- "pose en aucune manière à ce que le dit acte de vente "(consenti par elle à l'appelant), soit considéré fait à "Moïse Schwob en sa qualité de procureur de la dite Dame "Pelletier (Madame Kenny), mentionnée en cette cause; "et qu'au surplus elle s'en remet à justice."

C'est alors que les conclusions de la demande des intimés furent accordées.

1886.
Schwob & Baker.

Voilà les faits de la cause, et ils ne seraient pas plus complets si l'appelant eut plaidé.

L'appelant soumet que le jugement dont est appel, doit être renversé pour les raisons suivantes :

1. La demande est trop vague. La déclaration aurait dû faire voir comment Madame Kenny était devenue la propriétaire apparente.

2. L'action que les intimés auraient dû prendre dans les circonstances—et elles sont corroborées par le témoignage de l'appelant—était une action en reddition de compte contre l'appelant en sa qualité d'agent de Madame Kenny pour un but particulier.

3. Les faits de la cause font voir que l'appelant est le propriétaire véritable de l'immeuble dans le but de le vendre si l'on veut, et de payer les dettes et rendre compte à Madame Kenny, mais avec pouvoir indéniable de passer un titre valable. S'il y eut fraude, les intimés auraient pu l'attaquer ; mais c'est ce qu'ils n'ont pas fait.

4. L'appelant ne peut être forcé de signer la déclaration qui fait l'objet de cette demande sans qu'auparavant la vente par Madame Ste-Marie à l'appelant soit mise de côté. Tant que cette vente subsiste, l'appelant est propriétaire.

5. L'appelant ne pouvait donner la déclaration que lui demandaient les intimés, sans avoir obtenu au préalable le consentement de Madame Kenny, qui avait et a encore des droits à faire valoir.

6. Pareillement, le jugement dont est appel n'aurait pas dû être rendu sans appeler en cause Madame Kenny, qui au dire de Madame Ste-Marie, a surtout intérêt sur le litige.

7. Enfin comment l'appelant a-t-il pu être condamné à remettre l'immeuble purement et simplement lorsqu'indépendamment de ses transactions avec Madame Kenny, il est le propriétaire au moins de l'usufruit de l'immeuble.

8. Ces considérations font voir que le procédé le plus expéditif d'arriver à la vente par le shérif, était l'action en déclaration d'hypothèque et le délaissement qui s'en est suivi et qui pouvait avoir lieu sans le consentement

1886.
Schwob & Baker.

de Madame Kenny, absente du pays depuis longtemps, ni sans la mettre en cause.

E. Barnard, Q. C., for the respondents :—

Les demandeurs en Cour Supérieure, présentement intimés en leur qualité d'exécuteurs testamentaires de feu M. William Workman ont, le 13 novembre 1887, obtenu jugement contre Dame Marie-Joséphine-Cordélia Pelletier, veuve de feu John Henry Jackson et épouse en secondes noces de William John Kenny, pour la somme de cent dollars avec intérêts et frais.

Les intimés n'ont pu jusqu'à présent recouvrer le montant de ce jugement, vu que la dite Dame Marie-Joséphine-Cordélia Pelletier, qui a laissé la province et dont le domicile actuel est inconnu, ne possède en son nom aucuns biens mobiliers ou immobiliers, que les intimés puissent saisir en exécution de leur jugement. Mais les intimés ont découvert qu'une propriété immobilière située à St-Vincent de Paul (comté de Laval) appartient réellement à leur débitrice, quoique cette propriété paraisse aux livres du régistrateur être la propriété de Moïse Schwob, l'appelant.

L'acte de vente par Madame Ste-Marie à Moïse Schwob, ayant été enregistré dans le bureau d'enregistrement du comté de Laval, sans aucune déclaration par Moïse Schwob, que Madame Kenny était la véritable propriétaire, les intimés, le 3 mars 1881, s'adressèrent à Moïse Schwob lui demandant de signer une déclaration des faits qui leur permettrait de saisir la propriété comme appartenant à leur débitrice. M. Schwob ayant refusé ou négligé de signer la déclaration demandée, les intimés ont intenté l'action qui a amené le jugement dont est appel, pour qu'il fût condamné à signer cette déclaration, ou à défaut pour que le jugement servit de déclaration.

L'appelant n'a pas plaidé à l'action, mais lors de l'argument sur l'inscription au mérite, il a soumis un factum dans lequel il soulève trois points: Le premier que Madame Kenny eût dû être partie à l'action. Le second que l'action eût dû être une action en reddition de compte. Le troisième que lui, Moïse Schwob, avait été poursuivi

par Alfred Schwob, son frère, un créancier hypothécaire qui a obtenu jugement qui ordonne à l'intimé de payer ou de délaisser.

Ces moyens n'ayant pas été plaidés, ne pouvaient être pris en considération par la Cour Inférieure. D'ailleurs ils sont manifestement frivoles.

June 30, 1886.]

RAMSAY, J. (for the Court) :—

This is a peculiar action and the principal question is whether such an action lies. Repondents obtained judgment against a Mrs. Kenny. Subsequently they discovered that she had made over some property to appellant for certain purposes and had got from him a *contre-lettre* acknowledging the fact that he was only agent. The action prayed that Schwob should give the respondents an acknowledgment to that effect, or that the judgment should stand for such acknowledgment.

We do not think this action illegal, but obviously it is useless. Respondents had the acknowledgment if that was necessary. We therefore think that as respondents have taken an unnecessarily expensive process, they cannot have costs in either Court, but the judgment will be confirmed.

Judgment confirmed except as to costs.

D. Girouard, Q. C., attorney for the appellant.

Barnard & Barnard, attorneys for the respondents.

(J. K.)

May 26, 1887.

Coram DORION, CH. J., TESSIER, CROSS, BABY, CHURCH, JJ.

ALFRED JOYCE,
(*Petitioner in Court below*),
APPELLANT;

AND

LA CITÉ DE MONTRÉAL,
(*Defendant in Court below*),
RESPONDENT.

City of Montreal—42-43 *Vict.* (Q.), *ch.* 53, *s.* 12—*Assessment roll*—*When it comes into force*—*Prescription of action to annul.*

HELD:—That an assessment roll comes into force from the date of its final completion, and deposit by the commissioners in the office of the city treasurer, and the prescription of three months under 42-43 Victoria, chap. 53, s. 12, runs from that date.

The action was to annul an assessment roll. The roll was completed and deposited by the commissioners on the 12th of January, 1882, but the last notice of deposit was published on the 17th January. The action was served on the 15th April.

The respondent pleaded the prescription of three months, under 42-43 Vict. (Q.), ch. 53, s. 12.

The appellant answered in law to this plea, but the law issue was decided against the appellant by the following judgment rendered by MATHIEU, J., 14 January, 1884:—

"La Cour, après avoir entendu les parties par leurs avocats et procureurs respectifs, sur le mérite de la réponse en droit du requérant au premier plaidoyer de la défenderesse, par lequel dit plaidoyer, la défenderesse soutient que le droit du requérant d'attaquer le rôle de cotisation en question en cette cause, est prescrit depuis le 12 avril 1882, avoir examiné le dit plaidoyer, la dite réponse en droit, etc.;

"Attendu que le dit requérant demande par sa requête produite le 17 avril 1882, la cassation d'un rôle de cotisation pour répartir sur les personnes que les commissaires nommés par la Cour Supérieure jugeraient être intéressées dans l'établissement du Carré de la Puissance, lequel rôle de cotisation a été déposé le 12 janvier 1882, dans le bureau du trésorier de la cité;

"Attendu que la dite défenderesse allègue dans son premier plaidoyer que le dit rôle de cotisation spécial pour l'établissement du Carré de la Puissance a été dûment ratifié et confirmé le 12 janvier 1882, par les commissaires nommés à cette fin; que la requête du requérant demandant la cassation de ce rôle de cotisation spéciale est datée du 15 avril 1882, jour où elle a été signifiée à la défenderesse, savoir plus de trois mois après la confirmation et mise en force du dit rôle de cotisation;

"Que d'après les dispositions du Statut de Québec de 1879, 42-43 Victoria, chap. 53, section 12, tout électeur municipal peut en son propre nom demander et obtenir pour cause d'illégalité la cassation de tout règlement, rôle de cotisation ou répartition, mais que le droit de demander telle cassation est prescrit par trois mois à compter de la date de la mise en force de tel règlement, rôle de cotisation ou répartition, et qu'après ce délai, tel règlement, rôle de cotisation ou répartition doit être tenu valide, ou obligatoire, à toutes fins que de droit; que le dit délai de trois mois doit être computé du moment de la mise en force du rôle de répartition, savoir, à compter du jour où le dit rôle a été complété ou confirmé par les commissaires, et que le droit de demander la cassation de ce rôle est prescrit et éteint en vertu du dit statut;

"Attendu que le dit requérant allègue dans sa réponse en droit demandant le renvoi du dit premier plaidoyer de la dite défenderesse qu'il ne s'ensuit pas que le rôle est en force parce qu'il a été confirmé et ratifié par les commissaires à une époque inconnue des contribuables ou personnes taxées et du public; que d'après la loi un rôle de cotisation générale ou spéciale dans la ville de Montréal, pour les fins municipales, ne devient en force

1887.

Joyce & Cité de Montréal.

que dix jours après la dernière insertion de l'avis que donne le trésorier dans les journaux que le rôle en question est complété et déposé dans son bureau (37 Victoria, chap. 51, s. 85), et que jusqu'à tel avis les intéressés ne peuvent pas savoir si le rôle a été complété ou non, qu'en supposant vraies les allégations de la défenderesse que le rôle en question a été ratifié et confirmé par les commissaires le 12 janvier 1882, et en supposant même qu'il ait été déposé le même jour dans le bureau du trésorier, ce qui n'est pas même allégué, il ne s'ensuivrait pas que le délai pour attaquer le dit rôle est expiré le 12 avril 1882, qu'il paraît par les allégations du dit plaidoyer lui-même, que lorsque la requête du requérant a été signifiée à la défenderesse, le délai pour attaquer le dit rôle n'était pas expiré;

"Considérant que par la section 12 du chap. 53 des statuts de Québec, de 1879, 42-43 Victoria, il est décrété que tout électeur municipal peut, par une requête présentée à la Cour Supérieure siégeant dans le district de Montréal, demander et obtenir, pour cause d'illégalité, la cassation de tout rôle de cotisation ou répartition, mais que le droit de demander telle cassation est prescrit par trois mois à compter de la date de la mise en force de tel rôle de cotisation ou répartition, et qu'après ce délai tout tel rôle de cotisation ou répartition sera tenu pour valide et obligatoire, à toutes fins que de droit, pourvu qu'il soit de la compétence de la dite corporation;

"Considérant que par la section 185 des statuts de Québec de 1874, 37 Victoria, chap. 51, il est décrété qu'aussitôt après la confirmation et la ratification du rapport des commissaires par la Cour, il sera du devoir des dits commissaires dans tous les cas où le dit conseil aura ordonné que le prix de revient des travaux ou améliorations soit supporté, en tout ou en partie, par les propriétaires ou intéressés avantagés, de procéder à cotiser et à répartir le prix ou compensation, conformément à la résolution du dit conseil sur chacune des propriétés qui auront été avantagées, et qu'aussitôt que le rôle spécial de cotisation sera terminé les commissaires le déposeront au bureau du

greffier de la cité, pour l'inspection et l'examen des parties intéressées, et donneront avis public dans au moins deux journaux anglais et deux journaux français publiés dans la dite cité, de l'achèvement et du dépôt du dit rôle spécial de cotisation ; que cet avis portera que les commissaires ont complété le dit rôle spécial de cotisation et qu'il a été déposé au bureau du greffier de la cité, où toute personne y intéressée peut le voir et l'examiner dans le délai spécifié dans le dit avis, lequel délai, dans tous les cas, ne sera pas moins de quinze jours à partir de la dernière insertion du dit avis, et qu'après l'expiration du dit délai aux jour et heure mentionnés dans le dit avis les commissaires s'assembleront à l'hôtel-de-ville pour réviser le dit rôle spécial de cotisation ; que les commissaires devront, sur demande de quiconque se croit lésé, s'assembler aux jour et heure et lieu ci-haut mentionnés pour entendre et examiner toutes les plaintes qui leur seront faites relativement au dit rôle spécial de cotisation, et pourront ajourner de temps à autre, selon qu'il sera nécessaire, pour entendre et juger les dites plaintes, et après tel examen les commissaires pourront maintenir, modifier ou amender, à leur discrétion, le dit rôle spécial de cotisation, sans autre avis ultérieur, et que le dit rôle spécial de cotisation une fois achevé et établi par les dits commissaires, comme susdit, sera produit et gardé de record dans le bureau du trésorier de la cité, et la dite cotisation spéciale sera due et pourra être recouvrée par la corporation de la dite cité, de la même manière que les taxes et cotisations ordinaires que la dite corporation est autorisée à imposer et à prélever par le dit acte ;

" Considérant que par la section 85 du dit statut, il est décrété que lorsque les évaluateurs de la cité feront rapport du rôle de cotisation d'un des quartiers de la dite cité après la révision complète du dit rôle et survenant le rapport d'un rôle de cotisation spéciale, le trésorier de la cité donnera avis public dans deux papiers-nouvelles publiés en langue anglaise et dans deux papiers-nouvelles publiés en langue française, que le dit rôle de cotisation est terminé et déposé dans son bureau, et que tous ceux

1887.
Joyce
v.
Cité de Montréal.

dont les noms y sont inscrits comme tenus au paiement d'une taxe, d'une cotisation ou d'une contribution sont obligés d'en payer le montant à son bureau, en l'hôtel-de-ville, sous dix jours à compter de la date de la dernière insertion du dit avis dans les dits papiers-nouvelles ;

"Considérant que par les avis exigés par la dite section 185 ci-dessus mentionnée les contribuables de la cité de Montréal ont et doivent avoir connaissance de la passation d'un rôle de cotisation spéciale, et qu'ils ont dû avoir connaissance de la passation du rôle de cotisation spéciale dont il est question en cette cause, et que par les ajournements qui doivent ou peuvent se faire à compter du jour fixé dans les avis ils ont dû connaître le jour où le rôle spécial de cotisation a été achevé et établi ;

"Considérant qu'il est décrété et qu'il résulte des termes de la sous-section 5 de la dite section 185, ci-dessus mentionnée, que le rôle spécial de cotisation se trouve achevé et établi par la révision qui en est faite par les dits commissaires, et qu'on doit considérer que le rôle de cotisation est mis en force à compter de son dépôt dans le bureau du trésorier de la cité ;

"Considérant que bien que la cité ne puisse exiger le paiement des taxes avant l'avis requis par la section 85 du dit statut, cependant le rôle de cotisation n'en existe pas moins et n'en a pas moins force et effet pour établir un lien de droit entre la cité et les contribuables ;

"Considérant que l'obligation résultant de la confection du dit rôle de cotisation n'est pas une obligation conditionnelle et qu'elle n'est pas non plus à terme dans le sens de l'article 2236 du Code Civil, vu qu'il dépend de la cité d'en recouvrer le montant quand bon lui semblera, en donnant l'avis requis par la loi ;

"Considérant qu'il résulte de ce que dessus que le délai de trois mois pour contester le dit rôle de cotisation doit être computé du jour de son dépôt au bureau du trésorier de la cité et que la réponse en droit du dit requérant est mal fondée ;

"A renvoyé et renvoie la réponse en droit du dit requérant avec dépens."

1887.
Joyce & Cité de Montréal.

The petition of the appellant was dismissed by the final judgment, pronounced by JETTÉ, J., 9 July, 1884, as follows :—

"La Cour, etc.....

"Attendu que par sa requête présentée à cette Cour le 17 avril 1882, le requérant Joyce se plaint d'un rôle de cotisation préparé par les commissaires nommés pour la fixation et répartition de la proportion à payer par les propriétaires intéressés dans l'établissement du *square* ou carré de la puissance, et en demande la cassation ;

"Attendu que la cité s'oppose à l'octroi de cette demande soutenant qu'elle a été faite tardivement, savoir, plus de trois mois après la mise en force du dit rôle de cotisation, et que par suite elle est non recevable ;

"Considérant que l'exercice du recours adopté par le requérant pour demander la cassation du dit rôle de cotisation susdit, est limité et restreint par l'article 12 du statut de 1879, chapitre 58, à une période de trois mois, à compter de la date de la mise en force de tel rôle de cotisation ;

"Considérant qu'aux termes de l'article 185 du statut de 1874, chap. 51, la procédure imposée aux commissaires chargés de préparer tel rôle de cotisation est terminée et close par la confirmation de ce rôle par les dits commissaires et que le dit rôle devient dès lors en force à toutes fins que de droit ;

"Considérant qu'il est établi par les admissions des parties que le rôle de cotisation en question dans l'espèce a été finalement confirmé par les commissaires le 12 janvier 1882 ;

Considérant que l'article 85 du dit statut ne s'applique pas à tel rôle de cotisation ;

"Considérant en conséquence que le délai de trois mois pour demander la cassation du dit rôle était expiré lorsque le requérant s'est pourvu et que par suite il y a lieu de lui appliquer la déchéance prononcée par la loi ; Renvoie la dite requête du requérant avec dépens."

March 21, 1887.]

E. Barnard, Q. C., for the appellant.

R. Roy, Q. C., for the respondent.

1887.

Joyce & Cité de Montréal.

May 26, 1887.]

CROSS, J. (for the Court):—

The proceeding which has given rise to the controversy in this case, was begun by a petition presented to the Superior Court, by Alfred Joyce, an elector of the City of Montreal, to set aside a special Assessment Roll prepared by commissioners appointed by the Superior Court, to assess the parties who should be judged interested for the establishment of the Square called Dominion Square in the St. Antoine Ward, of the City of Montreal.

The petition was presented on the 17th April, 1882, and the proceeding was taken under and in virtue of sec. 12 of cap. 53, of the Statutes of Quebec, 1879, 42 & 43 Vic., which provides that any municipal elector in his own name may, by a petition presented to the Superior Court, demand and obtain on the ground of illegality, the annulment of any by-law, resolution, assessment roll or apportionment, with costs against the Corporation, but the right of demanding such annulment is prescribed by the lapse of three months from the date of the coming into force of such by-law, resolution, assessment roll or apportionment; and after that delay every such by-law, resolution, assessment roll, or apportionment, shall be considered valid and binding for all legal purposes whatsoever, provided it be within the competence of the said Corporation.

The petition was met on the part of the city by an exception in the nature of a *fin de non recevoir* alleging that more than three months had elapsed from the coming into force of the assessment roll in question before the signification of the appellant's petition; that the assessment roll came into force on the 12th January, 1882, the day on which the commissioners terminated and closed their deliberations thereon, confirmed the roll, and deposited it with the City Treasurer; while the appellant's petition was signified the 15th of April, and only presented on the 17th April, 1882.

The appellant demurred to this exception, whereon a hearing was had, with the result that the demurrer was

dismissed, the principle of the exception being thereby sustained, and the case coming afterwards to be heard on the merits, the petition of the appellant, Alfred Joyce, was dismissed, and he now appeals from these two judgments.

The proceedings of the commissioners were had under the Statute of Quebec of 1874, 37 Vic. cap. 51, sec. 185, whereof by § 2, 3, 4 and 5, it is provided that "after the completion of the roll of assessment it shall be deposited with the City Clerk for inspection by all parties interested, and notice shall be given in the newspapers, of the time when said parties may be heard before commissioners; that on the day fixed, and after having heard the parties, the commissioners may maintain, modify or amend the roll without further notice, and that when finally settled the said assessment shall be filed and kept of record in the City Treasurer's office, and it shall be due and may be recovered by the said city in the same manner as the ordinary taxes and assessments"—which clearly shews that it is finally disposed of and completed by its confirmation by the commissioners and their deposit of it; and therefore comes in force from that date.

But the appellant argues that by sec. 85 of the same Statute it is declared that upon the return of any special roll of assessment, the City Treasurer shall give public notice in the newspapers that the said assessment roll is completed and deposited in his office, and that the persons liable to such assessment are required to pay the amount thereof within ten days from the last insertion of such notice.

This cannot be held as delaying the coming into force of the assessment roll, it is only providing for the collection of the assessment thereby imposed. The effective assessment is completed by the act of the commissioners; its after collection is the business of the City Treasurer, for which purpose the direction given by sec. 85 is intended.

The Court is of opinion that the prescription pleaded by the city had accrued; that the judgments sustaining

1887.

Joyce
v.
Cité de Montréal.

it were well founded and must be confirmed, and so it is ordered.

Judgment confirmed.

Barnard & Barnard, attorneys for appellant.

R. Roy, Q. C., attorney for respondent.

(J. K.)

January 16, 1886.

Coram DORION, Ch. J., RAMSAY, CROSS, BABY, JJ.

JEAN MARIE GROTHÉ,

(*Plaintiff in Court below*),

APPELLANT;

AND

ALEXANDER SAUNDERS,

(*Defendant in Court below*),

RESPONDENT.

Malicious arrest—Probable Cause.

Appellant, a jeweller, desiring to increase his business, obtained advances from respondent, a wholesale dealer, and gave as security a hypothec on his property, on which he declared there were mortgages, but he only specified one of a certain amount. There was really another. Shortly afterwards, the appellant became insolvent, and the respondent arrested him on the charge of obtaining property on false pretences.

HELD:—That there was probable cause for the arrest, though it appeared that the appellant did not intend fraudulently to conceal the mortgage.

The appeal was from a judgment of the Superior Court, Montreal (JOHNSON, J.), June 30, 1882, dismissing an action of damages for malicious prosecution. The observations of the learned judge in the Court below are reported at length in 5 Leg. News, pp. 213–215. The *considérants* of the judgment in the Court below were as follows:—

"Considering that the present action is brought to recover damages from the defendant, for that he prosecuted

the plaintiff maliciously and without reasonable or probable cause, on a charge of having obtained property by false pretences, with intent to defraud;

"Considering that the defendant has pleaded that he had reasonable and probable cause for the said prosecution; considering that the said plea of the defendant is proved, and that by the evidence of record there is no sufficient evidence of absence of reasonable cause for the same, doth maintain the said plea of the defendant, and doth dismiss plaintiff's action with costs."

Nov. 18, 19, 1885.]

Trudel, Q. C., for the appellant.

Ritchie, for the respondent.

Jan. 16, 1886.]

CROSS, J.:—

In this suit, Grothé, the appellant, claims from Saunders, the respondent, $4,630 damages for malicious prosecution and false arrest, alleging that he has suffered to the extent of $10,000, but is willing to reduce his claim to the above-mentioned sum.

The action is defended on the ground; First, that Grothé was an uncertificated bankrupt, and had no right to bring an action for himself and in his own name. Secondly, that Saunders had acted in the matter in good faith, and that there was reasonable and probable cause for the prosecution and arrest.

The Superior Court held that Grothé had failed to show absence of reasonable or probable cause for the prosecution and arrest, and that Saunders had established its existence; they, consequently, dismissed the action, and Grothé has appealed from their judgment.

There is no difficulty as to the principles of law that govern in such cases. The controversy here is limited entirely to the question of fact, involving the enquiry as to what extent Grothé has made out a case, and if he has, whether it has been satisfactorily answered by Saunders.

The first ground of defence may be at once disposed of. It is entirely unfounded. Before the prosecution was com-

1886.

Grothé & Saunders.

menced, Grothé had obtained a composition and discharge from his creditors, besides which the recourse sought is in the nature of a personal right, being compensation for a purely personal injury.

Regarding the second, the circumstances are as follows:—

Grothé was a jeweller, and kept a shop in the Main street of the St. Lawrence suburb for the disposal of his wares. Saunders was a wholesale dealer in the same line of business and supplied goods to Grothé.

On the 5th of June, 1874, Grothé hypothecated a property to Saunders to the extent of $1,600, in part for advances made, but chiefly for advances to be made; and in the deed executed before Hart, notary, he specially declared that the property belonged to him, and that it was free and clear of every and all claims, mortgages and incumbrances whatsoever, save and except mortgages for the sum of $3,000 in favor of the Trust and Loan Company of Canada. Saunders advanced goods on the strength of this hypothec, and on the 13th March, 1877, Grothé made an assignment in insolvency. Saunders figures as a creditor in the insolvent proceedings, having preferred his claim in the ordinary course for $4,658, from which he deducted, as secured, the hypothec for $1,600, and a further sum of $500, as the estimated value of a policy of insurance, which Grothé had assigned to him, reducing his claim to $2,558, which was afterwards on a contestation further reduced to $1,050.

On the 18th March, 1877, Grothé obtained his deed of composition and discharge from his creditors. In this operation he seems to have been assisted by Saunders. About this time, or soon afterwards, Saunders seems to have been making extraordinary exertions to secure his claim or make up for the loss he was likely to sustain by Grothé. Under pretext that the policy of insurance would prove worthless, the insurance company disputing the claim, he obtained from Dame Louise Herse, Grothé's sister-in-law, a hypothec on some property of hers to the extent of $1,000, and some notes to a like extent, as well

as a hypothec for $295 from Grothé's son Theodore. These latter, he claimed, were in payment of his proved claim against Grothé's estate, which he had sold to Theodore Grothé. It further appears that he drew his dividend to the amount of $511.73, but he says it was on the order of Theodore Grothé. These proceedings, Grothe contends, were all unwarrantable extortions, and a connected series of persecutions on the part of Saunders, which aggravated Grothé's injuries and augmented his damages. He further pretended that, by these means, Saunders was more than paid in full, and could have no ground of complaint.

It certainly does not appear very clear that Saunders became entitled to all these additional guarantees after his claim had been legally closed by the insolvency. I think, however, it is shown that some amount of goods were advanced after the insolvency and composition, and it does not appear that much was made of the additional securities. The policy of insurance proved worthless, as did also the hypothec of Louise Herse.

These collateral matters, are, however, beside the legimate issue raised by the present suit.

The property on which Grothé had given the hypothec to Saunders for $1,600, and which he reckoned and allowed for at that valuation when he made his claim in insolvency, was brought to sheriff's sale, and produced nothing for Saunders, there being a prior hypothec and charge upon it to the extent of $2,000 in favor of the Metropolitan Building Society, not declared by Grothé when he gave the hypothec to Saunders for the $1,600. On the strength of the declaration in the deed of hypothec for the $1,600, and the discovery of the additional hypothec in favor of the building society, Saunders prosecuted Grothé for obtaining goods by false pretences; he caused a bill to be placed before the grand jury, and supported it by his evidence. It was found a true bill by the grand jury; Grothé was tried and acquitted. To prove malice against Saunders, besides the circumstances already alluded to, Grothé produces the evidence of his two sons, Albert and Theodore, who were in his employ, also a clerk of his, named Beauchamp, who

1886.

Grothé & Saunders.

swears most distinctly that Saunders was informed of the hypothec in favor of the Metropolitan Building Society at the time the hypothec for $1,600 was granted to him. He has produced evidence of additional circumstances going to show that there might have been malice on the part of Saunders, if he were not really, as we think he was, in the exercise of his rights, and had a stronger proof in his favor. The hypothec was given him with a solemn assurance formally expressed in the document that there were only prior mortgages to the extent of $3,000, when there were, in fact, mortgages to the extent of at least $5,000. He had a right to rely upon that document, and Grothé has himself to blame if he suffers from having given that assurance. Besides this, the testimony in favor of Grothé is by parties more or less interested. Their representations are not very probable, and, if true, should have been reason for putting Grothé on his guard not to allow a document of such incriminating character to remain of record against him for so long a time. If even the circumstance of the additional mortgage had been mentioned to Saunders at the inception of the transaction, when he referred to his security years afterwards, the probability would be that he would have forgotten all about early verbal conversations on the subject, and would be in perfect good faith in urging his rights as shown by his title. The policy of the law should not be too severe towards those who, in the public interest, resort to the legal tribunals to have their grievances investigated; when good faith appears on their part, and probable cause, they should be excused, although their prosecution may fail, and that even when the object of it is put to inconvenience and damage. The judgment of the Superior Court will, therefore, be confirmed.

RAMSAY, J.:—

The judgment turned solely upon the fact, not whether it was true that the appellant acted fraudulently—his character was not called in question at all—but whether Saunders proceeded without probable cause. It has been repeated several times that respondent is a Jew. It does not make the least difference whether he is a

Jew or a Gentile; all persons approach the tribunal of justice upon an equality. Grothé was vindicated in the Criminal court, bnt this did not give him an action for damages, unless he could show that Saunders acted without probable cause. A great deal of declamatory matter has been introduced into the factum, but it is far from conclusive as to the pretension of the appellant, and a great deal of it is wholly irrelevant and unnecessary, and serves only to embarrass the court and swell the costs of the suit. I am of opinion that, under the circumstances, the respondent acted with probable cause. A false declaration was made in the deed, and Saunders was justified by this in taking the prosecution. In a recent case, a person had taken some money to which he had no right; and the moment his attention was called to it, he made restitution; yet he was convicted and sent to jail for it. The judgment in the present case was a good judgment and should be confirmed.

DORION, Ch. J.:—

Grothé gave a mortgage to Saunders and did not declare a previous mortgage upon the property. In France this would have been considered *stellionat*, and the party would have been sent to jail for it. In France it would have been an act punishable under the criminal law. Here we have the criminal law of England, and therefore the act must be considered in the same way as it would be considered in England, that is, the question is whether the party bringing the criminal proceedings acted with probable cause or not, for if he had probable cause it is considered a duty to bring to punishment those who commit criminal acts. Here, probably, Grothé made a mistake in not mentioning the other mortgage, but this does not affect the case. Saunders had before him a declaration in a deed, which declaration was false, and he was entitled to institute the prosecution.

Judgment confirmed.

Trudel, Charbonneau & Lamothe, attorneys for Appellant.

Robertson, Ritchie & Fleet, attorneys for Respondent.

(J. K.)

November 25, 1885.

Coram DORION, Ch. J., MONK, RAMSAY, CROSS, JJ.

THE ST. LAWRENCE STEAM NAVIGATION CO.
(*Defendants in Court below*),
APPELLANTS;

AND

WILLIAM B. LEMAY
(*Plaintiff in Court below*),
RESPONDENT.

Appeals on questions of appreciation of evidence — Quantum meruit.

HELD:—That where it is not a matter of contract, and no question of law or principle is involved, and the case resolves itself into a mere question of appreciation of evidence, *e. g.*, as to the value of services, the Court of Appeal will not disturb the judgment of the Court below, unless a serious injustice has been done to the appellant.

The appeal was from a judgment of the Superior Court in Review, Montreal, reversing a judgment of the Superior Court, Montreal, (RAINVILLE, J.), Oct. 8, 1883.

The judgment of Rainville, J., is as follows :—

"La cour, etc.

"Attendu que le demandeur réclame de la défenderesse une somme de $720 comme balance à lui due pour salaire et dépenses pendant la saison de navigation de 1882, en vertu d'un engagement intervenue entre les dites parties le 4 juillet 1882, en vertu duquel la défenderesse aurait engagé le demandeur pour agir comme son agent pour lui procurer des radeaux à remorquer à raison de $800 pour la saison ;

"Attendu que la défenderesse plaide que le demandeur n'était pas engagé comme agent salarié ainsi qu'il l'allègue, mais comme agent à commission à raison de 5 p. c., sur le montant du fret gagné par la défenderesse pour remorquage à part de déboursés ;

1885.

St. Lawrence Nav. Co. & Lemay.

"Attendu que défenderesse par son dit plaidoyer reconnait devoir au demandeur la somme de $182.53, savoir ;— $158.87, balance due sur la somme de $238.87, comprenant $126.50 de commission et $56.37 de dépenses et $23.60 pour frais d'action, sauf à forfaire ;

"Attendu que la défenderesse a déposé en cour la dite somme de $182.53 ;

"Considérant que le demandeur n'a pas fait preuve des allégations de sa déclaration et particulièrement de la convention et engagement par lui allégué ;

"Considérant que la défenderesse a prouvé les allégations de sa défense et que ses offres sont suffisantes et légales ;

"Declare les dits offres et la dite consignation de $182.53 bonnes et valables, et autorise le protonotaire de cette cour à payer au demandeur le montant ainsi déposé, et condamne le demandeur aux dépens distraits, etc."

The judgment in Review reversing the above (TORRANCE, DOHERTY, JETTÉ, JJ.), Jan. 31, 1884, was in the following terms :—

"La Cour, après avoir entendu la plaidoirie contradictoire des avocats des parties sur le bien fondé de la demande de révision du jugement rendu en cette cause le huit octobre dernier, et dont le demandeur se plaint, disant que la condamnation prononcée en sa faveur est insuffisante, etc. :—

"Attendu que le demandeur a poursuivi la défenderesse lui réclamant une somme de $800 :—

1o. A titre de salaire convenu et payable par la défenderesse au demandeur comme agent de la dite compagnie à la Bord à Plouffe pendant la saison de navigation de 1882.

2o. Comme valeur des services par lui rendu à la défenderesse pendant cette dite saison, savoir : en qualité d'agent et représentant d'icelle comme susdit :

"Attendu que la défenderesse a plaidé à cette demande disant qu'elle n'a pas engagé le demandeur à salaire, mais que pendant la saison de navigation susdite le demandeur lui a procuré des touages en certaines occasions sans con-

1885.

St. Lawrence Nav. Co. & Lemay.

vention préalable quant à sa rémunération, et que conformément à l'usage il n'a droit pour ce qu'il a ainsi fait pour la défenderesse qu'à une commission de cinq pour cent sur le chiffre des touages par lui fournis en sus de ses dépenses, ce qui forme une somme de $182.50 pour commission et de $56.37 pour dépenses, soit une balance de $158.87 que la défenderesse a offert et consignée;

"Attendu que cette défense a été accueillie par le tribunal de première instance qui a déclaré les offres de la défenderesse suffisantes et renvoyé la demande quant à tout surplus avec dépens;

"Considérant néanmoins qu'il est établi en preuve que la défenderesse a d'abord cherché à engager le demandeur comme son agent moyennant une commission de cinq pour cent., mais que le demandeur a positivement et formellement refusé disant que vu l'opposition que la dite compagnie avait à rencontrer dans ces opérations en lui imposant un surcroit de travail l'exposait à une diminution de recettes qui ne lui laisserait qu'une rémunération insuffisante; et que pour ces raisons il ne s'engagerait à la dite défenderesse que moyennant un salaire de $800;

"Considérant que cette réponse et proposition du demandeur envoyée par écrit par l'agent de la compagnie défenderesse au bureau de direction de celle-ci et soumis à ce bureau est ensuite restée sans réponse, et que néanmoins la dite compagnie a continué à traiter le demandeur comme son agent à lui donner ses ordres et à recevoir ses services;

"Considérant que si la compagnie défenderesse ne peut être considérée à raison de ce silence comme acquiescer formellement à la proposition du demandeur, celui-ci de son côté ne peut après cette réponse être considéré comme s'étant soumis aux conditions que la défenderesse lui offrait, et qu'il y a lieu dans les circonstances de donner au demandeur le bénéfice de la preuve faite au sujet de la valeur des services par lui rendus;

"Considérant qu'il est amplement prouvé que si la commission de cinq pour cent. offerte par la demanderesse et accueillie par le premier juge pouvait être suffisante dans

des circonstances ordinaires, elle ne l'était plus à raison de la concurrence contre laquelle le demandeur a eu à lutter pour servir les intérêts de la défenderesse, et que la valeur de ses dits services ne saurait être évaluée à moins de $400, de laquelle somme il faut déduire celle de $80 reçue par le demandeur, ce qui ne laisse qu'une balance de $320;

"Considérant en conséquence qu'il y a erreur dans le jugement dont la révision est demandée;

"Casse et annule le dit jugement et procédant à rendre celui que la dite Cour de première instance aurait dû rendre, déclare les offres de la défenderesse insuffisantes et la condamne à payer au demandeur la dite somme de $320 avec intérêt, etc."

"M. le Juge Torrance ne concourt pas dans ce jugement."

Sept. 18, 1885.]

R. D. McGibbon for the appellant.

L. Laflamme for the respondent.

Nov. 25, 1885.]

CROSS, J.:—

Lemay sued the St. Lawrence Navigation Company for $776.87 as a balance alleged to be due him for acting as their agent at River des Prairies, to the north of Montreal, during the rafting season of 1882, for the purpose of securing for them rafts to be towed on the way down the river to Quebec and elsewhere, for which he claimed to be paid at the rate of $800 for the season, giving credit for $80 collected by him, leaving the balance due, $776.87.

The Company appellants pleaded, denying any contract having been made, and offering $158 as the full value of the services rendered by the respondent, being a commission of 5 per cent. on the towages performed by the appellant, of the rafts engaged for towage by Lemay.

By the proof it appears that about the commencement of the season the appellants sent their Three Rivers agent, Mr. Farmer, to endeavour to engage the services of Lemay as agent at Rivière des Prairies, to secure for them the towage of rafts, and offered him a commission of 5 per

1885.

St. Lawrence Nav. Co & Lemay.

cent. which he positively refused. His authority extended no further, and he informed Lemay that no more could be given. Farmer reported his interview to the office of the Company at Quebec. In making the offer Farmer acted on a letter received from the office at Quebec, dated the 10th July, 1882, informing him that Lemay had applied for the employment, and had already secured to them two rafts, finally, that if engaged he was to be paid by a percentage.

Notwithstanding the failure to agree, the Company continued to communicate with Lemay, and he procured them rafts during the season of 1882, which was not a very prosperous one for them.

The Superior Court held the tender sufficient, and dismissed the action. In Review this judgment was set aside, and the action maintained for $320, that is allowing $400 for the services and deducting the $80 collected.

Neither Court found an agreement, nor does the evidence justify it. There was no agreement proved, and in either case it was but an estimation of the *quantum meruit* which scarcely admits of an interference by this Court. Had the judgment of the Superior Court come directly to this Court they might not have considered it their duty to disturb it, but the Court of Review having seen fit to make a different estimate of the value of the services which this Court does not find unreasonable, they think it their duty to confirm the judgment, which they accordingly do.

RAMSAY, J.:—

I will not enter a formal dissent, but the judgment of the Court of Review seems to me to be on a false principle. The presumption of law is not that the last proposition is accepted, unless it appears clearly that the work is carried on upon this understanding. Here there is no such evidence. Respondent went on getting rafts for the Company on his own assumption as to what the bargain was, at least so he says now. When work is done without a bargain the claim is regulated by the *quantum meruit*. The judgment appealed from practically admits this, for

1885.

St. Lawrence Nav. Co. & Lemay.

it does not give Lemay $800. I think the greatest value of Lemay's services proved is five per cent. on $3,600, and expenses.

DORION, CH. J.:—

The first judgment gave five per cent; the second gave $400, which is about ten per cent. We are disposed to think that seven-and-a-half per cent. was enough. But we say this: that in a case where it is a mere matter of fact, this Court will not change the amount allowed by the Court below, unless it is something very gross. Where it is a question of contract, it is a different thing. But where it is a *quantum meruit*, we will not disturb the last judgment. We say this, because we have appeals coming here often upon a mere issue of fact, and for a very small amount. We will confirm in such cases, unless there is a question of law or principle, or a great injustice has been done to the parties.

Judgment confirmed.

Girouard & McGibbon, attorneys for appellants.

Laflamme, Huntington, Laflamme & Richard, attorneys for respondent.

(J. K.)

January 21, 1886.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

LA CORPORATION DU COMTÉ D'YAMASKA,
(*Respondent in Court below*),
APPELLANT;

AND

NARCISSE DUROCHER,
(*Petitioner in Court below*),
RESPONDENT.

Municipal Law — M. C. 932—County Council — By-law of Local Council—Powers of County Council.

A local council passed a by-law which was amended by the county council on appeal. The local council, without new proceedings or any

1886.

Co. d'Yamaska & Durocher.

effort to amend, passed a by-law in similar terms to the former by-law, which was then again taken to the County Council on appeal, when the following resolution was proposed and adopted :—"Attendu "que la question en litige sur le présent appel a été réglée par ce "Conseil, en homologuant le procès-verbal de Louis Parent, en octobre "dernier ; et attendu que le Conseil Municipal de la paroisse de St. "David, au lieu de mettre à exécution le dit procès-verbal et de res-"pecter la décision de ce Conseil, a adopté à sa session du 7 avril der-"nier, un règlement mettant à néant la dite décision de ce Conseil ; "Que l'appel porté devant ce Conseil par requête de Dolphis Lessard "et autres, en date du 12 avril dernier, soit maintenu ; et que le règle-"ment dont est appel, adopté par le Conseil Municipal de la paroisse de "St. David, à sa session du 7 avril dernier, ainsi que tous les procédés, "ordres et résolutions du dit Conseil Municipal de la paroisse de St. "David, adoptés à sa dite session du 7 avril dernier, amendant le dit "procès-verbal de Louis Parent, soient, et ils sont par la présente "résolution, cassés, annulés et mis à néant à toutes fins que de droit, "avec dépens contre Régis Crépeau, père (and four others), de la pa-"roisse de St. David, qui ont par requête en date du premier mars "dernier sollicité du Conseil Municipal de la paroisse de St. David "la passation du dit règlement, savoir les intimés sur le présent "appel."

HELD :—That the county council, in thus setting aside the by-law of the local council, acted within its jurisdiction.

The appeal was from a judgment of the Circuit Court, district of Richelieu (GILL, J.), December 9, 1884, in the following terms :—

"La cour etc.

"Considerant qu'en vertu de l'article 698 du Code Municipal, le requérant avait droit d'adopter le procédé de sa présente requête en cassation contre la répondante, et que, sur ce chef, de même que sur tous les autres y allégués, la dite défense en droit est mal fondée ;

"L'a rejetée et rejette avec depens.

"Et au fond :

"Considerant que le conseil de la répondante, par sa résolution ou ordonnance dont se plaint le requérante, adoptée à sa séance du 16 mai dernier (1884), et par laquelle, sur appel porté à cet effet, un certain règlement adopté par le Conseil Municipal de la Paroisse de St. David, à sa session du 7 avril précédent, ainsi que tous procédés du dit Conseil de paroisse, à sa dite séance du 7 avril, amendant le procès-verbal de Louis Parent, en date de l'année précédente, con-

cernant la route *Jos. Pierre*, ont été cassés, annulés et mis à néant, a violé la loi en procédant à juger l'appel porté devant lui par Lessard *et al.*, contre Crépeau *et al.*, sur le dit règlement, sans instruire et entendre la cause, ainsi qu'il est réglé par l'article 932 du Code Municipal ;

" Maintient la requête en cassation du dit requérant comme bien fondée et casse, annule et met à néant, à toutes fins que de droit, la dite résolution ou ordonnance du dit Conseil de Comté d'Yamaska, en date 16 mai dernier, avec dépens contre la répondante, distraits, etc."

Nov. 25, 1885.]

Germain, Q.C., for the appellant.

Geoffrion, Q. C., for the respondent.

Jan. 21, 1886.]

CROSS, J. (*diss.*) :—

The main road of the Concession Wurtele, or Petit Rang, runs nearly parallel to the River St. David, but tending towards it so as to enclose the intervening space, almost in the shape of a very acute angle, where it comes within a trifling distance of the river, viz : about two arpents. What is called the *Route Chamberland* diverges from it, about at right angles, and joins the Pont Chamberland, serving to cross the river at this point, and to communicate with the main road leading to the village St. David.

At a certain distance further up the road, what is called *la Route Jos. Pierre*, diverges at nearly right angles from the *Route Wurtele*, or Petit Rang, passes through some three properties at a place called Pointe à Crépeau, not all in a straight line, a distance of about eleven arpents, until it reaches the river, where it crosses on the *Pont Jos. Pierre*, and joins the main roads leading to the parishes of St. Aimé and St. Marcel.

Both these routes had been maintained by the parties concerned according to a repartition made by a *procès-verbal* of J. O. Pepin, 25th June, 1867. Certain of the proprietors on the Rang Wurtele, or Petit Rang, had been made contributory to the Route and Pont Jos. Pierre, but claiming that this route and bridge was unnecessary, more especially as far as they were concerned, they peti-

1886.
Co. d'Yamaska & Durocher.

tioned the local council of St. David to be relieved from contributing to the Route and Pont Jos. Pierre, and to be included with the contributories to the route and Pont Chamberland, and asked for the appointment of a superintendent to report on the subject. They accordingly appointed as Superintendent, Jos. Parent, notary, who reported in favor of the petitioners, save that as the Route and Pont Jos. Pierre seemed to be desired by three proprietors whose land it crossed, it might remain open to be maintained by themselves. The council took the report into consideration. They were evenly divided, but by the casting vote of the Mayor, the report, although nominally homologated, was virtually set aside in its main provisions, whereupon the petitioners appealed to the council of the County of Yamaska, who reversed the decision of the local council, adopted the superintendent Parent's report in its entirety, and ordered its execution.

The By-law, or *procès-verbal*, as thus amended, remained in force for about five months, when a new petition was got up by parties interested in the Route and Pont Jos. Pierre, containing many new and important allegations of fact, among others representing that this road had been used for a great many years; that it was still the main avenue for the passage of many of the proprietors of the Rang Wurtele, who were continuing to use it for business in going to the parishes of St. Aimé and St. Marcel; that it was the road to the public school, and ninety arpents of frontage were assigned to the support of the Route and Pont Chamberland, while only three proprietors were assigned to the support of the Route and Pont Jos. Pierre. They, therefore, asked for a new repartition. The local council took this petition into consideration, and accorded its conclusions, setting aside by their resolution the *procès-verbal* of Jos. Parent, and restoring the former contributors to the Route and Pont Jos. Pierre. From this decision, an appeal was again entered to the county council, who treated the decision of the local council as one over-ruling that of the county council on the former petition. They consequently, without hearing the petitioners, or the members of the

local council, or taking the evidence that might have been offered, passed a resolution maintaining the appeal, setting aside the proceedings of the local council, with costs against the Petitioners. From this decision the latter appealed to the Circuit Court for the district of Richelieu, in virtue of art. 698, of the C. M. Their appeal was maintained, and the proceedings of the county council cancelled, from which latter decision the county council of Yamaska have appealed to this court.

The county council urge strenuously that the demand of the second petition, being in effect to set aside the decision of the county council on the first petition, the matter in dispute should be considered *chose jugée*, not susceptible of being renewed in this manner. On the other hand, the petitioners contend that there is a clear provision in arts. 810 and 810*a* M.C., that every *procès-verbal* in force may at any time be amended or repealed by another *procès-verbal*, on petition of the parties interested, that they were petitioning for the maintenance of a road that existed for over twenty years, and which was still used as an important thoroughfare leading to two adjacent parishes and to the public school; that the appeal on the first petition had really gone *ex parte*, and they were prepared to prove their allegations and the justice of their pretensions.

I find that the ground taken by the now appellants that the matter was *chose jugée*, is untenable. There might have been great inconvenience, and even impropriety in the subject being revived so soon after the decision on the first petition, and it may have been wrong to have taken up, on the second petition, the *procès-verbal* which was prepared by Parent for the first; but it was clearly the duty of the county council to have heard the parties interested, the local council and any witnesses that might have been offered on points on which testimony might have been admitted, or to reject the evidence, if found inadmissible, before proceeding to adjudicate on the appeal, in conformity with art. 932. The matter is reduced to one of regularity of procedure, in which light it was treated

1886.
Co. d'Yamaska & Durocher.

by the Circuit Court. I think they were right, and that the judgment should be confirmed.

TESSIER, J., who also dissented, expressed his concurrence in the reasons given in the judgment of the Court below.

The judgment of the Court is as follows:—

"La cour, etc...

"Considérant qu'à une session du conseil municipal de la paroisse de St. David, dans le comté d'Yamaska, tenue la 3 septembre 1883, un règlement a été passé concernant les "routes, ponts, fossés et clôtures de Joseph P. Chamberland;" le dit règlement homologuant en partie mais rejetant dans ses points les plus importants le procès-verbal de Louis Parent, surintendant du conseil local de la paroisse de St. David;

"Considérant qu'il y a eu appel de la décision du dit conseil local au conseil de comté, concernant ce règlement, et que par résolution du dit conseil de comté, le règlement passé par le dit conseil local a été cassé, savoir le 24 octobre 1883, et le procès-verbal du dit surintendant homologué pour être exécuté suivant sa forme et teneur;

"Considérant que le 7 avril 1884, le dit conseil local agissant comme s'il n'était pas lié par la décision du conseil de comté, et sans même essayer de la mettre à exécution, a procédé sur nouvelle requête à passer un autre règlement dans les mêmes termes que le règlement annulé du trois septembre 1883, rétablissant ses amendments au rapport du dit surintendant et renversant virtuellement la décision rendue en appel par le conseil de comté de 24 octobre 1883;

"Considérant que sur un nouvel appel porté devant lui, par Dolphis Lessard et autres, le dit conseil de comté a, le 16 mai 1884, après avoir lu et considéré la requête en appel contre le règlement et les procédés du dit conseil local du 7 avril 1884, cassé le dit règlement et les dits procédés en adoptant la résolution qui suit: [See resolution in head note to report];

"Considérant qu'en cassant comme il l'a fait par la dite résolution du 16 mai 1884, le règlement et les procédés du

dit conseil local du 7 avril 1884, le conseil du comté a agi dans les limites de sa juridiction et dans l'exercice des droits qui lui sont reconnus par la loi;

"Considérant, partant, qu'il y a erreur dans le jugement dont est appel, savoir le jugement rendu par la cour de circuit pour le district de Richelieu, le 9 décembre 1884, lequel a maintenu la requête en cassation du dit intimé et a annulé la dite résolution ou ordonnance du conseil de comté du 16 mai 1884;

"Renverse le dit jugement et procédant à rendre le jugement que la dite cour de première instance aurait dû rendre, renvoie la dite requête en cassation de l'intimé avec dépens tant en cour de première instance qu'en appel; (*diss.* Tessier et Cross, JJ.)"

Judgment reversed.

A. Germain, attorney for Appellant.

J. B. Brousseau, attorney for Respondent.

(J. K.)

Sept. 21, 1886.

Coram DORION, CH. J., MONK, RAMSAY, CROSS, BABY, JJ.

LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DU DIOCESE DE HYACINTHE,

(*Opposant collocated in Court below*),

APPELLANT;

AND

THE EASTERN TOWNSHIPS BANK,

(*Contestant in Court below*),

RESPONDENT.

Seigniory—Cadastre—Omission to enter constituted rent.

HELD:—That an omission to enter in the *cadastre* a constituted rent to represent the former seigniorial rent, cannot be rectified.

The appeal was from a judgment of the Superior Court, St. Hyacinthe, (SICOTTE, J.), Nov. 14, 1884, dismissing the

1886.

Corporation Episcopale, etc. & E. T. Bank.

appellant's opposition *afin de conserver*. The judgment is as follows:—

"La Cour, après avoir entendu la Corporation Episcopale du diocèse de St-Hyacinthe et la Banque des Townships de l'Est sur l'opposition afin de conserver de l'opposante et la contestation d'icelle par la Banque;

"Considérant que, par le Cadastre de la Seigneurie Rosalie, l'immeuble acquis par la Banque est enclavé dans cette Seigneurie, et qu'il est y indiqué et désigné sous le numéro 455, avec mention qu'il était es-mains de Maurice Laframboise comme le propriétaire et le censitaire le possédant alors, et sans mention d'aucune charge de rente constituée;

"Considérant que le cadastre de cette Seigneurie a été clos et déclaré par l'autorité compétntee être en force depuis le 24 janvier 1862;

"Considérant que la Banque, en se rendant adjudicataire de cet immeuble en est devenue propriétaire sans charge d'aucune rente constituée et droit seigneurial;

"Considérant que cet immeuble n'était lors de la saisie et vente judiciaire qui en a été faite, grevé d'aucune rente constituée représentant les droits seigneuriaux;

"Considérant que l'acte seigneurial de 1854, a été fait pour abolir le système seigneurial et remplacer les droits, qui en découlaient en leur substituant des rentes constituées, déterminées par le cadastre pour représenter les droits seigneuriaux, affectant les terres en censive;

"Considérant que par la letter et l'esprit de la loi sur la matière, tout immeuble, désigné dans le cadastre et qui n'y est pas chargé de telle rente constituée, est franc et quitte à toujours de toute redevance seigneuriale;

"Considérant que l'opposante est mal fondée dans sa réclamation et dans son opposition afin de conserver, et que la Banque est bien fondée dans sa contestation, déboute l'opposante de son opposition avec dépens distraits aux avocats de la Banque."

May 25, 1886.]

Lacoste, Q. C., and *Geoffrion*, Q.C., for the appellant.

J. O. Joseph, for the respondent.

Sept. 21, 1886.]

1886.

Corporation Episcopale etc. & H. T. Bank.

CROSS, J.:—

A contestation has arisen in this case between the claimants on the distribution of the proceeds at sheriff's sale of an immovable, owned by one Jeremie Daignault.

The appellants claim to be entitled to priority as being in the rights of the Seignior of the seigniory of St. Rosalie, and as such were collocated for $40.46, a year's arrears of rent, alleged to have accrued on the property sold. The respondent, a hypothecary creditor and *adjudicataire* of the property in question, by a contestation, denies this claim of priority, and as a consequence, denies appellant's right to be collocated on the proceeds of the property. The Superior Court maintained this contestation and rejected the collocation of the appellants; whence this appeal.

The case can be understood from the following narration of facts:—

On the 26th of March, 1852, the heirs Dessaules, proprietors of the Seigniory Dessaules, conceded to M. Laframboise, *à titre de bail à cens*, a property on that seigniory for the price of £600, charging it with the payment of seigniorial rents, save that so long as Laframboise or his heirs remained proprietors of the whole or any part of the property in question so conceded, no rent would be due or payable by them thereon.

Mrs. Laframboise was one of the heirs Dessaules, among whom a *partage* was subsequently made, the portion so sold to Laframboise falling into the lot or share of Mrs. Laframboise, her lot or share being afterwards called the seigniory of Ste. Rosalie.

Laframboise subsequently sold part of the property so purchased by him to Jeremie Daignault, on whom it has since been *décrété* by sheriff's sale, the respondent becoming the purchaser, and the proceeds, to the extent above mentioned, being now the subject of dispute between the parties to the present appeal.

In August, 1883, Madame Laframboise sold her seigniorial rights in the seigniory Ste. Rosalie, consisting of the reserved rents, to G. C. Dessaules, who afterwards sold and conveyed the same to the appellants.

1886.

Corporation Episcopale, etc. & E. T. Bank.

The *cadastre* of said seigniory, after the observation of all necessary legal formalities, was closed and deposited according to law, the land of Daigneault being therein designated as No. 455, with Laframboise's name as proprietor, and a declaration that it was subject to no rent in favor of the seignior.

An *arpentage* took place on the 14th April, 1884, whereby it was established that the portion of rent which would have been due for Daignault's portion of the land, would be $40.46 per annum. The claim of the appellants is for a year's arrears of this rent ending 11th February, 1883, which should have been inserted in the *cadastre* of the seigniory as a constituted rent substituted in place of the seigniorial rent.

The respondents contested appellant's collocation for this claim, on the alleged ground that more than thirty years had elapsed since the concession to Laframboise, containing the stipulation regarding this rent, and that without any renewal of registration, whereby it had become prescribed, but more especially that by the seigniorial commutation Act and its amendments, the seignior or any party claiming for any such *cens et rentes*, had been foreclosed from any such rights, save those preserved by and specified in the *cadastre* prepared by and put in force by the proceedings of the commissioner appointed for the purpose under said Act, which *cadastre* in the present matter had been made, closed, deposited and published according to law, after the observance of all the necessary formalities required by said statutes, the land in question being included by the No. 455, the name of the proprietor, Mr. Laframboise, being also given, and so far from any rent being chargeable or charged thereon, a declaration was inserted to the effect that no rent was due or payable upon the property in question. And as the object of the statute in question and its amendments was to abolish all seigniorial dues, and substitute in lieu thereof constituted rents reserved by the *cadastre*, it was clearly explained that only those reserved by the *cadastre* would be afterwards in force.

1886.

Corporation Episcopale, etc. E. T. Bank.

The observance of all required formalities is not disputed, and the general consequence of a forfeiture of rights under the statute is not denied, but it is suggested that an error was committed in this case within the powers of the Court to remedy; further, that the amending statute 30 Vic., c. 30, comes to the aid of the appellants. It is obvious to the Court that if any error occurred in the *cadastre*, the seignior should have had it corrected by the commissioner, as required by sec. 18, cap. 41, C. S. L. C., and not having done so, the consequence was a forfeiture of the rights not included and reserved by the *cadastre*, it being then too late to correct errors (see sec. 29), unless the amending Act comes to the aid of the claimant. It is true that the amending Act allows certain omissions to be corrected, but does not touch the case here complained of. The Court cannot supply the omission which the Legislature might have done, although it has the same appearance of equity in its favor as that which engaged the attention of the Legislature.

The amending Act provided for two cases, viz.: the omission of the name of a *censitaire*, and the correction of an error in the extent of land possessed by a *censitaire*, neither meeting the case in question. It besides contained the special provision that nothing in the Act should affect the rents due and payable up to the date thereof, by the *censitaires*, in virtue of the seigniorial *cadastres*, which *cadastres* should remain in full force and vigor in all other respects, notwithstanding any other informality or irregularity that might be found therein.

The Court is of opinion that it was rightly held by the Court below that the property so adjudicated to the respondent was freed from seigniorial dues by the commutation, and was not subject to the year's rent claimed by the appellants, nor were they entitled to rank on the proceeds of the sale for the same. It is besides doubtful if the appellants ever had any right or pretension to this particular rent transferred to them by their title from Dessaules; that was only a title to the constituted rents reserved by the cadastre, and no special mention was

1864.

Corporation Episcopale, etc. & E. T. Bank.

therein made to the pretension now raised by the appellants. Being of this opinion on the main question, it is unnecessary to consider the plea of prescription. The Court now rules that the judgment appealed from should be confirmed.

RAMSAY, J.:—

This is a case arising out of the conversion of the feudal tenure into what is called the tenure of franc and common soccage. The title to what represents a former fief has passed to the appellants. A piece of land, formerly belonging to the husband of one of the co-seigniors, is entered in the cadastre, but no constituted rent appears charged on this land. It seems pretty clear that it is an omission, owing, probably, to the fact that the owner was not to pay rent during his lifetime. Can the error be rectified?

The argument is, that it is like an error of calculation, that the purchaser, defendant in the suit in which the land was seized, purchased *à la charge de la rente constituée représentant les droits seigneuriaux sur le dit terrein.* This position is favorable to appellants, who should succeed, unless the text of the statute and the policy of the law are imperious.

Objectionable, in many respects, as the law is in principle, it seems to me that the title of the former seignior to what is substituted for his former dues, is only what is to be found in the cadastre. The valuation, it is true, is not made by a regular court of law, but by a commissioner who was, however, performing a quasi-judicial function. He was obliged to give public notice of the beginning of his operations, so that the parties interested might take part. After his schedule was completed, he had to give notice that during 30 days he was prepared to correct any error and *supply any* omission that might be pointed out to him. Originally, the parties interested might name experts. This was altered most unfairly in the second part of the session of 1854; nevertheless, it shows that the operation was to be a final adjustment of contending interests. Again, there was opportunity given for revision, and the statute calls the revising commis-

sioners a "Court of Revision." It must also be borne in mind that in the conversion of a system such as the seigniorial tenure, to a new tenure, it was necessary to start from a well defined basis, and this the cadastre was intended to be as between the former seignior and his *censitaire*. Of course, this is open to the reproach of being arbitrary; but the whole thing was arbitrary. Nothing could be urged for it but policy. When one spoke to an anti-seigniorial agitator, he did not reason, he raved. Sham questions of law were raised; but this was a tribute vice paid to virtue. The world has got quite beyond this happy stage of negative morality, and expropriation takes place—without apology, and without the semblance of indemnity.

No weight is to be attached to the undertaking to pay the *rente constituée*. It was purely a matter of style, for there was no *rente constituée* to pay, and the seigniorial dues were abolished.

Another argument is to be borrowed from the use of the copies of the schedule. One was to remain in the hands of the Prothonotary, who was to furnish extracts, which were to be evidence *prima facie*—of what?—of an unauthentic record? This could scarcely have been the intention of the legislature (1)

Judgment confirmed, BABY, J., *diss.*

Geoffrion, Dorion, Lafleur & Rinfret, attorneys for Appellant.

Doutre, Joseph & Dandurand, attorneys for Respondent.

(J. K.)

(1) I am inclined to think the 29-30 Vic. c. 30, does not help appellant.

November 27, 1886.

Coram DORION, CH. J., RAMSAY, CROSS, BABY, JJ.

THE EXCHANGE BANK OF CANADA,
(Defendant in Court below),
APPELLANT;

AND

LA BANQUE DU PEUPLE,
(Plaintiff in Court below),
RESPONDENT.

Cheque—Acceptance by President and Cashier—Payable at a future date—Liability of Bank.

In 1881, G., having business transactions with the Exchange Bank, agreed with C., who was both President and Cashier, that in lieu of further advances, the bank would accept his cheque, but made payable at a future date. On the 19th October, 1881, G. drew a cheque on the Exchange Bank, and after having got it accepted as follows: "Good on 19th Feb., 1882. T. Craig, Pres.," got the cheque discounted by the Banque du Peuple, and deposited the proceeds to his credit in the Exchange Bank. This cheque was renewed on the 23rd May, and it was presented at the Exchange Bank and paid. Subsequently, another cheque for the same amount was accepted in the same way and discounted by the Banque du Peuple, and renewals were made up to 23rd May, 1883. At the time of the suspension of payment by the Exchange Bank, the Banque du Peuple had in its possession four cheques also payable at future dates, signed by G., and accepted by T. Craig, president and manager of the Exchange Bank, which were subsequently presented for payment on the dates when they were payable, and duly protested. The total amount of these cheques was $66,020.64, and one of them, dated 7th September, 1883, for $31,000, was a renewal of the cheque the proceeds of which had been paid to the credit of G. in the Exchange Bank.

To an action brought by the Banque du Peuple against the Exchange Bank, based on the four cheques in question, for the recovery of the sum of $66,020.74, the Exchange Bank pleaded *inter alia*, that C. had not acted within the scope of his authority, and that the Exchange Bank had never authorized or ratified his acceptance of G.'s cheques:

HELD:—That the Exchange Bank was liable for the acceptance by their president and cashier, of G.'s cheques, discounted by the Banque du Peuple in good faith and in the ordinary course of business.

The appeal was from a judgment of the Superior Court, Montreal, (LORANGER, J.), March 31, 1885, maintaining

the respondent's action on four cheques. The judgment of the Court below (reported in M. L. R., 1 S.C., 231) was in the following terms :—

" La Cour, etc.,

" Attendu que la demanderesse réclame de la défenderesse la somme de $66,020.64, qu'elle prétend lui être due de la manière suivante, savoir :

1o. Par un chèque fait et signé à Montréal le 21 août 1883, par F. E. Gilman, par lequel ce dernier a requis la défenderesse de payer à la demanderesse ou à son ordre la somme de $20,000, lequel chèque a été accepté par le ministère du président et gérant de la défenderesse dans les termes suivants : " Good on 20th December, 1883, T. Craig, Pres.," puis ensuite remis par le dit F. E. Gilman à la demanderesse pour valeur reçue ;

2o. Par un autre chèque fait et signé à Montréal par le dit F. E. Gilman, le 21 août 1883, par lequel ce dernier a requis la défenderesse de payer à la demanderesse ou ordre, la somme de $5,000, lequel chèque a été accepté par le ministère du président et gérant de la défenderesse dans les termes suivants : " Good on 24th December, 1883, T. Craig, Pres." puis ensuite remis à la demanderesse par le dit F. E. Gilman, pour valeur reçue ;

3o. Par un autre chèque fait et signé à Montréal le 4 septembre, 1883, par le dit F. E. Gilman, par lequel ce dernier a requis la défenderesse de payer à la demanderesse ou ordre, la somme de $10,000, lequel chèque a été accepté par le ministère du président et gérant de la défenderesse dans les termes suivants : " Good on the 4th of January, 1884, T. Craig, Pres. Exchange Bank," puis ensuite remis à la demanderesse par le dit F. E. Gilman, pour valeur reçue ;

4o. Par un autre chèque fait et signé à Montréal par le dit F. E. Gilman, le 4 septembre 1883, par lequel ce dernier a requis la défenderesse de payer la demanderesse ou ordre, la somme de $31,000, lequel chèque a été accepté par le ministère du président et gérant de la défenderesse dans les termes suivants : " Good on the 24th day of January,

1886.

Exchange Bank & Banque du Peuple.

1884, T. Craig, Pres." puis ensuite remis à la demanderesse par le dit F. E. Gilman, pour valeur reçue ;

5o. La somme de $20.64, coût des protêts des dits chèques qui n'ont pas été payés à leur échéance ;

"Attendu que la défenderesse a plaidé que les chèques en question ont été faits et acceptés pour des considérations et des fins étrangères à son commerce, et qu'elle n'en a jamais reçu aucune considération ni retiré aucun bénéfice ou avantage ; qu'elle n'a connu l'existence des dits chèques et la prétendue acceptation qu'en aurait faite le nommé Craig, son président et gérant, qu'après que la défenderesse eût été mise en liquidation ; qu'aucune trace ou entrée des dits chèques ne se trouve dans les livres de la défenderesse, et que toutes les transactions intervenues entre le dit F. E. Gilman, le dit Thomas Craig et la demanderesse en rapport avec les dits chèques, ont eu lieu à son insu et à l'insu de ses directeurs ou autres officiers exécutifs ; que la mise en liquidation de la défenderesse a été amenée par l'incurie et l'administration frauduleuse et coupable de son président et gérant le dit Thomas Craig, lequel se serait approprié des montants considérables, et se serait enfui en pays étrangers où il se trouve encore ; que les chèques en question ont été acceptés par le dit Craig, sans autorité et à l'insu de la défenderesse et de son bureau de direction, pour couvrir des transactions et affaires particulières au dit Craig, dans lesquelles la défenderesse n'avait aucun intérêt et qu'elle n'a connu qu'après la mise en liquidation ; que le dit Craig, le dit F. E. Gilman et d'autres personnes inconnues de la défenderesse, se seraient associés pour former un complot au moyen duquel ils devaient en achetant les parts et actions du fonds social de l'Assurance Canadienne Royale, réussir à contrôler l'administration de cette assurance de manière à pouvoir s'en emparer, la diriger et liquider à leur profit personnel ; que les chèques en question ont servi à procurer aux dits Craig, Gilman et leurs complices les fonds requis pour l'exécution de ce complot ; que les faits ci-dessus allégués étaient à la connaissance de la demanderesse lorsqu'elle a accepté les dits

chèques, et que si elle a donné valeur pour les dits chèques, la considération ainsi donnée est nulle, illégale et illicite ; que de plus le dit Craig n'avait aucune autorité pour accepter les dits chèques, et qu'en les acceptant, il a excédé ses pouvoirs et n'a pas obligé la défenderesse ; qu'il n'avait aucun pouvoir pour accepter des chèques payables à une date postérieure au jour de l'acceptation ; que cette acceptation est contraire à la loi et aux usages et coutumes des banques en cette cité et dans toute la Puissance du Canada ; que suivant l'usage et la coutume les chèques ne sont acceptés que lorsque le tireur a suffisamment d'argent en banque pour en couvrir le montant ; que cette acceptation se fait au moment même de la présentation dans un livre tenu par un commis spécialement chargé de ce soin ; que les dits chèques n'ont pas été présentés pour acceptation, et que cette acceptation n'a pas été notée dans aucun livre de la banque ; que tous ces faits étaient connus de la demanderesse au moment où elle a reçu les dits chèques, et qu'elle doit supporter les conséquences de sa propre faute et de son imprudence. [The remainder of the judgment is printed in the report of the case in the Court below, M. L. R., 1 S. C. 232.]

Nov. 15, 16, 1886.]

M. Hutchinson, for appellant:—

From the evidence it will be seen that the undertaking of Craig on behalf of the Bank to pay these cheques at a future date was, to say the least, a very unusual proceeding and certainly not in the ordinary course of business. Besides, the Exchange Bank had not only no funds in its possession belonging to Mr. Gilman to meet these cheques, but the fact was apparent to the holder of the cheques from the very nature of the acceptance or certification, and to take these cheques accepted by an officer of the Bank when there were no funds to meet them, but instead of funds a guarantee on the part of this officer that the Bank would pay the cheques at a future date, is a proceeding unknown in the experience of old and leading bankers in Canada. The Bank respondents were certainly put on their guard and should have made enquiries of the direc-

1869.
Exchange Bank & Banque du Peuple.

torate as to the powers of Craig to do such a thing, and as to the funds available to meet cheques for amounts so large. In fact it appears that Mr. Trottier, the cashier of the Bank respondents, was struck with the very unusual character of these cheques, and before taking them did make some enquiries, but not of the directors of the Exchange Bank or of any one who could inform him as to the facts, but merely contented himself with enquiries of his legal adviser as to the regularity of the proceeding. And having neglected to do so they must suffer the consequences.

Vide Morse on Banks and Banking, p. 97: "Unless "under very peculiar circumstances a Bank will not be "held liable to make good such acts or undertakings of "their officers as are unwarrantable, unusual, or indi- "rectly in contravention of any law."

Vide Hyman v. *Hallowell and Augusta Bank*, 14 Mass. 58; *Lloyd* v. *West Branch Bank*, 14 Penn St. 172.

But the appellants contend further, that Mr. Craig, as an officer of the Bank, was entirely without authority to bind the bank for the payment of these cheques, and that respondents must or should have known it, as no president or cashier of a bank has ordinarily such authority. *Vide Mussey* v. *The Eagle Bank*, 9 Met. 306.

The undertaking of Craig was not that Gilman had funds in the Exchange Bank to meet these cheques, as the usual effect of a certification of a cheque by a cashier would be, but that the Exchange Bank would become surety or guarantee that the cheques would be paid at a fixed date in the future. Here is a contract of suretyship which no cashier of a bank unless specially authorized could validly enter into on behalf of his bank and so as to bind it. It is even doubtful if the directors have such power. *Vide* Morse on Banks and Banking, p. 11: "It "is a general rule that a bank has no power to engage as "surety for another in a business in which it has no in- "terest, and from which it can derive no profit. There- "fore, it has no right to become an accommodation "endorser."

1866.

Exchange Bank
Banque du Peuple.

And page 156: "Those acts which the cashier may "undertake to perform in perfectly good faith, and per- "haps under color of authority, but which the law imper- "atively and absolutely precludes him from performing; "such are the discretionary and semi-judicial acts which "it is the exclusive province and inalienable duty of the "directors to perform at their board meetings, power to "do which on their behalf they can delegate to no other "officer whomsoever. No excuse of circumstances is ad- "missible to give to these acts any validity or binding "force upon the bank."

See also page 152: "The key note to the whole subject "lies in the fact that the office of the cashier is strictly "executive. He is the business officer of the bank, but "in the sense of one who transacts the business, not of "one who regulates and controls it. The grand difficulty "which has been experienced in defining his exact func- "tions has always lain in the necessity of giving him "sufficient practical power to enable him to conduct the "daily routine of business without trespassing upon the "domain of discretionary authority which pertains exclu- "sively and for the most part inalienably to the directors. "Acts which demand only confidence in the integrity of "the official, and familiarity with the forms and customs "of business, acts strictly of performance, which do not "rise to the importance of the semi-judicial character, are "those which he is properly delegated to do. But the "responsible conduct, and management of the affairs of "the institution, upon the soundness and wisdom of "which its prosperity and success depend, which call for "the exercise of a high degree of care, knowledge, and "experience, and a semi-judicial discretion, which demand "general business qualifications of a higher order, are "not and never have been held to be, appurtenant to the "office of cashier."

And at page 157: "The ordinary duties of a cashier do "not comprehend the making of a contract, which in- "volves the payment of money, without an express "authority from the directors, unless it be such as

1886.

Exchange Bank & Banque du Pe

"relates to the usual and customary transactions of the "bank."

And at page 205: "A cashier cannot certify the cheque "of a drawer who has not unencumbered funds on hand "in the bank sufficient to meet the cheque. Any person "having notice of the fact that the bank had not enough of "the drawer's funds on hand to meet the cheque at the "time of certification will be presumed to know that the "act was unauthorized and void, and will not be allowed "to hold the bank liable upon it."

Vide Cooke v. *State National Bank of Boston*, 52 N. Y. 96 and 50 Barb. 339; Morse, pp. 176 and 202. Daniel on Negotiable Instruments, vol. 2, §1607: "No officer of the "bank has any authority to certify a cheque when there "are no funds of the drawer to meet it. And it is only "in favor of *bonâ fide* holders for value and without notice "that, without funds to meet the cheque, the law will "enforce the liability of the bank upon its officers' certi- "ficate. No officer, moreover, has any implied authority "to certify a cheque until it is presented for payment, "when, of course, it must be actually due and payable. "Therefore, should any officer certify a post dated cheque, "such cheque bears on its face, until the day of its date "arrives, notice and information to all parties receiving "it, that it has not been certified in the usual course of "business; and if it turn out that the drawer had no "funds on deposit at the time of the certification, no party "so receiving it can hold the bank liable."

Clark National Bank v. *Bank of Albion*, 52 Barb. 593. Also foot note: "Without special authority conferred "upon him, the officer of a bank has no implied authority "to certify any but commercial cheques—that is those "drawn in commercial form, in the usual course of busi- "ness; and if the cheque bear upon it a memorandum "that it is to be 'held as collateral, etc.,' the cashier's cer- "tification is not in due course, and will not bind the "bank unless expressly authorized." *Dorsey* v. *Abrams*, 85 Penn. St. 299.

1886.

Exchange Bank & Banque du Peuple.

Vide Story on Agency, §116 Note. *Foster* v. *Essex Bk.*, 17 Mass. 479, 1 Bell, Com. p. 480 (5 ed.)

One reason why the authority of cashier or executive officer should be so limited is obvious, for by thus accepting cheques with no funds on hand to meet them, the cashier, without the knowledge or authority of the directors, might convert these cheques into a species of currency and issue them far in excess of the amount allowed the bank by its Act of Incorporation and the Banking Acts.

There is also another fact worthy of notice, the cashier was the chief executive officer of the bank,—Craig was cashier and also President. As cashier he was the business officer of the bank, as President his chief duty was to take charge of the litigation of the bank, but we find him in this case signing these cheques not as cashier, but as President. This being the case, was it not incumbent on the bank taking these cheques to inquire what were the powers of the President? As to duties of President, see Morse on Banks and Banking, p. 144. As to duties of Cashier, see p. 152. *Vide* also, p. 88, as to enquiry to be made regarding President.

Under the circumstances the appellants contend that Mr. Craig had no authority to accept the cheques in question, and that the nature of the acceptances was of a character sufficient to place the respondents on their guard, and to notify them that Gilman had no funds in the Exchange Bank to meet said cheques, and that the acceptance was given fraudulently, without value, and without the authority of the bank appellants.

Geoffrion, Q.C., for the respondent :—

Voici sous quelles circonstances l'intimée est devenue le porteur des chèques en question : dès 1881, M. Gilman faisait des affaires pour un montant considérable avec l'appelante ; le 19 octobre de la même année, le compte de M. Gilman était soutiré pour un montant de $25,000 à $30,000. M. Gilman à qui l'appelante avait promis de faire des avances pour un montant excédant celui pour lequel il était soutiré, demanda de nouveaux fonds au

1886.
Exchange Bank & Banque du Peuple.

gérant de cette banque, M. Craig. Celui-ci lui intima que la banque n'avait pas assez de fonds dans le moment, pour lui faire les avances promises et qu'il lui faudrait attendre certains encaissements avant de pouvoir le faire, ce qui pouvait prendre un temps plus ou moins indéfini. M. Gilman dont les chèques étaient acceptés et payés par la Banque d'Echange, même sans qu'il eût de fonds à son crédit, quand celle-ci pouvait le faire, proposa alors au gérant de l'appelante d'accepter son chèque pour $30,000, payable à une date future suffisamment éloignée pour permettre à la Banque d'Echange de se procurer les fonds nécessaires pour honorer ce chèque. Le gérant de l'appelante acquiesça à cette proposition. M. Gilman fit donc son chèque sur la Banque d'Echange pour $30,000, daté le 19 octobre 1881, et M. Craig, comme gérant de la Banque d'Echange, l'accepta de la manière expliquée, payable à quatre mois, savoir le 19 février alors prochain, 1882. Le même jour, M. Gilman se présenta au bureau de la Banque du Peuple, laquelle ayant des fonds disponibles, avança sur ce chèque ainsi accepté par la banque, le montant de $30,000 moins l'escompte. Le même jour, 19 octobre 1881, M. Gilman déposa à son crédit à la Banque d'Echange $29,412.23 étant le produit du chèque de $30,000 ci-dessus mentionné.

Il va sans dire que toute cette histoire de conspiration pour ruiner et mettre en liquidation l'assurance "Royale Canadienne", contenue dans la défense, n'est qu'une simple fabrication, en autant que la Banque intimée est concernée, et que celle-ci a fait la transaction ci-dessus relatée, de bonne foi dans le cours ordinaire de son commerce et a donné bonne et valable considération pour le chèque de $30,000 et les autres qui l'ont suivi.

Les espérances de M. Craig qu'il serait en fonds quatre mois après l'acceptation du chèque en question ayant été déçues, des renouvellements se répétèrent jusqu'au 23 mai 1883. Par des intérêts ajoutés à la créance primitive, le chèque devenant dû à cette dernière date, était de $31,000.

Dans le cours ordinaire des affaires, et par l'entremise

1886.

Exchange Bank & Banque du Peuple.

du commis de la Banque du Peuple préposé à ce genre d'affaires, savoir l'un des compteurs, le chèque fut présenté dans la matinée, à l'ouverture de la Banque d'Echange, et payé. Ce paiement eut lieu, ainsi que l'explique le témoin Varey, sur l'ordre de M. Craig, et est constaté dans au moins deux des livres de la Banque d'Echange, savoir dans les livres tenus par le comptable (Ledger Keeper) et par le payeur.

Les directeurs de la Banque d'Echange, sont, les uns après les autres, venus jurer qu'ils n'avaient eu aucune connaissance de l'acceptation de ces chèques, faite au nom de la banque, par le gérant; la chose est possible, et il paraît qu'il y avait beaucoup d'autres choses qui se passaient à cette banque que les directeurs ignoraient, mais qu'ils auraient dû connaître. Leur ignorance de cette transaction, jusqu'au 23 mai 1883, est justifiable en autant que leur employé, M. Craig, admet s'être contenté d'avoir tenu note de la dite acceptation dans un livre memorandum qu'il tenait pour son usage personnel; mais après le 23 mai 1883, cette excuse ne peut plus valoir. Les livres mêmes de la banque, savoir, ceux qui viennent d'être mentionnés en constatent l'existence; deux des employés de la banque, à part du gérant, en ont eu connaissance. Bien plus, le chèque ainsi payé au comptoir de la Banque d'Echange le 23 mai 1883, est demeuré en la possession de la banque appelante; sa forme aussi bien que la manière dont il avait été accepté sont donc parvenues également à la connaissance de l'appelante.

Si le gérant avait excédé ses pouvoirs, dans la transaction en question, en acceptant ce chèque de la manière plus haut relatée, la banque aurait dû en refuser le paiement; dans tous les cas, ses directeurs qui sont censés avoir connaissance de tout ce qui est entré dans les livres de la banque et de ce qui fait partie de leurs archives, auraient dû répudier la transaction. Il est en preuve qu'ils n'en firent rien.

Il paraîtrait que ce chèque ainsi présenté par la Banque du Peuple, le 23 mai 1883, aurait pris le gérant par sur-

1886.

Exchange Bank & Banque du Peuple.

prise, attendu qu'il ne se trouvait pas encore assez en fonds pour sortir de sa caisse une somme aussi considérable. Il écrivit à M. Gilman et lui demanda de vouloir bien tirer sur la Banque d'Echange un nouveau chèque pour le même montant, offrant de l'accepter de la même manière que le précédent, ce à quoi consentit M. Gilman qui le présenta de nouveau pour escompte à l'intimée.

La Banque du Peuple qui, le matin même, avait vu un chèque exactement semblable, payé sans aucune difficulté au comptoir de la Banque d'Echange, n'hésita pas à faire des avances sur ce nouveau chèque ; c'est le même ou plutôt un renouvellement d'icelui en date du 7 septembre 1883, qui est l'un des chèques sur lesquels est basée l'action de l'intimée.

Les trois autres chèques paraissent avoir été escomptés originairement à différentes époques, depuis le 6 avril 1883, sous les mêmes circonstances.

La seule question, d'après nous, à discuter, est celle de savoir si, dans les circonstances, le gérant de l'appelante a agi dans les attributions de sa charge et dans les limites de ses pouvoirs. L'appelante a amené un certain nombre d'officiers de banque pour leur faire dire que, pour eux, c'était une transaction extraordinaire et qu'ils ne se rappelaient pas d'avoir vu de chèques acceptés d'une manière exactement semblable. L'ensemble des dépositions de ces prétendus experts démontre qu'ils sont peut-être parfaitement brisés à la routine du commerce de banque, mais que leur connaissance des principes régissant ce commerce est très limitée.

Ainsi, par exemple, on voit l'un d'eux, M. Grindley, gérant de la Banque Britannique de l'Amérique du Nord, admettre avoir déjà vu, quoique rarement, des chèques semblables à ceux dont il s'agit en cette instance, dans le cours de son expérience comme banquier ; mais qu'il n'a pas voulu escompter de semblables chèques. La chose n'est pas surprenante avec les notions que le témoin possède sur la nature d'une lettre de change ou d'un chèque, car il prétend n'avoir jamais vu une traite tirée à vue, acceptée payable à une date postérieure à sa présentation,

1886.

Exchange Bank & Banque du Peuple.

et il déclare sans hésiter qu'il n'escompterait pas une traite ainsi acceptée, même s'il n'entendait faire crédit qu'à l'accepteur.

Rien, cependant, de plus régulier que cette acceptation, et, si elle n'est pas fréquente dans le commerce de banque, il ne s'ensuit pas que, si le fait se présente, les banquiers doivent considérer cette acceptation comme suspecte. L'article 2293, C. C., doit avoir plus de poids que la prétendue coutume de nos banquiers ; d'ailleurs, si les témoins entendus de la part de l'appelante, n'ont jamais vu, dans le cours de leur expérience, d'acceptation à un jour postérieur à celui mentionné dans une traite ou dans un chèque, nous verrons plus tard que cela s'est présenté fréquemment et que la jurisprudence n'a pas hésité à consacrer la régularité de ces transactions et à en définir la valeur et les conséquences pour les différentes parties intéressées à l'effet de commerce ainsi accepté. (*Vide* Story, 2 vol., On promissory notes, page 672, 2e colonne des notes au bas de la page.)

M. Campbell, l'un des liquidateurs de la Banque d'Echange, est obligé d'admettre lui-même que ce n'est qu'une question de confiance dans l'officier qui aurait signé une acceptation semblable à celle dont il s'agit en la présente instance ; à la question qui lui est posée par la cour, ce qu'il ferait si un chèque semblable, accepté par le gérant de la Banque de Montréal lui était présenté, il répond : "I think that would be very likely discounted at once "and readily."

Malgré que les différents banquiers qui ont été examinés prétendent qu'ils n'ont jamais vu de transaction exactement semblable, ils admettent qu'il arrive assez fréquemment que les banques acceptent des chèques pour être remis à des tiers, comme garantie de l'exécution de certains contrats ; mais, disent-ils, quand des chèques de cette nature sont acceptés, la banque a la précaution de se faire donner des garanties pour l'indemniser dans le cas où le chèque serait présenté. Cette distinction ne signifie rien en autant que les tiers sont concernés ; ceux-ci, en acceptant comme valeur, contre la banque, un chèque

1880.

Exchange Bank
v.
Banque du Peuple.

accepté par elle, ne sont pas obligés de s'enquérir si la banque, ou les officiers ayant le droit de parler pour elle, ont pris les précautions nécessaires avant de signer. Ceci devient une question de discipline intérieure de l'institution.

La question de l'acceptation des chèques et des différentes manières d'effectuer cette acceptation n'est pas nouvelle dans la jurisprudence. Elle a été présentée, soit pour déterminer quels étaient les officiers de la banque qui avaient le droit d'accepter ou *certifier* les chèques, soit pour décider quelle était la manière d'effectuer telle acceptation ou *certificat*.

Morse, *on Banks & Banking*, page 309 de la 2me Edition, contient ce qui suit :

" The practice of certifying checks has grown out of " the business needs of the country. They enable the " holder to keep or convey the amount specified with " safety. They enable persons not well acquainted to " deal promptly with each other, and they avoid the de- " lay and risks of receiving, counting and passing from " hand to hand large sums of money..... If the bank only " accepts or certifies generally, its obligation is to pay at " any time when the holder may make demand. *But* " *if the acceptance is to pay at a future day certain, then the* " *transaction, as between the bank and the drawer, is equivalent* " *to a loan of the amount, made by the drawer, to the bank, for* " *the period intervening between the acceptance and the date* " *named for payment. Bank of England* v. *Anderson*, 4 Scott, p. 50."

Même auteur, p. 80 : " Any person who deals innocently " with the agent or officer of a corporation, within the " scope of that agent's or officer's functions will be pro- " tected and will have [illegible] contract enforced by law."

Même auteur, p. 81 : " The simple question is whether " or not the third party dealing with the agent had a *right* " *to suppose* that [illegible] was dealing within the scope " of his authority."

Même auteur, p. [illegible] : " If an officer is acting, speaking " or receiving information in matters which the ordinary

1886.

Exchange

Banque du Peuple.

" usage of the banking business cast within the range of " his functions, the bank is bound and affected thereby."

Même auteur, p. 91: "The directorial board of the " bank, which is its corporate government.....is obliged " to meet frequently, and to keep a close and constant su- " pervision over the daily course and conduct of its busi- " ness. In many species of corporations, the position of " a director is almost a sinecure..... but it is not thus " with banks. Their directors are bound to constant " activity and thorough acquaintance with the daily " course of the affairs and dealings of the institution. It " is their duty to make this acquaintance so thorough " that no officer can continue long and consistently to " usurp a function of any degree of importance whatso- " ever without their knowledge."

A la page 107, parlant du bureau des directeurs, l'auteur ajoute: "They are bound to know all that is done " beyond the merest matter of routine."

Voir aussi le même auteur à la page 162 et suivantes, quant aux pouvoirs du président et du caissier d'une banque.

Voici ce que dit Daniel, *on Negotiable instruments*— Ier Vol. No. 392 p. 368: " So he (the cashier) has implied " authority to draw bills or checks on fund of the bank " elsewhere; to certify checks drawn upon the bank; to " receipt for an issue certificates of deposit; to borrow " money and execute promissory notes of the bank there- " for; also we should say, to accept bills in the bank's " name, although the implication of this power *virtute* " *officii* has been denied."

2me Vol. No. 1574: "But every draft upon a bank or " banker which is not payable immediately, possesses, as " we think, all the qualities of a bill of exchange."

Même Vol. No. 1573: "If a draft upon a bank or banker " be dated on a certain day, say the 1st of December, and " be payable on a future day named, say the 10th of De- " cember, it has been considered by some authorities to " be a check payable on the precise day named without

1866.
Exchange Bank & Banque du Peuple.

"grace; and the high authority of Story & Sharswood "sustains this view."

No. 1606b. "Ordinarily the certification states no time "of payment, and the check is then payable instantly on "demand; *but if the certificate specify a future day of payment, "it is binding between the bank and the holder receiving it.*"

Voir Nos. 1609 et 1610, quant au pouvoir du président et du caissier d'accepter des chèques."

Nous référons encore, quant aux principes généraux sur la question à Addison, On Contracts, vol. I, page 120, No. 69, page 212, No. 137.—Angell & Ames, On Corporations, Nos. 301, 302, 304.—17 L. C. J. page 197—*The City Bank & The Bank of Montreal.* C. C. Arts. 2293 & 2354.

Ainsi que le décide le savant juge qui a rendu le jugement en première instance, il résulte de la contestation telle que liée et de la preuve les questions suivantes:

1o. L'intimée a-t-elle donné considération pour les chèques dont elle réclame le paiement?

2o. Savait-elle au moment où elle a reçu les dits chèques de M. Gilman, que leur produit devait servir à certaines fins particulières inconnues du bureau de direction de l'appelante?

3o. Les chèques ont-ils été négociés dans le cours ordinaire des affaires, et M. Craig, le président, gérant et caissier de l'appelante agissait-il dans les limites de ses pouvoirs en les acceptant?

Les deux premières questions n'ont pas besoin d'être discutées.

Quant à la troisième, il est inutile pour nous de la discuter d'avantage, les extraits que nous venons de faire des meilleurs auteurs qui ont écrit sur la matière, ainsi que les références à d'autres parties de leurs ouvrages, élucident cette question bien mieux que nous ne pourrions le faire. Il nous paraît hors de doute que les chèques ainsi escomptés par l'intimée, sont réguliers à leur face et que rien n'existait lorsque l'intimé a donné valeur pour ces chèques, de nature à éveiller ses soupçons et à la mettre sur ses gardes. L'appelante n'a pas protesté lorsque l'un

1888.
Exchange Bank
&
Banque du Peuple.

de ces chèques, le plus considérable en montant, a été présenté à son comptoir ; elle l'a au contraire payé sans faire aucune difficulté et le document est depuis resté en sa possession. Non seulement elle a, le jour de ce paiement, été informée que son gérant avait ainsi accepté un chèque de M. Gilman, mais elle a gardé en sa possession le document même qui lui a permis de voir et de constater la forme de cette acceptation.

Nov. 27, 1886.]

RAMSAY, J. :—

A customer of the appellant drew four cheques to order on the bank, dated respectively 21st August for $20,000, 24th August for $5,000, 4th September for $10,000, and 7th September, 1883, for $31,000. The president of the Exchange Bank, who was also its manager and cashier, accepted these cheques payable the first on the 20th December, the second on the 24th December, 1883, the third on the 4th January, and the fourth on the 24th January, 1884.

The cheques were given to respondent for value, and were not paid when due. Suit was brought in March, 1884. The pleas are that the president had no authority to accept these cheques ; that there was concerted fraud between the president and Gilman ; and that these operations were so out of the ordinary course of affairs that the respondent ought to have known that the transactions were fraudulent.

It is not pretended that the respondent did not give value for the cheques, or that there was any fraud on the part of the respondent ; but it is contended that from the unusual character of these transactions, there was notice which ought to have induced the bank respondent to enquire ; that the respondent was grossly negligent, and ought to be treated as if it was guilty of fraud. The managers of the largest and oldest banking institutions in Montreal have been examined on this head, but their evidence does not appear to us to support the pretension of the appellant. We think that the organization put forward to the world binds the bank, and that the appel-

Banque du Peuple.

[illegible]nk must be held liable for the act of its president and cashier. The judgment will, therefore, be confirmed.

CROSS, J.:—

There is one point on which I desire to make a remark. It was said to be supported by authority that a post dated [illegible] as a suspicious cheque. But the cheques in question here are not post dated cheques; the bank says in effect, "the cheque is good, but we will only pay it next week, or as the case may be." This does not indicate that the drawer has no funds; it rather indicates, to my mind, that the bank was not prepared to pay so large a sum at once.

DORION, CH. J.:—

A previous cheque, accepted in the same manner, and discounted by the respondent, was paid by the proper officer of the appellant. Every director of the Exchange Bank knew, or is supposed to have known, that this cheque was paid. The subsequent cheques were accepted in the same manner, and in these circumstances I do not see any difficulty as to the respondent's right to recover the amount paid by them in good faith.

Judgment confirmed.

Macmaster, Hutchinson & Weir, attorneys for appellant.

Geoffrion, Dorion, Lafleur & Rinfret, attorneys for respondent.

(J.K.)

September 24, 1887.

Coram DORION, CH. J., TESSIER, CROSS, CHURCH, JJ.

JAMES McGILLIVRAY,
(*Plaintiff in Court below*),
APPELLANT;

AND

CHARLES C. WATT,
(*Defendant in Court below*),
RESPONDENT.

Sale—Jus disponendi—C. C. 1025.

HELD:—(Affirming the judgment of the Court of Review, M. L. R., 3 S. C. 150), where a person who sells goods on credit, shows by his acts his purpose to retain the property therein until the conditions of sale be complied with,—as, for example, by consigning the goods to his own agent in the city where the purchaser resides, with instructions not to part with the bill of lading until the purchaser shall have accepted a draft for the price,—the right of property in the goods does not pass to the purchaser, and an action of revendication by the purchaser, who has refused to accept a draft for the price, will not be maintained.

The appeal was from a judgment of the Court of Review, Montreal, dismissing an action of revendication. The judgment of the Court of Review is reported in M. L. R., 3 S. C. 150.

September 21, 1887.]

C. H. Stephens, for the appellant:—

The question raised in this case, after sundry changes in its passage through the Courts below, seems to have resolved itself into this:—When a merchant buys goods on time, is he bound to sign paper for them—that is, to accept a bill of exchange or give a promissory note for the price, before he can demand delivery?

The defendant having in his possession the samples of Messrs. John William and Henry Shaw, manufacturers of cloths and tweeds in Huddersfield, England, solicited the plaintiff for an order, and the plaintiff gave him one.

1887.

McGillivray & Watt.

The goods arrived late, and the defendant, fearing that plaintiff would have a claim for damages, refused to deliver them, unless plaintiff would first sign a draft for the full amount, which he refused to do.

That this is the only issue between the parties is proved by the note sent by defendant to plaintiff on the arrival of the goods and which is as follows:

"Montreal, 16th September, 1885.

JAMES MACGILLIVRAY, Esq., City.

The terms and conditions upon which I will deliver the goods purchased from John William & Henry Shaw, Huddersfield, England, through us, are as follows—that you take them as invoiced and give your acceptance for the full amount, without making any claim for the goods arriving out of season.

I am yours, etc.,

C. SPENCER,
Per C. C. Watt."

The defendant pleads: 1o. That the order was subject to acceptance by the sellers in England, and was never accepted;

2o. That plaintiff was bound to sign a draft or note before getting delivery;

3o. That defendant was really the owner of the goods.

The first and last pleas are obviously incompatible. If defendant is really vested with the ownership of the goods then the order must have been accepted and defendant has complete control over them, and is in a position, and is bound, to fulfil the contract entered into by him with plaintiff. And if defendant is really vested with the ownership, then the Messrs. Shaw are divested and have no further interest in imposing conditions, even if they have the right to do so.

That John William and Henry Shaw accepted the order and did everything incumbent on them in order to pass the property, is clear from the letter of the vendors of date November 10, 1883.

The only question remaining is, whether the plaintiff was bound, under the terms of the contract, to accept a draft before getting possession of the goods. There is nothing to that effect in the contract, but defendant says

1887.
McGillivray & Watt.

that when a term for payment is given, as in the present case, that means, according to the custom of trade, the acceptance of a draft for the amount before getting possession.

The only witness produced in support of this, is Moffatt, and he nowhere says that it is the custom to sign drafts before getting possession, nor that it is an universal custom to sign drafts at all. This Moffatt is, or was, an employee of Spencer's, and no attempt is made to bring up a single merchant of standing or repute to prove the alleged custom. On the other hand, the witnesses Small and Dieterle are such merchants, and they deny the existence of such a custom, in the most emphatic manner.

In delivering the judgment appealed from, the Court said:

"Plaintiff says there is an attempt here, in the deposi-"tion of Moffatt, to prove a custom. I do not so under-"stand the questions put to Mr. Moffatt. He is simply "asked to give us the meaning of the terms. He is un-"contradicted."

In answer, appellant says that Moffat said nothing to the purpose requiring contradiction. He says nowhere that the words:—"Terms six months"—mean accepting a draft *before delivery*. If he did, he is contradicted by Art. 1496 of our Code. As a matter of fact, Moffatt does pretend to prove a custom, and he is contradicted point blank by the witnesses in rebuttal. The question he is asked is:

"Q.—Please look at the plaintiff's exhibit No. one, and state what is the meaning, *according to the custom of trade*, of the expression "terms six months from first following "month."

To which he answers in effect that it is a rule, "not an "invariable custom," when a term for payment is given, to send a note or draft with the goods, which dates from the time mentioned. He says nowhere that it is the rule to sign the note or accept the draft *before getting possession of the goods*, which is the only question in the case. Asked in cross-examination if he ever knew of a case of a person

1867.
McGillivray & Watt.

being compelled to sign a bill or note when there was no agreement to do so, he replies:

"I cannot give you an answer to that. What do I know "of other people's business. I have no answer to that at "all."

Failing in proof of a custom, respondent changed his basis in review, and relied upon what in England is called the *jus disponendi*.

This is a rule, pretty generally recognized by the Courts in England, by which, when goods are ordered by a merchant in one country *by correspondence* from a merchant in another, the seller, even after shipment, is allowed to retain his hold on the goods until their arrival; and if the bills of lading are drawn to his own order and are accompanied by a draft for the amount, it is accepted as an indication of his intention of holding the goods until acceptance of the draft.

In *Shepherd* v. *Harrison*, L. R., 4 Q. B. 23, 197, the facts were that the shippers in South America bought the goods for the plaintiffs in England, at their request, and shipped them to the plaintiffs, sending them a draft for the amount to which they "begged their protection." The plaintiffs took the bill of lading, but refused to accept the bill of exchange. Held, that the *jus disponendi* had been reserved by the vendors.

In *Brandt* v. *Bowlby*, 2 B. & Ad. 932, one Berkeley of Newcastle, ordered wheat from the plaintiffs B. & Co. of Petersburg. A dispute arose between the parties, and the buyer countermanded all his orders. In the meantime, however, plaintiffs had bought a cargo for him and had put it on board the defendant's ship which B had chartered and sent for the wheat. They sent him invoices and an endorsed bill of lading; and to H. & Co. of London, their agents, an endorsed bill of lading and draft for acceptance, which defendant refused, but got possession of the wheat on the unendorsed bill of lading. In an action against the master of the vessel, *held*, that the property had not passed to the buyer, as by a letter of the shippers it was clear that they did not intend that the

property should vest in the buyer unless the bills were accepted.

These are the cases which most resemble the present, but they differ in essential particulars. There is no contract entered into, except what may arise from the letter of the buyer and the subsequent shipment of the goods by the seller. The proposal comes from the buyer, there is no term agreed upon for payment. The buyer's order is direct to the seller, and is in effect to ship him the goods he wants upon his (the seller's) own terms as to time and methods of payment. In this respect it differs broadly from the present case, nor is there in the English books any case to be found in which an agreement was entered into, and the seller was held after shipment to to possess a *jus disponendi*.

But in England, the law, even if it applied here, is stretched farther in this direction than it is in any other country in the world. In the United States, which adopts the English law in all its general principles, the *jus disponendi* appears to be unknown. In France there is no such rule, and no hint or indication of it in the Civil Code of this province.

It was attempted to be shown in the Court below that the French law has something similar to the *jus disponendi*, but nothing can be found in the books to bear this out. The authority cited in support of this attempt was *Laurent*, vol. 24, No. 4, but the passage does not seem to bear that construction. For authority to the contrary, appellant refers to Sirey & Gilbert, Art. 1585, Nos. 20, 24 and 25, Art. 2102, No. 175 *et seq.*, Marcadé & Pont, Vente, cap. 1, sec. 1.

As to the law of this province, appellant relies on the Civil Code, Arts. 1025, 1472 and 1474.

Even in England, the *jus disponendi* has been very strictly and carefully guarded, insomuch that the cases in which it has been denied are as numerous as those in which it has been granted. Appellant also refers to the opening of the chapter in Benjamin on the *jus disponendi*, in which he gives the reason for the rule. In the present case, not

1867.
McGillivray & Watt.

one of these reasons exist? The contract was entered into by an agent who says himself, he was acquainted with the plaintiff and went to him and solicited the order and agreed with him as to the terms. When the goods were shipped, there is no doubt they were at the risk of the buyer, and the buyer could have been held in damages if he had refused to receive them.

When the order was sent, it appears clear from the letters of the firm in England, that the agent was so well satisfied with the position of the buyer, that he guaranteed the payment, for the purpose of satisfying the seller and ensuring the shipment of the goods. As a matter of fact, the seller has no interest in the present contestation; that is clear from the beginning of the defendant's deposition, and the pretention that the Shaws intended reserving to themselves a control over the goods after they left their hands is utterly refuted by the tone and tenor of their own letters to defendant as given above.

It is the defendant, and the defendant only, who is pretending to a *jus disponendi*, and that he has none, and could have none, even if such a law existed here, need not be argued. If his desire was that plaintiff should sign and accept paper before obtaining delivery, he should have so stipulated, but no one knows better than the defendant that neither plaintiff, nor any other business man would consent to such a condition.

H. Abbott, Q. C., for the respondent:—

The case as instituted was one of revendication of certain goods in the possession of the collector of customs, who was made a party to the case, the defendant holding the bills of lading, which were made to his order by the shippers of the goods, Messrs John William and Henry Shaw, of Huddersfield, in England. This action was maintained by the judge of the Court of first instance, and, on being taken to review by the present respondent, was then dismissed.

The questions involved upon this appeal are as to the right of a foreign shipper of goods to reserve the right of property and possession therein by making the bill of

lading to the order of his agent here, and to make the delivery of the goods conditional upon the acceptance of a bill of exchange for the price; and also, under these circumstances, the right of the agent (the respondent here) to refuse delivery of the goods upon the failure of the purchaser to fulfill the condition.

The circumstances of the case are, that in the month of June, 1885, the appellant gave an order to the respondent acting for the agent of Messrs. John William and Henry Shaw, of Huddersfield, in England, for a quantity of cloths and tweeds described in the order. This order was given upon the terms of credit stated as follows: "Terms, six months, from first following month." The pretension of the respondent is that, according to the custom of trade, the above quoted expression means the acceptance of a bill of exchange for the price, payable six months from the first day of the month following the shipment of the goods. And this interpretation was also put upon these terms by his principals in England. For after hesitating for some time about shipping the goods to the appellant without some security that they would be paid for, they finally shipped them, about the end of August, making the bill of lading payable to the order of respondent, and at the same time sending him the invoices and a bill of exchange drawn on the appellant for the price of the goods, and requesting respondent to obtain its acceptance by the appellant. Immediately upon the arrival of the goods, the respondent notified the appellant, and applied to him to take delivery of the goods, and accept the bill of exchange. The appellant, however, refused to take the goods unless a reduction of 25 per cent. off the invoice price was made, and upon the respondent refusing to make any such reduction, the appellant refused to accept the bill of exchange, and entered his action in revendication.

It should be at once observed that the appellant, by his declaration, does not say that he ever paid for these goods, and does not express any willingness to pay for the same, and bases his action entirely upon the ground

1887.
McGillivray & Watt.

that his order having been accepted by the firm of John William and Henry Shaw, who selected the goods and shipped them to Montreal, he thereby became the proprietor, and was entitled to the delivery. The respondent, by his plea, says that the order was subject to the approval and acceptance of John William and Henry Shaw, and that they did not accept; but on the contrary, shipped the goods to him consigned to his order, thus vesting him with the possession and control of the goods, and giving him the power to receive and collect the price from the appellant, or to dispose of them in such other manner as he might see fit; that by so consigning the goods to him and instructing him to obtain the acceptance of the bill of exchange, the shippers reserved their right of property in the goods, merely vesting him with possession as their agent, and the appellant having refused to fulfil the condition precedent of accepting the bill of exchange, the respondent was entitled, and indeed bound to refuse delivery of the goods.

The proof in the case is contained in the depositions of the respondent, examined as a witness for the appellant, and W. R. Moffat, examined by the respondent, and E. A. Small and W. Dieterle examined by the appellant in rebuttal. The respondent's deposition being availed of by the appellant, must serve as evidence in the case; and his position as stated in that deposition, is entirely consistent with that set up in his plea. He says that he acted in taking the order for a Mr. Spencer, a commercial traveller of John William and Henry Shaw, Mr. Spencer being at the time incapacitated from doing business. He states what took place between him and the appellant on the arrival of the goods, in substance as already set forth. He produces the invoices of the goods, and two letters, dated respectively the 20th and 28th of August; in both of which he is instructed to obtain acceptance of the bill of exchange of £388.8.0. enclosed in the letter. It would appear from the correspondence that John William and Henry Shaw looked upon the respondent as guaranteeing the price of these goods, though there is no direct evid-

ence in the case that he did so. It is doubtful, however, if this fact would in any way affect the decision of the questions at issue, but merely goes to show that the shippers were unwilling to sell their goods to the appellant on his personal credit, and furnishes an additional reason why they made it an express condition of the delivery of the goods that a bill of exchange should be first accepted. In addition to demanding acceptance of the bill of exchange verbally, Mr. Watt wrote plaintiff a letter explaining the conditions upon which he would deliver the goods, namely, that the appellant should take them as invoiced and give his acceptance for the full amount, without making any claim for the goods arriving out of season, on account of which it is proved that the appellant demanded 25 per cent. discount on the face of the invoice. The respondent also produces a letter from John William and Henry Shaw, dated the 10th November, 1885, which shows that he was perfectly justified in acting as he did; and that they would have held him liable for any loss which might have occurred, had he delivered the goods without obtaining the acceptance of the bill of exchange. The evidence of the respondent is corroborated by that of Mr. Moffatt, who accompanied him to the appellant's office upon the arrival of the goods, when he states that the respondent asked the appellant if he was going to take the goods; the appellant replied he would take them, but he wanted 25 per cent. discount off the price of the goods, and refused to accept the bill of exchange unless he got this discount: thus showing that the shippers in England had good reason for making the stipulation that the bill of exchange should be accepted as a condition precedent to the delivery. Mr. Moffatt also proves that, according to the custom of trade, the expression "Terms, six months from first following month," means that payment for the goods should be made by the acceptance of a draft, or the signature of a note, payable six months from the first day of the month following the date of the invoice, and it also appears from his evidence,

1887.
McGillivray & Watt.

as well as from that of Mr. Watt, the respondent, that where there is no stipulation of this kind, or reservation of any sort on the part of the shippers, the goods are shipped direct to the purchaser and the bills of lading made out to his order. The appellant, to rebut the evidence of Mr. Moffat as to the custom of trade, brought up the two witnesses already mentioned, to declare that there is no custom of trade by which the purchaser is bound to give a note or accept a draft for the price of the goods before obtaining delivery; that is, in the absence of any agreement; but they say it would be a very different thing if there was an agreement. The defendant denies that this evidence is in contradiction to that of Mr. Moffat. The witnesses are not asked any questions as to the meaning of the contract as interpreted by the custom of trade; they are asked, simply, as to the custom of trade independent of, and without any reference to the contract in question; they do not say a word as to the meaning of the terms in question; and therefore Mr. Moffat's evidence stands uncontradicted. In fact the appellant was careful to ask his witnesses as to the custom of trade, where there is no agreement and no mention of any papers being signed. The respondent objected to the whole of the evidence as irrelevant; and relying on his objection refused to cross-examine.

The position of the respondent will be seen to rest upon two grounds: first, that according to the true meaning of the contract, the appellant was bound to accept the bill of exchange before he could get the goods; and secondly, that the owners and shippers of the goods reserved the *jus disponendi*, by consigning the goods to the respondent, and made the acceptance of the bill a condition precedent to the delivery of the goods, and that consequently no right of property in the goods ever passed to the appellant.

The first position, as has been pointed out, is clearly established; the meaning of the terms is proved according to the custom of trade, and is not disproved. The second position is also clear from the facts above men-

tioned. What other object could the shippers have had in consigning the goods to the respondent, and in sending him the bills of lading and exchange as they did? If their acceptance of the order had been unconditional, would they not have shipped the goods direct to the purchaser, and sent the bill to him in the ordinary course?

This reservation of the *jus disponendi* is of frequent occurrence in such dealings as the present, and has frequently been discussed in the English Courts. Exactly similar cases have arisen there, where the Courts have recognized this right of the seller; and have invariably rejected the action of the purchaser *in trover* to obtain possession of the goods. The defendant refers specially to the case of *Shepherd* v. *Harrison* (L. R., 4 Q. B., pp. 196, 493; and 5 H. of L. App. 116), which is the leading case, and is quoted and approved in Benjamin on Sales, and in Campbell's Law of the Sale of Goods and Commercial Agency at pages 256 to 262. In that case the bills of lading of the goods were made out at Pernambuco to the shippers' order, and sent to their agents at Liverpool with bills of exchange and a request to have them accepted by the purchasers. The purchasers refused to accept the bills of exchange on the ground that there was a defect of quality in the goods, and that previous bills had covered the balance of the price. The agents thereupon refused to give delivery of the goods, and the purchasers took action against the parties in whose possession the goods were in Liverpool to obtain them. It was held that the question was dependent upon whether the plaintiff had a right to the possession as well as the property of the goods in question. For even if the property had passed, if the right of possession was not vested in the plaintiffs, they could not succeed in their action. This case came before the Court of Queen's Bench, where the Court, presided over by Chief Justice Cockburn, were unanimous in holding that the plaintiff's action was bad; that the consignors of the goods had the right to impose conditions upon the delivery and possession; and that by sending the bills of lading to an agent, to be by him handed to the consignee,

1867.
McGillivray & Watt.

accompanying them with a bill of exchange to be accepted by the consignee, they did effectually impose such conditions. The majority of the judges also held that by sending the bill of lading accompanied by the bill of exchange to the agent, the consignors or shippers intended to *and did* retain the right of property in the goods until the bill of exchange should be accepted. In the Exchequer Chamber the judgment of the Queen's Bench was confirmed;—Kelly, C. B., Willes, J., and Channel, B., being unanimous that the intention was only to transfer property conditionally. The case was then appealed to the House of Lords, where Lord Chelmsford said that the question was whether under the circumstances the plaintiff was entitled to the possession of the goods, or whether the defendants were liable to an action of *Trover* (or revendication) for refusing to deliver the goods, and held in favor of the defendants. Lord Westbrough said that the two documents were intended to be dependent one upon the other, and that they were sent in the confidence that the bill of exchange would be accepted in consideration of the bill of lading. Lord Colonsay thought that the plain meaning and intention of the parties was that the bills of lading should be handed over, only if the bill of exchange was accepted. Lord Cairns had no doubt that it was the intention of the shippers that they should retain, and that they did retain, the property in the goods; and that "it was "not necessary for one merchant to say to another in "words, 'we require you to take notice that our object in "enclosing the bills of lading and bills of exchange is, that "before you use the bills of lading you shall accept the "bills of exchange.' Merchants know perfectly well what "they mean when they express themselves, not in the "language of lawyers, but in the language of courteous, "mercantile communication."

The above case certainly lays down the principle of law contended for by the defendant herein, as clearly and as strongly as it is possible for it to be expressed, and the circumstances in each case could hardly be more similar. There are two other cases, however, cited by Campbell,

1897.

McGillivray & Watt.

page 265, in which, perhaps, there is even a closer similarity. The first is that of *Ogg* v. *Shuter*, (L. R., C. P. D. 47-50), where the Court of Appeal laid down that where the shipper takes and keeps in his own or his agent's hands a bill of lading to protect himself, this is effectual so far as to reserve to him a hold over the goods, until the bill of lading is handed over, on the conditions being fulfilled, or at least until the consignee is ready and willing, and offers to fulfil these conditions. In the case of *Mirabita* v. *Imperial Bank* (L. R., 3 Ex. Div. 164), cited on the same page, the same principle is laid down reversely, viz.: that where the vendor forwards the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser until acceptance or payment of the bill of exchange, then upon payment or tender by the purchaser of the price, there is a performance of the condition, and the property passes to the purchaser.

These principles are summarized at pages 266 and 267 of Campbell, and the cases in support thereof cited. The respondent would specially refer to paragraph 2 on page 266; where it is held that the intention may be to create conditional appropriation of the goods shipped to the fulfilment of the order or contract, and a conditional transfer of the property and right of possession in the same goods, and this intention, if expressed in accordance with a mercantile usage, will receive effect. Also to paragraph 6 on the same page, where it is laid down, that if a shipper from abroad, having executed an order of a merchant in this country for the purchase of goods, sends the bill of lading endorsed in blank to his own agent in this country, and the latter sends it to the merchant enclosing a bill of exchange and requests that the same should be accepted; the presumption founded on mercantile usage is that the acceptance of the bill of exchange is the condition precedent to the vesting in the purchaser of the right of property and possession under the bill of lading. But that no such presumption arises from a request by the foreign shipper for the protection of his drafts sent *direct* to the

1887.
McGillivray & Watt.

merchant, and enclosing the bill of lading to him, or unless the bill of lading is sent to the agent.

In the present case, the goods were placed absolutely in the possession of the agent (respondent here); the bill of lading was made out to his order; the invoices were sent to him; the packages were marked with his initials; and the bill of exchange was sent to him with a special request to obtain its acceptance. No circumstances could fit more closely to the principles of law which are laid down in the reported cases.

It is therefore strongly contended that the right of property never passed to the appellant, certainly not the right of possession. If he has no right to obtain possession, his action is unfounded; still more so if he has no right of property.

The respondent would further contend that there was no completed sale to the appellant; that the consent which is necessary to complete a sale of goods, was wanting in this transaction; the shippers were willing to sell the goods upon the condition that the purchaser should accept a bill of exchange for the sum of £388.8.; while the purchaser was unwilling to take the goods upon these conditions. The goods were never shipped to him, or to any carrier for him. They were neither sold nor delivered. Furthermore, he has never paid for the goods; he has never offered to pay for them; and does not make any offer or tender by his action, which is taken apparently with a view to obtain possession of the goods, and then resist payment of the price.

Sept. 24, 1887.]

DORION, CH. J.:—

[After stating facts]. It is evident from the circumstances of the case, that the appellant never had the possession or ownership of the goods. The vendor was willing to deliver them only on certain conditions with which the appellant refused to comply. We have not to decide here whether the appellant would have any claim to damages against the vendor or his agent. He has seized the goods as belonging to him, and we are of opinion that such

action was unfounded. The judgment of the Court of Review, which dismissed the *saisie-revendication*, was correct, and it is confirmed. 1887. McGillivray & Watt

Judgment confirmed.

C. H. St[illegible] for the appellant.

Abbotts & [illegible] for the respondent.

(J. K.)

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23 septembre 1887.

Coram DORION, C.J., TESSIER, CROSS, BABY et CHURCH, JJ.

J. A. MASSUE ET AL.,

(*Requérants en Cour Inférieure*),

APPELANTS ;

ET

LA CORPORATION DE LA PAROISSE DE ST-AIMÉ,

(*Défenderesse en Cour Inférieure*),

INTIMÉE.

Chemin public à travers une érablière—Article 904, Code Municipal.

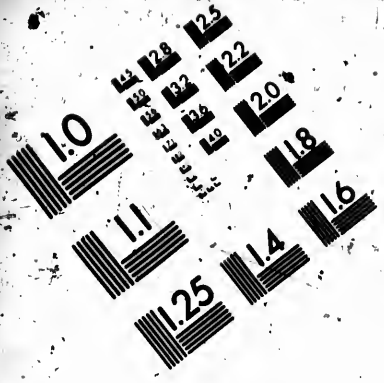
JUGÉ : — Qu'un conseil municipal ne peut ouvrir un chemin à travers une érablière située dans un rayon de 400 pieds de la maison habitée par l'occupant de telle érablière sans le consentement par écrit du propriétaire ;

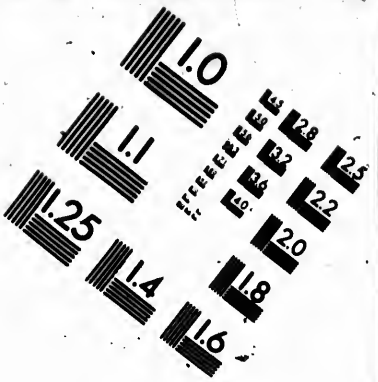
2o. Que le fermier habitant la maison appartenant au propriétaire d'une érablière affermée est "*occupant*" de telle érablière, dans le sens de l'article 904, C. M.

Voici le jugement dont est appel, rendu par la Cour Supérieure, dans le district de Richelieu, le 6 octobre 1886, (PLAMONDON, J.) :—

"Sur le mérite de la requête en injonction en cette cause :—

"Les requérants résidant dans la paroisse de St-Aimé,





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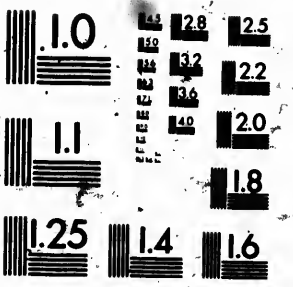

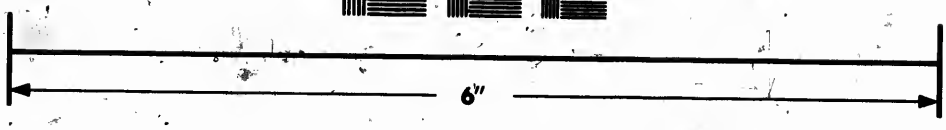

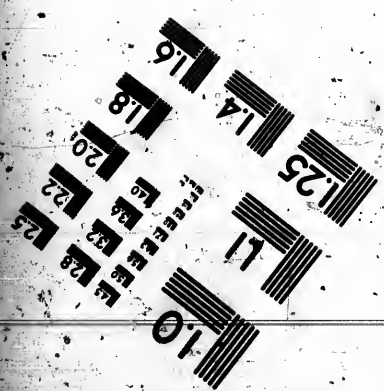

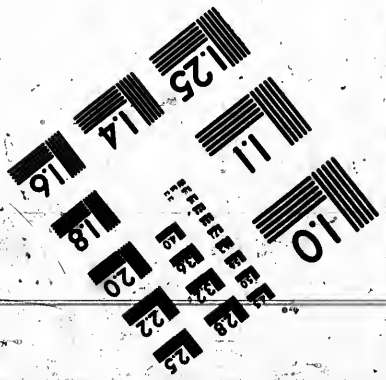

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1887.

Masson & La Cor. Par. de St-Aimé.

demandent que cette Cour déclare illégal et nul, et annulle un certain procès-verbal, homologué par le conseil de la défenderesse, le 22 septembre 1884, ordonnant l'ouverture et l'entretien d'un nouveau chemin de front sur la propriété des requérants, et changeant le site du chemin actuel sur le premier rang Bonsecours, de la paroisse de St-Aimé;—et aussi qu'il soit enjoint à la défenderesse et au mis-en-cause de suspendre et faire suspendre tous procédés et tous travaux relativement au dit chemin sur la propriété des requérants.

"Les raisons à l'appui de la requête sont: 1o. Parce que le nouveau chemin de front est tracé et localisé de manière à traverser une érablière, et un terrain embelli, contigus et faisant partie des dépendances de la maison et résidence des requérants, et situés, ainsi que le tracé du nouveau chemin, dans un rayon de moins de 400 pieds de la dite maison et résidence des requérants, contre le gré de ces derniers, qui sont, savoir: Masson, le propriétaire, et Saint-Pierre, l'occupant des dits érablière et terrain embelli. 2o. Parce que les requérants, s'étant d'abord opposés à l'octroi de la requête et à son homologation par le conseil de la corporation de la défenderesse, en ont appelé au conseil de comté, et que cet appel a été rejeté sans même avoir été pris en considération au mérite.

"La défenderesse a plaidé d'abord en droit. Les allégations de la requête ne sont peut-être pas aussi complètes qu'elles pourraient l'être, mais il s'y trouve un droit d'action suffisamment énoncé. C'est pourquoi la *défense en droit* est renvoyée.

"La défenderesse, à part d'une dénégation générale, a plaidé et prouvé à la satisfaction de la Cour, plusieurs moyens péremptoires de défense. En effet il est constaté par les témoignages et par les pièces au dossier:—

"1o. Quant au requérant Saint-Pierre, qu'il n'avait aucune occupation quelconque de la maison, lors de l'homologation du procès-verbal:—que son occupation subséquente n'était à aucun titre ou droit, lui donnant qualité pour se joindre à la demande en injonction.

"2o. Que le chemin projeté et localisé ne passe pas

1887.

Massue & Le Cor. Par. de St-Aimé.

dans le rayon de 400 pieds de la maison habitée par Saint-Pierre, mais bien au delà.

"3o. Que Saint-Pierre était seulement le fermier de la partie cultivée de la terre, laquelle appartient au requérant Massue;—qu'il n'occupait pas l'érablière, tandis que la résidence du requérant Massue est située à bien au delà de 400 pieds d'aucune partie quelconque de cette érablière.

"4o. Qu'il n'y a pas là de terrain embelli, mais rien autre chose qu'un bois ordinaire, traversé par plusieurs chemins de voiture pour les besoins de la ferme, et que ce bois ne forme aucunement partie des dépendances de la résidence du requérant Massue et n'est pas contigu.

"5o. Que par son désistement de sa première requête, dans le but de ne laisser le tribunal adjuger que sur la question préalable de l'évaluation, le requérant Massue a, de fait, reconnu et accepté la juridiction du conseil et l'autorité du procès-verbal, et qu'il n'avait plus le droit de renouveler sa demande en injonction relativement au même prétendu sujet de plainte. Il est bien évident que l'ordre du juge sur cette seconde requête a été obtenu sans qu'on ait porté à sa connaissance les procédés qui ont suivi le jugement sur la première requête et qui n'étaient que l'exécution de ce jugement.

"Pour ces raisons la Cour rejette et casse la requête libellée des dits requérants et le bref d'injonction émané en cette cause, renvoie et déboute les requérants à toutes fins que de droit, de leur demande en injonction en cette cause, et donne main levée à la défenderesse; le tout avec dépens contre les requérants conjointement et solidairement; les dits dépens distraits tel que requis."

24 mars 1887.]

Lacoste, C. R., pour l'appelant.

Geoffrion, C. R., et *Brousseau*, pour l'intimé.

DORION, J. C. (*dissidant*):—

En 1884, la corporation de la paroisse St-Aimé a passé un procès-verbal pour l'ouverture d'un nouveau chemin destiné à traverser la propriété du requérant Massue. Ce nouveau chemin devait remplacer l'ancien chemin et

1887.

Massue & La Cor. Par. de St-Aimé.

passer à plus de 400 pieds de la maison occupée par St-Pierre, l'un des requérants, et fermier de Massue, l'autre requérant, mais à travers une érablière qui commence à moins de 400 pieds de cette maison. Les appelants se sont opposés à l'ouverture de ce chemin au moyen d'un bref d'injonction en alléguant que la corporation n'a pas le droit d'ouvrir un chemin dans une érablière située à moins de 400 pieds de la maison qu'ils occupaient. La clause du Code Municipal qui doit régler la question est la deuxième section de l'article 904, qui se lit comme suit :

" Nul conseil d'une municipalité de comté ou de campagne ne peut, sans le consentement par écrit du propriétaire :

" 1o. Démolir ou endommager une maison, grange, moulin ou autre édifice ;

" 2o. Faire passer un chemin public à travers une basse-" cour ou un jardin clos d'une muraille, de haie vive, ou " d'une clôture de planches ou en piquets debout, *ni à* " *travers une érablière ou un verger, situé dans un rayon de* " *quatre cents pieds de la maison habitée par l'occupant de telle* " *érablière ou verger ;* ni à travers une c[illegible]e bois de scia-" ge, un terrain d'amusements, ou a[illegible] terrain embelli " et enclos contigu à, et faisant partie d'une maison de " campagne ou résidence."

Cette disposition veut-elle dire que la municipalité ne pourra jamais ouvrir et faire passer un chemin à travers une érablière, si cette érablière commence à une distance qui est moindre que 400 pieds de la maison, ou veut-elle dire que l'on ne pourra faire passer un chemin dans un rayon de 400 pieds d'une maison occupée s'il s'y trouve une érablière ? Si c'est là première interprétation que l'on doit donner à la loi il serait impossible de construire des chemins publics toutes les fois qu'ils se rencontreraient dans leur voie une terre plantée d'érables dont la lisière du bois approcherait la maison de 400 pieds, quelque fût l'étendue du bois. La Cour Inférieure a décidé le contraire et la minorité ici partage cette opinion. L'interprétation que je donne à la section est celle-ci : — qu'une

1887.

Massue & La Cor. Par. de St-Aimé.

corporation municipale n'a pas droit de faire passer un chemin à travers une érablière dans un rayon de 400 pieds d'une maison occupée. Autrement, si tout le terrain était un verger ou une érablière, le propriétaire pourrait toujours empêcher la construction d'un chemin public à travers son domaine. Il me paraît que ceci n'a pu être l'intention du législateur, et que les termes de la loi ne comportent pas une pareille interprétation. C'est le chemin qui ne peut passer dans un rayon de 400 pieds d'une maison occupée lorsqu'il s'y trouve une érablière. La législature a voulu protéger les environs des habitations jusqu'à une distance de 400 pieds, et non protéger les érablières ou autres améliorations qui se trouvent à au delà de 400 pieds de la maison. C'est de l'occupant de la maison dont elle s'occupe et non de l'érablière, puisque si la maison n'était pas habitée l'on pourrait passer un chemin à une distance de moins de 400 pieds de telle maison lors même qu'il s'y trouverait une érablière. Pour cette raison, je serais d'opinion de confirmer le jugement ; c'est aussi l'avis du savant juge à ma gauche (CROSS, J.)

TESSIER, J. :—

Mr. Massue, un des requérants, est propriétaire d'un terrain situé dans la paroisse de St-Aimé, dont la largeur est de 9 arpents sur une profondeur de 80 arpents. Le chemin actuel traverse cette propriété et à une certaine distance de ce chemin se trouve une érablière sur la même propriété. Le conseil municipal voulut faire passer un autre chemin, et personne n'étant obligé à servir deux chemins de front, Mr. Massue s'y est opposé et a pris une première injonction dont il s'est désisté sur l'offre faite par le conseil d'une indemnité pour le terrain exproprié.

Mais aussitôt que main-levée en fut donnée, la corporation fit des démarches de nouveau pour ouvrir le chemin projeté. Massue s'y oppose encore, et, sur le rejet par le conseil de comté de sa requête à ce sujet, il intente la présente procédure, commencée par bref d'injonction, demandant à ce qu'il soit enjoint à l'intimée de ne pas ouvrir le chemin en question, vu qu'il devait passer à travers son érablière.

1867.

Massue & La Cor. Par. de St-Aimé.

La question à décider est de savoir si la distance de 400 pieds, mentionnée à l'article 904 du Code Municipal, se rapporte à la situation de l'érablière vis-à-vis de la maison. Si l'érablière située sur le terrain de Massue est à une distance de moins de 400 pieds de la maison, nous sommes d'opinion que la corporation a tort. L'article 904 se lit comme suit :

(Voir l'article cité ci-dessus.)

Comment doit-on comprendre ce mot " *situé* ? " La construction grammaticale de l'article veut qu'on interprète cette phrase de manière à comprendre que la municipalité ne pourra construire de chemin traversant une érablière à une distance de 400 pieds de la maison. C'est évident que le mot *situé* qualifie et se rapporte à *verger ou érablière.* Il est établi que l'érablière en question est située à une distance moindre que 400 pieds. Il est possible que cette interprétation donne lieu à des inconvénients dans certains cas, surtout où l'on rencontrait des vergers ou des érablières de grande étendue. Mais ces érablières exploitées sur une grande échelle sont assez rares et il se trouve si peu de grands vergers que peut-être, pour en encourager la culture, le législateur a voulu laisser la loi telle qu'elle est. En disant *érablière*, on ne veut pas dire toute terre complantée en érables, et si l'on opposait l'ouverture d'un chemin public à travers un terrain couvert d'érables, l'objection ne serait pas suffisante. La vraie interprétation est :—une terre couverte en érables dont on se sert pour l'exploitation du sucre d'érable. C'est là le sens légal et grammatical des mots " érablière située dans un " rayon de 400 pieds de la maison."

La maison en question est habitée par le fermier de Mr. Massue, et l'intimée prétend que ce fermier n'est pas *l'occupant* de l'érablière. Mais celle-ci appartient à Mr. Massue pour qui son fermier l'occupe. Ainsi, sur ce point comme sur l'autre la majorité de la Cour est d'opinion de renverser le jugement et de maintenir l'injonction.

Le jugement de la Cour est rédigé dans les termes suivants :

" La Cour, etc...

1887.

Massue & La Cor. Par. de St-Aimé.

" Considérant que la Corporation de la paroisse de St. Aimé n'a pas le droit sans le consentement par écrit du propriétaire d'ouvrir un nouveau chemin dans l'érablière située dans un rayon de 400 pieds de la maison habitée appartenant à l'appelant Joseph Massue sur une terre occupée par lui, et que dans le jugement rendu par la Cour Supérieure, siégeant à Sorel, dans le district de Richelieu, le sixième jour d'octobre 1886, il y a erreur ;

" Renverse le dit jugement, et rendant le jugement qui aurait dû être rendu, maintient péremptoirement le bref d'injonction émané en cette cause, et en conséquence enjoint à la dite corporation de la paroisse de St-Aimé et au mis-en-cause de suspendre tous procédés et tous travaux relativement au dit chemin mentionné dans la demande en bref d'injonction, savoir, du chemin dont l'ouverture et la confection ont été ordonnées à travers une érablière, propriété du dit appelant, faisant partie des débentures et du domaine de l'appelant Joseph Aimé Massue, situés en la dite paroisse de St-Aimé, et ce sous toutes les peines de droit ainsi qu'il appartient ;

" Et cette Cour condamne la dite corporation de la paroisse de St-Aimé à payer aux appelants les frais tant en Cour Inférieure qu'en Appel, mais sans frais contre le mis-en-cause Job Robidoux."

Jugement renversé, DORION, J. C., et CROSS, J., diss.

Ethier & Lefebvre, procureurs des appelants.

J. B. Brousseau, procureur de l'intimée.

(H. J. K.)

20 septembre 1887.

Coram DORION, J. C., CROSS, BABY et CHURCH, JJ.

ROMEO H. STEPHENS,
(*Défendeur en Cour Inférieure*),
APPELANT ;

ET

CHARLES CHAUSSÉ,
(*Demandeur en Cour Inférieure,*)
INTIMÉ.

Quasi-délit—Absence de malice—Dommages-intérêts.

JUGÉ :—Que dans les cas de dommages résultant de la négligence du défendeur, quand il n'y a pas de malice de sa part, il n'est pas passible de dommages-intérêts exemplaires, mais seulement des dommages réels que sa négligence aurait causés.

Voici le jugement, dont est appel, rendu par la Cour Supérieure, à Montréal, le 30 juin 1885, (JETTÉ, J.) :—

" La Cour, etc....

" Attendu que le demandeur se pourvoit contre le défendeur pour lui réclamer une somme de [illegible],000 à titre d'indemnité pour les dommages qu'il a éprouvés par suite d'une chute qu'il a faite le 18 avril 1883 du premier étage dans la cave de la bâtisse connue sous le nom " d'Ottawa Hotel," dont le défendeur est propriétaire ;

" Attendu que le demandeur allègue au soutien de sa demande :—

Que le défendeur a construit et tient en opération dans la dite maison un ascenseur destiné au service des divers étages d'icelle ;

Qu'il était locataire de bureau au troisième étage de la dite bâtisse et que par son bail il avait droit à l'usage de l'ascenseur ;

Que le jour susdit il serait venu pour monter à son bureau, mais que malheureusement l'employé préposé au service du dit ascenseur ayant par incurie et négligence

1887.

Stephens & Chaussé.

grossière abandonné temporairement son poste sans se faire remplacer, ayant de plus laissé la caisse de l'ascenseur à l'étage supérieur, la porte du premier étage ouverte, et baissé le gaz tenu généralement allumé pour éclairer l'endroit, le demandeur fut précipité dans la cave et se fit dans sa chute une fracture au crâne tellement grave que sa vie fut pendant longtemps en danger;

Que transporté à l'hôpital le demandeur eut à y subir un traitement long et dispendieux, et qu'il n'a pu être guéri complètement des suites de cet accident, sa mémoire et son ouie en étant restés considérablement affectés et sa santé généralement ne pouvait jamais être ce qu'elle était auparavant;

Enfin le demandeur a perdu par suite de cette chute une année entière de travail et toute sa clientelle, comme architecte, que cette longue maladie a nécessairement éloignée, et que le demandeur ne sera même jamais en état de se livrer aux travaux de sa profession avec autant d'avantage qu'avant.

"Attendu que le défendeur plaide que cet accident n'est arrivé que par la négligence grossière du demandeur qui avait l'habitude d'ouvrir les portes de l'ascenseur et de s'en servir lui-même malgré les remontrances fréquentes que le défendeur lui avait faites à ce sujet et que par suite le défendeur n'est pas responsable envers le demandeur;

"Attendu qu'il est établi en preuve que le préposé au dit ascenseur était un jeune garçon de treize ans seulement, qu'il est aussi constaté qu'à plusieurs reprises il avait laissé les barrières ouvertes à un étage lorsque l'ascenseur était à un autre; que diverses personnes ont failli être victimes de cette incurie peu de temps avant l'accident arrivé au demandeur et ont signalé alors ce fait à la personne ayant la garde de la dite maison et ont fait remarquer au dit employé lui-même qu'il arriverait un malheur s'il n'était pas plus soigneux;

"Attendu qu'il est aussi prouvé que le jour de l'accident arrivé au demandeur, le dit employé avait laissé son poste sans se faire remplacer par le gardien de la maison,

1887.
Stephens & Chaussé.

comme il aurait dû le faire, qu'il avait laissé la barrière ouverte et que l'ascenseur se trouvait à l'étage supérieur: enfin qu'il avait aussi mis la lumière fort basse;

"Attendu que le demandeur a de plus prouvé qu'il a gravement souffert de la dite chute; que sa santé en sera à jamais altérée et sa capacité de travail notablement diminuée: qu'il a en outre fait des dépenses considérables pour son traitement, le compte de son médecin s'élevant notamment à $180: enfin que la perte qu'il a subie d'une année entière de travail lui représente au moins $1,200;

"Attendu que le défendeur n'a pas prouvé que le demandeur ait été, dans l'occasion de l'accident sus-rapporté, coupable d'une imprudence ou négligence, mais qu'au contraire il résulte de la preuve que si le préposé au dit ascenseur eut été à son poste l'accident aurait été évité;

"Considérant que la responsabilité du défendeur résulte clairement des faits prouvés: qu'il a été coupable d'une négligence grossière et d'une faute lourde en confiant le service du dit ascenseur à un enfant aussi peu soigneux, et que par suite il est mal fondé à demander le renvoi de la demande; appréciant les dommages à la somme de $5,000;

"Renvoie l'exception de la défense du dit défendeur et le condamne à payer au demandeur la dite somme de $5,000, avec intérêt, etc."

21 mai 1887.]

Carter pour l'appelant.

St-Pierre, C. R., pour l'intimé.

DORION, J. C.:—

Chaussé, le demandeur, intimé, occupait comme locataire des appartements au troisième étage de la bâtisse connue sous le nom "d'Ottawa Hotel," dont Stephens, le défendeur, appelant, est propriétaire. Par son bail Stephens avait consenti à Chaussé le droit de faire usage de l'ascenseur dont la dite bâtisse était munie. Cet ascenseur appartenait à Stephens et était sous le contrôle de son employé chargé de le surveiller. Lors de l'accident qui causa les dommages réclamés, l'entrée de l'ascenseur était ouverte, le gardien absent, et la machine à l'étage

supérieur. Chaussé, voulant monter à ses appartements, crut que cet ascenseur était au niveau du premier étage, et, entrant par la porte laissée ouverte, tomba dans la cave. Il subit des injures très-graves,et nous pensons qu'il a souffert par suite de la négligence des employés de Stephens. Mais il faut observer qu'on ne prétend pas qu'il y a eu malice de la part du défendeur, et pour cette raison Chaussé n'a pas droit à des dommages exemplaires. Le jugement de la Cour Supérieure a accordé $5,000. Ce montant nous paraît trop élevé et nous le réduisons à $3,000, avec les frais de la Cour de première instance, chaque partie payant ses frais d'appel.

1887. Stephens & Chaussé.

The following was the written judgment in appeal :—

" The Court, etc.

" Considering that the respondent has proved that by the fault and negligence of the appellant's employees in not properly attending to the hoist placed in the building mentioned in the declaration in this cause, the respondent did suffer grievous injuries for which he is entitled to be indemnified by the appellant, his landlord, under article 1054 of the Civil Code ;

" But considering that the damages suffered by the respondent arose out of mere negligence on the part of the party employed to attend to the hoist, and not from any wilful neglect on the part of the appellant, and that the appellant is not liable for any vindictive damages, but only for such actual damages the respondent had suffered, and that such damages should under the circumstances, have been established at such reasonable amount as would indemnify the respondent for his loss ;

" And considering that the damages awarded in this case are excessive and should be reduced to the amount of $3,000 ;

" This Court doth reform the judgment rendered by the Superior Court sitting at Montreal on the 30th of June 1885, and doth reduce the damages thereby awarded to the sum of $3,000, and doth condemn the said appellant to pay to the respondent the said sum of $3,000 with inte-

1887.
Stephens & Chaused.

rest on the said sum of $3,000 from the 2nd day of February 1884, date of summons, and doth condemn the said appellant to pay the costs incurred by the said respondent in the Court below, each party to pay his own costs on the present appeal."

Jugement réformé.

Kerr, Carter & Goldstein, procureurs de l'appelant.
Saint-Pierre & Bussière, procureurs de l'intimé.

(H. J. K.)

September 23, 1887.

Coram DORION, CH. J., CROSS, BABY, CHURCH, JJ.

H. R. BECKETT,

(*Defendant in Court below*),

APPELLANT;

AND

LA BANQUE NATIONALE,

(*Plaintiff in Court below*),

RESPONDENT.

Security for costs—Opposition afin d'annuler by absent defendant.

HELD:—That an opposant who is absent from the country, even if he is a defendant opposant *afin d'annuler*, is bound to give security for costs.

The respondent seized appellant's property under a judgment.

The appellant filed an opposition *afin d'annuler* to set aside the seizure as irregular.

After filing his opposition, he left the country. The respondent then moved for security for costs, which was granted, and on the default of appellant to give security, the respondents moved to reject the opposition, which was also granted.

It was from these two judgments that the appeal was taken.

May 25, 1887.]

1887.

Beckett
v.
La Banque Nationale.

Brown, Q.C., for appellant :—

Numerous and contradictory decisions have been rendered since the code as to whether the opposant *afin de distraire* is bound to give security for costs.

These cases are all brought together in the case of *Parke* v. *Rivard*, M. L. R., 1 S.C. 291, where Sicotte and Mathieu, JJ., Papineau, J., dissenting, held, reversing the judgment of the Court below, that it is the opposant *afin de distraire* and not the plaintiff contesting, who is bound to give security for costs. We pretend, however, that the reasons which support the judgment in the case above quoted, do not apply to the defendant, opposant *afin d'annuler*, who is simply defending himself against an illegal seizure of his property. In the case of *Miller & Deschêne*, 8 Q. L. R. p. 18, Meredith and Casault, JJ., held, the present Chief Justice Stuart dissenting, that the opposant *afin de distraire* was the party to give security. But both of these judges, in the course of their remarks, state that the defendant, opposant *afin d'annuler*, is not the party to give security. Merlin, Répertoire, vbo. Caution judicatum solvi, p. 449, says: "On doit à cet égard considérer "comme défendeur l'étranger qui se pourvoit en nullité "d'une saisie pratiquée contre lui en France, parcequ'en "effet c'est le saisissant qui est le demandeur originaire." If the defendant opposant is the party called upon to give security, by a parity of reasoning, it must be held that the defendant who petitions to quash a *capias* or attachment before judgment, is bound to give this security.

Panneton, Q.C., for respondent :—

Security for costs was demanded under art. 29 C. C. This article is a mere reproduction of 41 George III, ch. 7, sec. 2, which was embodied in sec. 68, ch. 83, C.S.L.C., and reads as follows :—"Dans *toutes* actions, *oppositions* et "poursuites, etc." It says *all* oppositions—no distinction made as to the different kinds of oppositions. The Code substituted the word INSTANCES for the word opposition,

1887.
Beckett & La Banque Nationale.

but no change of the law could be intended by this, as *instance* has a broader meaning than opposition.

In the case of *Parke* v. *Rivard*, though the question was not directly raised, we have a full and complete discussion of it. Mathieu, J., makes an exhaustive review of the whole law on the question, and gives his reasons for differing from the opinions expressed by Meredith and Casault, JJ., in *Miller* v. *Deschêne*. He declares the opposant *afin d'annuler* bound to give security for costs.

The pretended distinction as to the different kind of opposition is a mere subtlety. In substance and reality, all parties, defendant and third parties, are fighting with the same plaintiff to free their property from seizure. They may have different reasons for their demand, but both are doing the very same thing. The judgment sought to be executed is no more attacked by the defendant than by third parties. In fact, after judgment, the defendant ceases to be defendant. The *action, instance, procès*, is over. He has nothing more to defend, if he acquiesces in the judgment. If he comes again before a Court, it is no longer as a defendant, but as an opposant defending his property from seizure, the same as a third party would do. He is a plaintiff, he complains of the original plaintiff, and brings him before the Court with his opposition.

CROSS, J. (for the Court):—

The appellant, an opposant claiming the nullity of a seizure of immovable property at the instance of the respondent, being a non-resident, has been ordered to give security for costs, and failing to do so, his opposition, on motion of the respondent to that effect, has been dismissed with costs. From this judgment he appeals. I think he has succeeded in shewing by authorities that by the practice prevailing in France, an opposant merely claiming the nullity of a seizure of his property for alleged informalities, as in the present case, was not, by the Courts there, required to give security for costs. There was much reason in favor of this view of the case, on the ground that he was attacked in the possession of his property, and was merely defending himself; but our rule here was

established by statute whose terms would include all oppositions, and the practice has always been in that sense. We conceive that we cannot depart from that practice, and we are bound by it, and are required by the terms of the statute and the C. P. C., to adhere to the rule that non-resident opposants must give security for costs. We are, therefore, of opinion to confirm the judgment of the Court below.

Art. 29, C.C., declares, That every person not resident in Lower Canada, who brings or institutes any action, suit or proceeding in its Courts, is bound to give the opposite party, whether a subject of Her Majesty or not, security for the costs that may be incurred in consequence of such proceeding. This is founded on sec. 68 of cap. 83, C.S.L.C., and 41 Geo. III., c. 7, sec. 2, which expressly mentions oppositions. In practice they have always been included, and no change has been in consequence of any supposed change that might be inferred from the change of the wording of the Code. *Bonacina* v. *Bonacina*, 4 L. C. J. 148. We, consequently, confirm the judgment rendered in this sense by the Superior Court.

Judgment confirmed.

Ives, Brown & French, attorneys for appellant.
Panneton & Mulvena, attorneys for respondent.
(L. E. P.)

March 18, 1887.

Coram DORION, CH. J., TESSIER, CROSS, BABY, JJ.

HERCULE J. B. BEAUDRY ET AL.,
(*Contestants in Court below*),
APPELLANTS;

AND

DUNLOP & LYMAN,
(*Collocated in Court below*),
RESPONDENTS.

Execution—C. C. 1994—*C. C. P.* 606—*Privilege for Costs.*

HELD:—1. (Reversing the judgment of the Court of Review, M. L. R., 1 S. C. 443), That the plaintiff's privilege for the costs of suit, under C. C. 1994 and C. C. P. 606, § 8, as amended by 33 Vict. (Q.), ch. 17, s. 2, extends only to the costs incurred in the Court of first instance; and so, where the plaintiff obtained judgment in the Superior Court against three defendants jointly and severally, and the judgment was reversed by the Court of Queen's Bench sitting in appeal, and, on appeal to the Privy Council, the original judgment was restored, it was held that the plaintiff was entitled to be collocated by privilege on the proceeds of defendants' movables only for the costs incurred in the Superior Court.

2. (Affirming the judgment in Review), That the plaintiff's privilege for the costs of suit, where the suit has been with a firm, has priority even as regards the personal effects of the individual members of the firm, over the lien of the landlord for rent of premises leased to such members.

The appeal was from a judgment of the Court of Review, Montreal, reversing a judgment of the Superior Court, DOHERTY, J. The judgment of the Court of Review is reported in M. L. R., 1 S. C. 443.

The written judgment of the Court of Review (TORRANCE, LORANGER, CIMON, JJ.) is in the following terms:—

"The Court here sitting as Court of Review, having heard the contestants, and the parties collocated, upon the inscription by said parties collocated for review of the judgment rendered in the Superior Court, sitting in and for the district of Montreal, on the 25th of February, 1884, etc.;

1887.

Beaudry & Dunlop.

"Considering that Messrs. Dunlop & Lyman, as attorneys for plaintiffs, and plaintiffs, had a privilege for the costs incurred in obtaining the judgment in this cause under the Civil Code 1994, and the Code of Civil Procedure 606, as amended by 33 Vict. ch. 17, sec. 2 (Q.), simply because they are the seizing and selling creditors;

"Seeing, therefore, that they are entitled to the collocation in their favour, and that there is error in the said judgment of the 25th of February, 1884, maintaining the contestation by said H. J. B. Beaudry *et al.*, against said collocation;

"Doth reverse the said judgment, and proceeding to render the judgment that ought to have been rendered in the premises, doth dismiss said contestation and maintain said collocation with costs of both Courts against the said contestants."

Jan. 18, 1887.]

W. H. Kerr, Q.C., for the appellants:—

On the 13th June, 1883, a writ of execution was issued out of the Superior Court, Montreal, in the case of Elliot *et al.*, against the goods and chattels of James Lord, John Magor, and Stewart Munn, merchants and co-partners trading together under the name of Lord, Magor & Munn, defendants, for $4,136.66, amount of debt, with interest from the 17th November, 1873; $795.81 costs of the Superior Court and Court of Queen's Bench; £239. 15. 10 sterling, costs in the Privy Council; and $4.50 sub-costs.

Under this writ, no levy was made on the partnership goods, but the bailiff charged with the writ levied, over and above the costs of sale, of the goods and chattels of John Magor, the sum of $170, which he paid over to Messrs. Dunlop & Lyman, attorneys, *distrayants* in the Court of Queen's Bench and Superior Court; of the goods of Stewart Munn $393.17, and of those of James Lord $548.43. The two last sums amounting in the aggregate to $921.60 were paid into Court for distribution.

An opposition *afin de conserver* was filed upon the moneys derived from the sale of James Lord's goods and chattels, so sold as aforesaid, by the present appellants,

1887.
Beaudry & Dunlop.

claiming to be paid by privilege and in preference to all other creditors of the said James Lord, the sum of $448, being for one quarter's rent, overdue, of the premises in which were the goods so sold, for the year's rent then current, and for the taxes upon the said premises, all due under the lease of the said premises of five years from the 1st of May, 1880.

The sale in question of the said goods and chattels, took place in the month of June, 1883.

A similar opposition was filed by M. B. Atkinson, claiming a like privilege on the proceeds of the defendant Munn's goods.

By the report of distribution, the present respondents, *avocats distrayants*, were collocated for $625.81 balance of $795.81, their costs in the Superior Court and Court of Queen's Bench, they having received $170, proceeds of sale of defendant Magor's effects, and in the further sum of $244.08, in part payment of £239. 15. 10 sterling, costs taxed on the decree in the Privy Council, in favor of the plaintiffs Elliott *et al.*

These collocations form the fifth item of the report of distribution filed in the case.

The fifth item of the said report of distribution, was contested by the present appellants, on the following grounds:—

1. That the appellants, being the landlords of James Lord, were entitled to a privilege upon the effects sold, whereof the proceeds were to be distributed, for the rent and taxes claimed.

2. That the respondents were only entitled to be collocated by privilege for the costs of their action in the Superior Court, without contestation, and the costs of the report of distribution to be taken proportionately out of moneys to be levied on the goods of each of the defendants separately.

3. That the respondents were creditors of the firm, whilst the appellants were the creditors of James Lord individually.

4. That the respondents had not discussed the property of the firm before selling out that of James Lord.

5. That by law the respondents are entitled to be paid out of the proceeds of the effects of their debtor, in preference to any creditor of the firm, the sum of $448, amount claimed by their said opposition *afin de conserver*.

The Superior Court (Doherty, J.) on 25th February, 1884, maintained the contestation of the appellants, and ordered them to be collocated as prayed for by their opposition *afin de conserver*. This judgment was on 30th September, 1885, after the case had been three times argued before different judges, finally reversed by the Court of Review, and the report of distribution upheld.

The question presented to the Court for decision, may be couched in the following words:—If a creditor obtains judgment against a firm, which judgment is afterwards taken up through the Court of Queen's Bench to the Privy Council, wherein it is confirmed with costs, has such creditor a privilege for the total of his costs, amounting to over $2,000, outranking that of the landlord of one of the partners, giving to such creditor the whole of the proceeds of the sale of the goods garnishing the house occupied by such individual partner?

By Art. 1994 C. C. L. C. it is provided:—"The claims "which carry a privilege upon movable property are the "following, and when several of them come together they "take precedence in the following order, and according "to the rules hereinafter declared, unless some special "law derogates therefrom.

"1. Law costs and all expenses incurred in the interest "of the mass of the creditors.

"8. The claim of the lessor.

Art. 606 C. P. C. as originally fashioned, was in the following words: "The following order is observed as "regards the collocation of judicial costs:

"1. Costs of seizure and of sale.

"2. The duty payable upon moneys levied or paid into "Court.

1887.
Beaudry & Dunlop.

"3. The fees of the officer receiving moneys levied or "paid in.

"4. The fees upon the report of distribution.

"5. The fees of the attorney prosecuting the distri- "bution.

"6. Costs subsequent to judgment, incurred in order to "effect the seizure and sale, and according to the priority "of date or of privilege when there are several seizing "creditors.....

"7. Costs of affixing seals, or of inventories when "ordered by the Court. (The plaintiff is next paid his "costs of suit, taxed as in an uncontested case not in- "scribed for proof)."

By 33 Vict. chap. 17, sec. 2, all the words after "suit" in the last paragraph were struck out, so that virtually the last paragraph of Art. 606, now reads, "The plaintiff is next paid his costs of suit."

Art. 606 C. P. C. is evidently a species of explanation of Art. 1994 C. C. It does not extend the paragraph in question, it is merely explanatory. It does not do away with the necessity for the law costs and expenses being incurred in the interest of the mass of the creditors.

The basis of the privilege is that the costs have been incurred for the common benefit. If a creditor be not benefited by the law costs or expenses, so far as he is concerned, those law costs or expenses have no privilege or preference over his claim. In all cases where there is a distribution *au marc la livre* of moneys levied, there is really a contribution by each of the persons so collocated, to pay the privileged costs. And such should be the course in all cases, but the practice is different, and thereby if the amount levied be not sufficient to pay the whole of the creditors, it frees those who are collocated in full from any contribution, making the burthen to fall on him who is collocated in part or who fails to be collocated at all. But there can be no case where the seizing creditor is entitled on the ground of having made costs in the interest of the mass, to sweep away all the assets of their

1867.

Beaudry & Dunlop.

common debtor, in order to repay himself those costs. Such a proposition is absurd upon its face.

1 Troplong Priv. and Hyp. Nos. 122 and notes 1-4, 124, 126, n. 13, 130, 131. 1 Pont, Priv. and Hyp. Nos. 66-69.

Evidently this idea of benefit to the mass, was the one which induced the codifiers to limit the privilege of the plaintiff for his costs in the suit, wherein by seizure and sale, the money to be collocated has been levied, to those in an uncontested case not inscribed for proof, for thereby the bare costs necessary to obtain an execution were alone vested with privilege, the other costs in the suit in the Superior Court had no law costs privilege. Has the striking out of the words "taxed as in an uncontested case not inscribed for proof," the effect of making all costs in appeal to the Queen's Bench, the Supreme Court, and the Privy Council, incurred by a plaintiff executing, privileged under Arts. 1994, 1995, C. C. L. C. ?

First, Do the words "costs of suit," cover costs in appeal or are they limited to the costs of action in Court of original jurisdiction? Evidently the words "costs of suit" in Art. 606 C. P. C., as originally drawn, only apply to the costs in the Superior Court; no reasoning is required to establish this proposition. The striking out of the words "taxed as etc.," had not the effect of amplifying the meaning of the words "costs of suit", and causing them to include costs of appeal in addition to costs of Superior Court.

Art. 662 of the C. P. C. (French) provides "*les frais de poursuite seront prélevés par privilége avant toute créance autre que celle pour loyers dus au propriétaire.*" The words are apparently the same in our French version, those used being *frais d'action*, in the French *frais de poursuite*, but they have different meanings, the French *frais de poursuite* means solely those costs "*qui procurent la distribution lorsque la chose est déjà couverte en prix.*" (Troplong, Priv. and Hyp. No. 65. In the Code of Procedure, special mention is made of costs in appeal. Arts. 1143, 1146. The word "suit" would seem to apply solely to proceedings in the Superior Court; appeals are not considered as suits but are called

1867.
Beaudry & Dunlop.

appeals. Arts. 1168, 1157, 1154, 1150, 1117, 1118. Moreover, by Art. 734, a distinction as to ranking is made between costs in the Superior Court, and in the Court of Queen's Bench.

In this case, the costs against the firm virtually sweep away the proceeds of the chattels of the three defendants upon which their respective landlords had a privilege for rent, depriving those landlords of their privilege and stripping them of their security, thereby causing to them the loss of their rents due and to become due, and the only ground upon which such a violation of their rights can be justified is that the landlords have been benefited by these costs. But such a pretension is manifestly absurd and cannot be maintained. This case is not ruled by *Tansey & Bethune*, M. L. R., 1 Q. B. 28; the circumstances are different.

Second. There can be no doubt that the debt for costs in this case is a partnership debt and that the respondents are creditors of that partnership, they are not separate creditors of each of the partners.

Art. 1899 provides for the payment out of the partnership property of the creditors of the firm in preference to the separate creditors of any partner, "but in case such "property be found insufficient for the purpose—the pri- "vate property of the partners or of any one of them is "also to be applied to the payment of the debts of the "partnership, *but only after the payment out of it of the se- "parate creditors of such partners or partner respectively.*"

This evidently shows that no debt of a partnership, whether the same be privileged or not, can outrank on the proceeds of the private property of the partners, the claim of a separate creditor of such partners.

Such partnership creditor having obtained judgment cannot merely by seizing and selling give to a debt of the partnership a privilege over privileges already in existence on the private property of the partners. It always continues a partnership debt and can therefore only be paid after the separate creditors of such partners.

Should any privilege be attached to costs incurred in

1878.
Beaudry & Dunlop.

obtaining judgment for a debt, which debt is not entitled to and cannot rank upon the proceeds of a sale of moveables under that judgment?

An hypothecary creditor, whose claim has been contested and which has been taken into appeal, then winning, has but a privilege for his costs in the court in which he originally obtained judgment equal to the ranking of his debt, his costs in appeal only rank according to the date of their registration. If he be the party who sells out the property hypothecated, his costs in the Court wherein he originally obtained judgment, alone outrank his debt and are the costs of suit collocated under art. 728 C. P. C., but his costs in appeal only rank according to date of registration. If he sell out a property on which he has no mortgage, surely he cannot be in a better position.

Third. § 6. of art. 728 C. C. P., provides that "costs incurred either in the Court below or in appeal upon proceedings incidental to the seizure and necessary to effect "the sale of the immovables." Evidently the legislature, in order to make the costs in appeal so privileged, introduced the words "either in the Court below or in Appeal." If they had not been introduced, those costs would have been limited to the costs of the Court wherein the proceedings originated, so that applying the same rule, the words costs of suit in § 7 evidently mean costs of suit in Court wherein action was instituted.

§ 6 of art. 606 does not make the same provision with respect to costs subsequent to judgment as in § 6 of art. 728, that is to say, it does not provide that "costs incurred either in the Court below or in Appeal"; it merely is general, saying "costs subsequent to judgment necessary for the same purposes", so that if the holding of the Court of Review were sustained, it would be tantamount to saying that the legislature had made a difference between the privilege of costs connected with the sale of movables and those connected with the sale of immovables.

S. Bethune, Q. C., and *J. Dunlop*, for the respondents:—

1887.

Beaudry & Dunlop.

The appeal in this case is taken from a judgment of the Court of Review, rendered 30th September, 1885, reversing the judgment of the Hon. Mr. Justice Doherty, maintaining appellants' contestation of a collocation in favor of respondents for a large amount of costs.

The plaintiffs, John Elliott et al., had obtained a judgment against the defendants, the partners in the firm of Lord, Magor & Munn, for a partnership debt and costs, amounting to a large sum in three Courts, the last being the Privy Council. The bailiff seizing had levied $168 from the sale of the goods of defendant Magor, about which there is here no question raised, $528.43 from the goods of defendant Lord, and $393.17 from the goods of defendant Munn. The amount levied from Magor was paid to respondents in part payment of their costs in the Superior Court, taxed at $264.83.

The prothonotary collocated respondents for the other amounts in part payment of their costs of suit. The appellants contested the collocation on the ground that they had a claim against the goods of Lord for rent due and to accrue amounting to $448, and further, that their debt was a private debt against Lord, and the debt of the plaintiffs was a partnership debt, and their debt should be paid by preference out of the private property of Lord.

A similar contestation was filed by Atkinson, lessor of premises occupied by defendant Munn.

The cases were heard together, and the judgment of the Superior Court (Doherty, J.) maintained the contestations on the 25th February, 1884.

The cases were heard together in Review, and the judgment of the Superior Court, reversed, and respondents allowed their privilege for costs.

The remarks of Mr. Justice Torrance in rendering the judgment of the Court of Review in the case of Atkinson, Montreal Law Reports, 1 S. C. pp. 444-45, fully explain this case, the contestations being identical.

In the case of *Tansey & Bethune*, M. L. R., 1 Q. B. 28, it was held in the Court of Queen's Bench:—"That when "a defendant in an action of damages which has been

"dismissed with costs, causes an immovable belonging "to the plaintiff to be seized and sold by the sheriff, he "is entitled to be collocated by privilege for such costs "on the proceeds of the sale." See observations of Baby, J., p. 34.

This authority bears out to the fullest extent, the pretention of respondents, that as the law now stands they have a privilege for all their costs incurred in obtaining the judgment in this case, under the Civil Code 1994, and the Code of Civil Procedure 606, as amended by 33 Vic., chap. 17, sec. 2, Quebec, simply because they are the seizing and selling creditors.

Article 1899, C. C., invoked by appellants, is founded on C. S. L. C., cap. 65, sec. 6, which is simply a rule showing how the joint stock of a firm and the separate estate of the partners *brought into Court* shall be disposed of, and has nothing to do with the privilege of the seizing creditors for costs of bringing the property to sale and the proceeds into Court.

The rule of distribution is the same in England. In Massachusetts, where the rule is the same, in the case of *Buck* v. *Burlinghame*, 13 Gray, 307, where the point came up exactly in the same way as in the present case, the partnership creditor bringing the proceeds of the separate estate of a partner to sale was held to be entitled to his costs before payment of separate debts.

The privilege for costs extends on all that is realized by means of those costs, and therefore the plaintiffs had a privilege for these costs on all the monies realized. The costs incurred in order to obtain execution, and the realization *du gage*, although an accessory of a *demande* or claim, do not follow the rank of privilege of the principal claim of which they are an accessory, simply because they are by law privileged; so the maxim "*accessoria sequuntur rem principalem*," quoted by the Hon. Mr. Justice Doherty in his judgment, does not apply.

The greater part of contestants' claim was for rent to accrue. His claim is based on a lease dated 19th July, 1879, long after the institution of the original suit, and is

1887. Beaudry & Dunlop.

for the sum of $80, a quarter's rent due 1st May, 1883, and for a year to accrue from 1st May, 1883 to 1st May, 1884, as appears by his opposition, filed 28th June, 1883.

Contestants can compel the defendant to garnish the premises or resiliate the lease, so that there was no such want of equity in maintaining the privilege for costs, as was contended by contestants in the Court below.

It will be observed that by the judgment of the Hon Mr. Justice Doherty, respondents were not even allowed their costs in the Superior Court, there being still a balance due of $96.88.

The respondents contend that by law they are entitled to all their costs of suit in all the Courts. The judgment of the Privy Council grants this to the plaintiffs. The law gives a privilege for costs of suit, which must mean all the costs incurred by plaintiffs in successfully prosecuting their suit, and selling the property of their debtors of whatsoever description, and bringing the proceeds into Court for distribution.

TESSIER, J. (for the Court) :—

Le 18 juin 1883, un bref d'exécution émana à l'instance d'Elliott et al. contre Lord, Magor et Munn pour une somme principale et pour des frais en cour supérieure, en cour d'appel et au conseil privé, se montant à environ $2,000.

Par la vente des meubles de Munn et Lord une somme de $921.60 a été rapportée en cour pour distribution.

L'appelant Beaudry a produit une opposition pour réclamer sur les meubles de Lord par privilège de locateur un montant de $448 pour loyer échu [illegible] et taxes de l'année. Atkinson a produit aussi une semblable opposition sur les meubles de Munn.

Par un rapport de distribution les avocats et procureurs distrayants, MM. Dunlop & Lyman, ont été colloqués pour leurs frais dans les trois cours, c'est-à-dire, à-compte sur les frais absorbant le produit de la vente.

M. Beaudry a contesté cette collocation et par un premier jugement la cour supérieure le 25 février 1884 a refusé tout privilège aux avocats distrayants, en s'ap-

puyant principalement sur ce que les biens privés des associés n'étaient pas tenus, avant d'avoir discuté les biens de la société.

1887.
Beaudry & Dunlop.

La cour de révision après audition et deux ré-auditions, a renversé ce jugement et maintenu le privilège des frais des trois cours.

L'article 1994 du Code Civil indique l'ordre des privilèges sur les biens meubles ; le premier de ces privilèges y est indiqué comme suit :

" Les frais de justice et toutes les dépenses faites dans " l'intérêt commun."

Mais pour avoir l'explication de ces frais de justice il faut recourir à l'article 606 du Code de Procédure Civile. Dans le paragraphe 6 le privilège s'étend " aux frais pos- " térieurs au jugement encourus pour arriver à la saisie " et à la vente ;" dans le paragraphe 8 il est dit : " le de- " mandeur sera payé ensuite de ses frais d'action, (costs " of suit) taxés comme dans une cause non contestée " sans enquête."

Si cet article fut resté comme cela, il n'y avait pas de difficulté dans l'interprétation ; les frais privilégiés étaient limités aux frais d'une action non contestée, et il semble évident que cela ne donnait pas de privilège pour les frais en appel et au conseil privé, puisque l'on refusait même les frais de contestation en cour de première instance.

Mais la législature a amendé cet article en retranchant tous les mots après ceux " frais d'action," 33 Vict. ch. 17, s. 2.

Quel est l'effet de cet amendement ? quelle a été l'intention du législateur ? C'était sans doute de donner ce que l'article original refusait, c'est-à-dire, de donner les frais de l'action contestée même avec enquête. On ne peut pas donner une autre interprétation, parce que le privilège est de droit strict, il est plutôt rétréci qu'étendu.

Si le législateur eut voulu inclure dans ce privilège les frais d'appel et du conseil privé, il eut pris la peine de le mentionner, de même que l'on trouve cette mention faite dans d'autres articles du Code, par exemple, dans l'article

1887.
Beaudry & Dunlop.

728 C. P. C., dans les ventes d'immeubles on donne un privilège pour frais sur les incidents de *la saisie* tant en première instance qu'en appel, mais lorsqu'il s'agit des frais d'action on réfère à l'article 606 qui ne fait aucune mention des frais d'appel.

Dans l'article 734 on fait la distinction sur le privilège des frais en première instance, ils suivent le même rang que le jugement ; mais l'article ajoute : " Les frais adju- " gés en appel ne sont colloqués que suivant la date de " leur enregistrement."

Dans le Code Napoléon art. 662 le privilège du locateur est préféré aux frais de poursuite ; c'était ainsi dans la Coutume de Paris, et dans notre ancienne jurisprudence. Le locateur faisait une opposition afin de récréance pour obliger le saisissant de lui donner caution que les meubles seraient vendus à un montant suffisant pour payer le loyer. Une disposition statutaire a changé cela. Cependant il semble que c'est contre l'équité et l'intérêt commun des créanciers de laisser absorber tout le mobilier d'un débiteur par des frais de trois ou quatre tribunaux, qui s'élèvent assez souvent à une somme considérable.

Il faut donc limiter le privilège des frais des avocats distrayants en cette cause aux frais d'action en cour supérieure et aux frais de saisie et vente. L'interprétation que cette cour adopte unanimement paraît bien raisonnable ; il n'est que juste que le privilège de frais s'élevant bien souvent comme dans le cas actuel à $2,000 et plus, ne vienne pas détruire le privilège du locateur et d'autres créanciers. Ceci serait contraire aux intérêts des créanciers en général et injuste.

Il est encore dû aux avocats des intimés une balance de $96.83 qui doit leur être accordée dans l'ordre de distribution.

Sur la question des frais du présent litige les intimés doivent avoir leurs frais en cour de première instance sur la contestation de l'ordre de distribution et en révision contre les appelants, mais avec les frais du présent appel contre les intimés.

1887.

Beaudry & Dunlop.

The judgment of the Court reads as follows:—

"La Cour, etc.....

"Considérant que bien que les deniers qui font l'objet du présent litige, et maintenant en voie de distribution, soient le produit des meubles et biens particuliers des nommés Stewart Munn et James Lord, pris en exécution par les demandeurs en cette cause, John Elliott et autres sur les dits James Lord, Stewart Munn et le nommé John Magor, marchands associés sous le nom de "Lord, Magor & Munn," les défendeurs en cette cause, ces deniers n'en sont pas moins soumis au privilège accordé par l'article 1994 du Code Civil, pour les frais de justice dans l'ordre prescrit par l'article 606 du Code de Procédure Civile, et que les intimés, avocats et procureurs des demandeurs, avaient droit suivant le paragraphe 8 du dit article 606 tel qu'amendé par la loi 33 Vict. (Q.), ch. 17, sect. 2, d'être colloqués pour leurs frais d'action de préférence aux appelants, et sans égard au privilège invoqué par ces derniers dans leur contestation à titre de locateurs du dit James Lord, sur la partie des deniers prélevés en cette cause provenant de la vente des meubles et biens particuliers du même James Lord ; mais que ce privilège pour les frais de justice est limité, dans le cas de distribution du produit des meubles ou immeubles, aux frais de l'action même contestée, ainsi qu'aux frais de saisie et de vente, mais ne s'étend pas aux frais d'appel et dans l'espèce aux frais encourus par les demandeurs John Elliott et autres sur l'appel interjeté par les défendeurs James Lord et autres, non plus qu'aux frais de l'appel interjeté par les dits demandeurs à Sa Majesté en son Conseil Privé, et partant que dans le jugement dont est appel, savoir le jugement rendu par la Cour Supérieure siégeant en révision à Montréal, le 30me jour de septembre 1885, qui a maintenu dans son entier la collocation des intimés, il y a erreur,

"Renverse le dit jugement et procédant à rendre le jugement que la dite Cour de Révision aurait dû rendre, maintient la collocation des intimés jusqu'à concurrence seulement des frais de l'action en cette cause en Cour de

1887.
Beaudry & Dunlop.

première instance, savoir, de la balance due sur les frais taxés sur le jugement rendu en cette cause par la Cour Supérieure siégeant en première instance le 21 mai 1880, tel que confirmé par le décret de Sa Majesté en son Conseil Privé rendu le 19 mars 1883. savoir, jusqu'à concurrence de la somme de $96.83, balance des dits frais d'action, et rejette la dite collocation quant au surplus, savoir, quant aux frais sur l'appel interjeté devant cette Cour par les dits défendeurs James Lord et autres, et sur l'appel des dits demandeurs, John Elliott et autres, au Conseil Privé;

"Et la Cour condamne les appelants à payer aux intimés les frais encourus en Cour de première instance et en révision, et les intimés à payer aux appelants les frais sur le présent appel."

Judgment reversed.

Kerr, Carter & Goldstein, attorneys for appellants.

Dunlop, Lyman & Macpherson, attorneys for respondents.

(J. K.)

November 22, 1887.

Coram DORION, Ch. J., [illegible]SSIER, CROSS, CHURCH, JJ.

JOHN H. [illegible]LLEN,
(*Plaintiff in Court below*),
APPELLANT;

AND

THE MERCHANTS MARINE INSURANCE CO.
(*Defendant in Court below*),
RESPONDENT.

Insurance, Marine—Condition of Policy—Prescription—C. C. 2184—Prosecution of Claim.

HELD:—1. That a condition in a policy of insurance, "that all claims under this policy shall be void unless prosecuted within one year from "the date of loss," is a valid condition, and the non-observance thereof defeats the remedy of the insured. Such condition is not a renunciation of prescription by anticipation within the meaning of C. C. 2184.

2. That correspondence between the insured, or persons claiming to represent him, and the insurer on the subject of a loss, without any admission of liability on the part of the insurer, is not a "prosecution" of the claim by the insured, within the meaning of the above condition.

The alleged ruling in *Anchor Marine Ins. Co. & Allen*, 13 Q. L. R. 4 (that such condition is invalid) questioned and denied.

The appeal was from a judgment of the Superior Court (JETTÉ, J.) October 31, 1885, dismissing appellant's action with costs.

The judgment of the Court below was in the following terms:—

"La Cour, etc....

"Attendu que le 29 octobre 1877, la Compagnie défenderesse a assuré pour la somme de $5,000 et le terme d'une année, la Barque "Waterloo," appartenant au demandeur contre les dangers de la navigation, que la dite Barque a été perdue en mer vers le 28 février 1878, qu'il en a été fait abandon à la défenderesse le 6 juin suivant,

1887.

Allen & Merchants Marine Ins. Co.

et que le demandeur se pourvoit maintenant en recouvrement de la somme assurée ;

" Attendu que la Compagnie défenderesse conteste cette demande, disant :—

1o. Qu'il est stipulé au contrat invoqué par le demandeur que toute réclamation contre la défenderesse en cas de sinistre, sera non-recevable si elle n'est faite dans les douze mois après la perte du navire assuré, et que l'action du demandeur n'ayant été prise que le 8 avril 1880, c'est-à-dire plus de deux ans après la perte du navire, la demande ne peut être reçue.

2o. Que le demandeur a frauduleusement fait assurer son dit navire par la défenderesse et d'autres compagnies pour des sommes dépassant de beaucoup sa valeur et que par suite le contrat qu'il a obtenu de la défenderesse doit être annulé.

" Attendu que sans l'avoir spécialement allégué, le demandeur a néanmoins tenté de prouver que la défenderesse avait renoncé au bénéfice de la prescription stipulée au contrat entre les parties, mais qu'il a complètement failli de faire telle preuve ;

" Considérant que la stipulation insérée au contrat entre le demandeur et la Compagnie défenderesse au sujet de la dite prescription conventionnelle de l'action, est dans les termes les plus absolus, le dit contrat s'exprimant comme suit :

' That all claims under this policy shall be void, unless ' prosecuted within one year from the date of loss.'

" Considérant qu'en l'absence de toute preuve de faits indiquant de la part de la Compagnie défenderesse, soit un consentement tacite à reconnaître la demande nonobstant l'écoulement du délai, soit l'intention de retarder frauduleusement le demandeur dans la poursuite de son droit, afin de profiter injustement ensuite de l'écoulement du terme fixé, la stipulation invoquée par la défenderesse doit avoir son plein et entier effet ;

" Considérant en conséquence que la demande a été portée tardivement et qu'aux termes du contrat entre les parties, elle est non recevable ;

" Maintient la première exception de la défenderesse et renvoie la dite action du demandeur avec dépens distraits etc."

Sept. 15, 1887.]

W. F. Ritchie, for the appellant :—

Appellant submits that the judgment was erroneous. It will be manifest on looking over the correspondence extending over a long period which took place between the respondents and parties acting for the appellant, that the suit was delayed by him under the belief, (encouraged by the letters and actions of the Company, respondents, they never having refused to pay the claim), that the loss under the policy would be paid and that the Company in urging the grounds they did successfully, pleaded in effect their own misdeeds and by their actions waived the prescription of a year as stipulated in the policy, supposing such to be valid, which appellant denies. Appellant also submits that the condition, binding him to institute proceedings within a year is not valid, not being mentioned in the binding application for insurance (No. 11 of Record) which is the contract between the parties and being contrary to the terms of Art. 2184 of the Civil Code: "Prescription cannot be renounced by anticipa- " tion. That acquired may be renounced and so may also " the benefit of any time elapsed by which prescription " is begun."

It being a matter of public order, that under given conditions, people are entitled to a decision of their differences by the Courts, and it is evident, that if prescription cannot be renounced by anticipation, much less can a new one be created by anticipation which is the effect of the clause above referred to.

Anchor Marine Ins. Co. & Allen, 13 Q. L. R. 4, was relied upon.

J. C. Hatton, Q.C., for respondent :—

An attempt was made to prove that the claim had been " prosecuted " within the year, by reason of certain correspondence, between the respondents and certain Banks, and persons claiming to be entitled to the amount of in-

1887
Allen
&
Merchants
Marine Ins. Co.

surance now sought to be recovered by the appellant. It is absurd to say that such letters were a "prosecution" of the claim within the meaning of the condition. Even the quality and rights of the persons claiming were unknown to the respondents. They exhibited no title or evidence of right to the amount insured, and were continually asked to produce their proof. The condition is explicit, and the action not having been brought within a year after the date of loss was absolutely prescribed before the date of its institution. The learned counsel cited *Cornell* v. *Liverpool & London Ins. Co.*, 14 L. C. J. 256, where the validity of such a condition was expressly affirmed by this Court. Also *Armstrong* v. *Northern Ins. Co.*, 4 Leg. News, 77; *Bell* v. *Hartford Ins. Co.*, 1 Leg. News, 100; *Rousseau* v. *Royal Ins. Co.*, M. L. R., 1 S. C. 395; *Whyte* v. *Western Ins. Co.*, 22 L. C. J. 215; *Browning* v. *Provincial Ins. Co.*, L. R., 5 P. C. 274. The following Ontario decisions were also referred to:—*Lampkin* v. *Western Ass. Co.*, 13 Q. B. 237; *Hickey* v. *Anchor Ass. Co.*, 18 Q. B. 433; *Davis* v. *Canada Farmers Mutual Ins. Co.*, Q. B. 1876; *Brady* v. *Western Ins. Co.*, 17 C. P. 597; *Provincial Ins. Co.* v. *Ætna Ins. Co.*, 16 Q. B. 135; *Tallman* v. *Mutual Fire Ins. Co.*, 16 Q. B. 1000.

As to the French law, reference was made to Laurent, vol. 32, § 184, p. 191; Poujet, Dict. des Assurances, tome 1; Pothier, vol. 1, p. 340; Merlin, Rep. vo. Prescription, etc.

English and United States decisions were cited in the same sense.

Nov. 22, 1887.]

CROSS, J. (for the Court):—

This action was brought by the appellant, claiming from the respondent $5,000, amount of insurance effected on the ship or barque called the "Waterloo," the property of the appellant, by a policy of insurance dated at Montreal, 29th October, 1877, whereby the vessel was insured for one year dating from 25th October, 1877, to 25th October, 1878, to cover said vessel employed in general trading, to start on a voyage from Quebec to Liverpool,

1887.

Allen & Merchants Marine Ins. Co.

on the 26th October, 1877. The vessel was valued at $35,000, and the risks assumed were the usual marine risks. The vessel left Quebec about the appointed time, but never reached Liverpool, being, according to the allegations of appellant's declaration, wholly lost about 28th February, 1878, at which date the proof shows that the vessel was posted at Lloyd's as lost; from which date, according to custom, losses would be payable. He further alleges that about the 6th June, 1878, having abandoned all hopes of the vessel's safety, he made an abandonment of it to the respondents.

The insurance Company respondents made various pleas to the action, all of which save perhaps two, being unsupported by evidence, may be left out of account in the reasons for the judgment we are called upon to render. These two reasons are, First, the non-payment of the premium for which a note appears to have been given. Even this we find it unnecessary to consider, the case turning as we view it on the second of these reasons, viz, That the action was not brought within the time limited by a condition in the policy of insurance, the objection being formally taken in the respondents' plea. It appears that the action was instituted on the 8th of April, 1880, and the only claim made by appellant was dated 24th February, 1879, and seems not to have been delivered to respondents until nearly a month later. The condition in the policy which respondents rely upon and plead reads as follows: "It is also agreed that all claims under "the policy shall be void unless prosecuted within one "year from the date of loss, and in case the note or obligation given for the premium herefor be not paid at maturity the full amount of the premium shall be considered as earned, and this policy become void while the "said note or obligation remains overdue and unpaid."

This raises the delicate question as to whether such a condition, requiring the prosecution or bringing of an action within the year from the date of the loss as a condition of the right to recover, is a valid condition, the non-observance of which defeats the appellant's remedy, especially

1867.
Allen & Merchants Marine Ins. Co.

in view of Article 2184 of the Civil Code, declaring that prescription cannot be renounced by anticipation. This is a question on which authorities are not uniform. The appellant has cited a number of decisions, chiefly from reports of cases tried in the State of Indiana, which would seem to favor his view that such a condition is invalid; also the case of the *Anchor Marine Insurance Co. & Allen*, decided by this court, reported in 13 Q. L. R. p. 4, in which the expressions used by the learned judge who rendered the judgment imply that he gave his sanction to that principle. But this was certainly not the opinion of some others of the members of the Court. There were other reasons for basing the judgment in that case. For one, I did not consider that the case was governed by this consideration, and am convinced that the condition in question is valid; and so it has been held by a great majority of the decisions on this point in the United States; as also in our own courts, notably in the case of *Cornell* v. *Liverpool & London Fire Insurance Co.*, 14 L. C. J. p. 256; also in the *Provincial Ins. Co.* v. *The Ætna Ins. Co.*, 16 U.C. Q. B., p. 135. Also, what is more important for the present case, a host of French authorities, both ancient and modern, have been cited by the counsel for the respondent, the latter under a system of law having in force the same rule as ours in regard to the non-renunciation of prescription. In fact, I do not think it is, properly speaking, a prescription. It is important in dealing with such aleatory contracts that insurers should at all times be able to ascertain as nearly as possible the extent of their liability. Hence it is reasonable for them to stipulate that in case of a loss they will be willing to pay an indemnity, provided it is claimed, and only in case it is claimed, within a specified time. The judgment maintaining the validity of the condition in question will be confirmed.

Judgment confirmed.

W. F. Ritchie, attorney for Appellant.

J. C. Hatton, Q.C., attorney for Respondents.

(J. K.)

November 22, 1887.

Coram DORION, C. J., TESSIER, CROSS and CHURCH, JJ.

JAMES ROSS,
(*Plaintiff in the Court below*),
APPELLANT;

AND

DUNCAN PAUL ET AL.,
(*Defendants in the Court below*),
RESPONDENTS.

Imputation of payment—Note given as fraudulent preference—Knowledge by trustee.

Where J. R., trustee to an insolvent estate, is member of a firm holding insolvent's note given it in illegal preference, and where, the purchasers of the estate having appointed the insolvent their agent for the purpose of realizing its assets, the latter pays the proceeds to J.R.:—

HELD:—On suit brought by trustee *ès qualité* against purchasers for balance of price, that the moneys so paid will be imputed on account of the debt due trustee by purchasers;

2.—That the knowledge by J. R. of the illegal preference, which came to him as a member of the firm, is a knowledge by him in his capacity of trustee.

The appeal was taken from the following judgment of the Superior Court, sitting in Review (JOHNSON, TORRANCE and LORANGER, JJ.) at Montreal, on the 30th June, 1885:—

"The Court here, sitting as Court of Review, having heard the parties by their respective counsel upon the judgment rendered in the Superior Court, in and for the District of Montreal, on the 21st of January, 1885, etc.:

"Seeing the consent that the contestation between the parties was limited to four items of $1,100, $100, $71.50, and $144;

"Considering that the only sum that defendants should offset against plaintiff's demand is the said sum of $1,100, less $26.03, viz.: the balance of $1,078.67;

1887.

Ross & Paul.

"Considering that said sum of $1,073.67, with interest from the 16th of February, 1884, namely, $16.10, making a total sum of $1,089.77, should be compensated according to its sufficiency against the plaintiff's demand for $1,668.70, and said demand is hereby reduced to the sum of $578.93;

"Considering that there is error in the said judgment of date 31st January last, *pro tanto*; Doth, revising said judgment, reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises, doth condemn the defendants jointly and severally to pay to the plaintiff the said sum of $578.93, currency, balance in principal and costs of protest due upon the promissory note dated Montreal, the 14th day of May, 1883, made and signed by the defendant Duncan Paul, payable twelve months after date to the order of the defendant Henry Dixon, at the Exchange Bank of Canada, in Montreal, for value received, and by the said Henry Dixon endorsed and delivered to the plaintiff, with interest on the said sum of $578.93 from the 17th day of May, 1884, date of maturity of the said note, and with costs in the said Superior Court, against the said defendants in favor of the said plaintiff; and with costs of this Court of Review against said plaintiff in favor of defendants."

TORRANCE, J. (in Review):—

The action is to recover $1,666.67, amount of promissory note. The plea is one of compensation by a much larger amount, according to defendant's exhibit No. 1. Plaintiff answered the plea by saying that he held the note as trustee of the estate of Alexander Paul, and that the note was the property of the creditors of Alexander Paul.

The evidence abundantly shews that James Ross received $1,100, proceeds of the Campbell and Dixson notes for the defendants, and $3,625 paid to plaintiff on behalf of defendants by The Commercial Insurance Company. I do not see how the status of James Ross as trustee can be separated here from his status as an individual. The equities are altogether against plaintiff's pretension. The amounts mentioned above of $1,100 and

$3,625 are far more than sufficient to extinguish plaintiff's claim.

But the admission of the parties limits the contest to four items:—

1.	Proceeds of Campbell and Dixon notes,	$1,100
2.	Amount paid J. Y. Gilmour & Co.,	71
3.	Charges by plaintiff,	100
4.	do do	144
		$1,415

I would make no difficulty about allowing the items $100 and $144 to plaintiff, or $71 the payment to J. Y. Gilmour & Co. Therefore, $1,100, less $26.33, or 1,073.77 are allowed in deduction of plaintiff's demand for $1,666.67, which is thereby reduced to $592.90.

The following is the judgment of the Superior Court at Montreal, (DOHERTY, J.) rendered on the 31st January, 1885, which was reversed by the judgment appealed from:—

"The Court, etc.....

"Considering that plaintiff hath proved the material allegations of his declaration and special answer, and that defendants have failed to prove and establish their pleas of compensation, and more particularly that plaintiff's claim on the note sued on as being the property of the creditors of the insolvent Alexander Paul can be compensated by any amount that might be due by plaintiff personally or by the firm of which he is or was a member, and that the pretensions of defendants to that effect are unfounded, dismissing said pleas of compensation, doth adjudge and condemn the defendants, jointly and severally, to pay and satisfy to plaintiff the sum of $1,668.70 currency, to wit, the sum of $1,666.67, amount of a promissory note, dated Montreal, the 14th of May 1883, made and signed by said defendant, Duncan Paul, payable twelve months after date to the order of the other defendant Henry Dixon, at the Exchange Bank of Canada, in

1887.

Ross & Paul.

Montreal, for value received, and by the said Henry Dixon endorsed and delivered to said plaintiff—and the sum of $2.03 for the cost of protest of the said notes; with interest on $1,666.67, from the 17th of May, 1884, date of said protest, and on $2.03 from the third day of June, 1884, day of service of process, until paid, and costs of suit *distraits*, etc."

Sept. 20, 1887.]

J. P. Cooke, for the appellant.

N. W. Trenholme, for the respondent.

TESSIER, J. :—

Le présent appel porte sur une question d'imputation de paiement. En 1863, Alexander Paul devint insolvable, et l'appelant James Ross, un des membres de la société James Ross & Co., fut nommé syndic ou curateur à la faillite. En cette qualité il vendit aux intimés Duncan Paul et Dixon tous les biens de la faillite pour le prix de $5,000, pour lequel il reçut trois billets promissoires. L'action de l'appelant fut prise pour le recouvrement du montant du dernier de ces billets. La défense allègue que Ross a déjà reçu un montant suffisant pour le paiement de ce billet, c'est-à-dire, un montant qu'il aurait reçu de Alexander Paul, et qu'il aurait imputé sur une prétendue dette de $1,100 pour laquelle celui-ci avait consenti son billet promissoire en faveur de James Ross & Cie., afin de garantir à cette société une préférence sur ses autres créanciers. Ce sont ces $1,100 qui font la difficulté en cette cause.

James Ross vis-à-vis de Alexander Paul avait deux qualités. Il était curateur de la faillite, et, comme associé de James Ross & Cie., il était son créancier. En ses différentes qualités il s'est fait payer plusieurs sommes d'argent. Il retient $1,100 du paiement du troisième billet des intimés, et l'applique au paiement du billet consenti par Alexander Paul en faveur de James Ross & Cie., pour donner à ceux-ci, disent les intimés, une préférence secrète et illégale. Mais pour détruire l'effet de ce billet de $1,100 entre les mains de l'appelant, il faut prouver qu'il y avait fraude à la connaissance de l'appelant. Après l'achat des biens

de la faillite par les intimés, le failli Alexander Paul, en fut mis en possession par les acheteurs pour en réaliser le produit par la vente. Il était l'agent des intimés sous un mandat spécial, et l'argent qu'il reçut de cette administration appartenait aux intimés, et ce au su de l'appelant. Celui-ci savait bien qu'Alexander Paul n'était pas autorisé à payer avec les deniers de Duncan Paul une dette que ce dernier ne devait pas et n'avait aucun intérêt à payer. Sous ces circonstances la Cour croit que la Cour de Révision a pris le sens légal des faits de la cause, et que son jugement ne condamnant les intimés qu'en la somme de $578.93 doit être maintenu.

1887. Ross & Paul.

Judgment confirmed.

Cooke & Brooke, attorneys for appellant.

Trenholme, Taylor, Dickson & Buchan, attorneys for respondents.

(H. J. K.)

22 novembre 1887.

Corum TESSIER, CROSS, BABY, CHURCH, JJ., et DOHERTY, A. J.

EDOUARD L. DEBELLEFEUILLE,
(*Contestant en Cour Inférieure*),
APPELANT;

ET

CHARLES DESMARTEAU, ès-qual.,
(*Répondant en Cour Inférieure*),
INTIMÉ.

Préférence entre créanciers privilégiés.

JUGÉ:—Que le locateur qui a saisi doit être payé sur le produit de la vente des effets garnissant les lieux loués par préférence aux frais d'administration, etc., encourus par le curateur nommé à la cession faite par le locataire subséquemment à la saisie-gagerie, à l'exception des frais pour la conservation et la vente de ces effets.

Cette cause fut décidée à Montréal par la Cour Supé-

1887.
De Bellefeuille & Desmarteau.

rieure (H. TASCHEREAU, J.), le 29 Janvier 1886, dont le jugement est rapporté M. L. R., 2 S. C. 130. Ce jugement de la Cour de première instance, maintenant la contestation, fut infirmé par la Cour de Révision (DOHERTY et JETTÉ, JJ., et CIMON, J., *diss.*), le 12 juin 1886.

Voici le texte de ce dernier jugement :—

"La Cour, etc.....

"Considérant qu'en principe, le privilège des frais de justice et de ceux faits dans l'intérêt commun des créanciers, est supérieur à tous autres et spécialement à celui du locateur ;

"Considérant que dans le cas d'un commerçant qui a cessé ses paiements, la loi permet de confier l'administration de ses biens à un curateur qui en prend possession et les réalise dans l'intérêt commun ;

"Considérant que les dépenses, faites pour l'organisation de cette administration spéciale des biens d'un commerçant, entrent nécessairement dans la catégorie des frais de justice, surtout lorsqu'elles se rapportent à des procédures ordonnées par la loi même ;

"Vu les articles 1994 et 1995 du Code Civil et les articles 763 et suivants du Code de Procédure Civile :

"Considérant que, dans l'espèce, les frais suivants mentionnés au bordereau de collocation que conteste le locateur, savoir :

1o. La somme de $68.33, chiffre du premier item du bordereau, pour frais et déboursés du curateur sur l'annonce de sa nomination, la vente du cheval et l'avis du dividende et autres procédures incidentes ;

2o. La somme de $41.65, chiffre du troisième item du bordereau, pour frais sur la demande de cession, la réunion des créanciers, la nomination du gardien provisoire et celle du curateur ;

3o. La somme de $61.97, chiffre du quatrième item du bordereau étant les frais du gardien provisoire relativement aux marchandises du failli, à l'inventaire et garde d'icelles, à l'envoi d'un état d'affaires à chaque créancier et autres incidents ;

4o. Enfin, la somme de $20.10 étant (moins $7.65) le

1887.

De Bellefeuille & Desmarteau.

cinquième item du dit bordereau, pour frais de saisie par le créancier Ménard, du cheval du failli, avant la cession de ce dernier et avant la saisie-gagerie du locateur ;

Sont des frais pour l'avantage commun, nécessaires pour l'organisation spéciale de la faillite du débiteur et la réalisation de ses biens d'après le mode prévu par les dispositions nouvelles du Code de Procédure Civile ; Que ces frais étaient autorisés par les articles 768, 770, 772 et 772*a* du dit Code et qu'ils ont été spécialement utiles au locateur qui n'avait rien saisi des biens et effets ainsi réalisés par le curateur ;

" Considérant que les divers items de frais susmentionnés sont justifiés par des mémoires taxés et par la preuve faite au dossier ; qu'ils s'élèvent réunis à la somme totale de $192.05 et que le curateur a, pour cette dite somme, après contribution proportionnelle des autres biens de la faillite, un droit de préférence antérieur à celui du contestant sur le produit des biens affectés à son privilège de locateur ;

" Considérant en conséquence que l'offre du dit contestant de contribuer au paiement des frais de liquidation jusqu'à concurrence de $25.50 était inacceptable et que la Cour de première instance a erré en la déclarant valable et suffisante ;

" Considérant, néanmoins, que le curateur ne peut réclamer un droit de préférence sur les biens soumis au privilège du contestant pour la balance des frais mentionnés au bordereau, savoir : $28.75 ;

" Réformant le jugement de la Cour de première instance et procédant à rendre celui qu'elle aurait dû rendre, maintient la contestation du bordereau de collocation par le dit contestant jusqu'à concurrence de cette somme de $28.75, mais la renvoie pour le surplus ; déclare que la dite somme de $192.05 constitue des frais de justice privilégiés et ayant droit de préférence sur toute réclamation contre la faillite du dit Ménard, même sur celle du locateur contestant et, en conséquence, ordonne qu'un nouveau bordereau soit préparé en tenant compte du privi-

1887.
De Bellefeuille & Desmarteau.

lège susdit, mais jusqu'à concurrence seulement de la dite somme de $192.05 sur les biens affectés au gage du contestant ; ordonne que chaque partie paie ses propres frais en Cour de première instance, mais condamne le contestant aux frais de cette Cour de révision, etc."

(Son Honneur M. le Juge Cimon ne concourt pas dans ce jugement).

C'est de ce jugement de la Cour de Révision que le présent appel est porté.

Sept. 19, 1887.]

DeBellefeuille et *Geoffrion*, *C. R.*, pour l'appelant.

A. Desjardins et *E. Lafontaine*, pour l'intimé.

TESSIER, J. :—

Le montant en litige n'est pas considérable, mais la question est importante en principe. Il s'agit de savoir si le privilège du locateur doit être préféré aux frais faits par le curateur à la cession de biens de W. E. Ménard.

L'appelant, M. DeBellefeuille, fit émaner en juillet 1885, une action avec saisie-gagerie contre son locataire Ménard et obtint un jugement contre lui ; mais en vertu de la cession de biens de Ménard au curateur Desmarteau, celui-ci prit possession des effets de Ménard, les fit vendre et réalisa $220.00 comme suit :—

1o. La vente du fonds de marchandises qui a rapportée	$ 68 44
2o. La vente d'un cheval qui a rapportée	66 00
3o. La vente des crédits qui a produit	34 68
4o. Enfin cinquante piastres ont été payées par un créancier hypothécaire pour reprendre le seul immeuble faisant partie des biens du failli Ménard et que les créanciers, sur résolution spéciale adoptée dans une assemblée réunie dans ce but avaient décidé de lui laisser	50 00
Ces diverses sommes ont produit un montant total de	$220 80

Le curateur prépara une feuille de dividende ainsi qu'il suit :—

Frais du curateur	$ 68 33
Frais pour autorisation à vendre les meubles et les immeubles ..	21 10
Frais pour nomination du gardien provisoire	41 65
Frais du gardien provisoire	61 97
Enfin mémoire de frais de M. Lareau *Ja re* Denis, v. Lareau	27 75
	$220 80

Ainsi l'appelant ne fut colloqué ni pour son loyer, ni même pour les frais de saisie-gagerie qu'il avait faits avant qu'il y eût une cession de biens et un curateur.

L'appelant a contesté ce bordereau de collocation sur les motifs suivants:

"Que la créance du contestant pour loyer et sa créance pour frais sont privilégiées et préférables à toutes les créances colloquées, excepté les frais de justice qui ont pu être faits au profit du contestant ou dans son intérêt.

"Que néanmoins le bordereau de collocation, tel que préparé, ignore complètement la réclamation du contestant et colloque des frais faits par des créanciers non privilégiés, lesquels frais n'ont pas été faits pour l'intérêt des créanciers en général et n'ont aucunement profité au contestant."

Par ses conclusions le contestant accorde comme frais de justice préférables à sa créance, une somme de 25.50, pour les dépenses encourues pour réaliser l'actif de la faillite, c'est-à-dire les frais d'inventaire des marchandises et ceux de la vente de ces marchandises et du cheval.

Le jugement en première instance a donné raison à M. DeBellefeuille et a ordonné qu'il fût colloqué en préférence au curateur et à tous autres, pour $108.94. Mais ce jugement, porté en révision, a été renversé, par deux juges contre un, en maintenant les frais du curateur en préférence au privilège de M. DeBellefeuille. C'est de ce jugement en révision qu'il y a appel devant cette Cour.

Le jugement en révision semble être appuyé sur les articles 1994 et 1995 du Code Civil en donnant la préférence aux frais du curateur comme *frais de justice*.

Ce privilège peut exister vis-à-vis des créanciers chirographaires ou non privilégiés, mais il n'existe pas en préférence à un privilège antérieur et particulier sur les choses saisies, savoir, le privilège particulier du locateur.

L'appelant a cité plusieurs autorités sur ce point conformes à l'article 1994 de notre Code, "les frais de justice, et toutes les dépenses faites dans l'intérêt commun." Ces autorités peuvent se résumer dans celle de Troplong, *Privilèges et Hypothèques*, No. 122:—

1887.

De Bellefeuille & Desmarteau.

"La définition de ce que l'on doit entendre par frais de justice, n'est pas difficile à donner. *Ce sont ceux qui se font pour la cause commune des créanciers*, et pour la conservation et liquidation du gage dans leur intérêt. Ainsi tous les frais exposés en justice ne sont pas frais de justice dans le sens de notre article. Il n'y a de privilège que pour ceux *qui ont profité aux créanciers ayant des droits à exercer sur le gage.*"

Et Laurent, vol. 29, p. 371, dit :—

"Le privilège des frais de justice a encore un caractère relatif en ce qui concerne les biens sur lesquels il s'exerce. D'après les termes de l'art. 17, on pourrait croire qu'il s'exerce sur tous les biens meubles et immeubles ; mais il faut entendre cette disposition dans le sens de l'art. 19, c'est-à-dire que le privilège porte sur tous les biens, quand tous les créanciers sont intéressés aux frais ; *mais s'il y a des créanciers qui ont un privilège sur des biens* pour lesquels les frais n'ont pas été faits, les frais de justice ne pourront pas être prélevés sur ces biens, car ce serait les prélever sur un créancier à l'égard duquel les frais ne sont pas privilégiés."

La Cour adopte cette interprétation et ne peut faire prévaloir le privilège des frais du curateur qui absorbe tout l'actif du failli au préjudice du locateur DeBellefeuille, parce que les frais de la faillite ne sont pas dans l'intérêt du locateur, mais contre son intérêt en lui enlevant son gage.

Nous croyons donc que le jugement en première instance du juge Taschereau accordant au locateur, M. DeBellefeuille, préférence sur les marchandises..... $ 68 44
sur le cheval..... 66 00

$134 44

est correct en principe, en le préférant au curateur en faillite, en déduisant pourtant les frais de vente..... 25 50
Il convient de déduire aussi pour les frais nécessaires de conservation du cheval..... 20 10

$ 45 60

réduisant le privilège du locateur à..... $ 88 84

Le jugement sera donc comme suit :—

"La Cour, etc.....

"Considérant que la créance de l'appelant, contestant en première instance, pour loyer et sa créance pour frais sont privilégiées et préférables à toutes les créances colloquées, excepté les frais de justice qui ont pu être faits au profit du dit appelant ou dans son intérêt, lesquels frais ne doivent pas excéder dans le cas actuel les sommes de $25.50 et $20.10 ;

"Considérant que le bordereau de collocation tel que préparé ignore complètement la réclamation du dit appelant et colloque des frais faits par des créanciers non privilégiés, lesquels frais n'ont pas été encourus dans l'intérêt des créanciers en général et n'ont aucunement profité à l'appelant ;

"Considérant que les frais de syndicat et de faillite ne peuvent légalement être colloqués par préférence à la créance du locateur ;

"Considérant que dans le jugement dont est appel, savoir, le jugement rendu par la Cour Supérieure siégeant en révision à Montréal le 12 juin 1886, il y a erreur ;

"Renvoie et met de côté le jugement de la dite Cour de Révision, et, procédant à rendre le jugement que la dite Cour de Révision aurait dû rendre, confirme en principe le jugement rendu en cette cause par la Cour Supérieure siégeant à Montréal, le 29 janvier 1886,

"Maintient la contestation, déclare irrégulier et met de côté le bordereau de collocation préparé en cette cause, et ordonne au curateur, intimé, d'en préparer un nouveau d'après lequel le dit appelant sera colloqué de sa créance en capital et frais, en tout ou en partie, sur le produit de la vente du cheval et des marchandises qui garnissaient les lieux loués par l'appelant, par préférence à tous les autres créanciers et même aux frais du curateur intimé, quant à cette partie des dits frais excédant la dite somme de $25.50 et $20.10, frais nécessaires de justice dûs à Mtre. Lareau, pour la conservation et vente du cheval, de sorte que le privilège du locateur, E. L. DeBellefeuille, est ré-

1887. De Bellefeuille & Desmarteau.

duit à $88.84, et le reste du produit des biens du failli sera alloué à qui de droit.

"Et quant aux dépens cette Cour condamne l'intimé à les payer à l'appelant, tant ceux de cette Cour que ceux de la Cour de Révision et de première instance."

Jugement infirmé.

DeBellefeuille & Bonin, procureurs de l'appelant.

Arthur Desjardins, procureur de l'intimé.

(H. J. K.)

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16 novembre 1887.

Coram TESSIER, CROSS, BABY, CHURCH, DOHERTY, JJ.

DAME JESSIE FRASER,

(*Défenderesse en Cour Inférieure*),

APPELANTE;

ET

DAME LOUISE BRUNETTE ET VIR,

(*Demandeurs en Cour Inférieure*),

INTIMÉS.

Procédure—Appel de la Cour de Révision.

JUGÉ:—Que lorsqu'il y a changement substantiel dans le jugement de la Cour de première instance par la Cour de révision, il y a lieu à l'appel quoique le jugement *a quo* condamne la partie qui a inscrit en révision.

Les intimés font motion pour rejeter l'appel alléguant que le jugement rendu par la Cour Supérieure, le 30 octobre 1886, leur était favorable; que les intimés ont inscrit en révision de ce jugement, et que le 30 juin 1887 la Cour Supérieure siégeant en révision confirma ce jugement; qu'ayant perdu en première instance et en révision les appelants n'ont par la loi aucun droit de porter la cause en appel.

Voici la partie du jugement dont est appel qui fait voir la raison de la présente décision:

1887.

Fraser & Brunette.

"The Court, etc...

"Seeing plaintiffs' amended declaration by which they modify and change essentially the allegations and conclusions of the original, and considering that in view of such changes and modifications there is error in the judgment *a quo* inscribed against in review, in so far as relates to that part thereof which orders and adjudges that such judgment be and stand for good and sufficient title to plaintiffs, in default of defendant giving such title only;

"Doth reverse said part of such judgment of the 30th October, 1886, and rendering the judgment which the Court below ought to have rendered, etc."

TESSIER, J.:—

Les intimés, qui ont réussi en Cour de première instance et en révision, demandent par leur motion le rejet de l'appel. Par la loi 37 Victoria, cap. 6, personne, qui aurait inscrit devant trois juges aucune cause en Cour Supérieure et qui aurait procédé à jugement sur son inscription, n'aura le droit d'appeler ici du jugement de la Cour de révision, si le jugement confirme celui rendu en première instance. Mais cette loi ne s'applique pas à la cause actuelle. Le jugement n'a pas été confirmé en révision — au contraire, on l'a changé. Je ne dis pas que tout changement donne droit à l'appel. Il faut que le changement soit un changement substantiel. La correction d'une erreur cléricale ne suffirait pas. Mais ici il y a eu un changement substantiel, une correction importante dans les dispositifs mêmes du jugement. La Cour de révision déclare qu'il y a erreur, et tout en adoptant partie des considérants, loin de le confirmer, elle change un des dispositifs du jugement. Donc il y a lieu à l'appel.

Motion rejetée.

Geoffrion, C. R., pour l'Appelante.

Sarasin, pour les Intimés.

(H. J. K.)

16 novembre 1887.

Coram TESSIER, CROSS, BABY, CHURCH et DOHERTY, JJ.

TASSÉ v. OUIMET dit BASTIEN.

Preuve testimoniale.

Jugé :—Que la preuve d'une condition de garantie dans une vente pour plus de $50 ne peut être faite par témoins.

TESSIER, J :—

Dans son action le demandeur allègue que le défendeur lui aurait vendu un certain cheval avec garantie expresse " qu'il était doux comme un mouton "; qu'au contraire c'était un animal vicieux, et que peu de temps après l'achat il avait infligé des injures graves au demandeur en le jetant par terre et le mordant. A l'enquête, après l'examen du défendeur, le procureur de la demande fit au premier témoin la question suivante:—Voulez-vous rapporter ce que le demandeur a demandé au défendeur au sujet des vices et défauts du cheval en question? Le défendeur alors s'est objecté à cette question comme illégale, attendu que le demandeur ne peut d'après la loi prouver par témoins la vente dont il demande la résiliation dans la présente cause, non plus que la prétendue clause de garantie sur laquelle il base son action. Cette objection fut maintenue (Bélanger, J.) et la motion du demandeur pour réviser cette décision fut renvoyée par la Cour Supérieure, district de Terrebonne. La présente motion demande permission d'appeler de ce jugement.

Motion rejetée.

Prévost & Mathieu, procs. du demandeur.
Ouimet, Cornellier & Lajoie, procs. du défendeur.

(H. J. K.)

16 novembre 1887.

Coram TESSIER, CROSS, BABY, CHURCH et DOHERTY, JJ.

McLEISH v. DOUGALL et al.

Appel de jugement interlocutoire—Procès par jury—Forclusion.

JUGÉ :—Qu'à défaut par la partie qui a demandé le jury de procéder sur cette demande, la partie adverse a droit d'obtenir la permission d'inscrire la cause pour enquête en la manière ordinaire.—371 C.P.C.

Qu'une motion signifiée mais non présentée à la Cour n'a aucun effet.

Motion pour appeler d'un jugement interlocutoire. Le jugement fut rendu à Montréal, 25 octobre 1887, (Jetté, J.) dans les termes suivants :—

" La Cour, parties ouïes sur la motion du demandeur requérant permission d'inscrire sa cause à l'enquête et mérite en même temps, vu le défaut des défendeurs de procéder sur leur demande d'un procès par jury ;

" Attendu qu'aux termes de la 64ème règle de pratique de cette cour, la partie qui a déclaré vouloir s'en rapporter à la décision d'un jury, peut être forclose de ce droit à défaut par elle de procéder sur sa demande d'un procès par jury, pendant plus de quatre jours après la contestation liée ;

" Attendu que, d'après l'article 148, § 2 du Code de Procédure Civile, la contestation est liée par la demande, les exceptions, les réponses et les repliques, si les réponses contiennent des faits non articulés dans la demande ;

" Attendu que dans l'espèce les réponses ne contiennent aucun fait nouveau et qu'en conséquence la contestation entre les parties a été finalement liée dès le 9 mai dernier, et que néanmoins depuis cette date les défendeurs n'ont rien fait pour conserver et exercer leur droit d'avoir un procès par jury ;

" Attendu que dans ces circonstances il y a lieu à déclarer les défendeurs déchus du droit de soumettre leur cause à un jury et de permettre au demandeur d'inscrire en la forme ordinaire ;

" Vu l'article 371 du Code de Procédure Civile ;

" Accorde la motion du demandeur, etc."

1887.

McLeish v. Dougall.

TESSIER, J. :—

Cette cause est une de celles qui sont susceptibles de procès par jury. Dans le mois de mai 1887 les défendeurs demandèrent acte de l'option qu'ils avaient faite de procéder devant un jury. Plus tard, vers le 21 mai, le demandeur fit signifier au défendeur une motion demandant que ce procès par jury ait lieu, mais cette motion ne fut pas présentée. La cause resta ainsi du mois de juin jusqu'au mois d'octobre sans qu'aucune procédure fut faite, et alors dans le mois d'octobre le demandeur par une motion demanda que les défendeurs soient déclarés déchus de leur droit de soumettre la cause à un jury et qu'il lui soit permis d'inscrire la cause pour enquête et mérite en la manière ordinaire, citant à l'appui de sa motion l'article 871 C.P.C., qui pourvoit " qu'à défaut par la partie qui a " demandé le jury de procéder sur cette demande, il est " loisible à la partie adverse d'adopter les procédés nécessai- " res pour la convocation du jury, ou d'obtenir du juge " ou du tribunal la permission d'inscrire la cause pour " enquête en la forme " ordinaire.

Cette motion fut accordée par la Cour inférieure, et c'est de ce jugement interlocutoire que l'on demande permission d'appeler.

Dans les cas indiqués par le Code de Procédure Civile la loi accorde à ceux qui veulent s'en prévaloir, le droit de soumettre leur cause à un jury ; mais aussi, en conférant ce droit, la loi veut que celui qui déclare opter en faveur de ce genre de procès continue ses procédures effectivement pour arriver à l'audition de sa cause devant le jury.

Dans la cause présente les défendeurs n'ont pas pris les moyens à cette fin. Pendant plus de deux mois ils sont restés inactifs et n'ont rien fait, et pour ces raisons leur motion pour permission d'appeler doit être rejetée.

Motion rejetée.

Ouimet, Cornellier & Lajoie, procs. du demandeur.

McLaren, Leet & Smith, procs. des défendeurs.

(H. J. K.)

24 septembre 1887.

Coram DORION, J. C., TESSIER, CROSS et BABY, JJ.

THE CANADIAN PACIFIC RAILWAY COMPANY,
(*Défenderesse en Cour Inférieure*),
APPELANTE;

ET

DAME RACHEL CADIEUX,
(*Demanderesse en Cour Inférieure*),
INTIMÉE.

Dommages—Faute mutuelle—Cause déterminante—Responsabilité.

JUGÉ, (CROSS, J., *diss.*):—Lorsque des dommages ont été causés par le quasi-délit du défendeur et qu'il y a eu faute de part et d'autre, la cour devra rechercher la cause principale et immédiate de l'accident, et condamner son auteur à payer les dommages soufferts par l'autre partie.

L'action de la demanderesse, intimée, allègue que le 27 novembre 1885, elle venait de St-Martin à Montréal, avec une voiture chargée de légumes pour le marché ; qu'arrivée à St-Louis du Mile-end, à l'endroit où le chemin public intersecte la voie ferrée de l'appelante, elle vit les barrières ouvertes, indiquant que les voitures pouvaient passer ; que le gardien lui dit de passer, mais qu'alors qu'elle traversait la voie ferrée sa voiture fut frappée par une locomotive de l'appelante qui venait de l'ouest et se dirigeait vers la station du Mile-End, le gardien n'ayant pas déployé son pavillon rouge, comme il était obligé de faire en pareilles circonstances pour avertir l'ingénieur du train qui approchait d'arrêter, vu le danger ; que son cheval fut tué et sa voiture brisée. Pour défense l'appelante a plaidé qu'elle n'était coupable d'aucune négligence et que l'accident est dû à la faute de l'intimée, qui, voulant passer en avant d'un nommé Charbonneau, a accroché les roues de sa voiture dans celles de ce dernier, et qu'il a été impossible de séparer les deux voitures avant l'arrivée du train.

1887.
C. P. R. Co. & Cadieux.

La Cour Supérieure (TORRANCE, J.) a renvoyé cette défense, et par jugement, rendu le 30 avril 1886, a condamné la Compagnie en la somme réclamée. Voici le jugement de la Cour Inférieure :—

" The Court, etc...

" Considering that defendants have failed to prove the allegations of their affirmative plea, doth dismiss the same ;

" And considering that plaintiff hath proved that by the fault of defendants, on the 27th day of November last, plaintiff lost her horse, waggon, vegetables and harness, to the amount of $189 ;

" Doth estimate plaintiff's damages for said causes at the said sum of $189, and condemn defendants to pay to plaintiff the said sum of $189, with interest from this day, and costs of suit *distraits*, etc."

DORION, J. C. :—

Il y a ici un accident et il s'agit d'en trouver la cause et de fixer la responsabilité. La Cour Inférieure a décidé qu'il y avait eu faute de la part de la défenderesse, et ceci est aussi l'opinion de la majorité de cette Cour. Le gardien de la barrière de l'appelante a permis à Madame Cadieux de passer, et quand les roues de sa voiture et de celles de Charbonneau se sont entrelacées, ce gardien, après avoir essayé de les séparer sans y réussir, est parti pour arrêter le train, mais voyant que l'intimée était encore sur sa voiture, est revenu pour la faire descendre. Son devoir dans les circonstances était de déployer un pavillon rouge pour avertir le train qu'il y avait une obstruction sur le chemin. Il a manqué à ce devoir et les chars sont venus écraser la voiture et le cheval de Madame Cadieux. Il y a eu peut-être faute de la part de celle-ci, mais ce n'est pas celle qui a été la cause principale de l'accident.

La majorité n'est pas disposée à changer le jugement, quoique je suis d'opinion que lorsque les deux parties sont en faute, les dommages devraient être divisés entre elles. C'était la règle du droit romain, c'est encore celle suivie en France, et on l'applique en Angleterre et partout dans

le cas de collisions maritimes. Cependant cette règle n'a jamais été adoptée dans ce pays, quoique je pense que c'est la meilleure règle.—Le jugement est confirmé.

1887.
C. P. N. Co. & Cadieux.

Jugement confirmé, CROSS, J., diss.

Abbotts & Campbell, pour l'Appelante.

Loranger & Beaudin, pour l'Intimée.

(H. J. K.)

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17 novembre 1887.

Coram TESSIER, CROSS, BABY, CHURCH et DOHERTY, JJ.

THE RASCONI WOOLLEN AND COTTON MANUFACTURING COMPANY v. THE LANCASHIRE INSURANCE COMPANY.

Permission d'appeler d'un jugement interlocutoire—Preuve avant faire droit.

JUGÉ:—Que la Cour n'accordera pas la permission d'appeler d'un jugement interlocutoire ordonnant preuve avant faire droit, lorsqu'à une action, où procès par jury doit avoir lieu, défense en droit est faite à une partie de la déclaration alléguant des faits généralement nécessaires à la demande, quoique le développement de ces faits sur certains points peut être inutile.

TESSIER, J.:—

La défenderesse, qui fait motion pour permission d'appeler d'un jugement interlocutoire, est une compagnie d'assurance contre l'incendie, et l'action contre elle, prise pour le recouvrement du montant de la perte soufferte par la demanderesse, est basée sur la police de la compagnie défenderesse. La cause devant être soumise à un jury, la défenderesse a fait une défense en droit par laquelle elle demande le rejet de certaines parties de la déclaration.

La demanderesse ne s'était pas contentée d'alléguer l'émanation de la police en sa faveur et la perte des biens assurés, mais de plus elle allègue que suivant les termes de la police les deux parties ont régulièrement soumis leurs différends à des arbitres, qui ont procédé à l'évalua-

1867.

Rasconi Manufacturing Co. v. Lancashire Ins. Co.

tion de la perte et qui ont fait un rapport estimant cette perte à la somme de $11,000, mais que ce rapport est nul, faute de sa signification un jour trop tard.

Néanmoins, la demanderesse se déclare avoir toujours été prête à accepter ce montant de $11,000, mais elle conclut pour le montant de sa perte *i. e.* $15,000. La défenderesse s'objecte à ces allégations, parce que, dit-elle à la demanderesse: "il ne devrait pas vous être permis de soumettre "au jury la preuve qui fut faite devant les arbitres par "des témoins que je ne pourrais transquestionner, ni de "mettre entre les mains du jury le rapport des arbitres, "puisque vous-même vous le déclarez nul,"—et elle demande permission d'appeler du jugement ordonnant preuve avant faire droit, parce que, dit-elle, si une preuve illégale est permise, même sous réserve, elle aura son effet sur le verdict du jury.

Voici la position où se trouvait le tribunal inférieur: D'un côté la demanderesse était tenue, aux termes de la police d'assurance, à l'accomplissement de certaines conditions précédentes, et parmi celles-ci se trouvait l'obligation en cas de sinistre de soumettre sa réclamation à des arbitres,—donc le droit d'alléguer l'arbitrage, etc. D'autre part le rapport des arbitres ne peut faire preuve des faits que ses auteurs y constatent. Mais la position de cette Cour n'est pas meilleure que celle de la Cour Inférieure, et il serait difficile pour nous de diviser ce qui est admissible de ce qui ne l'est pas. Donc la Cour Inférieure s'est trouvée obligée d'ordonner preuve avant faire droit, elle a agi légalement et dans l'exercice d'une saine discrétion; et nous ne pouvons accorder la permission d'appeler de ce jugement.

Permission d'appel refusée.

C. A. Geoffrion, *C. R.*, pour la demanderesse.

W. H. Kerr, *C. R.*, pour la défenderesse.

(H. J. K.)

22 novembre 1887.

Coram TESSIER, CROSS, BABY, CHURCH et DOHERTY, JJ.

JOSEPH AIMÉ MASSUE ET AL.,
(*Requérants en Cour Inférieure*),
APPELANTS ;

ET

LA CORPORATION DE LA PAROISSE DE ST-AIMÉ,
(*Défenderesse en Cour Inférieure*),
INTIMÉE.

Délai pour appeler à la Cour Suprême.

JUGÉ :—Que, le délai du statut passé, lorsque permission est demandée d'appeler à la Cour Suprême, elle sera refusée s'il n'est pas démontré que des circonstances spéciales ont retardé l'appel. S. R. C., chap. 135, ss. 40 et 42.

TESSIER, J. :—

L'intimée demande permission d'appeler à la Cour Suprême du jugement rendu le 23 septembre dernier. Le délai pour appeler est de 30 jours ; ceci est réglé par le statut. Il s'est écoulé un peu moins que deux mois depuis le jugement. La 40me section du statut fixe le délai à 30 jours, mais la 42me section pourvoit que sous des circonstances particulières la Cour ou un juge peut permettre l'appel. La question sur une telle motion est celle de savoir si la partie qui la présente a fait diligence pour obtenir un appel. L'intimée dit qu'elle est une corporation et que ces corps ne peuvent agir avec la même promptitude que les personnes naturelles. Ceci est vrai peut-être, mais la loi ne fait aucune exception à leur égard, et il incombait à l'intimée de faire voir qu'elle a agi en cette affaire avec diligence. Le jugement fut rendu le 23 septembre et le conseil ne s'est assemblé que le 2 novembre. Nous savons que l'intimée est une corporation de paroisse, pour laquelle il est plus facile de s'assembler en conseil que pour une corporation de comté. Aucun affidavit n'est

1887.

Massue & La Paroisse de St-Aimé.

produit pour faire voir qu'on n'aurait pas pu convoquer une assemblée à temps. Il faut se souvenir qu'il n'était pas nécessaire d'attendre la présente session de la Cour, puisque ces requêtes peuvent être présentées à un juge. D'ailleurs les affaires municipales sont urgentes et demandent une juridiction sommaire. Pour ces raisons et sous ces circonstances, la Cour croit qu'elle ferait un mauvais précédent en permettant l'appel, et la motion demandant cette permission est rejetée.

Motion rejetée.

Alexandre Lavoste, C. R., pour les appelants.
C. A. Geoffrion, C. R., pour l'intimée.
(H. J. K.)

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17 novembre 1887.

Coram TESSIER, CROSS, BABY, CHURCH et DOHERTY, JJ.

CHARLES R. F. BOXER ET AL. v. FREDERICK T. JUDAH ÈS-QUAL., et LE DIT DÉFENDEUR, *opposant*, et DAME ARLINE KIMBER, *requérante*.

Cautionnement pour frais—Discrétion.

JUGÉ:—1o. Lorsque la partie ayant droit au cautionnement pour frais a en sa possession des biens, appartenant à la partie adverse, suffisants pour garantir ses frais, que cette possession doit tenir lieu du cautionnement;

2o. Que la question de la suffisance de cette garantie des frais est dans la discrétion du tribunal comme toute question de frais;

3o. *Semble:* Que lorsqu'une partie en cause meurt, après avoir donné cautionnement pour frais, son héritier, quoique résidant à l'étranger, peut reprendre l'instance sans fournir un nouveau cautionnement.

TESSIER, J.:—

Le demandeur, M. Boxer, ayant des droits à lui conjointement avec son épouse, et aussi en son nom particulier, obtint un jugement pour $225,000 contre le défendeur. En vertu de ce jugement une exécution fut prise par voie de saisies-arrêts auxquelles le défendeur fit opposition afin d'annuler. Cette opposition fut con-

testée et lorsqu'elle était encore pendante M. Boxer est mort, ayant par son testament légué ses biens à son épouse, Dame Arline Kimber, qui présenta une requête dans la cause demandant la reprise d'instance. Madame Boxer réside en Angleterre et l'opposant demande d'elle le cautionnement pour ses frais. La motion à cet effet fut renvoyée par la Cour Inférieure, vu que l'opposant avait déjà entre ses mains une valeur de $225,000 appartenant à la substitution dont Madame Boxer est grevée, gage plus que suffisant pour garantir l'opposant de ses frais.

L'article 1963 du Code Civil dispose que celui qui ne peut pas trouver de caution est reçu à donner à la place, en nantissement, un gage suffisant. D'ailleurs M. Boxer avait déjà donné cautionnement pour frais dans la présente cause. Il n'y a pas de nouvelle action et Madame Boxer dit maintenant, "je suis l'héritière testamentaire de mon mari, je suis aux yeux de la loi la continuation de sa personne juridique et comme telle, je ne fais que continuer la même action intentée par lui et dans laquelle les frais du défendeur opposant sont déjà garantis par le cautionnement qu'il a donné." Si par le jugement on avait refusé le cautionnement, peut-être la permission serait accordée d'appeler ici de ce jugement. Mais, reconnaissant le droit de l'opposant, il ne le refuse pas, mais trouve seulement, comme fait apparaissant au dossier, que l'opposant est déjà suffisamment garanti. Comme toute question de frais est généralement laissée à la discrétion du tribunal, celle de la suffisance du cautionnement *judicatum solvi* doit l'être également. Nous croyons que le défendeur-opposant ne souffrira aucun préjudice par le jugement et que les fins de la justice veulent le rejet de la motion demandant permission d'appeler de ce jugement interlocutoire.

Permission d'appeler refusée.

H. Abbott, C. R., pour la requérante.

A. Branchaud, pour l'opposant.

(H. J. K.)

22 novembre 1887.

Coram TESSIER, CROSS, BABY, CHURCH et DOHERTY, JJ.

ANDREW ALLAN ET AL.,
(*Défendeurs en Cour Inférieure*),
APPELANTS;

ET

JOSEPH PRATT,
(*Demandeur en Cour Inférieure*),
INTIMÉ.

Appel au Conseil Privé—Exécution provisionnelle du jugement.

JUGÉ:—Que le dossier doit être remis à la Cour Supérieure pour l'exécution du jugement lorsque l'appel n'a pas été logé au Conseil Privé dans les six mois suivant la date du jugement de la Cour du Banc de la Reine accordant l'appel. C. P. C. 1181.

TESSIER, J.:—

L'intimé demande par sa motion que le dossier soit remis à la Cour Supérieure pour l'exécution du jugement, attendu qu'au-delà de six mois sont écoulés depuis la date du jugement accordant la permission d'appeler au Conseil Privé, et que dans l'intervalle appel n'y a pas été logé. Le jugement permettant l'appel a été rendu le 29 mars 1887, les six mois sont échus le 29 septembre dernier, et maintenant près de huit mois sont écoulés. Depuis le jour de la présentation de la motion actuelle, les appelants ont fait compléter le transcript du dossier et ils ont déposé ce transcript au bureau des postes ici à l'adresse du Conseil Privé. Les procureurs des appelants expliquent le délai qui a eu lieu par le fait que M. Benjamin, procureur des appelants lors de l'audition de la cause par cette Cour, est mort depuis la date du jugement dont on veut appeler. Mais on voit que les procureurs actuels représentaient les appelants au mois de mars dernier, et que ce sont eux qui ont obtenu la permission d'appeler. D'un autre côté ce n'est pas sans raison que la loi met des

1887.

Pratt.

limites au délai pendant lequel la permission d'appeler arrête l'exécution du jugement; dans cette cause le jugement accordant la demande pour un montant de $1,100 fut rendu en 1884 et fut unanimement confirmé le 18 mars 1887 (*vide* M. L. R., 3 Q. B. 7), et si un délai plus considérable devait être accordé l'intimé souffrirait peut-être injustement. Nous mentionnons ceci non pas comme considérant du jugement, mais pour faire voir la raison de la loi. L'article 1181 du Code de Procédure Civile ordonne que "l'exécution du jugement de la Cour "du Banc de la Reine ne peut non plus être arrêtée ou "suspendue après six mois à compter du jour auquel "l'appel est accordé, à moins que l'appelant ne produise "au greffe des appels un certificat du greffier du Conseil "Privé de Sa Majesté, ou de tout autre officier compé-"tent, constatant que l'appel y a été logé dans ce délai, "et que des procédures ont été adoptées sur cet appel." Dans toutes les causes citées comme précédents en rapport avec cet article du Code, le transcript du dossier avait été remis dans les six mois et il ne manquait que le certificat. Dans la cause de *Jones* v. *Guyon*, le transcript du dossier avait été transmis un jour ou deux après le délai de six mois, et là la Cour semble avoir décidé que le délai pour la production du certificat n'étant pas impératif; cette Cour ne peut pas admettre cette interprétation. Mais les circonstances de cette cause diffèrent de celles de la présente. Nous ne déclarons pas que les appelants sont déchus de leur appel, mais nous accordons à l'intimé cette partie de sa motion par laquelle il demande que le dossier soit remis à la Cour Supérieure pour l'exécution du jugement.

CROSS, J.:—

I would not reject this motion, but I would be disposed to hold it over for a time, in order to give the party in default an opportunity to produce the certificate. There were some special circumstances in the case which, I think, might justify this indulgence. The attorney in charge of the case was ill, there was an omission in the office to attend to the matter, and if execution issues the

1887.
Allan & Pratt.

attorneys may have to advance the amount themselves. I do not, however, dissent from the judgment.

Motion accordée.

Abbotts & Campbell, procureurs des appelants.

Trudel, Charbonneau & Lamothe, procureurs de l'intimé.

(H. J. K.)

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24 septembre 1887.

Coram DORION, J. C., TESSIER, CROSS et BABY, JJ.

THE CANADIAN PACIFIC RAILWAY COMPANY,
(*Défenderesse en Cour Inférieure*),
APPELANTE;

ET

SIMON J. CHALIFOUX,
(*Demandeur en Cour Inférieure,*)
INTIMÉ.

Quasi-délit—Négligence—Responsabilité.

JUGÉ, (CROSS, J., *diss.*):—Que lorsqu'un accident sur un chemin de fer est arrivé par suite de la rupture d'un rail, c'est à la compagnie à prouver que cette rupture est dûe à un cas de force majeure et sans sa faute, autrement il y aura présomption de négligence et elle sera responsable des dommages qui en sont résultés.

Le jugement dont est appel (rapporté M. L. R., 2 S. C., p. 171), fut rendu par la Cour Supérieure (MATHIEU, J.) à Montréal, le 12 mars 1886.

DORION, J. C.:—

Le 26 janvier 1884, Chalifoux, le demandeur, intimé, était passager à bord de l'un des trains de la compagnie appelante. Près de Calumet, entre Ottawa et Montréal, le train dérailla et Chalifoux reçut dans cet accident plusieurs blessures. Il s'est pourvu en dommages, et la compagnie a plaidé qu'elle avait agi avec toute la prudence possible et que l'accident est arrivé par suite de la

1887.

C. P. R. Co. v. Challifoux.

rupture d'un rail sans faute aucune de sa part. A l'enquête la compagnie a cherché à prouver que le rail qui avait causé l'accident s'était rompu à raison des changements de température. Les témoins de la compagnie disent qu'il avait fait très froid quelques jours avant l'accident, mais que le jour de l'accident la température était plus douce, et ils attribuent à ce changement la rupture du rail. Si c'est là la cause de l'accident il est évident que le rail avait dû être cassé depuis quelques jours, puisque le fer se casse en se refroidissant et non en s'échauffant et la compagnie a commis une négligence en ne remplaçant pas de suite ce *rail*. Si ce n'est pas la gelée qui l'a fait casser, c'est qu'il était défectueux, et la compagnie était également en faute. La majorité de la Cour est d'opinion de confirmer le jugement de la Cour Supérieure qui a accordé $400 de dommages à l'intimé.

Jugement confirmé, Cross, *J.*, *diss.*

Abbotts & Campbell, pour l'appelante.

Geoffrion, Dorion, Lafleur & Rinfret, pour l'intimé.

(H. J. K.)

November 26, 1887.

Coram DORION, Ch. J., TESSIER, CROSS, CHURCH, JJ.

LESLIE J. SKELTON ET AL.,
(*Defendants in Court below,*)
APPELLANTS;

AND

WILLIAM S. EVANS,
(*Plaintiff in Court below*),
RESPONDENT.

Lessor and Lessee—C. C. 1629—*Responsibility of Tenant—Accidents by fire—Burden of Proof—Police Regulations.*

HELD:—That the presumption of fault established by C. C. 1629, against the lessee, cannot be invoked by the lessor who by the terms of the lease stipulated for the delivery of the premises in as good order, etc.,

1887.

Skelton & Evans.

at the expiration of the lease "accidents by fire excepted,"—and more particularly where the lessees undertook to pay all extra premiums of insurance, which might be charged to the lessor consequent on the nature of the business carried on in the premises by the lessees. In such case, the burden of proof is on the lessor to establish fault on the part of the lessees.

2. Where in such circumstances the cause of the fire is not established, it will be considered an accidental fire for which the lessees cannot be held responsible. And the fact that the lessees did not conform strictly to the regulations of police with reference to the deposit of ashes, will not affect the case in the absence of any proof that such negligence on their part was the cause of the fire.

The appeal was from a judgment maintaining an action of the lessor, based upon Art. 1629 of the Civil Code.

The judgment of the Court below (Superior Court, Montreal, DOHERTY, J., Oct. 31, 1885), was in the following terms:—

"The Court, etc.

"Considering the plaintiff hath shown right of action in this cause, and proved the material allegations of his declaration in the premises, and that he hath established his claim for rent and taxes and sustained damages, by the destruction by fire, of the building in question, in this cause, in all to an amount of $2,675, over and above the $10,000 received by him for insurance on said building, for which amount or difference the defendants are liable according to the proof made and the law applicable to such proof in that behalf;

"And considering that defendants have failed both in law and in fact to establish the pretentions and pleadings by them set up as against and in answer to this action, and more particularly, to make good their position or pretensions that defects in construction of the building in question could and can be legally pleaded *in bar* of an action of this nature as between lessor and lessee, dismissing such pleas and each of them, doth adjudge and condemn the said defendants jointly and severally, to pay and satisfy to said plaintiff the said sum of $2,675, composed and due as follows: $288 for rental of said leased premises from the 1st of May 1884 up to the 22nd of June 1884: $84, amount of taxes and assessments on said leased

premises for the year from the 1st of May 1884 to 1st of May 1885: $1,211.95, for damages estimated at an amount equal to the amount of rental of said premises from the 22nd of June 1884 to 1st of February 1885: and $1092 being the balance of the estimated cost of reconstructing the said premises after deducting the said amount of insurance realized by plaintiff: with interest, etc."

Sept. 15, 16, 1887.]

W. H. Kerr, Q. C., and *A. W. Atwater*, for the appellants:—

The appellants, in January, 1882, leased from the rsepondent for ten years from the 1st of May then next, a store and factory being numbers 52 and 54 St. Henry Street, in the City of Montreal, at a rent of $2,000 per year with taxes for the first five years, and $2,400 with taxes for the remainder of the term of the lease.

The appellants were wholesale shirt and collar manufacturers, and dealers in haberdashery, and they had been carrying on the same business in the same premises, for several years previous under lease from the respondent.

At a few minutes before three o'clock on Sunday morning, the 22nd of June, 1884, a fire was discovered on the premises, and within fifteen minutes of the discovery of the flames, the entire building collapsed and fell to the ground, totally destroying the stock of the appellants.

On the 1st of August, 1884, the respondent protested the appellants and claimed $288.05 for the rent of the premises from the 1st of May, 1884, to the date of the destruction of the building, and a further sum of $216 for taxes for the current year, and the further sum of $211.95 for damages estimated at an amount equal to the amount of rental of the premises from the said 22nd of June to the first of August, and the further sum of $7,500, being the balance of the estimated cost of constructing the premises after deducting an amount of $10,000 which the respondent had collected as insurance effected by him upon the building.

1887.
Skelton & Evans.

On the 14th of August the appellants replied to this protest notarially to the effect that the lease was dissolved by the destruction of the leased premises on the 22nd of June, tendered him the sum of $288.05 being the amount of rent due up to the date of the destruction of the building, and declared their willingness and readiness to pay their proportion of the assessments on the building for the portion of the year during which they had occupied the premises up to the date of their destruction.

This tender respondent declined to accept.

Again on the 9th of January, 1885, the appellants tendered the same amount of rent together with the proportion of taxes for the term during which they had occupied the building, in all the sum of $321.78.

On the 9th of February, 1885, the respondent took action against the appellants, and by his declaration alleged that the leased premises were totally destroyed by fire and that the fire was due to, and was caused by, the fault and negligence of the appellants.

The appellants appeared and by their plea admit the lease, but say:—

1. That the lease was terminated on the 22nd of June, by the total destruction of the premises, but that the destruction was not caused by fire.

2. That they had always as lessees of the premises used the same as prudent administrators and exercised every care, and that they had only used them according to the purposes for which they were leased. They deny that the fire which broke out in the premises was caused by their fault or by any of those in their employ, and specially deny that the fire was the cause of the total destruction of the premises. They allege that the building was defective and that respondent neglected to maintain the same in a fit condition for the uses for which it was intended, under the lease, or to warrant the appellants against defects and faults in the building. That respondent knew of the defective character of the building and had been warned of the same by the appellants, and they allege specially that the chimney on the north-west side of the

building was faulty and defective and improperly built, and was not properly joined to the wall against which it was built. That by the terms of the lease the appellants were specially relieved from liability resulting from accidents by fire, and that any fire which occurred in the premises was, so far as the appellants were concerned, purely accidental and that the appellants themselves were losers by the fire to the extent of $20.000.

3. The appellants allege further that they are not under any circumstances liable for any loss which the respondent may have suffered by reason of the faulty and defective construction of his building, and that any loss occasioned by fire, or which fire might have occasioned in the said building, had it been properly built, was amply covered by the insurance on the building which the respondent had effected and which he had collected.

4. The appellants allege that by the terms of the lease they undertook and were bound to pay all extra premiums of insurance rendered necessary by reason of the nature of the business carried on by them on the premises, and that by law and the terms of the lease, the respondent thereby undertook to insure the building against loss by fire and for the consideration mentioned to relieve the appellants from any such risk, and that during all the term of the lease the respondent demanded and the appellants paid such extra premiums of insurance and that the respondent was bound to insure himself against loss by fire, and that if he failed to protect himself, his loss was due to his own fault and neglect.

5. That the building was badly and improperly constructed, the foundation not being sufficient and the walls not sufficiently strong to support the weight and height of the building, to such an extent that the walls had been forced from the perpendicular and over-hung, and the entire floors on the third and fourth stories of the building had fallen or pulled away from the north wall and become detached and had pulled away the chimney on the north side of the building, of all which the respondent was frequently notified and knew, but failed to repair.

1897.
Shelton & Evans.

That the appellants used the greatest possible care to guard against loss or damage by fire, and that on the night in question, no fire could have broken out in the building from any heating apparatus used by the appellants, and that the fire which did actually break out would have been extinguished with comparatively little loss, had not the whole structure fallen to the ground within fifteen minutes of the time of the discovery of the fire. That the fire broke out near the third story on the north side of the building and was caused by the defective condition of the chimney before mentioned, and of the space between the chimney, the walls and floor.

For answer to pleas respondent said:

1. That the tender is insufficient, inasmuch as the rent and taxes paid to the date of the said fire amount to the sum of $372.05.

2. He denies generally and alleges that the appellants are by law responsible, and he further specially denies that the building was improperly built or in bad repair at the date of the fire. He further alleges that prior to the date of the lease, being the 11th of January 1882, the appellants had been in possession of the premises for the period of nine years and were aware that the building was well built. That the chimney mentioned in the plea had been taken down some months before and rebuilt, and was well built and in good state of repair at the date of the fire. That the appellants had the building filled with goods in paper boxes which are inflammable material.

3. He denies generally and repeats the allegation of the strength and good state of repair of the building.

4. He denies generally, and further says that the appellants did not agree to pay the ordinary insurance on the said leased building, but only the extra insurance which the insurance company might charge by reason of the hazardous nature of the business carried on by the appellants, and denies that there was any liability on the respondent's part to insure.

5. He denies generally, and specially denies that ap-

1897.
Shelton
&
Evans.

pellants used every care in and about the premises, and alleges that the appellants had previously stored and filled the building with goods packed in paper boxes, and had a fire and machinery in operation on the third and fourth flats, and the appellants did not take sufficient and proper care with regard to that fire.

On these pleadings the issue was joined.

The respondent's case is based entirely on the provisions of article 1629 of the Civil Code, which reads as follows: "When loss by fire occurs on the premises leased, there "is a legal presumption in favor of the lessor that it was "caused by the fault of the lessee or of the persons for "whom he is responsible, and unless he proves the con- "trary, he is answerable to the lessor for such loss."

The appellants proved that they had used every possible care and precaution in the conservation of the leased premises, and in this respect had fully conformed to the obligations of a lessee as established by Art. 1626 of the Civil Code "to use the thing leased as a prudent administrator for the purposes only for which it is designed, and according to the terms and intentions of the lease." A private night watchman was employed by the defendants, to look after the premises during the night. The building was of brick with a stone front, facing to the east and having its north wall against the building known as Shorey's building on the corner of St. Henry and St. Joseph streets. In this north wall was a chimney, and on the south side, remote from Shoreys, was another chimney communicating with the premises in the basement.

The appellants' business was chiefly made up of the manufacture of shirts and collars, which necessitated the drying and the laundrying of the articles when manufactured and consequently the use of considerable heat in the processes. The nature of their business was thoroughly known to the respondent as they had used the same premises in practically the same manner for nine years before the time of his granting them the lease under which they occupied at the time of the fire. The first or ground

1887.
Skelton & Evans.

flat was used as an office and warehouse for certain manufactured goods. The second flat was used also for storing haberdashery. On the north side of this flat next to Shorey's there was a rack containing haberdashery and underclothing and there were also tables in the centre and in the back. On the south side remote from Shorey's were tables containing braces, rubber coats, and umbrellas, all pretty well filled. On the third flat at the back in the corner next to Shorey's was a small stove used for heating irons for the collar turners; along Shorey's side were cases used to pile undressed shirts, on the front were sewing machines, and the south side farther from Shorey's was used for piling cambrics, cottons and linens in boxes.

It is important to notice that the small stove on this flat was the only stove or fire-place used by the appellants which connected with the chimney on the north side next to Shorey's. It connected with this chimney by means of a pipe which was let into the chimney near the ceiling of the third story and floor of the fourth story above. The fourth flat was used along the side next to Shorey's as an ironing room, and the front was used as a room for packing manufactured goods in boxes. There were shirts and collars ready to be boxed on this flat. On the lower or south side away from Shorey's were two laundry stoves or heaters which were used to heat the smoothing irons used in appellants' business. The garret was used as a storing department and drying room. There were some underclothing in cases and some shirts stored on this flat.

It is noticeable that the goods which were stored on the side next to Shorey's were the most severely burnt; nearly all the salvage of goods in the building were taken from those which had been on the south side. These were more scorched and spoiled by water than burnt, and did not appear as though fire had been through them.

The stoves were protected with every possible care with tin round and beneath them, and McConnel says there had been no fire in the stove on the third flat on the day before the fire. The stoves on the fourth flat led into the chimney on the south side. These stoves had been

1887.

Skelton & Evans.

there for certainly five years and were used for the purposes of the business. Only one of these stoves had been used on the day before the fire, and they were protected by sheet iron on the floor and by tin completely around them, and very little fire had been used on the day before. Donaldson who had charge of the fires states that he examined these stoves the night before the fire and left them black out; the other fires in the building were also out. Every care consistent with the proper conduct of the business carried on by the appellants, and for which the premises were leased, had been taken to prevent the occurrence of a fire which would be, and was, disastrous to the appellants, and it is contended that it was impossible for a fire to have originated in the building directly from the use of these appliances for supplying heat, had the building been properly constructed.

The entire destruction of the building, which was due to its faulty and imperfect construction, necessarily made it impossible to ascertain after the event, the precise spot where the fire originated, but the appellants contend that the proof adduced by them established beyond the possibility of a doubt that the fire originated in the chimney on the north side next to Shorey's building. This chimney was most improperly constructed. It had only one layer four inches in thickness, of bricks, instead of two, as it should have had at its back. It was not bound to the wall nor pointed or plastered. The other side of the chimney next to the destroyed building had cracked away from its back leaving a space of about four inches on the third floor So large was this crack that one could see from side to side of the chimney between chimney and wall, and smoke could be seen going up. This crack extended three storeys down. The respondent's attention had been called to the condition of this chimney. A couple of years before the fire he employed a plasterer to take down the chimney, but his repairs only extended to that part of the chimney which was above and outside the building and to one story below the roof to within three feet of the floor. His reforms stopped there, in spite of

1887.
Skelton & Evans.

the protests of his plasterer and the appellants, and he left the balance of the chimney in the same condition as before. In addition to this, the floors of the building had been drawn away from the adjoining building from one inch to an inch and a quarter, and as there was a space between the floor and the ceiling in the different stories it was almost impossible for sparks to pass up the flue without lodging in the space between the floors. The evidence of the firemen who were examined proved that a fire so ignited might result from a spark which would smoulder for a long time before breaking out. In addition to this we have the facts that the fire when first discovered was coming from the windows on the third and fourth flats on the side next Shorey's only, and after the building fell, the heaviest body of fire was towards Mr. Shorey's building and while the new part of this chimney was clinging to Shorey's wall, the whole lower part had fallen, and there were indications from the blackened and charred appearance of the bricks on Shorey's wall around the chimney, that the fire had originated there. The fact also that the goods which were stored in that side of the building suffered most severely from the fire is also corroborative, and we think leaves no doubt that the cause of the fire was the defective chimney in question.

The appellants contend also that, had it not been for the faulty and imperfect construction of the building the fire would have been extinguished without causing the total destruction of the building. In this respect the learned judge who rendered the judgment *a quo* misunderstood the nature of this plea of the appellants. They did not pretend that a fault in the building constituted a plea in-bar to the respondent's action, but they did contend that they were only responsible (if at all) for such damage as was caused by fire and not for the destruction of the building on account of its own defects.

The condition of the chimneys and of the floors has been already referred to, but in addition to that we have evidence that the supports were insufficient, that the

1887.
Skelton & Evans.

building shook and trembled with every weight that was moved in it and with every motion on the street outside, and that the back and side as well, bulged to such an extent that it was impossible to see the foundation when looking from the roof, and so as to be plainly perceptible from the ground. Besides this the building inspector of the city testifies that the building had been condemned, and he also testifies that there were marks of smoke upon Shorey's wall which would indicate that the chimney was defective, and that it would be dangerous in its condition. The building was known to the firemen also as a dangerous building. Within fifteen or twenty minutes from the time that the fire was discovered the whole building collapsed, and as proof that it was not burnt down, investigation of the ruins showed that many beams were not burnt through, and many were only scorched. The firemen were unanimous in stating that they never saw a building collapse in such a manner. The roof was not even burnt through at the time it fell, and they agree in saying that if it had not so collapsed they would have been able to extinguish the fire before it had destroyed the building, and under such circumstances the respondent cannot pretend that he is entitled to the full amount of his loss, which, had the fire been put out, and the building been properly constructed, would have been covered by the amount of insurance which he collected.

The respondent himself admits the receipt of the extra premiums of insurance, and he moreover admits that he knew all about the business of the appellants as they had been tenants of his for eleven years. He was also aware of the use of the stoves which he no complains of and of their necessity for appellants' business.

The respondent endeavored to make proof of carelessness on the part of appellants in handling ashes from the stoves, but this is entirely disproved by the evidence for the defence, which shows that every care was taken in the treatment of these ashes and that coal was entirely

1887.
Skelton & Evans.

used for heating purposes, and the ashes of coal are shown not to retain heat sufficient to cause ignition.

On the part of appellants it is contended:

1. That the respondent has already received from the insurance companies more than the property was worth.

2. That every possible care was taken by the appellants as is shown by the evidence.

3. That there were *vices de construction* present in the building—such as bulgings in the walls—walls out of perpendicular—sinking of the walls which caused the building to fall within twenty minutes of the discovery of the fire, which, had the building been properly built, would never have occurred.

4. Defective nature of chimney next to Shorey's, not built according to rule of trade nor the by-laws of the corporation—the division between it and the wall was not plastered, not pointed, and badly built.

5. The theory of the fire as maintained by the appellants. The defective chimney, smouldering fire for days. Like instances had occurred at the residence of Mr. A. F. Gault and at the St. James Hotel, Montreal. The fire had evidently originated, from what the firemen say, on the third flat. The stove pipe was let into the defective chimney on the third flat near ceiling and no fire was apparent on the third flat at the commencement, nor in any other flat lower than the third. The condition of the goods also proves the correctness of this theory. Those on the Shorey side, viz. the one on which the chimney was situated, were destroyed, whilst those on the other side of the building were only damaged—the flame evidently being hottest between Shorey's wall and the wall of the building occupied by the appellants.

6. The respondent was perfectly aware that the character of the appellants' business was to a certain extent dangerous owing to the fact that heat to an abnormal extent was necessary in the preparation of their goods.

Another point suggested itself in the consideration of the appellants' liability. There is a provision in the lease that the appellant shall be liable to pay the respondent

any extra premium of insurance which the respondent might be obliged to pay owing to the nature of the business carried on by the appellants. What is the effect of this provision on the liability of the appellants under article 1629 of the Civil Code? Is it not equivalent to an undertaking by the respondent to insure the building to its full value and to pay the premiums therefor so long as those premiums are not increased by the nature of appellants' business increasing the risk? Does it not in effect appear as if the ordinary premiums to guarantee the appellants against responsibility, under article 1629, were included in the rent, leaving it for the respondent to place the insurance with others or to be his own insurer? The fact of the premises being intended to be insured is evidently inserted in the lease. It is clear that respondent held out to the appellants the idea or promise that he (the respondent) would insure. Why should he bind them to pay any extra premium he might be obliged to pay to insure, if he had no intention of insuring? Moreover it is clearly shown that he had such idea, and that it was agreed that he should insure because he did so insure, and he makes no claim for the premiums which he paid for such insurance, thereby acknowledging the fact that having only paid ordinary rates of premiums he had no claim on them for such ordinary rates, being bound to pay them himself. This view is strengthened by the fact of his having claimed from the appellants merely the extra rates for the extra risk. Under ordinary circumstances if there were no mention of insurance or rates of premiums, it is clear that if the landlord insures the premises for which the tenant is responsible under article 1629, or if the landlord gives credit for the insurance received, he is entitled to charge against appellant the premium paid.

D. Macmaster, Q. C., and *M. Hutchinson*, for the respondent:—

The respondent contends that no amount of care that a lessee may prove to have bestowed upon the premises

1887. Skelton & Evans.

leased by him can alone relieve him, from the legal presumption in favor of the lessor, that the loss by fire of the premises was caused by the fault of the lessee or of the persons for whom he is responsible, and unless he proves the contrary he is answerable to the lessor for such loss. The appellants have not only failed to prove the contrary, but have not proved that they even exercised the care of a prudent administrator. It will be seen from the evidence that the appellants did not exercise due care in protecting the building against fire. Although it is impossible to establish to an absolute certainty where this fire originated, or how it was caused, yet the presumption is exceedingly strong that the fire originated in the drying-room, where there was an exceedingly high temperature kept up, and where clothing was hanging round to dry, or from the ash barrel on the fourth flat, where hot ashes had been put the day before the fire and left there. From either or both of these causes the fire could have originated. At the time the firemen arrived on the scene the fire had made very considerable progress, and certainly more in the upper flats than in the lower, thus strengthening the presumption that the fire originated from one of these causes.

The respondent submits:

1. That it is established that the premises in question were totally destroyed by fire while appellants were the lessees and occupants thereof.

2. That the appellants did not exercise due care in protecting the building against fire.

3. That the loss suffered by the respondent is at least the amount fixed by the judgment.

4. That by law the appellants are legally responsible for such loss.

CROSS, J.:—

This is an action by Evans, the landlord, against Skelton *et al.*, the tenants, to be indemnified for the loss occasioned to him, Evans, by a fire which occurred upon the pre-

1887.
Skelton & Evans.

mises leased, which, it is alleged, were totally destroyed by fire while in the occupation of the tenants, and for which Evans claims that they, Skelton *et al.*, were liable under Art. 1629 of the Civil Code, which reads as follows: "When loss by fire occurs in the premises leased "there is a legal presumption in favor of the lessor that "it was caused by the fault of the lessee or of the per-"sons for whom he is responsible; and unless he proves "the contrary he is answerable to the lessor for such "loss."

Art. 1627 also provides that "the lessee is responsible "for injuries and loss which happen to the thing leased "during his enjoyment of it, unless he proves that he is "without fault."

Art. 1628 provides, with regard to the lessee: "He is "answerable also for injuries and losses which happen "from the acts of persons of his family or of his sub-"tenants."

Skelton *et al.*, by their plea, contend that the legal presumption in question was rebutted by proof which they made that the fire was not occasioned by their fault, having proved that they exercised great care and caution with regard to fires. Secondly, that the loss was only to a slight extent caused by fire, the chief loss having resulted from the defective construction of the building, which peculiarly exposed it to danger from fire, and from its having collapsed soon after the fire took, while, had the building been solid, the fire would have been extinguished before any material damage had been done. Thirdly, that the building was insured by the owner, Evans, who, under the policy, recovered much more than the damage really occasioned by the fire—in fact more than the entire damage. Fourthly, that it was agreed by the lease that Skelton *et al.*, the tenants, should return the premises to Evans, the owner, at the termination of the lease in like condition as received, reasonable tear and wear and *accidents by fire excepted*. It was further thereby agreed that the premises should be insured and that the extra insurance occasioned by the trade and

1887. Skelton & Evans.

business of Skelton *et al.*, should be paid by them, the tenants, and it was actually by them so paid, and it being the business and duty of Evans, the landlord, to insure to the full amount of the value of the buildings, the loss resulting from the insufficiency of the insurance was chargeable to himself.

The proof shows that the building was more or less defective in its construction, particularly about one of the chimneys, which would expose it to extra danger from fire; also that reasonable care and precautions were taken against fire.

The liability resulting from the presumption established by the Code is one of extreme rigor; it is but fair that the tenant should be allowed the benefit of every exception under which he could be entitled to claim exemption. The presumption in question is not *juris et de jure*, therefore may be rebutted by evidence. It is, however, doubted whether a proof of excuse would be sufficient which fell short of showing the origin of the fire, and that it was purely accidental, a proof almost impossible to be made under the circumstances fires usually take place in buildings. If the proof of all reasonable precautions be insufficient, it would seem that the law was augmented in its severity even beyond the rigorous terms in which it is expressed, but it would probably have to be so construed and understood if this point were to rule the decision in the present case.

The case, as I understand it, turns upon the exception stipulated by the lease that fire was to be excepted from the risk which the tenants were to assume in this case. Such exception might, however, mean only of such fires as the tenant could prove were purely accidental. It would be unfair in this respect to at most assume a stronger presumption in the matter, against the tenant; but at all events it was a risk that could be fairly insured against, and as the lease contemplated that the buildings were to be insured, the decisive question was, at whose diligence this was to be effected. It was clearly the duty of the landlord to cause this insurance to be made. He

1887.
Skelton & Evans.

did in fact insure, and collected from the tenants the part of the premium they had undertaken to pay, namely what was charged for the extra rate; and having failed to effect sufficient insurance to cover the whole loss, he is, in the absence of any sufficient explanation to show the contrary, the person who is to bear the loss. His action should therefore fail, and the judgment rendered in his favor in the Court below should be reversed, and his action dismissed.

DORION, CH. J., [after stating facts]:—

The fire took inside; there is no proof in what manner it occurred. Evans, alleging that it was by the fault and negligence of Skelton, instituted an action by which he claims $9,000 damages. This amount is composed partly of assessments, partly of rent, and partly of the difference between the amount of insurance and the alleged value of the premises. Skelton made a tender of $321 for past rent and taxes due at the time of the fire. He pleaded to the rest of the demand that there was no fault on his part; that he took all the precautions possible; that by the lease he was exonerated from the responsibility which the law imposes on the tenant.

The question is whether Skelton is responsible for the risk which is imposed by law on the tenant. There is no doubt that in an ordinary lease the proof as to how the fire occurred, and that it did not occur through the fault of the lessee, falls upon him. But here the tenant contends that he was exonerated from this responsibility by the terms of the lease.

The clauses relied on are two. By one the tenant was bound to deliver the premises at the expiration of the lease in the same order, reasonable tear and wear and *accidents by fire* excepted; so that, evidently, if the building was burned by accident, the tenant is not responsible. Why was this exception put into the lease? Was it only to bar the responsibility of the tenant for fires for which he is not answerable? It was not necessary for that. It seems to me that it was to bar responsibility for

1897. Skelton & Evans.

fires for which, under the law, he would otherwise be responsible, that is, fires occurring in the premises by accident. Now, a fire the cause of which is unknown is a fire caused by accident. In this case the insurance company paid Evans £100 [illegible]y? Because the cause was unknown, and it must be supposed to be an accident. It is true, it would be an accident for which the lessee ordinarily would be responsible, for he has to show that it was an accident beyond his control.

Another clause relied on is one which stipulated that the lessee should pay all extra premiums of insurance which the companies might exact in consequence of the nature of the business carried on. There is no doubt that Skelton & Co. were carrying on a business which was hazardous. Both parties expected that an extra premium would be charged. Skelton & Co. said, in effect, "we "carry on a dangerous business; we are willing to pay "an extra premium, and we shall be exempt from res- "ponsibility for accidents by fire, that is, we shall be "put on the footing of any other party, that if there is "fault on our part you must prove it."

There is another clause, that Skelton should conform to the regulations of the police, as to sweeping of chimneys, etc. It is proved that they had a barrel upstairs in which ashes were deposited. If it had been proved that the fire occurred through this barrel of ashes they would be responsible, because it would be through their neglect to conform to the regulations of the police. But there is not an iota of proof that the fire occurred through the barrel of ashes. The chimney was defective, and had recently been repaired by the landlord, but not to the extent that the workman who repaired it thought it was necessary to do. There is as strong a presumption that the fire took place from the chimney as from the barrel of ashes. A man may smoke his pipe before going to bed; would it be sufficient to prove that, without showing that the fire was caused by it? It was for Evans to prove that the fire was not an accident. In the absence of direct proof that the fire took place from neglect of the tenant to conform to police regulations, he is not responsible.

It must be observed that Skelton & Co. themselves lost heavily by the fire. They had a great interest to protect their premises. Further, Evans insured the property for $10,000. It was his duty to insure to the full value, if he wished to avoid the risk he had assumed by relieving the tenant from his legal responsibility arising out of accidents by fire. After very contradictory proof as to value the Court below came to the conclusion that the value was $1,100 in excess of the insurance. Looking at the evidence, for my own part, I am of opinion that the insurance covered the full value. The building was so weak in its construction that it crumbled down within about twenty minutes after the fire broke out. This showed that it was not such a building as might have been expected. If Evans got the value of a new building in its place he would be greatly benefited. I am disposed to think that his own estimation, as shown by the amount of insurance which he effected upon the premises, was the fair one. The action will be dismissed, subject to verification of the amount of the tender for rent, assessments, etc.

CHURCH, J. (*diss.*) :—

I cannot concur in the judgment of the majority of the Court. I am dispensed from re-stating the facts and circumstances of the case, by the statements already made.

In this case there are two relations to be considered—the one established by the law, and the other by the contract between the parties.

The first, under the general terms of Art. 1053, C. C., by which parties are made responsible towards others for any loss occasioned by neglect, imprudence or fault; and by Art. 1626, by which a tenant is bound to use the leased premises as a prudent administrator; the third, Art. 1629, by which, in case of loss by fire, that it presumably was caused by the tenant's fault, and unless some derogation exists in the contract of lease, he must prove that it was not his fault or bear the consequences of the presumption which the law creates against him.

1887.

Skelton & Evans.

It appears to me that under the general law *fault* has been shewn on the part of the appellant, in that he did not use the property as a prudent administrator. It is proved that he habitually kept the ashes from the three stoves in an ordinary barrel on the garret of the leased premises, and without any other precaution than that afforded by a piece of zinc beneath it resting upon a wooden floor.

This he had covenanted he would not do, inasmuch as he had agreed to conform to the by-laws of the city in regard to such matters, which compelled him to keep them in stone or brick receptacles (see city by-laws), and I think the imprudence of such conduct is forcibly exposed in the opinion expressed by Mr. Perry, examined in the case, an expert in such matters, when he said such a practice was "sheer madness."

It has been urged that the clause of the lease which stipulated that the tenant should not be responsible for accidents by fire, relieved him (the appellant) unless it were shewn affirmatively by the landlord that the fire was not due to an accident. I do not agree with this reasoning. I think the burden of proof was on the party who sought exemption under such a clause. I think the term accidents meant such events as a fire spreading from adjoining premises, lightning, etc. That it was not sufficient that the cause was unknown or unexplained to have it assumed that it was "accidental." I make all the distinction imaginable between what is "unknown" and what is presumably "accidental," and I think the tenant has not made out his exception from responsibility, either under the contract or under the law.

Reference has been made to the clause in the lease whereby the tenant covenanted to pay for any extra premium which the nature of the business carried on in the leased premises might occasion to the landlord (respondent), and it has been urged that the landlord under this could have insured the premises for their full value, and that he should have done so, and that if he did not, and met with loss, he has only himself to blame for

1867.

Skelton & Evans.

such loss. I cannot concur either in this view of the nature of the covenant. I only see in it an undertaking to pay any extra premium, if the landlord were to insure, and if such extra premium had to be paid. I do not think this clause contained any undertaking on the part of the landlord to insure at all; besides, the respondent, in his action, has given his tenant (appellant) the benefit of the money collected from the insurance company, so far as it went to make good his loss, and that is all which, in my opinion, he (the tenant) could ask.

Evidence has been adduced to show that the premises were faultily built, and that the building succumbed to the fire with greater expedition than if more durably built it would have done, and from this it has been urged that the landlord is to blame, and the tenant, in a measure, if not entirely, relieved from responsibility. I cannot adopt this view. If the fire had not arisen this fault of construction was of no importance, and therefore, to my mind, has little, if any, bearing on the case. The real question is, was there real fault or legal fault on the part of the tenant? Has he shewn himself exempt either under his contract or under the law? Has he got rid of the legal presumption which the law creates against him? From what I have said before I think not. I think the respondent has shewn more than he was bound to do, for in my opinion, he has shewn gross neglect of the commonest prudence on the part of his tenant, and has afforded satisfactory presumptive evidence of the cause of the fire in the absence of any countervailing proof.

A suggestion has been made and strongly urged that the alleged defect in the chimney was the efficient cause of the fire. I do not concur in this; that the chimney was defective at one time is proven; that it was made the subject of protest by the tenant, is also shewn; but it was repaired, if not perfectly, at least sufficiently so that remonstrance ceased and protest was not repeated, and the tenancy continued without demur, and I cannot see that evidence has been given which establishes that it occasioned the fire. It certainly does not look as if it were

1887.
Skelton & Evans.

considered a serious matter by the appellant since he appears to have acquiesced in its condition and continued his tenancy for several years after its repair.

The tenant, moreover, used these premises in a manner to require at his hands extreme caution, since he habitually kept up a very high degree of heat for the purposes of his special business, and made alterations by which a highly heated current of air was made to circulate through some parts of them.

Some evidence has been made to show that the premises were not worth the valuation upon them by the respondent, and that his claim for loss is exaggerated. On this point I adopt by preference the opinion of the architect who superintended the construction, and knew their cost and the nature and value of the materials which entered into their construction, rather than that of others whose general information may be as good, but whose special advantages to judge were not equal to him who superintended their erection.

I am of opinion the judgment should be confirmed.

The judgment of the Court is as follows:—

"The Court, etc.....

"Considering that by the lease of the 10th of January, 1882, mentioned in the pleadings in this cause, the said appellants leased from the said respondent the premises therein described for a term of ten years, to be reckoned from the 1st of May, 1882;

"And considering that in and by the said lease it was stipulated that the said appellants should deliver the said premises to the said respondent at the expiration of the said ten years, in as good order, state and condition as the same were at the commencement of the said lease, reasonable tear and wear and accidents by fire excepted;

"And considering that it was further stipulated in the said lease that the said appellants should pay all *extra* premium of assurance that the company at which the said premises might be insured, should exact in consequence of the nature of the business or work done therein by the said lessees;

1887.

Skelton & Evans.

"And considering that the effect of the last mentioned stipulation is that the appellants undertook to pay the *extra* premium which might be charged to the said respondent on account of the *extra* risk consequent on the business carried on in the said premises by the said appellants, on condition that they, the said appellants, should be released from their responsibility for any accident caused to the said premises by fire;

"And considering that this release applies to the responsibility which the said appellants were by law subjected to as tenants under Art. 1629 of the Civil Code;

"And considering that on or about the 22nd June, 1884, the said premises were destroyed by fire, and that the cause of said fire has not been established, and that the said fire is to be considered as an accidental fire for which the appellants cannot be held responsible;

"And considering that the sum of $321.78 tendered by the appellants for rent accrued and taxes due by them up to the date of said fire, when the lease became cancelled by the said fire, is sufficient to cover the amount which they then owed to the respondent;

"And considering that there is error in the judgment rendered by the Superior Court sitting at Montreal, on the [illegible] October, 1885;

"This Court doth reverse the said judgment, and doth adjudge and declare that the said tender of the sum of $321.78 is good and valid, etc., and this Court doth hereby dismiss the action of the said respondent as to all other and further demands beyond the said sum so tendered by the appellants, and doth condemn the said respondent to pay to the said appellants the costs incurred by them, as well in the Court below as on the present appeal; the costs in this Court to be taxed as in a cause of the first-class."

Judgment reversed, CHURCH, J., *diss.*

Atwater & Mackie, attorneys for appellants.

Macmaster, Hutchinson, Weir & McLennan, attorneys for respondent.

(J. K.)

September 17, 1887.

Coram DORION, CH. J., CROSS, BABY, CHURCH, JJ.

EDMUND BARNARD,

(*Opposant en sous-ordre in Court below*),

APPELLANT;

AND

ALEXANDER MOLSON,

(*Contesting opposition in Court below,*)

RESPONDENT.

Opposition en sous-ordre—Moneys deposited in hands of prothonotary—C. C. P. 753.

HELD:—Affirming the judgment of MATHIEU, J., M. L. R., 2 S. C. 143, but resting the decision on other grounds, that where moneys have been attached by garnishment and deposited in the hands of the prothonotary to abide the result of a contestation, and subsequently, by a final judgment, the said moneys have been declared to be the property of the contestant, and the prothonotary, by a judgment of the Court, has been ordered to pay the same to the contestant, such moneys cannot be claimed by an opposition *en sous ordre*, there being no longer any suit pending in which such opposition could be made; and the claimant's recourse should be by *saisie-arrêt* founded upon affidavit as required by law.

The appeal was from two judgments of the Superior Court, Montreal, rendered upon the same day, a report of which will be found in M. L. R., 2 S. C. 143.

May 16, 1887.]

Lacoste, Q. C., and *Beïque, Q. C.*, for the appellant:—

Les motifs sur lesquels la Cour Inférieure a basé son jugement, sont:

1o. Que les biens du débiteur notoirement insolvable ne sont pas le gage de ses créanciers en ce sens qu'ils puissent être arrêtés au moyen d'une saisie conservatoire comme dans le cas d'un gage ordinaire. Sur ce point le savant juge *a quo* a cité 29 Laurent, No. 272. En conséquence le savant juge est arrivé à la conclusion que l'appelant n'ayant pas de titre exécutoire, il ne devait saisir

1887.

Barnard & Molson.

les deniers devant la Cour qu'au moyen d'une saisie-arrêt avant jugement accompagné d'un affidavit que l'intimé recélait ou était sur le point de recéler ses biens.

2o. Qu'une opposition en sous-ordre alléguant la déconfiture n'est valable, en vertu de l'article 753 du Code de Procédure qu'à la condition que les deniers devant la Cour soient le produit d'une saisie reconnue légale, en d'autres termes, que l'article 753 est limitatif. Pour justifier sa décision, le savant juge a cité *Stirling et al.* v. *Darling*, 1 L. C. J. 161 et les causes auxquelles cette décision réfère. Dans le cas actuel, le savant juge est d'opinion que la saisie-arrêt ayant été annulée, les deniers doivent être considérés comme ayant toujours été dans la possession de l'intimé, et que sa déconfiture n'avait pas l'effet de l'en dessaisir. Qu'en conséquence, l'intimé ne pouvait les saisir tant qu'il n'aurait pas un jugement ou qu'il ne procéderait pas par saisie-arrêt avant jugement.

Comme on le voit, la question soumise à ce tribunal est celle de savoir si la déconfiture notoire justifie le recours à des procédés conservatoires, sans allégation de fraude, et l'importance de cette question ne saurait être exagérée.

[After referring to the old law]

Maintenant quelle est la loi en Canada sur la matière, quelle opinion a prévalu, celle des premiers arrêts qui ont suivi la loi de Messidor, ou celle des auteurs modernes qui non seulement justifient la jurisprudence actuelle en France, mais qui veulent qu'elle soit d'accord avec l'ancienne jurisprudence qui nous sert de base d'interprétation en Canada? Sur ce point, la cause de *La Banque Jacques-Cartier & Gilvie*, jugée par ce tribunal, jette le plus grand jour. La décision de cette cause par la Cour Supérieure est rapportée au 3e vol. de la Revue Critique, p. 85, et la décision de la Cour d'Appel au 19e vol. de L. C. J., p. 100. L'appelante attache de l'importance à cette cause, non pas tant parce qu'il en résulte qu'en Canada l'hypothèque donnée par un homme en déconfiture est nulle, tout comme celle donnée par un commerçant en faillite, car tel est le texte de l'article 2023 de

1887.
Barnard & Molson.

notre Code, qui, conforme à la loi Brumaire et basé comme il l'est sur les nombreuses autorités citées par les codificateurs et tirées de l'ancien droit français, anéantit les raisonnements des auteurs modernes français sur ce qu'était l'ancien droit en France, mais, en autant que dans cette cause le juge de la Cour Supérieure a reconnu l'esprit et la véritable portée de l'article 2023, imbu qu'il était de la doctrine professée par les auteurs modernes, et que son raisonnement au fond ne diffère pas de celui du savant juge *à quo*. La déconfiture de Johnston Thompson n'était pas notoire, disait-on, parce que ses biens n'avaient pas été saisis et vendus en justice. Et l'on citait des autorités pour prouver "qu'il faut, pour qu'un homme soit "déconfit et insolvable que tous ses biens, tant meubles "qu'immeubles, eussent été saisis et vendus publique-"ment." En conséquence, l'on concluait que la déconfiture ne suffisait pas pour rendre l'hypothèque nulle, il fallait que la fraude fut prouvée. Or, dans le cas de Johnston Thompson, il n'y avait pas eu de collusion entre le débiteur et les créanciers qui prétendaient avoir obtenu l'hypothèque, puisque cette prétendue hypothèque résultait de l'enregistrement d'un jugement. Mais la Cour d'Appel maintint les vrais principes et décida que la déconfiture était notoire, parce qu'elle était avouée par le débiteur lui-même et connue du créancier à l'époque où il avait enregistré son jugement, et qu'il n'était pas nécessaire pour que l'hypothèque fût nulle qu'elle fût frauduleuse, que le simple préjudice pour les autres créanciers suffisait.

Dans la cause actuelle ce que soutient l'appelant, c'est également que la déconfiture suffit pour faire naître son droit à une mesure conservatoire, quelque nom que l'on donne au procédé, et que des allégations de fraude ne sont pas indispensables. Le principe est le même que celui qui régit la question de l'hypothèque donnée par un débiteur notoirement en déconfiture, c'est l'application seule qui est différente. L'article 753 donne le droit à tout créancier d'un insolvable colloqué sur les deniers provenant d'une saisie de filer une opposition en sous-

1887.

Barnard & Molson.

ordre. Et cet article en termes formels, place le créancier d'un insolvable sur le même pied que le créancier porteur d'un titre exécutoire. Pourquoi, c'est parce qu'en effet, d'après notre droit, le créancier d'un débiteur en déconfiture a le droit d'arrêter ses biens quoiqu'il n'ait pas encore pris un jugement. En d'autres termes son droit de prendre une saisie avant jugement est mis sur le même pied que le droit de celui qui est porteur d'un jugement. Comme l'article 753 ne fait qu'appliquer au cas des deniers provenant d'une vente judiciaire un principe de droit commun, cet article ne saurait être limitatif. Le droit du créancier à une opposition en sous-ordre, existe dans les circonstances, indépendamment de l'article 753, et, conséquemment, ce n'est pas parce que cet article reconnaît le droit du créancier dans le cas particulier qu'il mentionne, qu'il l'enlève dans le cas qu'il ne mentionne pas.

Pour comprendre toute la portée de l'article 603, C. P. C., il faut lire ce que dit Teulet sur l'article 2092 du Code Napoléon. Cet auteur fait voir la lacune qui existe dans la loi en France quant à la manière de distribuer entre les créanciers l'actif d'un débiteur non commerçant en déconfiture. C'est précisément cette lacune ainsi signalée que comble notre article 603. En s'en tenant à la lettre même de la loi l'on ne saurait nier que dans le cas actuel les deniers devant la Cour proviennent d'une saisie. L'appelant, par exemple, en supposant que sa créance eût existé lors de l'émanation de la saisie-arrêt par Carter n'aurait-il pas eu le droit de demander dès le principe que si, d'après le jugement à intervenir les deniers saisis étaient déclarés saisissables il fut colloqué au marc la livre avec Carter et tout autre créancier de l'intimé, vu la déconfiture de ce dernier, comme d'ailleurs il l'a fait depuis, sans objection, quant aux deniers saisis entre les mains de la Banque Molson, et que s'ils étaient déclarés insaisissables, quant à Carter, ils fussent déclarés saisissables quant à lui, l'appelant, et qu'en conséquence, les deniers ne fussent pas remis à Molson, tant que lui, l'appelant, n'aurait pas d'abord été payé de sa créance.

1887.

Barnard & Molson.

Ce qui montre bien jusqu'à quel point le jugement dont est appel est exorbitant, c'est que si Molson eût poursuivi Freeman pour se faire payer les loyers en question, l'appelant eût pu intervenir en alléguant simplement la déconfiture et sans alléguer la fraude. La pratique et la jurisprudence en Canada, sur ce point, assurément ne sauraient être mises en doute. De même si un créancier de Freeman eût saisi et fait vendre ses biens, Molson aurait pu filer une opposition et l'appelant serait venu en sous-ordre. Et c'est en présence de règles aussi constantes de notre procédure que l'on soutient que l'article 753 est limitatif. Qu'on remarque également ce qui se passe lorsque le débiteur a terme. Tout le monde sait que le terme, d'après la convention, disparaît s'il y a déconfiture, et cette règle s'étendait au terme accordé par le jugement. 1 Pigeau, Edit. de 1787. Or en principe, où est la différence entre n'avoir pas de jugement et en avoir un qu'on ne peut exécuter, tant que le terme n'est pas échu? Si la déconfiture donne le droit de saisir dans le dernier cas, pourquoi pas dans le premier également?

Au reste, c'est, strictement parlant, une question d'opposition en sous-ordre qui se présente dans la cause actuelle. Or, est-il possible de nier les changements importants introduits depuis les décisions de *Stirling et al.* v. *Darling*, 1 L. C. J. 161. A cette époque il n'y avait pas de texte qui défendit au débiteur en déconfiture d'aliéner, aujourd'hui il y en a un. Alors, il n'y avait pas de disposition expresse comme nous en avons maintenant permettant l'opposition en sous-ordre dans un simple cas de déconfiture quoique le créancier ne soit pas porteur d'un jugement. Mais surtout il n'y avait rien d'écrit dans notre droit statutaire qui pût être comparé à l'article 603 du Code de Procédure, pour ne rien dire de l'article 601.

L'appelant soumet donc que le jugement dont est appel doit être infirmé:

1o. Parce que la Cour Inférieure a envisagé la question de procédure d'une manière trop étroite et par suite erronée;

2o. Parce qu'elle a fait erreur quant aux principes, les

conséquences de la déconfiture étant de donner au créancier le droit de prendre toute mesure conservatoire requise, suivant les circonstances et les besoins de chaque cas.

L'appelant aurait pu en bonne conscience accompagner son opposition d'un affidavit de recel, car personne ne saurait douter, il semble, que la conduite de l'intimé dans l'espèce justifie la croyance qu'il est sur le point de recéler. Si l'appelant n'a pas produit cet affidavit c'est qu'il a voulu faire décider une fois pour toutes la question qui s'élève. S'il arrivait, contre toutes ses prévisions, que ce tribunal ne partageât pas la manière de voir ci-dessus exposée, il ne refuserait pas, l'appelant en est sûr, d'insérer dans son jugement les réserves nécessaires pour que l'appelant ait l'occasion de donner l'affidavit voulu.

Robertson, Q. C., and *Geoffrion*, Q. C., for the respondent:—

Respondent has filed an answer in law to the opposition, based on the following grounds:

1. That the opposition *en sous ordre* is on its face a proceeding by way of execution, and there is nothing to show that opposant's claim carries execution.

2. Because the monies are declared in the opposition to be exempt from seizure.

3. Because the opposition, though styled an opposition *en sous ordre*, is on its face not such an opposition, but an attempt to attach moneys of a defendant in the hands of third parties, before judgment without issuing a writ of attachment, and without compliance with the requirements of law necessary to entitle opposant to such a writ.

4. Because the affidavit forming part of the opposition is illegal and insufficient.

5. Because the moneys attached are in the hands of the prothonotary merely as a conservatory process between the parties in the original suit, and are not moneys levied subject to an opposition as made.

Opposant answered generally.

Article 753, C.C.P. governs sub-oppositions. This article is one of those under Sec. V., "Compulsory execution

1887.

Barnard & Molson.

of judgments," and from its terms and its connection with the other articles of the section, it is plain that in order that a creditor shall be entitled to file a sub-opposition, there are certain requisites, viz. :—

1st. Such oppositions can be filed only on moneys levied, that is to say there must have been an execution enforced and money realized therefrom, in the hands of the Sheriff.

2nd. The sub-opposition can be filed by a creditor only on sums collocated to his debtor. The terms of article 753, taken with the reference implied to the preceding subsection 11, show that a sub-opposition applies only in cases in which a report of distribution has been made and the debtor has been collocated therein under article 724, C. C. P.

The appellant's opposition does not show him to be within the above requirements. The money attached was not attached in the hands of the garnishee; it still remained the respondent's money, and was held by the garnishee for the plaintiff or defendant, as the judgment might determine. The deposit in the hands of the prothonotary was a mere substituting of one garnishee, under the control of the court, for another. The final judgment as alleged having declared the money to be the property of defendant, respondent, he immediately became entitled to withdraw it, and any creditor wishing to attach it before obtaining a judgment must do so in the usual way by a *saisie-arrêt*, supported by a legal affidavit, and third parties can have no greater rights to interfere with respondent's enjoyment and possession of his property, because it has been placed temporarily in the hands of the prothonotary, than they could have were it in the respondent's personal possession. The attachment, in fact, by the effects of the judgment set up in the opposition, became of no effect and was declared null.

There is no pretence that respondent was collocated for any sum. The money in question was his from the beginning and held by the prothonotary only to abide a judgment on a claim made on it, but subsequently declared to be unfounded.

1867.

Barnard & Molson.

A third requisite for a sub-opposition as laid down in Art. 753, is that the debtor must be insolvent, or the creditor's claim must carry execution. There is no pretence that the latter is the case, but there is an allegation of insolvency. Respondent submits, however, that the insolvency contemplated by the article is such insolvency as would be sufficient for a writ of seizure before judgment. A sub-opposition is really of the nature of a *saisie-arrêt* before judgment, and therefore should be accompanied with an affidavit as required by articles 834 and 855, C.C.P. This was the view taken in a case as reported in 1 L.C.J. 161, *Stirling* v. *Darling*, by three Judges of the Superior Court, and which has never been overruled.

The fact is that the appellant, considering that he has a claim against respondent, is desirous of attaching his debtor's property before obtaining a judgment against him. This the law gives him a right to do, but only in certain cases, viz.:—Those specified in articles 834 and 855. To avail himself of this remedy he must bring his case within the provisions of the law and also comply with the formalities the law requires. He must allege not insolvency only, but fraud. If appellant found the respondent attempting to defraud him out of a just debt, he might easily have attached the money by a writ in the usual way, but evidently knowing that he could not take the affidavit necessary for an attachment before judgment, he styles his opposition an *opposition en sous ordre*, and endeavors to evade the law, and accomplish his object in an indirect way.

Secondly.—As to the appeal from the judgment ordering the payment to defendant of balance after holding $3,932.17 to secure appellant's claim. If the judgment on the demurrer is maintained, the judgment on the motion will be maintained at the same time; but even should the demurrer be overruled, respondent submits that it is contrary to all law and equity that opposant's pretention with regard to this balance should be upheld. On his own showing opposant claims $3,932.17. He asks in addition to this a further sum of $9,572.65, to be held; for what

1887.
Barnard & Molson.

purpose, unless it be to harass the respondent by keeping him out of his money, it is hard to tell. He can have no interest save as security for costs in case he succeeds, and respondent being a resident in Lower Canada and a defendant, it is difficult to see on what grounds such security can be demanded; and the amount the opposant attempts to hold as security is $9,572.65. The proposition carries its own condemnation.

Further:—As it appears by the allegations of the opposant that the moneys in the hands of the court are exempt from seizure, the allegation of insolvency is wholly inapplicable in the present case, and the insolvency alleged is not the insolvency contemplated by article 753, C. C. P. Whether defendant be insolvent or not the moneys in the hands of the court are exempt from seizure, and no creditors can make any claim on them.

Respondent submits that the judgment on the demurrer is correct and should be maintained, and that in any case appellant has no interest or right in law to appeal from the judgment on the motion, and respondent should be declared to have always been and to be entitled to the $9,572.65 over and above the $3,932.17, and the judgment ordering this amount to be paid to him should be confirmed. He therefore asks that the appeal be dismissed with costs, and the judgments of the court below confirmed.

Sept. 17, 1887.

DORION, Ch. J. (for the Court):—

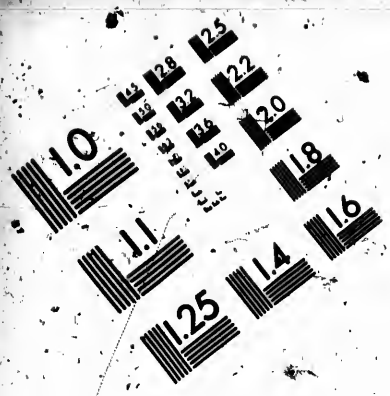
The opposition was dismissed on the ground that the moneys in question had not been levied. The opposition *en sous ordre* is given against money levied, and the argument adopted by the Court below was that this was not money levied: it was money deposited in the hands of the Prothonotary. On the 22nd of October, 1885, after the opposition had been produced, Molson moved that the Prothonotary be ordered to pay him a part of the $13,000, leaving in his hands a sufficient sum to pay Mr. Barnard's claim, in case he should succeed on his opposition *en sous ordre*—that he be paid the difference between

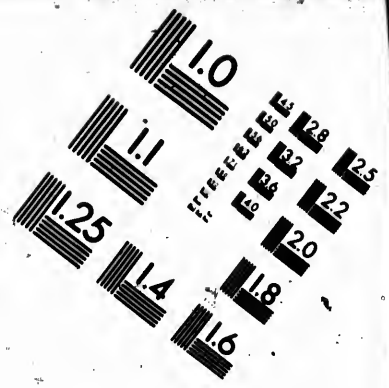
the amount of Mr. Barnard's claim and the amount of the deposit. This motion was not proceeded with but was held over to be decided on the merits [illegible] me day that the judgment on the merits [illegible] is motion was granted. The appeal is fr[illegible] ju[illegible] ments, which were rendered on the 20t[illegible]

Mr. Barnard pretends that he had a ri[illegible] op-position *en sous ordre*, and he appeals from t[illegible] judg-ment above mentioned, and also from the othe[illegible] If Mr. Barnard is right, the judgment on the motion is wrong.

We do not exactly adopt the ground mentioned in the judgment of the Court below. That ground was that the amount in question was not "money levied." I do not know that the question has ever come up since the Code. It is certain that before the Code, upon moneys deposited an opposition *en sous ordre* could be made. But in this case we hold that the money was no longer under the control of the Court. There was a final order, ordering the Prothonotary to pay to Molson. All contestations had ceased; there was no case pending between the original parties in the suit. The amount in question was not money levied in the proper sense, it was money that had been distributed. It belonged to Molson by an order given eleven days before. It was in the Prothonotary's hands merely because he had fifteen days in which to pay it. There was no case before the Court; there was no case pending in which an opposition could be made. And if the Prothonotary did not pay the money according to the order of the Court, Mr. Molson, without giving any notice to the creditors, could take a rule against the Prothonotary. No opposition could be made in the old case after the old case had ceased. There was no right to make an opposition *en sous ordre*. If Mr. Barnard has any right, it should be by a *saisie-arrêt*. He might have said: "Here are "moneys deposited; I will take a *saisie-arrêt*." But he would have had to make an affidavit that not only was Molson *en faillite*, but that he was making away with his property, in order to have a *saisie-arrêt* before judgment.

The judgment is correct, though we do not say that, it





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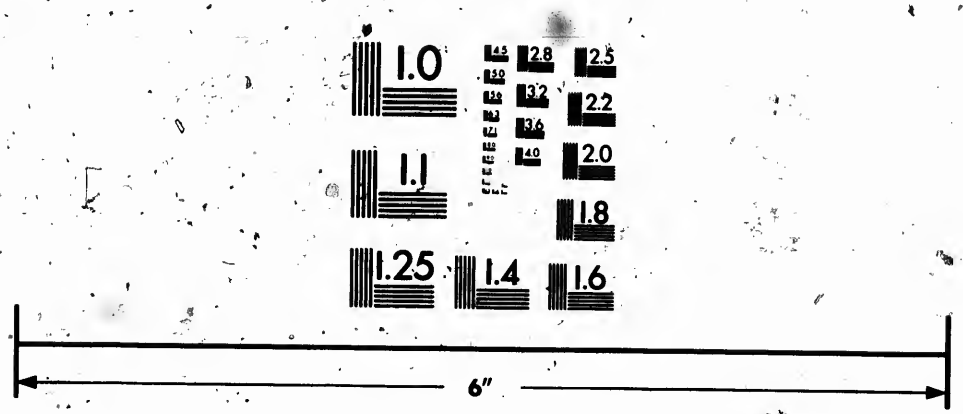

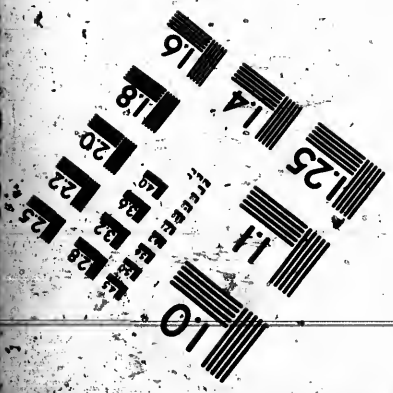

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1887.

Barnard & Molson.

proceedings were still pending and money had been deposited, an opposition *en sous ordre* could not be made.

The judgment of the Court is as follows :—

" La cour ayant entendu les parties par leurs avocats, tant sur le jugement final rendu en cour de première instance le 20 janvier 1886, que sur le jugement rendu le même jour sur la motion faite par l'intimé le 2 novembre 1885 ;

" Considérant que par son opposition en sous ordre produite en cette cause l'appelant demande à être colloqué en sous ordre du défendeur Alexander Molson, pour une somme de $3,942.17 sur et à même une somme de $13,712.50 étant le montant des loyers saisis entre les mains d'Allan Freeman en vertu d'un jugement que John T. Carter avait obtenu contre le dit Alexander Molson, et déposé par le dit Allan Freeman entre les mains du protonotaire de la Cour Supérieure en vertu d'un jugement de la dite cour rendu le 20ème jour de mars 1883, et d'un autre jugement du même tribunal rendu le 31ème jour d'octobre 1884 ;

" Et considérant que sur contestation par le dit Alexander Molson de la saisie-arrêt faite à la poursuite du dit John T. Carter, il a été déclaré par jugement de cette cour, rendu le 24 mars 1883, que les deniers saisis entre les mains du dit Freeman étaient insaisissables et la saisie-arrêt renvoyée ;

" Et considérant que ce jugement a été confirmé par un jugement rendu par Sa Majesté en Son Conseil Privé le 9ème jour de juillet 1885 ;

" Et considérant que par jugement de la Cour Supérieure prononcé le 11ème jour de septembre 1885, la dite Cour Supérieure en exécution du dit jugement du 9 juillet 1885, rendu par Sa Majesté, a ordonné au protonotaire de la dite Cour Supérieure de payer au dit Alexander Molson la dite somme de $13,712.50 moins la somme de $137.12, taxe du palais de justice, et $70.56 pour frais de consignation ;

" Et considérant que par ce jugement du 11 septembre 1885, les contestations entre les parties furent définitive-

1887.

Barnard & Molson.

ment vidées et l'instance terminée, en sorte que lorsque l'appelant a produit son opposition en sous ordre, il n'y avait plus d'instance pendante dans laquelle une pareille opposition put être faite ;

" Et considérant que sous les circonstances l'appelant ne pouvait exercer un recours sur les deniers déposés entre les mains du protonotaire de la Cour Supérieure, et adjugés au dit Alexander Molson, qu'en vertu d'un bref de saisie-arrêt en donnant l'affidavit requis par le Code de Procédure Civile ;

" Et considérant qu'il n'y a pas d'erreur dans le jugement rendu par la Cour de première instance le 20 janvier 1886, sur le mérite des contestations entre les parties ;

" Et considérant que le jugement rendu le même jour sur la motion du 2 novembre 1885 n'est que la conséquence du jugement rendu sur le mérite ;

" Cette cour confirme les dits deux jugements du 20 janvier 1886, et condamne l'appelant aux dépens encourus tant en cour de première instance que sur l'appel.

Judgment confirmed.[1]

F. L. Béique, Q.C., attorney for appellant.

Robertson, Ritchie, Fleet & Falconer, attorneys for Respondent.

(J. K.)

[1] An appeal is pending before the Supreme Court of Canada.

[CRIMINAL SIDE.]

November 15, 1887.

Coram DORION, C. J.

THE QUEEN

v.

DONALD DOWNIE.

Perjury—Deposition on which perjury is assigned—Proof that stenographer, who took deposition, has been sworn—Answers on 'faits et articles'—Notes of stenographer.

HELD:—1. That the fact that the stenographer, who took a deposition in a civil case, on which perjury is assigned, has been sworn, must be proved by the record or proceedings in the case in which the deposition was taken.

2. That a party summoned to appear in one division of the Superior Court, at Montreal, to answer upon *faits et articles*, and who has appeared and been sworn in another division of the same Court, where he has given his answers, may be convicted of perjury on the answers so given.

Quaere.—Whether it is now necessary, under 47 Vict. (Q[illegible] that the notes of the stenographer should, in all cases, be [illegible] the witnesses?

The defendant was indicted for perjury, and charged by two separate counts of the indictment, with having committed perjury, 1st, in his answers in a deposition he had given as a witness, in a case before the Superior Court, at Montreal, wherein he was plaintiff, and Frederick W. Francis was defendant; and 2nd, by his answers on *faits et articles* in a cause of *Downie* v. *Francis*, and *Clement, tiers-saisi.*

After the case for the prosecution had been closed, the defendant submitted that there was no evidence to go to the jury, inasmuch as the deposition on which the first count of the indictment was based, had been taken by a stenographer, and had not been read to, nor signed by the defendant, and that there was no proof that the stenographer had been duly sworn to take the deposition.

2ndly. That it appeared by the record that the defendant

had been summoned to appear in the third division of the Superior Court, to answer to *faits et articles*, that he had been sworn in the third division, while the answers had been taken in the second division of the Superior Court, which, under the circumstances, had no jurisdiction to swear the defendant, nor to take his answers.

The deposition of the defendant, on which the perjury is assigned in the first count of the indictment, was taken by a stenographer named O'Brien. The deposition was not signed by the defendant, nor did it appear that it had been read to him, and it was not shown by any part of the record, nor by the registers of the Court that the stenographer had been sworn before taking the deposition of the defendant. O'Brien was called as a witness and swore that the deposition of the defendant produced to him was an exact transcript of the stenographic notes he had taken when the deposition was given, with but one or two unimportant differences which he indicated. He also stated that he had been sworn before taking the deposition—without stating when and before whom he had been sworn.

As regards the objection to the evidence on the second count of the indictment, it appeared by the record that the defendant was summoned to appear and answer to *faits et articles* before the third division of the Superior Court; that he made default, but that on the 13th of April, 1887, he obtained leave to answer, that he was then sworn before the third division and gave his answers which were taken by a stenographer. When, on the 15th of April, (1887), the stenographic notes had been transcribed and been read to the defendant, he refused to acknowledge them, contending that his answers had not been correctly taken; subsequently, on the 18th of April, he was sworn in the second division of the Superior Court, and after correcting his answers he signed them and acknowledged them to be correct, in presence of the Judge sitting in the second division of the Court.

DORION, C. J.:—

I am with the defendant on his first objection, that is,

1887.

Regina v. Downie.

the one taken to the proof of the deposition on which perjury is charged in the first count of the indictment. The statute 35th Vict., ch. 6, sect. 10, authorises the taking of depositions of witnesses by stenographers in the cases therein provided for; but in these cases the law requires that the stenographer should be sworn before the Court or judge, or the prothonotary, or the clerk of the Circuit Court, and that the stenographer shall at the conclusion of each testimony read over the same to the witness, and such testimony shall, when afterwards transcribed in ordinary writing, form the record of evidence in the case.

I am of opinion that the swearing of the stenographer required by the statute must appear by the record or by the entries made in the registers of the Court, otherwise the Court having jurisdiction over the case could not take cognizance of depositions taken by such stenographers, unless it were proved that the certificate of their being sworn or the entry in the registers has been lost or destroyed, in which case the fact might be proved by oral testimony, but not otherwise. This question came up in the case of *Reg.* v. *Leonard*, 3 Leg. News, p. 211, but as it appeared by the *plumitif*, which is a book kept by the clerk of the Court and in which the proceedings in each case are entered, it was held that there was sufficient evidence that the stenographer had been regularly sworn. There is no such record or entry in this case, and on this ground, that there is no proof that the stenographer was regularly sworn, I hold there is no proof that the deposition produced contains what the defendant swore to, and therefore no perjury can be assigned on such deposition.

There is also a difficulty as to whether the notes of evidence taken by the stenographer, should be read to the witness. This is expressly required by the 35 Vict. c. 6, already referred to, and the majority of this Court quashed the verdict in the case of *Reg.* v. *Leonard*, on that ground. Since that case was decided, the Act 47 Vict. (Q.) ch. 8, without any reference to the provision in the 35 Victoria, that the notes taken by the stenographers should be read to the witnesses, has provided that the

Judge may order that the notes of evidence be read to the witness and corrected sitting the court, if necessary. This would imply that it is not necessary in all cases to read the stenographer's notes to the witnesses. Without, however, deciding this point, which is not without some difficulty, I think there is enough in the other objection, that it is not proved that the stenographer was sworn to take the deposition, to withdraw the first count of the indictment from the consideration of the Jury, and I will instruct them to that effect.

On the objection to the second count of the indictment, that the second division of the Superior Court had no jurisdiction and no right to swear the defendant nor take his answers on *faits et articles*, I am against the defendant.

The division of the Superior Court into three separate divisions is neither authorised nor recognised by law. It has been established by the Judges of the Superior Court for convenience sake, and to facilitate business and avoid confusion; but the rule they have neither adds to, nor detracts from any of these subdivisions any right, power or jurisdiction which is given by law to the Superior Court. If one of these subdivisions can compel a party to answer upon *faits et articles*, the other subdivisions have the same power, and if the defendant summoned to appear before one subdivision has chosen to appear voluntarily before another subdivision of the same court, his answers given in that other subdivision, were as binding in the case in which they were taken as if they had been taken in the subdivision before which he had been summoned. A party may even answer to *faits et articles* voluntarily and without any rule or order to that effect, and no objection can be taken to this course on a prosecution for perjury based on answers so taken.

Bishop, Crim. Law, vol. 2, § 1028, says: "There is "much in a case which a party may waive and if a de- "fendant, not being served with process, appears and "answers to plaintiff's allegations, the court has com- "plete jurisdiction and perjury may be committed."

1887.

Regina v. Downie.

This is law everywhere :—

Reg. v. *Fletcher*, L. R., 1 C.C. 320 ; *Reg.* v. *Mason*, 29 U. C. Q. B. 431 ; *Reg.* v. *Simmons*, 5 Jurist, N. S. 578.

I am, therefore, of opinion that the defendant must proceed on the second count of the indictment, and on that one alone.

W. H. Kerr, Q.C., and *Crankshaw*, for the prosecution.

H. C. St. Pierre, and *Barry*, for the defendant.

(J. K.)

December 22, 1887.

Coram TESSIER, CROSS, BABY, CHURCH, JJ., DOHERTY, A.J.

EDWARD LOWREY ET AL.,

(*Plaintiffs in Court below*),

APPELLANTS ;

AND

ROBERT T. ROUTH,

(*Defendant in Court below*),

RESPONDENT.

Appeal Bond—Judgment reversed by Queen's Bench, but restored by Privy Council—Death of party during pendency of suit.

HELD :—1. (Affirming the decision of JETTÉ, J., M. L. R., 2 S. C. 58), that the death of several of the plaintiffs, during the pendency of the suit, does not render a judgment pronounced in their name absolutely null ; the nullity being relative, and such as can be invoked only by the legal representatives of the deceased, on the ground that their rights have been prejudiced by the judgment.

2. (Reversing the decision of JETTÉ, J.), that a bond given as security for debt, interest and costs, on appeal by a defendant from the Superior Court to the Court of Queen's Bench, to the effect that the bondsmen will pay the condemnation money in case the judgment be confirmed, is binding, though the judgment of the Queen's Bench reversed the judgment of the Court below, if the original judgment of the Superior Court has been restored by the Judicial Committee of the Privy Council, and the effect is the same as if the judgment of the Superior Court had been affirmed by the Court of Queen's Bench.

1887.

Lowrey & Routh.

The appeal was from a judgment of the Superior Court, Montreal (JETTÉ, J.), Nov. 30, 1885, reported in the Montreal Law Reports, 2 S. C. 58. The action was brought on a security bond, and the effect of the judgment appealed from was to declare that, as the judgment in the first instance given in the Superior Court had been reversed in Appeal, the sureties were discharged from all liability on the bond, although the original judgment of the Superior Court was subsequently restored by a judgment of the Judicial Committee of the Privy Council.

The case was twice heard,—the second time, Nov. 18, 1887.

R. Laflamme, Q. C., and *John Dunlop*, for appellant :—

The bond sued on is in the ordinary form, and reads as follows :—

Province of Quebec, District of Montreal. } SUPERIOR COURT FOR LOWER CANADA.

Whereas on the 21st day of May, 1880, judgment was obtained in the Superior Court for Lower Canada, between John Elliott, Edward Lowrey, (here follows a number of names of other plaintiffs), owners of the steamship 'Gresham,' lately in the Port of Montreal, in the district of Montreal, plaintiffs, and James Lord and John Magor, both of the city and district of Montreal, and Stewart Munn, of Harbor Grace, in the Island of Newfoundland, merchants, copartners, and doing business together as such at Montreal aforesaid, under the firm of Lord, Magor & Munn, defendants, and from which said judgment the said James Lord, John Magor and Stewart Munn, have appealed.

Be it known that on the 7th day of June, 1880, personally came and appeared before us, the Prothonotary of the Superior Court for the district of Montreal, Robert Routh, merchant, and Dugald Macphie, manager, both of the city and district of Montreal, who acknowledged to be jointly and severally securities for and on behalf of the said James Lord, John Magor and Stewart Munn and obligate themselves that the said James Lord, John Magor and Stewart Munn, shall effectually prosecute the appeal of the said judgment, and pay such condemnation money, costs and damages as shall be adjudged in case the judgment of the Superior Court be affirmed, and in case the said James Lord, John Magor and Stewart Munn do not prosecute with effect the said appeal, or do not pay such condemnation money, costs and damages as shall be adjudged in case the judgment of the said Superior Court be affirmed, that they, the said Robert T. Routh and Dugald Macphie, shall pay the same, which said condemnation money, costs and damages shall be made of the goods, chattels, lands and tenements of the said Robert T. Routh and Dugald Macphie, to the

1887.
Lowrey & Routh.

use and profit of the said John Elliott and other plaintiffs, their heirs, executors, administrators or assigns.

(Signed), R. T. ROUTH,
D. MACPHIE.

Taken and acknowledged this 7th day of June, 1880, before us,

(Signed), HUBERT, HONEY & GENDRON,
P. S. C.

There were only two questions of law involved in the case:—

1st. Did the death of five of the original plaintiffs before the judgment was rendered in the Superior Court, render null all subsequent proceedings, and more particularly the security bond in question?

2nd. Did the judgment of the Court of Queen's Bench discharge the respondent from all liability under the security bond?

As to the first point, the judgment fully answers this objection, and shows that the only parties who could invoke the objection, would be the heirs of the deceased plaintiffs, but not the adverse party who has no interest. The judgment calls attention to the fact that as a matter of fact the representatives of the parties who died during the pendency of the suit, are parties to the present suit and demand its execution. The Court for these reasons dismissed this objection.

As to the second point, it will be necessary to refer to the exact terms of the exception or plea filed raising this objection, which is in the following terms:—

"That the security bond entered into by the said defendant and the said Macphie, as set forth in plaintiffs' "declaration, and as shewn by plaintiffs' exhibit No. 4, was "a bond whereby the said defendant and the said Macphie "undertook that the said James Lord, John Magor and "Stewart Munn should prosecute the appeal of the judg- "ment of the Superior Court of the 31st day of May, 1880, in "said declaration referred to, and pay such condemnation "money, costs and damages as had been adjudged against "them by the said judgment, in case the said judgment "should be affirmed by the Court of Queen's Bench for

"Lower Canada (appeal side), and that in case the said "judgment should not be affirmed by the said last men- "tioned Court, but on the contrary, be reversed by the "said Court, that the said bond shall be null and void."

The plea then alleges the judgment of the Court of Queen's Bench, and states that thereby the respondent was discharged from all liability under the bond. The plea does not recite the bond correctly, there is no mention of the Court of Queen's Bench in the bond, or of the judgment being affirmed in any particular Court. The bond is given in full above and is in general terms.

The judgment says respondent only became security for Lord *et al.*, under the condition that the judgment rendered against them should be confirmed by the Court to which the said Lord *et al.* appealed.

It is submitted that there is no such condition in the bond. Respondent undertook to pay the condemnation money, costs and damages if the judgment were affirmed; the judgment was affirmed by the Privy Council, and respondent is liable under the bond. The liability was suspended until the appeal to England was decided. If the bond depended simply on the judgment of the Court of Queen's Bench, it must follow that the security in the event of a judgment being affirmed in Court of Queen's Bench, but reversed in Privy Council, would be compelled to pay, although the judgment of the Court of the last resort declared that there was no liability on the part of the person for whom he became security. This must be the natural sequence of declaring that the liability was conditional on the judgment of the Court of Queen's Bench. This is what the judgment by its terms holds.

The security is not discharged until the affair is terminated. 1 Marcadé, p. 118. "Que si en première instance il était demandeur, la caution a dû lui être demandée, et si elle a été donnée, elle n'est pas déchargée encore puisque l'affaire n'est pas terminée."

Article 1124 C. P. C., on which, of course, the security bond is based, reads as follows:—"The appellant or plain- "tiff in error must, before the record can be sent up, give

1887.

Lawrey & Routh.

"good and sufficient security that he will effectually pro-
"secute the appeal or proceedings in error, and that he
"will satisfy the condemnation, and pay all costs and
"damages adjudged, in case the judgment appealed from
"is confirmed." This article in no way limits the effectual prosecution of the appeal to the Court of Queen's Bench. The clear meaning of this is that the obligation of the security is to satisfy the condemnation money, if the judgment should be confirmed; the liability of the securities being suspended until the case is finally decided in the Court of the last resort. The bond is in general terms, and is not restricted to any particular Court, and certainly is not conditional in its terms. We must be guided by the terms of the bond, and what is the fair legal interpretation to be given to it. It is submitted that the interpretation put on it by the terms of the judgment of the Superior Court is not warranted by the terms of the bond. The defendant's liability could not be determined as long as the process was alive. The appeal to England was not a new process or suit, but a continuation of the original suit, and the liability of the security was not dependent alone on the judgment of the Court of Queen's Bench, but on any further or ulterior judgment that might be rendered in the instance.

The judgment of the Court of Queen's Bench having been reversed cannot be considered at all; it had no effect, being suspended by the appeal, and could not have the effect of discharging the security. If the liability was contingent on the judgment of the Queen's Bench, this should have been expressed in the bond; it cannot be presumed. The security could not be discharged until the suit was finally settled in the Court of last resort. The contract was that the security would be liable if the judgment was affirmed.

S. Bethune, Q.C., for the respondent:—

On the question raised by the second plea, viz: the discharge of the respondent from all liability under the bond, the judgment of the Superior Court having been set aside by the Court of Queen's Bench, respondent submits, that

the terms of the bond must be fully examined into and the position of the surety thereunder clearly and specially defined; the liability of the respondent is dependent entirely on his undertaking, as specially set forth in the bond, and if the terms of the bond were fulfilled, and the respondent submits they were, as soon as these terms and conditions were fulfilled, respondent's liability under the bond ceased, and could not, without his consent, be revived. From the wording of that portion of the bond which covers the undertaking of the respondent, it is evident that the only condition on which respondent became security was that the bond should be of no effect if the Court of Appeal reversed the judgment of the Superior Court, which it did; the obligation of the respondent could not be continued or enlarged without his consent.

CROSS, J., for the majority of the Court:—

This is an action on a bond given as security on an appeal to the Queen's Bench, from a judgment of the Superior Court in a case of Elliott *et al. vs.* Lord *et al.*

By the judgment of the Superior Court in that case, Elliott *et al.* recovered from Lord *et al.* a sum of money for the hire of a vessel belonging to plaintiffs, which had been chartered by the defendants. The latter appealed to the Court of Queen's Bench and succeeded in having the judgment reversed by that Court. Elliott *et al.*, however, carried the case to the Privy Council, where the judgment of the Queen's Bench was set aside and the judgment of the Superior Court was affirmed.

On the appeal to the Queen's Bench, Routh, the present respondent, and another surety named McPhie were bondsmen for Lord *et al*, and entered into the bond on which the present action has been brought by Lowrey *et al.*, the representatives of Elliott *et al.*, deceased.

To this action Routh pleaded:

1st. That the proceedings in the first action were made after the death of Elliott *et al.*, and consequently irregular, null and void.

2nd. That his suretyship applied only to the appeal

1887.
Lowrey & Routh.

from the Superior Court to the Queen's Bench, and that Lord *et al.* having succeeded in the Queen's Bench in getting the judgment of the Superior Court reversed and the action dismissed, he, Routh, was thereby discharged from all liability, the condition in the bond, that the appeal would be effectually prosecuted, having been fulfilled.

The Superior Court by their judgment in this action properly overruled the first plea, it appearing that what proceedings occurred after the decease of the original plaintiffs were in ignorance of their decease and without notice, and were regular. As regards the second the Court held that Routh as such security was discharged; that Court accordingly dismissed the action against him. From this judgment, Lowrey *et al.*, the representatives of Elliott *et al.*, have appealed, and contend that the security bond extended to all subsequent proceedings into whatever courts the case might be carried by appeal.

The principal motives for the judgment of the Superior Court were that the contract of suretyship is to be construed *stricti juris*, and cannot be extended beyond what is clearly included in its promissory undertakings; that the parties never contemplated its extension beyond the appeal to the Queen's Bench; that Routh and his co-surety never intended to be bound for more than the consequences of the failure of the appeal to the Queen's Bench, and that such appeal not having failed, but having succeeded, their obligation had been fulfilled and they were discharged.

While this Court acquiesces in the correctness of the principle enunciated by the Superior Court as to the construction of the contract of suretyship, the majority of the members of this Court do not find that it meets the present case. They find that the terms of the bond are sufficiently ample to include at least the confirmation of the Superior Court judgment by the Privy Council. The terms of the bond are as follows:

The sureties thereby speaking obligate themselves that the said John Magor *et al.* shall effectually prosecute the

1887.
Lowrey & Routh.

appeal of the said judgment and pay such condemnation money, costs and damages as shall be adjudged in case the judgment of the said Superior Court be affirmed. There is no limit to the judgment being affirmed by the Court of Queen's Bench merely. The ultimate judgment of the Privy Council has in effect become the judgment as well of this Court as of the Superior Court, whose judgment has thus been affirmed and the condition thereby accomplished, which was to render the sureties liable. The sureties when they entered into the bond may not have supposed that their undertaking led to this result, but they should have noticed that the language used to which they subscribed, was to this purport, and expressed the undertaking that they should be liable in the event of the judgment of the Superior Court being confirmed, without qualification as to whether that confirmation took place in the Queen's Bench or in the Privy Council. The terms of the bond are in accordance with art. 1143 C. P. C. and c. 77 C. S. L. C., sec. 23. The case is new here. We find no precedent for it in our own courts, but the same application of a like bond seems to be practised in the courts in Scotland, where a similar system of law to our own prevails, also in courts in the United States. I cannot do better in concluding these remarks than cite Mr. Justice Allen's remarks in the case of *Robertson* v. *Plympton et al.*, 25 New York Reports, p. 484, cited by the appellants :—

Allen, J., said : "The appellant for whom the defendants were sureties, had the benefit of his appeal and of "the stay of proceedings upon the judgment appealed "from, as the result and in consequence of the undertaking "in suit ; and the question now is, whether the erroneous "judgment of the Supreme Court, reversing the judgment appealed from, worked a release of the sureties,— "notwithstanding the error was corrected, upon appeal "to this Court, and the original judgment ultimately "affirmed. The undertaking was in the form prescribed "by the Code (§§ 335, 348) ; and by it the defendants "undertook that, if the judgment should be affirmed, the

1887.

Lowrey & Routh.

"appellant would pay the amount thereof. In terms, the "undertaking does not restrict the liability of the defen- "dants to the contingency of an affirmance of the judg- "ment by the Supreme Court. The condition may as well "refer to an affirmance by the judgment of any Court to "which the cause may go by appeal, or the final decision "of the action in the Court of last resort. There was no "reason for making the undertaking effectual only upon "the first appeal, and for the judgment of a Court which "was not necessarily final; and the statute, and the un- "dertaking given in pursuance of it, have respect to the "final determination in the Court of last resort, or the "last Court to which the parties may take it by appeal. "The cause is the same in every Court, and the question "in each is the same, to wit: whether the first judgment "—that appealed from by the defendant's principal— "was erroneous and should be reversed, or was right and "should be affirmed. The condition is, in substance, for "the ultimate affirmance of the judgment appealed from."

"Upon the most literal and strict reading of the un- "dertaking, the defendants become liable upon the "filing of the remittitur from this Court, and the entry of "the proper judgment in the Supreme Court. The first "judgment of that Court became as if it had never been "pronounced, and the judgment entered in pursuance "of the decision of this Court was one in affirmance of "the judgment first appealed from. That the remedy of "the plaintiff was suspended, or rather, that the defen- "dant's liability was in suspense, pending the appeal to "this Court, does not affect the question, nor is there any- "thing in the suggestion that the defendants were not "parties to the appeal to this Court. They consented to "become liable upon a contingency which has happened, "and for the result of an action of which they had no "control and to which they were not parties, and are "bound, not because they were parties to either appeal, "but by the terms of their undertaking."

We therefore, by a majority of this Court, decree that the judgment of the Superior Court appealed from be

reversed, and that the appellants Lowrey *et al.* do recover from the respondent $3,233.02, the balance due on the judgment against Magor *et al.*, including the costs of that case in the Superior Court and Queen's Bench, with costs, also, of the present case in the Superior Court and this Court.

BABY, J., dissented, holding that the bond was no longer binding after the judgment of the Queen's Bench had set aside the judgment of the Superior Court. It might almost as well be pretended that the respondent should have to pay the costs of the Privy Council, as the judgment of that tribunal took the place of the original judgment.

DOHERTY, A. J., concurred in the dissent.

The judgment of the Court is as follows:—

"The Court, etc.....

"Considering that by the bond which the now respondent Robert T. Routh, with one Dugald McPhie, subscribed and acknowledged as their bond and obligation on the 7th of June, 1880, as security for an appeal taken by James Lord *et al.*, defendants, in a cause theretofore pending and bearing the number 1355 in the Superior Court, wherein John Elliott *et al.* were plaintiffs and the said James Lord *et al.* were defendants, and wherein the said plaintiffs had recovered judgment against the said defendants for the sum of $4,136.66 with interest and costs, the now respondent Robert T. Routh, together with the said Dugald McPhie, bound and obligated themselves jointly and severally to the effect that the said James Lord *et al.* would effectually prosecute the said appeal and pay such condemnation money, costs and damages as should be adjudged in case the said judgment of the said Superior Court should be affirmed, and in case the said James Lord *et al.* did not prosecute with effect the said appeal, or did not pay such condemnation money, costs and damages, as should be adjudged in case the said judgment of the Superior Court were affirmed, that they the said Robert T. Routh and Dugald McPhie would pay the same;

"And considering that although the said judgment of

1887. Lowrey & Routh.

the said Superior Court was reversed by this the Court of Queen's Bench, yet it was afterwards, on the 19th of March, 1883, affirmed by the judgment of Her Majesty in Her Privy Council, and said appeal of the said James Lord *et al.* having thus failed, and the condition on which the said now respondent Robert T. Routh and the said Dugald McPhie were to be liable jointly and severally for the payment of the said debt, interest and costs, awarded by said judgment of the Superior Court, having happened and come to pass, the said James Elliott *et al.*, or their representatives, thereby became entitled to recover from the now respondent, Robert T. Routh, the amount of the said debt, interest and costs;

"Considering that the now appellants are the legal representatives of the said John Elliott *et al.*, and have a right to stand in their place and stead, and to recover the amount of the said debt, interest and costs, as awarded to the said James Elliott *et al.*;

"Considering that the respondents are entitled to have deducted from the amount of said debt, interest and costs, certain sums which they, the appellants, have recovered from the said James Lord *et al.*, etc. (*without interest*);

"Considering, therefore, that there is error in the judgment rendered in this cause by the said Superior Court at Montreal on the 30th of November, 1885, the Court of Our Lady the Queen now here doth reverse and annul the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth adjudge and condemn the said Robert T. Routh, now respondent, to pay and satisfy to the appellants the sum of $3,233.02, etc., and costs as well of this Court as of the said Superior Court; reserving to the appellants their recourse for $869.81, the amount of their collocation in the case No. 1355 in the Superior Court of John Elliott *et al.* v. James Lord *et al.*, for which they have filed a *retraxit*, and further reserving to them such legal recourse as they may have on their conclusions for *con-*

trainte par corps (the Hon. Mr. Justice Baby and Mr. Assistant Judge Doherty, dissenting)."

Judgment reversed.

Dunlop, Lyman & Macpherson, attorneys for appellants.

L. N. Benjamin, attorney for respondents.

(J. K.)

June 30, 1886.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

DAME SARAH ANNE WALDRON,

(*Defendant in Court below*),

APPELLANT;

AND

DAME MARIA WHITE,

(*Plaintiff in Court below*),

RESPONDENT.

Married woman—Action for personal wrongs—Evidence of attorney ad litem—Mitigation of Damages.

HELD:—1. A married woman, authorized by her husband, can bring an action of damages in her own name for personal wrongs.

2. The evidence of an attorney *ad litem* in behalf of his client is admissible, but such testimony is repugnant to the discipline of the profession.

3. The fact that the injurious statements complained of were made principally in the privacy of the family, and that evidence of the slander was obtained by concealing a witness for the purpose of overhearing what transpired, will be considered in mitigation of damages.

The appeal was from a judgment of the Superior Court, Montreal (GILL, J.) 26th May, 1885, condemning the appellant to pay the respondent, her mother, the sum of $200 damages for slander.

In the course of the *enquête*, Mr. W. G. Cruickshanks, one of the attorneys by whom the action was instituted, withdrew from the case, and was examined as a witness on the part of the plaintiff.

1886.
Waldron & White.

The judgment of the Court below was in the following terms :—

" La Cour, etc....

" Considérant que la demanderesse est la mère de la défenderesse et qu'elle porte sa présente action contre sa dite fille réclamant d'elle $5,000 par forme de dommages-intérêts, en réparation d'injures verbales graves que sa dite fille aurait proférées contre elle, en disant faussement et malicieusement entre autres choses, que sa dite mère aurait été une prostituée avant de se marier, que ses parents (y compris la demanderesse) étaient tous des voleurs, que sa dite mère était allée en la cité de Montréal, dans la chambre d'un homme non marié, vivant seul, pour lui donner des soins en lui faisant prendre des bains et lui appliquant des cataplasmes comme traitement de maladies secrètes, dont il était affecté, propos que la défenderesse aurait plusieurs fois répétés à son père, George Waldron, mari de la demanderesse, pour l'engager à abandonner la demanderesse, et à cesser la vie commune avec elle ; et que de plus la défenderesse se serait présentée chez un marchand de la cité de Montréal, qui a un établissement considérable où son père, le dit George Waldron, était employé comme *foreman* de l'écurie, et aurait dit au marchand, à l'emploi duquel était son dit père, que ce dernier était l'auteur d'un vol d'argent dont le dit marchand avait alors récemment été la victime, et ce dans le but de faire perdre au dit George Waldron, sa place, et par là, enlever à la demanderesse tout moyen d'existence ;

" Considérant que la demanderesse a prouvé les allégations susdites de sa déclaration, mais que les accusations lancées contre la demanderesse et son mari par la défenderesse, toutes considérables qu'elles sont intrinséquement, n'ont cependant pas autant de gravité que le ferait voir la déclaration, en autant qu'elles ont été dites plutôt dans l'intimité qu'autrement, et qu'elles n'ont pas eu les conséquences fâcheuses qu'on aurait pu en attendre, surtout parce qu'elles ne paraissent pas avoir été crues par ceux sur l'esprit desquels elles étaient destinées à produire l'effet ;

1886.
Waldron & White.

" Considérant en outre que le dit George Waldron a tendu une embûche à la défenderesse, et l'a induite à lui répéter ce qu'elle paraissait lui avoir dit précédemment concernant la demanderesse, pendant qu'il avait placé un témoin derrière une porte, de manière que ce témoin put entendre ce qu'elle disait et vint le prouver, ce qui indiquerait que les dites injures et accusations ont été, au moins dans cette circonstance-là, recherchées de la part de la demanderesse, dans le but de pouvoir en faire une cause de dommages contre la défenderesse, dont le mari est un riche marchand bijoutier, tandis que la demanderesse et son mari sont sans fortune et de condition humble ;

" Considérant qu'il importe de ne pas donner plus de poids qu'il ne faut au témoignage du praticien qui, après avoir institué la cause et l'avoir mise en état, s'en départit au moment de l'instruction, apparemment dans l'unique but d'y être témoin, pratique qui pour n'être pas illégale, parce qu'elle n'est prohibée par aucun texte de notre loi, et qu'il est admis par notre jurisprudence que l'avocat peut être témoin dans et pour la cause qu'il soutient ou défend, n'en paraît pas moins contraire aux saines traditions disciplinaires de l'ordre des avocats ;

" Mitigeant, d'après les circonstances sus relatées, les dommages que comporteraient les injures qui, graves en elles-mêmes, deviennent atroces dans la bouche d'une fille à l'adresse de sa mère, n'oubliant pas toutefois que la défenderesse n'a guère montré de regret ni de repentir, tant dans sa défense que dans son enquête ;

" Condamne la défenderesse à payer à la demanderesse la somme de $200 de dommages-intérêts, avec tous les dépens de l'action telle qu'intentée, distraits, etc."

May 21, 1886.]

Joseph Duhamel, Q.C., for the appellant, on the question of authorization, submitted the following argument :—

L'appelante a prétendu, à l'argument devant la Cour Inférieure, que l'intimée n'a pas le droit d'intenter la présente action en son nom ; qu'elle n'a pas prouvé qu'elle fut séparé de biens en vertu des lois du pays où elle a contracté mariage, et qu'en l'absence de telle preuve la loi

1866.
Waldron & White.

du pays présume la communauté. Qu'en conséquence le droit d'action, s'il existe, appartient au mari comme chef de la communauté.

La Cour Inférieure n'a paru attacher aucune importance à cette prétention, et ne la mentionne même pas dans son jugement, mais l'appelante soumet que c'est une objection fatale.

L'intimée allègue :

"That the said female plaintiff was duly married to the said George Waldron, said other plaintiff, on or about the 7th of January, 1853, at Clonnel, in the county of Tipperary, in Ireland, in the United Kingdom of Great Britain and Ireland, and is consequently by the law of Ireland separated as to property from her husband."

Ainsi l'intimée affirme deux faits : 1o. Qu'elle s'est mariée en pays étranger ; 2o. que d'après les lois de ce pays elle est en communauté de biens.

Le premier fait est prouvé par le certificat Exh. No. 1.

Du second fait nous n'avons aucune preuve. Il est inutile de dire que nos tribunaux ne peuvent prendre connaissance d'eux-mêmes des lois étrangères ; ces lois doivent être prouvées, et en l'absence de telle preuve nos Cours doivent présumer que les lois étrangères sont les mêmes que les nôtres.

Cette doctrine est clairement établie dans la cause de *Brodie* v. *Cowan*, 7 L. C. J., p. 96. C. C. art. 6, § 3 et 4.

L'intimée a essayé de prouver, il est vrai, que d'après le "Married Women's Property Act," une femme mariée, en Angleterre, peut intenter une action en son nom. Mais cet acte ne peut avoir aucune application ici. C'est une loi de procédure qui ne peut avoir d'effet que relativement aux personnes domiciliées en Angleterre. Puisque l'intimée voulait intenter cette action en son nom, elle devait prouver que d'après la loi anglaise deux personnes mariées sans contrat de mariage sont séparées de biens. Ne l'ayant pas fait notre loi présume la communauté, et le mari de l'intimée seul avait le droit d'intenter la présente action.

Du reste, il est un fait que les intimés ne peuvent nier, c'est qu'immédiatement après leur mariage en Irlande, il

y a environ trente ans, ils sont venus résider à Montréal.

J. N. Greenshields, for the respondent:—

At the argument in the Court below, the appellant questioned the right of respondent to bring the present action, contending that there is no proof that respondent and her husband are separate as to property, consequently there must be community as to property; and that respondent has no right to institute the present action. The present action is one for personal wrong, and respondent has been duly authorized by her husband to bring this action. Even without such authority, respondent contends that she has the right to institute the action.

By the Coutume d'Orléans, art. 200, this right is clearly recognized. The article is in the following terms, "Fem- "me mariée peut intenter et poursuivre en jugement sans "son mari l'injure dite ou faite à elle; et aussi peut "être convenue pour l'injure qu'elle aurait faite ou dite à "aucun." In addition the Coutume d'Orléans provides in a case where the wife is condemned, what the responsibility to the community will be in the matter, clearly recognizing the principle that where the wife is common as to property, she can in her own name institute an action to recover damages for personal wrongs.

This is an inherent and natural right of every person, and one which the woman does not lose by her marriage; *vide* Pothier vol. 7, Traité de la puissance du mari p. 24, also article 176 of our own code.

The respondent submits, therefore, that she is entitled to institute the present action, as she has been authorized to do so by her husband, who appears before the Court to authorise her in the present proceedings, and that the judgment of the Court below is right and should be maintained.

June 30, 1886.]

BABY, J.:—

In this case a mother sues her daughter for slander. The expressions complained of were not words which should come from the mouth of a daughter. She accused her mother of being a prostitute before her marriage, and

1886.

Waldron & White.

of attending a gentleman suffering from certain diseases; and she endeavored to have her father dismissed from Mr. Carsley's employment, by representing that he was a thief. The defence is that the statements were made chiefly to her father privately; and that she had a right to make them. We are not disposed to disturb the judgment of the Court below. It is very carefully drawn, and the appellant has no reason to complain of the award of damages. Reference is made in the judgment to the fact there was a substitution of attorneys for the plaintiff, and that the original attorney was examined as a witness for his client. It is certainly better that a lawyer should never appear as a witness in his own case. I do not, however, see here any reason for assailing the character of the attorney in question.

RAMSAY, J.:—

There were certainly irregularities in this case. Evidence was obtained by putting a man behind a door to listen to what was said. In England, in some cases, such evidence has been refused.

CROSS, J.:—

I do not dissent; but if I had been sitting in the Court below, I would have given a smaller amount of damages.

Judgment confirmed, MONK, J., *diss.*

Duhamel, Rainville & Marceau, attorneys for appellant.

Greenshields, McCorkill & Guerin, attorneys for respondent.

(J. K.)

December 22, 1887.

Coram CROSS, BABY, CHURCH, DOHERTY, JJ.

ALBERT E. BECKETT,

(*Opposant in Court below*),

APPELLANT;

AND

THE MERCHANTS' BANK OF CANADA,

(*Plaintiffs contesting in Court below*),

RESPONDENTS.

Continuation of Community—Demand for—C.C. 1823.

HELD:—Where a community existed between husband and wife, and there was one child, issue of the marriage, and the wife dying intestate, the surviving consort failed to have an inventory made of the common property, and (the child being then a minor) married a second time without marriage contract—that in the absence of any demand on the part of the minor for a continued community, a tripartite community did not exist between the surviving consort, his second wife, and the child of the first marriage.

The appeal was from a judgment rendered by the Superior Court at Sherbrooke, (BROOKS, J.) February 9, 1886, maintaining the contestation of the respondents with costs. The judgment was in the following terms:—

"Considering that the plaintiff contesting hath proved the material allegations of his said contestation, and that it appears from the facts admitted and proved in this cause that there was a community of property existing between the said defendant and his first wife Margaret Walker, of which marriage William H. Beckett was the issue, and that his said mother, Margaret Walker, died intestate, and that the said community was not dissolved by the death of his mother, but was continued, and by the second marriage of said defendant Walter W. Beckett and Sarah Ritchie, a tripartite community was created between said defendant, said William H. Beckett and said Sarah Ritchie, which continued up to the time of her decease, and that

1887.
Beckett
Morrell et Saint

she bequeathed to said William H. Beckett and opposant one-half her interest in the land seized in this cause, then forming part of the real property of said tripartite community, that is to say; to each said William H. Beckett and opposant one-half of one-sixth of said real property, subject to the usufruct of said defendant Walter W. Beckett during his life, and that such bequest was made on the special condition therein mentioned that it should be accepted in lieu of all rights by virtue of the community theretofore existing between defendant Walter W. Beckett and his first wife, and of the continued community between said defendant Walter W. Beckett, William H. Beckett and said testator Sarah Ritchie, and it was so accepted, and defined the rights of all the parties interested in said property; that said community was continued and was in the interest of said William H. Beckett, and was declared so to have been by all parties interested, and that in consequence, at the time of the seizure in this cause opposant was only entitled to the three-twelfths interest in said property (except lot 159 in the Centre Ward of the City of Sherbrooke), and cannot oppose the sale of any other or greater portion of the real property seized which formerly belonged to said community and continued community, than the one-fourth part thereof to which he was and is entitled, save and except with regard to lot 159 of the Centre Ward of the City of Sherbrooke;

"And considering that on the 15th of February, 1884, opposant made over and assigned and quit claimed all his right and title thereto to defendant Walter W. Beckett by *acte* duly registered, long prior to the seizure herein of said lot No. 159, and that said deed was made by said opposant long subsequent to his becoming of age, and was not as by him claimed a nullity, but the same so far as the said parties were and are concerned, was and is valid and of full force, and vested the title to said lot in defendant Walter W. Beckett; that said defendant was not the [illegible] tutor or tutrix of opposant, and if so, said deed and transfer was only of one particular object, and not a settlement, *traité*, contemplated and forbidden by article

311 of the Civil Code, and not so far as plaintiff or third parties are concerned affected by the counter letter referred to in opposant's answer to the contestation as per Article 1212 of the Civil Code;

"And considering if opposant had any rights in said property prior to the making of said deed of transfer to defendant Walter W. Beckett, he was not justified in opposing the sale of any portion of said lot No. 159, but having according to his own pretensions, transferred his rights in said lot to said defendant and registered the same, with the view of enabling said defendant Walter W. Beckett to mortgage the same as proprietor, his only claim, if any, would be for a portion of the proceeds thereof, doth in consequence maintain said contestation of said plaintiff, and doth dismiss the opposition of the said A. E. Beckett, in so far as regards any right of property in said lot No. 159 upon the cadastral plan and book of reference of the Centre Ward of said City of Sherbrooke, and in so far as regards any greater claim than one-fourth of the other real property seized subject to the usufruct of defendant Walter W. Beckett with costs, *distraits, etc.*"

Nov. 22, 1887.

R. Laflamme, Q. C., and *W. F. Ritchie*, for the appellant:—

As to the question of community, our Code, in Art. 1323 says:—"If at the time of the natural or civil death of one "of the consorts there be minor children issue of their "marriage, and the surviving consort fail to have an in- "ventory made of the common property, the community "continues in favor of such children, *if they think proper.*"

The whole turns upon these last words which, in the French version, read "*s'ils le jugent convenable.*"

This article of our Code is old law, and the words used in the Coutume de Paris, are "si bon leur semble" (Cout. de Paris, Arts. 240-241). These two articles read as follows: 240:—"Quand l'un des deux conjoints par mariage, va "de vis à trépas, et délaisse aucuns enfants mineurs du "dit mariage, si le survivant des deux conjoints ne fait "faire inventaire avec personne capable, et légitime con-

1887.

Beckett & Merch'ts Bank.

"tradicteur, des biens qui étaient communs durant le dit "mariage, et au temps du trépas, soit meubles ou conquêts "immeubles, l'enfant ou enfants survivans peuvent, si "bon leur semble, demander communauté en tous les "biens meubles et conquêts immeubles du survivant, "posé qu'icelui survivant se remarie.

"241. Et pour la dissolution de la communauté, faut "que le dit inventaire soit fait et parfait, et à la charge "de faire clore le dit inventaire par le survivant, trois "mois après qu'il aura été fait; autrement, et à faute de "se faire par le survivant, est la communauté continuée, "*si bon semble aux enfants.*"

Pothier Com. No. 800, speaking on the point says:—"La "continuation de communauté ne consistant dans la cou-"tume de Paris, que dans un droit et une faculté que cette "coutume accorde aux enfants mineurs, de demander aux "survivants part dans tous les meubles, et dans les ac-"quêts faits par le survivant depuis la mort du prédécédé, "etc .....il s'ensuit que, tant que les enfants ou les repré-"sentants n'ont pas paru user de cette faculté que la cou-"tume leur donne, et qu'ils n'ont pas demandé au survi-"vant la continuation de communauté, *on ne peut dire qu'il "y ait eu continuation de communauté*, car il est de la nature "de tous les droits qui consistent dans une faculté, qu'ils "n'ont lieu que lorsque les personnes à qui la faculté est "accordée en veulent user." And again on page 390 (Bugnet) he says:—"Art. 1er. En quel cas y a-t-il lieu à la "continuation de communauté, etc. Il faut que quatre "choses concourent: 1. Il faut qu'au temps de la mort du "prédécédé il y ait une communauté de biens qui subsis-"tait entre les conjoints; 2. Il faut que le prédécédé ait "laissé pour héritiers des enfants mineurs de leur mariage, "qui aient succedé au prédécédé à une part des biens de "la communauté; 3. Il faut que le survivant ait manqué "à faire dans le temps prescrit ce que la coutume requiert "pour la dissolution de la communauté; 4. *Il faut que la "continuation de communauté ait été demandée.*"

We would particularly call the attention of the Court

1867.
Beckett & Merch'ts Bank.

to the case of *Bourassa* v. *Lacerte*, 10 Q. L. R., p. 118, and the authorities therein cited.

We would cite on this point also: Mourlon, Code Nap. Art. 1442; Lamoignon, Arrêts, Tit. 33, Art. 1. Maleville sur Art. 1442 C. N, Vol. 3, p. 215; 2 Prevost de la Jannès No. 373.

Merlin Rep. de Jurisp., Vol. 6, p. 177, says:—"Observez "aussi que pour qu'il y ait continuation de communauté, "il faut qu'elle ait été demandée: la raison en est que les "droits qui consistent dans une pure faculté, n'ont lieu "que quand les personnes auxquelles ils appartiennent, "veulent en user." Renusson, Traité de la Cout. P. 503-4 No. 1 (Library Edition).

De Ferrière, Coutume de Paris, Vol. 3, p. 546. Nos. 35 and 36, 2 Arrêts. Same author, Vol. 3, p. 539, No. 7: P. 543, No. 21, 23, 24, 25 and 26, also on page 546, No. 32 and 35. Chabot, Questions Transitoires sur Code Civil. Vol. I, p. 119 *et seq.*, particularly pp. 122-23 Conférence du Code Civil. Vol. V, p. 288.

Renusson, Communauté p. 530, Nos. 9 and 10, and 526, No. 1.

Merlin, Quest. de Droit Vol. IV, pp. 207 and 208 § 4 and 210.

Rep. de Jurisp. Vol. VI, p. 171, § 1.

We submit that these authorities show the necessity of a demand and declaration of option on the part of the minors for a continued community. That the *droit et faculté* accorded them by the law must be exercised to be preserved, otherwise the community does not continue: That the continued community does not take place tacitly by sole operation of the law à défant d'inventaire. That the continued community is a provision of law for the protection of the children's rights, and for the punishment of the father for failure or neglect of duty towards the children, which penalty or punishment, consists in the *droit et faculté* accorded the children of demanding or rejecting the continuation of community: That this *droit et faculté* is transmissible to the children's heirs.

H. B. Brown, Q.C., for the respondents:—

1887.

Beckett & Merch'ts Bank.

This case presents four questions :—

1. The most important question is : Was there a continuation of the first community? If so, the interest of the second Mrs. Beckett in this community was not half, as claimed by the appellant, but merely one-third, as it is pretended by us.

2. Did the relationship of tutor or quasi-tutor ever exist between W. W. Beckett and his son Wm. H. Beckett, and if it did, is the sale by the son to the father of March, 1880, null or not?

3. Did this sale from Wm. H. Beckett to his father include his interest under the will of the second Mrs. Beckett, as the appellant pretends, or was it limited to the transfer of his interests in the succession of his mother, the first Mrs. Beckett, as pretended by us?

4. Can the deed of sale from the appellant to his father, of the lot No. 159 of the Centre Ward, be set aside, as asked by the appellant?

On the first of these points we submit that the evidence in the case, and even the allegations of the appellant's opposition show that it was for the interest of Wm. H. Beckett that there should be a continuation of the community. That it is not necessary that the option should be declared or manifested in any particular way. That in accepting the legacy made to him in the will of the second Mrs. Beckett, and in accepting that will as settling the respective interests of the parties concerned, and by his declarations in the deed of sale from him to his father in March, 1880, when he was some 35 years of age, Wm. H. Beckett sufficiently manifested and declared his option that the community which had existed between his mother and father should be continued in his favor.

That it is abundantly clear that the parties, including Wm. H. Beckett, understood the rights of the parties to be those which a continuation of the community conferred upon them: and that it was fully understood and agreed that since the second marriage of the defendant W. W. Beckett, there had been a tripartite community of property.

This was the view of the case taken by the Court below, which we think this Court will confirm.

Adopting the view taken by the respondent, the appellant's rights which are admitted in the contestation, and which are established by the Court below, are as follows, viz.:—Under the will of the second Mrs. Beckett, appellant takes the *nue proprieté* of ½ of ⅓=⅙, and as one of the heirs of the late Wm. H. Beckett he also takes the ½ of the ⅛, which under the will of the second Mrs. Beckett was bequeathed to him, namely ½ of ⅛=1/16. And 1/16 added to his own interest, namely ⅛, equals ¼.

CROSS, J.:—

On the 16th August, 1843, Walter W. Beckett married Margaret Walker without ante-nuptial contract, thus creating a community of property between them. She died on the 14th March, 1847, leaving as her heir William H. Beckett, her son, the only issue of this marriage. On the 30th May, 1850, the said Walter W. Beckett, as his second wife, married Sarah Ritchie, again without a marriage contract, said William H. Beckett being then a minor. The second wife, Sarah Ritchie, died 13th January, 1880, leaving one child, issue of the last-mentioned marriage, viz., the present opposant, A. E. Beckett, then a minor, having been born in January, 1861. Her will bears date the 26th June, 1879. She thereby bequeathed the usufruct of all her property to her husband, and the ownership thereof to the present appellant, A. E. Beckett, and to the said William H. Beckett, the issue of the first marriage, as joint proprietors. It is admitted that these bequests were accepted. The first marriage created a community of property between Walter W. Becket and Margaret Walker. The second marriage made the contracting parties *communs en biens*, but it is a question whether by the second marriage the first community was continued tripartite or was dissolved. The bequest made by the will of Sarah Ritchie was on the express condition that it should be accepted in lieu of all rights by virtue of the community theretofore existing between Walter W. Becket and his first wife and the continued community between him and William H. Beckett and the testatrix, Sarah Ritchie. During the second marriage, between the 30th May, 1850, and the

1887.
Beckett & Merch'ts Bank.

13th January, 1880, Walter W. Beckett acquired a considerable amount of real estate, seized as hereinafter mentioned, no real estate having been acquired during the first marriage.

On the 11th March, 1880, William H. Beckett executed a deed of transfer to his father, Walter W. Beckett, of all his rights of property, including his rights in the property seized as hereinafter mentioned for the nominal consideration of one dollar.

No inventory was ever made of either community, no account ever rendered. Walter W. Beckett continued throughout to possess all the property.

William H. Beckett died intestate 29th January, 1882

The Merchants' Bank recovered judgment against Walter W. Beckett, and thereunder seized the real estate already above alluded to.

The appellant, Albert Edward Beckett, opposed the sale, claiming three-eighths of the *nue propriété* therein accruing to him, as follows:—Two-eighths or one-fourth as legatee of his mother, Sarah Ritchie, and one-eighth as heir-at-law to his deceased half-brother, Wm. H. Beckett.

The Merchants' Bank contested this opposition for part, claiming that the appellant Albert Edward Beckett's demand should be reduced to one-fourth share, alleging that the community between Walter W. Beckett and his first wife, Margaret Walker, had been continued with him and afterwards with his second wife, who consequently only represented one-third of the property, which third passed by her will, one-half thereof, or one-sixth, to each of the two sons, viz., her own son, and the son of the first marriage, and by the death o the latter, half of his share, or one-twelfth, was added to A. E. Beckett's share, making it three-twelfths, or one-fourth of the whole, claiming that although there had been no formal demand for the continuation of the community, yet William H. Beckett had referred to it as a continued community in his deed to his father, and had thus and by his conduct admitted that there was such continuation, which was in fact in his interest, as it gave him a share in the real estate; while, on the other hand, A. E. Beckett contended that it required

1887.

Beckett & Merch'ts Bank.

a demand for the continuation of the community, which was at the option of W. H. Beckett; this demand was never made, and the community was consequently never continued; that, moreover, it was to put an end to this option, and all claims in respect of it, that the bequest of Sarah Ritchie was made and accepted; therefore, that in transferring his property to his father, William H. Beckett had and could transfer no interest whatever in the real estate which had all been acquired during the second marriage, and did not for any part of it fall into the first community. It is this last view which the Court is disposed to take, and will therefore reverse the judgment of the Court below.

The judgment of the Court is as follows:—

"The Court, etc.....

"Seeing that the judgment appealed from is based on the assumption that a continued tripartite community of property existed between the defendant, his second wife Sarah Ritchie, and his son W. H. Beckett, by his first wife Margaret Walker,—and after the death of his second wife, her son the opposant, as representing her in said assumed community, and that said second wife would be entitled to take but one-third of the property of such community upon its dissolution;

"And seeing that upon such assumption, taken in connection with the last will of said second wife made in favor of opposant and the said W. H. Beckett, and which they accepted as legatees thereunder, each of them would be entitled to take of the property of the community one-half of one-third, to wit, one-sixth only;

"And seeing that W. H. Beckett, the half-brother of opposant, died intestate leaving no heirs of his body, his half of one-third, being one-sixth of the community, devolved to opposant for one-half thereof, to wit, one-twelfth, and the other half, or one-twelfth, to their common father the defendant, which one-sixth taken under the will, with the one-twelfth inherited from his half-brother W. H. Beckett, makes three-twelfths, or one-fourth;

"That upon such assumption of a continued tripartite community, and under the said will of his mother, the

1887

Beckett & Merch'ts Bank.

judgment *a quo* gives one-fourth of the property seized in this cause (excepting the lot 159) only to opposant, instead of three-eighths thereof claimed by his opposition ;

"And considering said assumption erroneous, and that the respondents contesting have failed to establish the continued tripartite community of property by them claimed and pleaded in the premises, and that no such community ever did or could exist, unless the said W. H. Beckett and opposant had thought proper to, and had demanded and chosen that such continuance should have taken place, of which there is no proof, the evidence of record rather tending to establish the negative in this behalf ;

" Considering, therefore, that there is error in said judgment of date the 9th of February, 1886, rendered by the Superior Court sitting at Sherbrooke, the Court now here doth reverse and annul the same ;

"And proceeding to render the judgment which the Court below ought to have rendered ;

" Considering that the opposant, appellant, hath established the material allegations of his opposition by admissions and legal and sufficient evidence, and that he was and is entitled to claim and have from the seizure in this cause made, three-eighths of the lands and property seized (except as to lot 159 as to which his opposition was dismissed in the Court below) ;

"And considering that respondents have failed in law and in fact to establish the material allegations of their contestation of opposant's opposition, and more especially failed to establish the continued tripartite community of property between the parties above referred to, and upon the assumption of the existence of which the judgment *a quo* in their favor is based ;

"And considering such assumption erroneous, and any pleading or contestation based thereon unfounded ;

"And considering that no such community existed, the opposant, under his mother's will, is entitled to one half of one-half of the ordinary community which existed between his father and mother, *plus* one half of his brother's

quarter thereof, under said will, equal to three-eighths as aforesaid claimed by him; dismissing respondent's contestation of opposant's opposition in this cause, except as to said lot No. 159, doth maintain said opposition for and to the extent of one undivided three-eighths of the lands and property seized in this cause as aforesaid, etc."

Judgment reversed.

W. F. Ritchie, attorney for appellant.

Ives, Brown & French, attorneys for respondents.

(J. K.)

September 17, 1887.

Coram DORION, CH. J., TESSIER, CROSS, BABY, CHURCH, JJ.

ERNEST SEHLBACH ET AL.,
(*Plaintiffs in Court below*),
APPELLANTS;

AND

A. W. STEVENSON,
(*Defendant in Court below*),
RESPONDENT.

Consignor and consignee — Consignee taking goods at fixed prices, profits over these prices to be his—Rights of consignor.

HELD:—The fact that an agent to whom goods are consigned for sale is to have for himself all that he can get over a schedule price, does not make him the owner of the goods, and the price, when collected by his assignee after his insolvency, does not fall into his estate, except such portion thereof as represents the agent's profit. And so, where an agent took over a stock on consignment, under an agreement in writing by which he was to account for goods sold as per price list supplied to him by the consignor, the profits over this price to belong to the agent—it was held that the consignor was entitled to be paid in full, per price list, for goods sold by the agent before his insolvency, but the price of which was collected by his assignee subsequently.

The appeal was from a judgment of the Superior Court, Montreal (CARON, J.), June 22, 1885, dismissing the ap-

1887.
Schlbach & Stevenson.

pellants' action. The facts are sufficiently stated in the opinion of the Court.

The judgment of the Court below was in the following terms:—

"La Cour, etc.....

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

"Considérant que le défendeur a établi les moyens qu'il invoque par ses défenses;

"Maintient les défenses du défendeur et renvoie l'action des dits demandeurs avec dépens."

March 21, 1887.]

Trenholme and *Leet* for the appellants:—

The only reasonable conclusion that can be arrived at from the facts is that Haswell & Co. were only the agents of the appellants for the sale of their goods, and that before they had received the price from the purchasers they had no interest in the goods or their price beyond the amount of their commission, and that the moneys received by the respondent in this case, for which the appellants ask, were received by him precisely as Haswell & Co. would have received them had they received such moneys under the agreement between appellant and respondent, viz., as the agent of the appellants. *Ex parte Bright*, L. R., 10 Ch. Div. 566, is relied on. Both English and French writers admit that it does not make an agent a purchaser because he may retain for commission the difference between what he may get and the sum that will satisfy the principal.

Fleet, for the respondent:—

The relation between the appellants and Haswell & Co. was not that of principal and agent, but of vendor and vendee. Haswell & Co. sold the goods as owners thereof, and were not bound to account to appellants for any sums received by them as the price of sales made by them, but were simply bound to pay the appellants the fixed schedule prices. The respondent, as assignee of the insolvent estate of Haswell & Co., received the price of the goods sold, and held the same for the benefit of the cre-

ditors. The appellants had only a right to be paid a dividend out of the estate, the same as the other creditors, being 38½ cents on the dollar, equal to $91.75, which respondent brought into Court.

Sept. 17, 1887.]

CROSS, J. (for the majority of the Court) :—

One A. H. McKee was agent for the sale at Montreal of aniline dyes or colors, the manufacture of Selhbach & Co., of New York. In March, 1884, he made an arrangement, on certain conditions, to transfer this agency to Haswell & Co., a firm doing business at Montreal. These conditions were stated in a memorandum not signed, but to which sufficient reference is made to have them considered established. So far as concerns the present case the essential part of them will be found referred to in a letter dated at New York, the 7th March, 1884, written by Sehlbach & Co. to Haswell & Co. at Montreal, in which they say :—"We wish to say that we understand "you take our stock in Montreal, on consignment, and "give us the names of the customers whereas we give "you our lowest prices, which you will have to pay us, "*and the profits thereon are yours*, and you to pay us after "60 days in 60 days note, from the first of each month. "In taking our agency we expect you do not handle any "other aniline colors except ours. We hand you enclosed "our price list. These prices are selling prices to you, a "fair profit to be added will surely enable you to do a "large trade. Any change in prices we shall at once com-"municate to you."

Under the arrangement made, and on the conditions expressed in this letter, the agency was taken over by Haswell & Co., who continued it up to the insolvency of Haswell & Co., which occurred early in June, 1884. They assigned to the respondent, Stevenson, on the 10th of June, 1884. The goods in the interim were sold by Haswell & Co., the sales being distinguished from their other regular business by having the words "Agents for E. Sehlbach & Co.'s aniline dyes or colors," stamped across their letter-heads.

1887.

Sehlbach & Stevenson.

It appears that the business in the interval included sales only, but no collections, and since the failure and assignment by Haswell & Co. to the respondent he has kept an account of the moneys collected for Sehlbach & Co.'s dyes, by agreement with the appellant, until it should be determined to whom they belong, that is, whether Sehlbach & Co. can claim them as the proceeds of their goods, or if they must be considered part of the estate of Haswell & Co., on which Sehlbach & Co. can only claim concurrently with other creditors.

In the interest of the respondent it is argued that the sales made by Haswell & Co. must be considered to have been made on their account and at their risk, seeing that the goods were chargeable to them at a fixed price, and that whether they produced more or less the realization was at the risk of Sehlbach & Co.; that under such an agreement when they made a sale to a customer it necessarily implied and operated a double sale, viz., a sale from the manufacturers, Sehlbach & Co., to their own agents Haswell & Co., and a sale by the latter on their own account to their customer.

Viewing as a whole the relations of the parties towards each other, we cannot come to any other conclusion than that the account between Sehlbach & Co. and Haswell & Co. was a regular consignment account; that Haswell & Co. acted throughout in the quality of agents of Sehlbach & Co.; that this agency was not changed from the fact of Haswell & Co. undertaking to pay themselves by profits on fixed prices to them. The agreement was that it was to be an agency; the sales took place in the name of Haswell & Co., but as agents for Sehlbach & Co., who by way of further precaution exacted as a condition that the names of the purchasers should be furnished to them. The agreement in effect provided that the sales by Haswell & Co. should not be considered double sales, but sales as of agents for principals. Haswell & Co. did not hold themselves out as owners, but as agents, so that the public were not deceived, nor could additional credit have been given to them on this ground, and there was

nothing compromising as regards their position from the understanding that Haswell & Co. were to take their payment out of the profits. The sales were made for the account of Sehlbach & Co.; the proceeds have been kept separate and belong to them.

As regards the authorities cited, there is one case, viz., *Towle* v. *White*, 21 W. R., p. 465, or *White* v. *Neville* as reported in 6 Chancery Appeal cases, p. 397, which seems to give some countenance to the respondent's pretensions, but it is not a parallel case. In that case, N., the agent, added to the value of the goods by a process of dyeing before he sold them. The price, therefore, included compensation for property of his own. He paid the proceeds into an account with his partners, on which he could draw as well for his own private expenses as to pay Towle & Co. Application was refused to allow Towle & Co. to prove against the partnership estate of N. & J., into which N. had paid the money with full knowledge by N. & J. of the facts.

It more resembles the case of *Ex parte Bright, in re Smith*, L. R., 10 Ch. D. 566. Equity is strongly in favor of appellants' case, and we find no rule of law which excludes their remedy.

We will, therefore, reverse the judgment of the Superior Court, and give the appellant judgment for the price of his goods, the agent's commission deducted.

BABY and CHURCH, JJ., dissented.

The judgment in appeal is as follows:—

"The Court, etc.....,

"Considering that the appellants have proved that the moneys sought to be recovered by them in the present action are the proceeds of sales made of goods belonging to them, and by them consigned for sale to the firm of Haswell & Co., and by them acting as their consignees and agents sold on their account, and now in the hands of the respondent, who has kept them separate from the moneys and assets of the said Haswell & Co., to the amount of $271.95;

"Considering, therefore, that there is error in the judg-

1887.
Schlegel & Stevenson.

ment rendered by the Superior Court at Montreal, on the 22nd of June, 1885;

"Doth reverse, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth adjudge and condemn the respondent to pay and satisfy to the appellants the sum of $271.95, with interest, etc. (the Hon. Justices Baby and Church dissenting)."

Judgment reversed.

Maclaren, Leet & Smith, attorneys for appellants.

Robertson, Fleet & Falconer, attorneys for respondent.

(J. K.)

September 17, 1887.

Coram TESSIER, CROSS, BABY, CHURCH, JJ.

THE ULSTER SPINNING CO.,

(*Plaintiffs in Court below*),

APPELLANTS;

AND

ALEXANDER M. FOSTER ET AL.,

(*Defendants in Court below*),

RESPONDENTS.

Consignor and Consignee—Packing Cases—Account Sales rendered during series of years—Acquiescence—Proof—C.C. 1234.

THE respondents, consignees at Montreal, under a written agreement, of appellants in Belfast, Ireland, accounted from time to time for the goods consigned to them, but never made any return for the price of the cases in which the goods were packed. These cases were always charged in the appellants' accounts, but the only reference made by the appellants to the omission to account for the packing cases, was contained in a letter in which they merely said:—"We observe you "do not make any return for the cases." The written agreement did not make any mention of the cases. Three years later the account was closed without any reservation as to the packing cases. The appellants afterwards brought an action in *assumpsit* for the price of the cases.

1887.

Ulster Spinning Co. & Foster.

HELD:—1. That the action could not be maintained, seeing that the appellants had notice during three years, through the respondents' accounts, that the packing cases were not being allowed for.

2. That parol evidence was inadmissible to vary the terms of the written agreement by proving that there was an understanding that the cases should be paid for.

The appeal was from a judgment of the Superior Court, Montreal, (MATHIEU, J.), June 27, 1885, dismissing the appellants' action. The facts are set forth in the opinion of the Court. The judgment of the Court below was in the following terms:—

"La Cour, etc.....

"Attendu que la demanderesse réclame des défendeurs par son action une somme de $794.57 pour prix et valeur de caisses contenant des marchandises que la demanderesse aurait transmises au défendeurs pour être vendues par ces derniers à commission pour le compte de la demanderesse;

"Attendu que les défendeurs ont plaidé à cette action qu'ils ne se sont jamais obligés de payer les boites ou caisses dont la valeur est réclamée par l'action de la demanderesse, et que par la coutume du commerce ils ne sont pas non plus tenus de payer la valeur de ces boites; qu'ils ont de temps à autre rendu compte à la demanderesse des ventes par eux faites des marchandises à eux transmises comme susdit, et ont réglé avec la dite demanderesse pour le prix de ses dites marchandises, et qu'ils ne lui doivent rien;

"Attendu que par sa lettre du 22 avril 1880, la demanderesse déclare qu'elle transmettra aux défendeurs des marchandises pour être vendues par ces derniers moyennant une commission de 5½ par cent, les défendeurs devant payer le fret, l'assurance, les droits de douane et toutes les autres dépenses subséquentes à l'envoi (*shipment*) des marchandises de Belfast;

"Considérant que cette convention par ses termes ne met pas à la charge des défendeurs les caisses en question mais au contraire exclut le coût de ces caisses, des charges que la demanderesse impose aux défendeurs;

1887.
Ulster Spinning Co. & Foster.

"Considérant qu'il est bien vrai que la demanderesse, dans ses envois aux défendeurs, a toujours chargé le coût des caisses, mais qu'il semble résulter des termes de la lettre de la demanderesse du dixneuvième octobre 1880 que cette charge des caisses était faite pour le cas où les défendeurs auraient fait payer à leurs pratiques le coût de ces caisses;

"Considérant que les défendeurs n'ont jamais reconnu leur obligation de payer pour les dites caisses et qu'on ne peut présumer cette obligation en face d'une convention formelle, par laquelle ils n'étaient tenus qu'à payer les charges subséquentes à l'envoi de marchandises de Belfast;

"Considérant que les défenses des défendeurs sont bien fondées;

"A renvoyé et renvoie l'action de la demanderesse avec dépens distraits, etc."

May 27, 1887.]

R. D. McGibbon, for the appellants, relied (1) upon the evidence as to the verbal contract that the cases were to be paid for; (2) the invariable charge in the invoices; (3) the appellants' letter of Oct. 19, 1880, in which they said: "We observe you do not make any return for the cases"; (4) the custom of trade to charge for cases.

L. H. Davidson, *Q. C.*, for the respondents, submitted that the letter of 22nd April, 1880, constituted a special contract, and precluded any claim for the packing cases, it being stipulated therein as follows: "You (that is the respon-
" dents) to pay freights, insurance, duties and all charges
" *subsequent to the shipment of the goods from Belfast*, and re-
" turn the sales to us on the current price list supplied to
" you by us at date of sale, without other deductions than
" the 5½ per cent. referred to above." Verbal evidence could not be allowed to vary or contradict the terms of this agreement.

Sept. 17, 1887.]

CROSS, J., for the Court:—

The Ulster Spinning Company, appellants, manufacturers of linens at Belfast, in Ireland, made consignments

1887.

Ulster Spinning Co. & Foster.

of goods to the firm of Foster, Baillie & Co., at Montreal, commencing in March, 1880, and closing with an apparent settlement of account on the 13th March, 1884. William Minto, an employee of the firm of Foster, Baillie & Co., seems to have first acted in having the account opened. He saw the appellants personally at Belfast, in Ireland, and discussed the subject with them. After he left for Montreal, they embodied their terms in a letter written and sent to Foster, Baillie & Co., at Montreal. The business was conducted without dispute between the parties up to 1883, when Minto, having left the employ of Foster, Baillie & Co., and entered into partnership with one Lavigne, and being again in Ireland, arranged with the appellants to have their account transferred to the firm of Minto, Lavigne & Co., who thenceforth became agents and consignees of the appellants.

After the account was closed with Foster, Baillie & Co., a pretension was set up by the appellants that they had not been paid for the cases which contained the goods which during upwards of three years they had consigned to Foster, Baillie & Co., and which had been accounted and settled for by Foster, Baillie & Co., without mention of the cases. The appellants accordingly brought the present action, which is not an action to correct or modify the accounts or raising any claim to have errors repaired, but is simply based upon allegations in the form of *assumpsit*, claiming that Foster, Baillie & Co. owed them $794 for the price and value of boxes, packages and packing cases, enclosing and encasing goods shipped by appellants to Foster, Baillie & Co., and at their request, and by agreement, and which by the custom of trade they were bound to pay.

To this action the respondents Baillie & Co., pleaded that they had never agreed to pay for the cases; that the goods were received under a special agreement which made no mention of payment of cases, nor were they bound by the custom of trade to pay for them; further, that they had accounted from time to time for the goods consigned to them, and at the termination of their agency

1887.
Ulster Spinning Co. & Foster.

had finally accounted to the then agents of the appellants and settled with them.

As regards the evidence bearing on this issue, the appellants' letter of the 22nd April, 1880, runs to the effect that Baillie & Co. were to pay freights, insurance, duties and all charges subsequent to the shipment of the goods from Belfast, and return the price to them, the appellants, on the current price list supplied by appellants to respondents, without any other deduction than the commission of 5½ per cent. referred to in the letter. The respondents, from time to time, accounted for goods, but never made any mention whatever of the cases, which, however, were always charged in the appellants' accounts; neither did the appellants, during the whole course of the account, make any reference to the cases save in one letter, of date the 19th October, 1880, in which they say, "We observe you do not make any return for the cases." This could scarcely be construed to be the language of criticism or complaint, or a demand that the cases should be paid or even accounted for; it might as well be construed as an acquiescence in Baillie & Co.'s treatment of the affair, that is, that the appellants, having observed that Baillie & Co. allowed nothing for the cases, they had noticed it, but made it no subject of demand, consequently acquiesced. It is true that Minto, being examined for the appellants, undertakes to swear that it was understood the cases were to be paid for, but besides his being an interested witness who superseded Baillie & Co. in the agency, his evidence in this respect would be adding to, if not contradicting the appellants' letter of the 22nd April, 1880, which could not be permitted.

Again, as regards the custom of trade, on which the evidence adduced may be said to be contradictory, it is obvious that the ordinary relation between the consignor of goods for sale and the consignee leaves the produce of the goods, including accessories such as cases, at the risk of the consignor, unless there be a special agreement to the contrary. It is true that in this case there was a special agreement, but it made no mention of, and did not

1887.

Ulster Spinning Co. & Foster.

extend to, payment of the price of the cases. Again, cases, after they have served their purpose of protecting the goods during transmission, are usually of little or no value; it would be extremely unreasonable, and would require a very special agreement to make the consignee liable for them at their full cost, which is the pretension put forward in this case by the appellants.

Should all these difficulties be got over, there still remains the fact that the appellants allowed three years to pass over with full warning through respondent's accounts that the cases were not being allowed for, and had their account closed on the same principle before they made any claim for payment of cases, which seems to us sufficient reason for refusing to allow the account to be reopened for such a claim as is now made, especially as appellants have not asked for the specific remedy. The case of *Dudley & Darling*, Montreal Law Reports, Q.B., vol. 2, p. 458, is more than sufficient precedent to warrant us in this conclusion. We must, therefore, confirm the judgment which the Superior Court gave in this case.

Judgment confirmed.

McGibbon & McLennan, attorneys for appellants.

L H. Davidson, attorney for respondents.

(J. K.)

December 22, 1887.

Coram TESSIER, CROSS, BABY, CHURCH, JJ., DOHERTY, A.J.

FRANCIS E. GILMAN,

(*Plaintiff in Court below*),

APPELLANT;

AND

EBENEZER E. GILBERT ET AL.,

(*Defendants in Court below*),

RESPONDENTS.

Surety—Cash security—Deposit receipt held by Government—Failure of Bank—Responsibility.

THE appellant agreed to put up a cash security of $15,000 to the Government for the performance of a contract by the respondents, which security was to remain in the hands of the Government until the contract should be fulfilled; and the respondents were to pay to the appellant $2,000 per annum until the security should be released. By arrangement with the Exchange Bank a deposit receipt for $15,000 was accepted by the Receiver-General, and that sum was placed to his credit in the Exchange Bank and remained under his control.

HELD:—That the loss of the $15,000 by the failure of the Bank, was a loss to be borne by the Government and not by the appellant, and that the appellant was entitled to recover the $2,000 from the respondents, notwithstanding the tender back to him of the deposit receipt; that the terms on which the appellant obtained the credit at the Exchange Bank were not material to the issue, the appellant having furnished what was accepted by the Government as equivalent to cash at the time it was given; that the amount being entered in the books of the Bank to the credit of the Receiver-General, the deposit thereby became a debt due by the Bank to the Receiver-General, and was at the risk of the Government.

The appeal was from a judgment of the Superior Court, Montreal, (PAPINEAU, J.), April 30, 1886, dismissing an action brought by the appellant for an unpaid balance on the amount which the respondents agreed to pay to him annually, in consideration of his putting up a cash security for the performance of a contract by the respondents.

The opinions fully explain the case. The judgment appealed from was in the following terms :—

" La Cour, etc.....

" Considérant que le demandeur allègue qu'à raison de ce que les défendeurs tenaient de William Davis & Sons le transport d'un contrat que ces derniers avaient avec Sa Majesté la Reine, ou le Gouvernement du Canada, pour le chenal dans le rapide des Gallops, il s'était obligé de fournir et avait fourni au Gouvernement un dépôt en argent comptant de $15,000, que le dit Gouvernement a accepté, et qu'il retient actuellement pour sûreté de l'exécution du dit contrat ;

" Considérant que le demandeur allègue avoir fait, le onze juillet 1882, par lettre, une convention à l'effet que si le dit dépôt n'était pas entièrement libéré le ou avant le 26 de juin 1883, les défendeurs s'obligeaient à donner au demandeur leurs billets promissoires pour les sommes suivant, savoir : $300 payable le 15 de juillet 1883, et $350 payable le 15 de chacun des mois d'août, septembre, octobre, novembre et décembre 1883 ;

" Que tous ces billets devaient être donnés au demandeur le 26 de juin 1883, payable à Montréal, et qu'à défaut de ce faire, ils paieraient comptant, au demandeur, la somme de $12,000, en un seul montant, le 26 de juin 1883 ; et qu'à défaut de libération complète du dit dépôt, les défendeurs paieraient comme ci-dessus au demandeur $2,000, le 26 de juin aussi longtemps que le dit cautionnement resterait entre les mains du Gouvernement du Canada ;

" Que le 26 de juin 1884, les défendeurs se sont acquittés de leur obligation, mais que le 26 de juin 1885, ils n'ont remis au demandeur ni billets ni $2,000 qui lui sont devenus dues le dit jour ;

" Que depuis le 26 juin les défendeurs auraient payé au demandeur en différents temps diverses sommes formant $666.64, laissant due au demandeur une balance de $1,333.36, qu'il réclame ;

" Considérant que les défendeurs ont plaidé en substance, qu'ils ont fait la convention en question, mais que le demandeur n'a pas réellement fourni au Gouvernement

1887.

Gilman & Gilbert et al.

un dépôt en argent de $15,000, mais a frauduleusement et collusoirement avec Thomas Craig fourni au Gouvernement un simple reçu de dépôt, pendant que ce dépôt n'a jamais été actuellement fait ;

" Que les défendeurs croyant que le dépôt avait été réellement fait de bonne foi, se sont obligés à payer au demandeur $2,000 par année comme intérêt du dit dépôt, tant que ce dernier ne serait pas libéré, et qu'ils ont payé au demandeur cette somme annuellement, et qu'ils ont payé la proportion de cette somme accrue depuis le 26 de juin 1885, jusqu'au 20 de novembre 1885, et que le dit 20 de novembre 1885, ils ont fait offrir au demandeur par le ministère de Maître Marler, Notaire, le dit certificat ou reçu de dépôt, et que le demandeur a refusé de le recevoir ;

" Considérant qu'ils plaident en outre que le 15 de septembre 1883, la Banque d'Échange où le dit prétendu dépôt a été fait, aurait fait faillite, et que le Gouvernement du Canada a notifié les défendeurs que le dépôt en question n'était plus suffisant et que les défendeurs eussent à leur fournir une autre sûreté ; que les défendeurs n'ont découvert qu'après le 20 de novembre dernier que le dépôt n'était qu'un fiction, et qu'ils ne doivent plus rien au demandeur ;

" Considérant que la somme de $2,000 que les défendeurs se sont obligés de payer au 26 de juin de chaque année tant que le dit dépôt ne serait pas complètement libéré, était à raison de l'utilité qu'ils pouvaient retirer de la sûreté fourni au Gouvernement et que cette somme devenait due de jour en jour, *de die in diem*, et à raison de cette utilité seulement, quoiqu'elle fut payable à un terme préfix ;

" Considérant que les défendeurs ont prouvé les allégations principales et essentielles de leur défense, et spécialement qu'ils ont offert, par le ministère de Maître Marler, le certificat ou reçu de dépôt en question au demandeur le 20 de novembre 1885 ;

" Considérant que dès avant cette dernière date le dit dépôt avait été considéré comme inutile par le Gouverne-

ment, mais que les défendeurs ne paraissent avoir donné connaissance de ce fait au demandeur que par le dit protêt;

"Considérant qu'il est prouvé que les défendeurs ont payé au demandeur $883.30 depuis le 26 de juin, 1885, et que ce montant couvre complètement ce qui était accrue de la dite somme de $2,000, en vertu des conventions des parties jusqu'au 20 de novembre 1885, date du dit protêt, et offre de remise du certificat ou reçu de dépôt en question, et que les défendeurs ne doivent rien au demandeur; Renvoie l'action du demandeur avec dépens, etc."

The case was twice argued—the second time before the Court constituted as above mentioned.

Nov. 15, 1887.]

Gilman and *J. N. Greenshields* for the appellant:—

The question of the sufficiency and regularity of the security is certainly not one that can be raised by the respondents. They can have no interest in this question. The consideration promised to respondents by appellant, was that he should furnish the security required by the Government to enable the respondents to obtain and carry on their contract, and secure thereby the benefit for themselves. Has the appellant fulfilled his obligation? Undoubtedly he has. Whether the Government was deceived by the appellant (of which there is not the slightest proof) and received from him as cash, security which afterwards turned out to be valueless, is a matter relating exclusively to the contract between the Government and appellant, and which can be settled and adjudged upon only upon a contestation between these parties. With respect to the respondents it is *res inter alios*. The security is acknowledged to have been given and accepted. The appellant was never called upon to replace or make good this security after the failure of the Bank; never received any intimation from the Government or anyone else of its insufficiency; the Government did not intervene in this suit to complain or demand that the security be held to be, and to have been, irregular and void; on the contrary, the Court has the positive declaration in writing contained in

1887.

Gilman & Gilbert et al.

a solemn deed, that this security was given by the appellant to the entire satisfaction of the Government and of the respondents.

The appellant submits that no parol evidence could be adduced to contradict this statement of a solemn deed in writing, and no legal grounds were alleged to allow of such evidence. Moreover, in the attempt to urge the grounds of objection which the Government alone could urge, the result is that it is proven that the amount of the security, $15,000, was obtained by the appellant from the Exchange Bank of Canada, regularly transferred to and accepted by the Government, who thought proper to leave this money in the Exchange Bank, and for which the appellant gave full consideration. Supposing, for a moment, that the Exchange Bank had not failed, and that the Government had returned the appellant the $15,000 in cash on the 20th November, 1885, would not the appellant still be entitled to the payment of the $2,000 due him by respondents on the 26th June previous (1885)? Certainly he would. The appellant received the payments due June, 1883, June, 1884, and only part of the payment due June, 1885, and there was no pretence of returning the security till November, 1885, consequently appellant was entitled to be paid the amount due 26th June, 1885, sought to be recovered by the present suit.

Archibald, Q. C., for the respondents:—

We understand that appellant bases his case upon two propositions:

First and principally that, seeing the failure of the Exchange Bank, the Government could not liberate itself as regards him, by a return of the deposit receipt, but was obliged to return him $15,000 in cash. In other words that his alleged deposit in the Exchange Bank was at the risk of the Government and not at his risk.

Second. That in any event the interest of $2,000 per annum having been, by the contract, payable in advance, on the 26th of June, and that delay having passed without appellant being liberated from his security, respondents could not avoid payment of the whole amount,

although the appellant was after five months relieved from his security, and although the appellant had been in the habit of receiving said interest monthly.

There does not seem much that need be said in regard to the first proposition. In the first place what the Government required was security. They might have demanded a deposit of cash in their own hands; but for the convenience of appellant they consented to accept a Bank certificate of deposit. The appellant chose the Bank, not the Government. It was the appellant who was getting $2,000 per annum for the use of the deposit receipt. But besides that, it is clearly proved that the only value given by appellant for the deposit receipt was his promissory note for a like amount which the Bank was always ready to deliver back upon return of the receipt. It would be ridiculous, as it seems to us, to hold the Government responsible for the money (supposing money to have been deposited) in the Exchange Bank. It is evident that the cash deposit of $15,000 with the Government was by the favour of Government, substituted by the deposit actually made at the request of, and to suit the convenience of appellant. The Court below dismissed this contention without notice.

As to the second contention, that the 26th of June being passed, the whole $2,000 fell due and is recoverable, we think the judgment very conclusively disposes of that proposition. There was no aleatory element in the contract. It was in reality a contract of lease and hire in one sense. The appellant leased to respondent a certain valuable security for the sum of $2,000 per annum, so long as the security should not be released by the Government, and it was at first stipulated that the rent should be paid in advance. It is clear that the rent accrued *de die in diem* as the honorable Judge observes. The moment the lease was terminated by the re-delivery of the thing leased, the obligation to pay the rent ceased. Supposing the obligation to pay in advance had not been departed from, it would have made no difference. A house is rented for a year for $1,000, which is paid in advance, and after a month it is destroyed

1887.
Gilman & Gilbert et al.

by an earthquake, the tenant could clearly recover back a proportionate part of the rent. Here the lease was made not for any specified time, but until a certain event should happen; it is clear upon every principle that, when the consideration proceeding from appellant ceased the obligation to pay contracted by respondent also ceased.

We refer to Story on Bailments, 9 ed. No. 417; Pothier, Contrat de louage, Ed. Bugnet 1847, No. 139.

CHURCH, J. (*diss.*):—

The decision of this case turns upon the construction of the agreement of the 11th July, 1882, with whatever assistance can be obtained in so doing in examining the agreement passed between the Government, Davis, Gilbert and the appellant on the same day, and referred to in the agreement, and by an examination of the receipts and other documents which subsequently passed between the different parties, especially the receipts, and the evidence of record in the case.

It is quite manifest that the respondents agreed with the appellant that he, the appellant, should furnish the security required by the Government, which was a security for a future and contingent condition, namely, that the respondents would finish and complete the contract by 20th July, 1884; that the Government was content that this security should consist in the deposit, during that period of time, of the sum of $15,000 in the Exchange Bank by Mr. Gilman to the credit of the Receiver General; that Mr. Gilman and the Messrs. Gilbert joined in a representation to the Government that this had *bona fide* been done, and in proof of that produced the deposit receipt, page 10 of appellant's factum.

There is little, if any, doubt that in so doing the Messrs. Gilbert were in perfect good faith, and there is just as little doubt that the appellant knew that *de facto* no such cash deposit had been received by the bank, but the bank had received the note of the appellant for that amount payable on demand and without interest, and $400 in cash.

For this security which the respondents assumed had been made and which the Government had accepted in good faith, they agreed to pay $2,000 per annum in the manner and on the terms in the agreement of the 11th July, 1882, set forth.

It is admitted they paid this sum up to November, 1885, a period of three years and five months, when the Government having notified Messrs. Gilbert of the insolvency of the Exchange Bank and having required substituted security, and having surrendered up the deposit receipt, they (the Messrs. Gilbert) tendered it, through a notary, back to Mr. Gilman, which instrument Mr. Gilman refused to accept, alleging that he was entitled to a return of $15,000 in cash, and then he instituted the present action to recover the balance of the sum of $2,000 for the year 1885-86, expiring on the 26th June, 1886, viz., $1,333.33, alleging that it was due and payable from that latter date.

If it were not for the specific admission of the respondents in their factum that the sum of $2,000 was payable each year in *advance* after that of the first year, which was made the subject of special arrangement and made payable in six monthly payments after the expiry of the first year, I would have thought the alternative of six months extension would have, perhaps, applied as well to subsequent annual payments as to the first, for in the first year, the $2,000 was made payable at the date named (26th June) in cash, with the faculty of giving six notes in lieu thereof, and the agreement respecting any other payment stipulated it might be paid "as above," and "as above" provided for an extension for six months if notes were given. However, that I take it was not the intention of the parties, since they are both agreed the amount was by the original agreement payable in advance. The defendant, however, contends that such agreement was modified and a consent given that the payments should be made monthly, and he produces a large number of receipts, fifteen in number, which go to show that the plaintiff (appellant), had in fact consented to receive his payment

1887.
Gilman & Gilbert et al.

in monthly instalments, and I am strengthened in this view by the terms of many of the receipts themselves, wherein the amount paid is either for one or more months' *commission* as it is called, and speaks of such payment being made as per agreement or other equivalent expressions. Be this as it may, it is quite evident that the practice was followed almost from the beginning of subdividing the payment, and that it continued up to the very last payment, 25th October, 1885, apparently without demur or protest by the appellant. As to the question of fact, whether the appellant ever deposited the money, the dates show the appellant's recollection of the facts does not agree with the dates he thinks he got it and paid the cash over (proceeds of his note); inasmuch as the deposit receipt was granted 26th June, and the note is dated 12th July afterwards.

The question now comes to be decided: was the appellant entitled to claim for the balance of the unexpired year, viz., eight months between November and June of 1885? I think not; the plaintiff had undertaken to deposit $15,000 for and on his behalf in the Exchange Bank; he did not do so. When the bank failed, the Government took advantage of its right to terminate the suretyship, and of the clause in the agreement whereby it might, at the termination of the agreement, return and deliver over either the cash which, at the time it was represented had been deposited, or "the cheque representing the same," *vide* agreement, page 6 of appellant's factum. These words obviously referred to the deposit receipt "representing the same," and the consequence was the security *quoad* Gilbert failed, with the tender back of it to Gilbert and its tender and delivery to Gilman, appellant. The earning power also ceased, because the agreement between appellant and respondents was that they would pay him "in default of his security being released," *vide* pages 8 and 9 of appellant's factum. It was released, and from that day forth their obligation to pay for its use also ceased. It is, to my mind, no answer (even if it were a fact) for the appellant to say, but you (respondents) agreed to pay in

advance. Suppose they did, and that the appellant, from good will or any other cause, did not choose to exact payment and accepted payment as earned (by monthly instalments), in what way can that give him a right, now that it has become manifest that the consideration for the continuing obligation has ceased, and that the obligation will not continue? I even go further and I say that if they had paid, and the Government had afterwards validly terminated the suretyship, the respondents could have asked that the money which they had paid, under the impression that they would have the use of their suretyship for a year and which they had only enjoyed for four months, be repaid to them. It would have been otherwise if this failure to enjoy the benefit of suretyship had resulted from the fault or default of the Messrs. Gilbert, but they were entirely innocent in the matter and should not be made to pay, in my opinion, for what they did not receive value for. *Vide* Story on Bailments, § 417.

A good deal has been made in the argument of the entries in the Bank's books and what might or might not have happened if the Government had presented the cheque. Doubtless, if the Government had presented the cheque and had drawn the money, the position would have been a good deal altered, and the circumstances would have very much changed. The Government would undoubtedly have been obliged to have made good to the appellant the moneys which it had received, but as it did not choose to do so, and as it chose rather to allow it to remain where the appellant had placed it and with those whom he had selected to be its custodians, and to avail itself of the power to hand back the cheque representing the same, rather than the cash which the appellant, to my mind, never placed in deposit or custody, as he represented he had done, I think it was within the power of the Government, under the circumstances of the bank as admitted and shown in this case, to do as it did do, and that the Messrs. Gilbert having tendered the cheque or deposit receipt to the appellant and paid the commission

1887.
Gilman & Gilbert et al.

which represented its use for the time they enjoyed it, fully carried out all their engagements towards the appellant, and should be held exonerated and released from his claim. In this opinion Mr. Justice Baby concurs and with me thinks the judgment of the Court below should be confirmed, but, as the majority of the Court think otherwise, another view prevails.

CROSS, J. (for the majority of the Court):—

On the 5th of August, 1878, the firm of Wm. Davis & Sons made a contract with the Dominion Government for the extension of certain works in the channel of the Galops rapids on the river St. Lawrence.

On the 11th July, 1882, W. Davis & Sons assigned said contract and their interest therein to E. E. Gilbert & Sons.

On the same day a contract was entered into between Gilbert & Sons of the first part; Her Majesty the Queen represented by the Commissioner of Railways of the second part; the now appellant, Gilman, of the third part, and W. Davis & Sons of the fourth part; whereby it was declared that said assignment was so made with the consent of the Government of Canada expressed in a certain order-in-council passed on the 30th June, 1882, by the terms whereof Wm. Davis & Sons were on the execution of the assignment and on the deposit by said E. E. Gilbert & Sons of certain cash security as mentioned in the order-in-council, to be relieved from all liability in connection with the said works, and the said E. E. Gilbert & Sons would thereupon be accepted by Her Majesty as the contractors for the completion of the works embraced in said contract.

That the said assignment had been executed and deposited in the Department of Railways and Canals, and the said cash security had been put up as required by the said order-in-council, and the said E. E. Gilbert & Sons were required by Her Majesty to enter into a covenant on their part to complete the said contract for which the time was extended to the 20th July, 1884. An undertaking to do so was entered into, as expressed in said document,

and it proceeded to declare as follows: Whereas the said cash deposit of $15,000 required to be made by the said E. E. Gilbert & Sons, under the terms of the said order-in-council, had been put up by the said Gilman, at the request and for the benefit of the said E. E. Gilbert & Sons, it was thereby agreed and declared that the said cash deposit should be held by Her Majesty in lieu of that put up by the said Wm. Davis & Sons, and upon and subject to the same terms and conditions, and for the said purposes, and that upon the completion of the said works according to the terms of the said contract the said cash deposit, *or cheque representing the same*, should be returned and delivered to the said Gilman.

On the same day, the 11th July, 1882, E. E. Gilbert & Sons addressed a letter to Gilman, expressed as follows:

F. E. Gilman, Esq.,

DEAR SIR,—In the event of your $15,000 security deposited with the Government of Canada for us in the Galops Rapids contract not being entirely released on or before the 20th of June, 1883, we hereby agree to give you our promissory notes for the following amounts:

(1) For $300 payable on the 15th July, 1883.
(2) For $300 payable on the 15th August, 1883.
(3) For $250 payable on the 15th September, 1883.
(4) For $350 payable on the 15th October, 1883.
(5) For $350 payable on the 15th November, 1883.
(6) For $350 payable on the 15th December, 1883.

All said notes to be given on the 26th June, 1883, and payable in Montreal for the amounts and on the dates specified above, and in default of so doing, we hereby agree to pay you the sum of $2,000 in cash; said sum to become due in one amount on the 26th June, 1883, and in default of your security being entirely released, we hereby agree to pay you as above—$2,000 on the 26th day of June, in each year, so long as said security remains in the hands of the Government of Canada, or so long as you are not released therefrom.

Under this agreement Gilman appears to have been paid the $2,000 falling due in June, 1883, also that falling due in June, 1884. That falling due in June, 1885, was paid in part, Gilman having consented to receive it by monthly instalments. The present action was instituted 30th November, 1885, for $1,160.67, a balance of said $2,000 falling due 20th June, 1885.

This action was met by a plea that Gilman had never

1887.
Gilman & Gilbert et al.

put up any cash security, that he only gave a false and fraudulent deposit receipt procured by conspiracy with and connivance of the manager of the Exchange Bank, who was paid $400 to corrupt him; that the Exchange Bank failed on the 15th September, 1883, and on the 17th November, 1883, respondents had returned the false deposit receipt to the appellant; consequently they were released from further payments.

The documents cited are admitted. There are but three witnesses examined, all on the part of the respondents. 1st. Mr. Marler, notary, who proved that on the 17th November, 1883, at the instance of the respondents he tendered to the appellant a document which reads as follows:—

$15,000.

No. 124. MONTREAL, 26th June, 1882.

The Exchange Bank of Canada acknowledges having received from the honorable the Receiver General, in trust for contract E. E. Gilbert, Galops Rapids, the sum of $15,000, which sum will be repaid to the Receiver General, or order, only on surrender of this certificate.

[Signed] T. CRAIG,
Managing Director.

Entered
Signed, JAMES W. CRAIG,
Accountant.

The appellant refused to accept this document. Gilman himself being examined, admits that he paid the money into the Exchange Bank to the credit of the Receiver General, which he had raised by discounting his note with the same Bank, and delivered over the deposit receipt to the Receiver General when the contract for the transfer of the work was signed at Ottawa on the 11th of July, 1882. The remaining witness is Mr. Varey, a clerk in the Exchange Bank, who proves that the appellant gave a demand note to the Bank for $15,000 without interest, but paid $400 on account of interest. That the note was put through by the Bank as a special loan to appellant entered in the calls loan ledger under date 12th July, 1882. The certificate given was, however, dated eighteen days before the demand note. The $15,000 loan was regularly entered and passed through appellant's current account, and appears entered in the Journal of the

Bank, under date, the 12th July, 1882, as follows: "Debit "loans on call, $15,000; and credit per accounts, $15,000." The $15,000 is credited to the Receiver General of Canada in the Ledger of the Bank. The General Ledger is produced, wherein, at p. 752, there is shown a credit to the Receiver General, June 28th, 1882, by F. E. Gilman, $15,000.

The whole transaction was that Mr. Gilman lodged $15,000 and placed it to the Receiver General's account. Gilman was originally credited in his current account with the loan and the loan debited; then his current account debited and the Receiver General credited, so the four entries balanced. His loan account was debited only, not credited.

This evidence entirely confutes that part of the defence which contends that the appellant never put up any security and that the deposit receipt was false and fraudulent, besides which the appellant was not bound to go into the question of the consideration he had given the Bank. That institution had never questioned their obligation, and it was acknowledged as cash by the four parties to the agreement of the 11th July, 1882.

The terms on which Gilman got credit at the Exchange Bank were no matter of concern either to the Government or to Gilbert & Sons; but the further contention is now more especially urged that there was restored to the appellant what he had given as cash.

The answer is that it was cash or its equivalent and accepted as such when given; but it was not cash, on the contrary it was worthless, when offered back. Further, it was the money deposited that was transferred to the Receiver General, not the paper vouching for its then existence. When Gilman placed the money in the Bank he divested himself of all authority over it. That is evidenced by the tenor of the document given by the Bank. The money was by the Bank acknowledged to have been received from the Receiver General himself. It was immaterial whether he placed it there himself, as evidenced by the document, or whether somebody else

1887.

Gilman & Gilbert et al.

placed there for him, it was equally under his control. It is not shown how or by what arrangement this paper came into the respondents' possession. It appears that the Government asked him for additional security, because the Bank had failed, and he was probably weak enough to comply with their demand without considering the appellant's interest in the matter. The appellant is neither offered back his money nor any discharge of his security to the Government, both of which he is entitled to have if Gilbert & Sons have fulfilled their contract. The Minister of Railways and Canals acknowledged that the cash deposit had been put up by the appellant. The money was entered in the books of the Bank to the credit of the Receiver General. It was to all intents and purposes and in effect as if deposited directly by the Receiver General himself. The document issued by the Bank acknowledged the fact to be so. The deposit thereby became a debt due by the Bank to the Receiver General, subject to be drawn out by him at any moment as effectually as he could have drawn any other moneys deposited either by or for him. The Government in the name of Her Majesty contracted for a cash security; they accepted this deposit as cash; if they in the least suspected the solvency or standing of the Exchange Bank it was for them to refuse to accept as cash the deposit in question. An objection on this ground was improbable, as the Bank was at the time in good standing and was in fact a Bank in which the Government were making deposits. The Receiver General became holder of the deposit receipt, subject to such duties as regards diligence as were incident to the nature of the instrument. The form adopted placed the money entirely under the control of the Receiver General, and made it as much his as any other money paid into the treasury. By accepting the deposit so made for him in his name he made it his own, and subjected himself to the use of the necessary diligence required for its protection. It is said that Gilman chose the Bank. What responsibility that by itself involves, it is difficult to perceive. At all events

it was a chartered Bank, and one in which the Receiver General had an account, as shown by the evidence adduced by the respondents themselves. If the Receiver General was not satisfied with its responsibility he could at any moment have changed the deposit to another Bank. If he had any doubt, prudence and duty alike required him to withdraw the money. His failing to do so implied responsibility. It is nevertheless argued that the use of the word cheque in that part of the agreement of the 11th July, 1882, which provides for the return of Gilman's cash deposit, means not an actual cheque by the Receiver General on the funds wherever they might then be placed, but the identical deposit receipt which served to put these funds in the hands of the Receiver General. This, to begin with, is a strained construction, and the use of the term here cannot reasonably have such an extension. But if claimed to be a cheque, should it not then be subject to the diligence required from the holder of a cheque which allows a very brief space for collection, and in default of diligence, throws the loss by the failure of the drawee upon the holder? But is it only to be called a cheque and yet in its nature to be a deposit receipt? If even so, is there a great difference as to the time allowed for the exercise of diligence? I am not aware that there is. In either case it is a commercial instrument for the transfer of cash. The recipient not only admits this, but declares he had received the cash. I think no precedent can be produced or exists where, in law, the transferor of such an instrument is held liable to take it back after the lapse of over three years, and the drawee, or person standing in a like position, having value in hand, has failed. It was an instrument on which immediate diligence should have been done if Gilman was to be looked to; but in fact, by the purport of it, Gilman was already discharged, and the cash was held by the Receiver General at the risk of the Government. The paper transferred the money to the Government. It was not merely the paper that was transferred, it was the money represented by the paper. Suppose it to have been the paper. When

1887.
Gilman & Gilbert et al.

Gilman delivered it to the Receiver General 11th July, 1882, its cash value was $15,000; that cash value was thenceforth in the hands of the Receiver General; it could not be transferred for anyone else to receive the money save by his order endorsing the instrument. At the time he must have endorsed and delivered it to E. E. Gilbert & Sons, which would be about the 20th Nov., 1885, it was a worthless piece of paper. The Exchange Bank had failed long before that date, viz., in the autumn of 1883, on the 15th September of that year. No diligence whatever seems ever to have been exercised by the Receiver General to have the receipt cashed. This could only be done on the order of the Receiver General. Gilman could do nothing to withdraw the money or prevent the loss. It remained the money of the Receiver General until he transferred or drew it. As holder of the cheque, the Government were responsible and had to bear the loss by the failure of the Bank in the absence of diligence on their part. See art. 2352 C. C. "If the cheque be not presented for pay-"ment within a reasonable time and the bank fail be-"tween the delivery of the cheque and such presentment, "the drawer or endorser will be discharged to the extent "of the loss he suffers thereby." See Morse on banking p. 328 to 331, Smith's Mercantile Law, p. 300. Gilman was much less able to protect himself than the drawer or endorser of a cheque. Gilman has consequently never had his security released, his $15,000 never been returned to him; consequently E. E. Gilbert & Sons owe him the balance of the money they promised to pay him as a consideration for becoming their surety. Look at it in what way you will, even as a deposit of a cheque or receipt for money, the Government is responsible for the loss, C. C. art. 1973: "The creditor is liable for the loss "or deterioration of the thing pledged according to the "rules established in the title *of obligations*."

In this view of the case it is unnecessary to discuss the further question raised as to whether any balance was due for the time during which it is admitted the surety lasted. However, at first sight and without much

reflection, it seems to me that the contract between Gilman and Gilbert & Sons resembled less a contract of lease, as contended for by the respondents, than a contract of assurance, whereof the premium required to be paid annually and in advance.

The following is the judgment of the Court:—

"The Court, etc.,.....

"Considering that the appellant has proved the material allegations of his declaration;

"Considering that by a contract duly made and entered into on the 11th of July, 1882, between the now respondents of the first part, Her Majesty the Queen represented by the Minister of Railways and Canals of Canada, of the second part, the now appellant of the third part, and a certain firm of Wm. Davis & Sons, of the fourth part, it was among other things in effect declared and acknowledged that the now appellant had put up and furnished to the Receiver General a cash security of $15,000 for the performance of a certain contract which, by the consent of the Government, had been transferred by the said Wm. Davis & Sons to the now respondents, which said cash security was to remain in the hands of the Government until the said contract should be fulfilled;

"Considering that on the same day, the 11th of July, 1882, the respondents, by a letter of that date written and delivered to the appellant, agreed (with certain modifications as regards the first year), so long as the appellant's said $15,000 security deposited with the Government was not entirely released, that they would pay the appellant $2,000 on the 26th day of June in each year;

"Considering that the respondents paid the appellant $2,000 for each of the years 1883 and 1884, but that the payment falling due the 26th of June, 1885, was only partially made, leaving a balance unpaid thereon of $1,166.67 for which the present action is brought;

"Considering that the respondents, by their defence, claim that said yearly payments were divisible and became payable only *pro rata* and *de die in diem* while the said security remained unreleased in the hands of the

1887.
Gilman & Gilbert et al.

Government; that they had paid the appellant $833.33, being sufficient for that part of the year 1885 for which the said security had been unreleased, and they contended that for the remainder of the said year and thereafter the said security was released, because that on the 20th of November, 1885, they tendered to the appellant the deposit receipt of the Exchange Bank in favor of the Receiver General, payable by endorsement to his order, for $15,000 which they claim was the cash security put up and furnished by the appellant, and consequently pretended that the security of the appellant was entirely released, and that their obligation to make any further payments under their said agreement with the appellant made by said letter of the 11th of July, 1882, had ceased, and that they were discharged from any further liability under said agreement;

"Considering that said deposit receipt purported to be for $15,000 deposited by the Receiver General, and that sum was placed to his credit in the said Exchange Bank, and remained at his credit and under his control and at the risk of the Government from the time of its deposit in pursuance of said contract until the failure of the said Bank on the 15th September, 1883, as also thereafter;

"Considering that said tender of said deposit receipt to the appellant of the said 20th of November, 1885, was of no avail whatever to release the cash security so put up and furnished by the appellant to the Receiver General for the fulfilment of said contract;

"Considering that the loss of the said sum of $15,000 by the failure of the said Exchange Bank, is a loss to be borne by the Government, and not by the appellant, who is entitled to the return of his $15,000 in cash on the said contract being fulfilled and his said security not being restored to him nor released, he is entitled to recover from the respondents jointly and severally and as co-partners, the said balance of $1,166.67, with interest, as demanded by his declaration in this cause;

"Considering that there is error in the judgment rendered in this cause by the Superior Court at Montreal, on

1887,
Gilman
&
Gilbert et al.

the 30th of April, 1886, the Court of Our Lady the Queen now here doth reverse, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth overrule and dismiss the pleas of the respondents, and doth adjudge and condemn the respondents jointly and severally as copartners to pay and satisfy to the said appellant the sum of $1,166.67 with interest thereon from the 26th of June, 1885, and costs as well of the said Superior Court as of this Court, said costs to be taxed as in a cause of the second class. (The Honorable Justices Baby and Church dissenting)."

Judgment reversed.

J. N. Greenshields, attorney for appellant.
Archibald, McCormick & Duclos, attorneys for respondents.
(J. K.)

June 22, 1877.

Coram DORION, CH. J., MONK, RAMSAY, SANBORN, TESSIER, JJ.

ALEXANDER M. FOSTER,
(*Defendant in Court below*),
APPELLANT;

AND

JAMES BAYLIS,
(*Plaintiff in Court below*),

AND

ANTHONY McKEAND,
(*Intervenant in Court below*),
RESPONDENTS.

Insolvency—Estate reconveyed to Insolvent—Registered Judgment—Action to set aside hypothec.

HELD:—That a debtor against whose property a judgment has been registered, and who afterwards makes an assignment, and obtains back his estate by a composition with his creditors, in

1877.

Foster & Baylis.

which he undertakes to pay the hypothecs on his property in full, cannot have the hypothec so registered set aside, at his own suit, on the ground that it is a fraud on his creditors.

The respondent, Baylis, brought an action against the appellant to have it declared, by the judgment to be rendered, that, for the causes set up in his declaration, the defendant obtained no valid *hypothèque* by the registration of two judgments of *Foster* v. *Baylis*, after the *déconfiture* and insolvency of Baylis, and to have it declared that Foster was bound by the terms of the deed of composition as an ordinary creditor; and praying that the registrations be radiated, and the land declared free. The judgment appealed from granted the conclusions of the action.

Abbott, Tait, Wotherspoon & Abbott for the appellant:—

The main question which arose in the Court below may be thus shortly stated:

Can a debtor, against whose property a judgment has been registered, and who afterwards makes an assignment and obtains back his estate by a composition with his creditors, in which he undertakes to pay the hypothecs on his property in full, cause the hypothec created by such judgment and its registration to be set aside, at his own suit, on the ground that it is a fraud against his creditors?

The appellant contends that such an action can only be instituted in the interest of a creditor or creditors, and that the debtor himself cannot pretend to any right of the kind.

The appellant further contends that in this case the foregoing question is made more favorable to him by the fact, that the calculations upon which the debtor effected his composition with his creditors, contemplated the payment in full of the hypothec which he now seeks to have radiated.

The intervening party comes into the cause as the holder of a portion of the estate of the debtor under a transfer to him, as collateral security, to guarantee him against loss as the surety for the payment of this composition; and, therefore, as the appellant contends, stands in precisely the same position as the debtor himself.

The judgment of the Court below, however, does not decide the foregoing question in favor of the respondents. It gave them *gain de cause* upon a different ground: namely, that inasmuch as Baylis, the debtor, had received a reconveyance from the intervening party of his estate, he held it with the same rights as creditors would have had if no settlement had been made; and as they could have claimed the radiation of the appellant's hypothec, he had derived from them the right to do so. And judgment was rendered also in favor of McKeand, the intervening party, for no other reason that appears, except that it is stated that he is interested in the matter.

The appellant contends that these judgments are based upon an erroneous view of the facts of the case. No reconveyance had been made to Baylis of the immoveable upon which the appellant's hypothec attached; and the reconveyance, if made, would only have replaced him in the position he held before the composition was effected, and would not have given him any rights which the creditors had, apart from those they derived from him. And the other respondent only held temporarily the rights which Baylis had obtained under the composition.

The appellants' counsel cited Bioche, Faillite, No. 323.

The respondent's counsel cited 3 Bedarride, Faillite, p. 64; Dalloz, Juris. du Roy. 1855, part 2, p. 115.

SANBORN, J. (*diss.*):—

The question involved in this appeal is one of considerable interest, and of a novel character. It is, whether an insolvent can, after having got possession of his estate under a deed of composition, urge against a mortgage creditor that his mortgage being a registered judgment obtained when he was notoriously insolvent, is ineffective as a hypothec; and that, as respects him (the insolvent), the mortgage creditor is bound to accept the percentage fixed by the composition as a chirographary creditor.

It is proved that in the spring and summer of 1874, the respondent, Baylis, was notoriously insolvent, having

1877.
Foster & Baylis.

become so by large liabilities in connection with certain railways. On June 19th, and August 9th, 1874, proceedings were taken to force him into insolvency; and he made an assignment in August, 1874. On the 30th April, 1874, appellant obtained a judgment against Baylis for $6,500, which was registered on the 4th May, 1874; and another on the 27th June, 1874, which was registered on the 1st July, 1874. After the examination of his estate by his creditors, Baylis, on the 11th December, 1874, obtained the requisite number of his creditors to a deed of composition for 20 cents on the dollar. Baylis having complied with the terms of his agreement of composition, a deed was executed, transferring his estate to Anthony McKeand, the other respondent, who became security for the payment of the composition notes. On 4th January, 1875, McKeand transferred the moveables of the estate to Baylis, retaining in his hands the real estate to secure the payment of the composition notes, till he was released from liability. The deed of composition was confirmed by the Superior Court, 31st December, 1874. On the 30th April, 1875, Baylis and McKeand, by a protest, notified appellant of the composition, and called upon him to discharge the apparent mortgages created by his judgments, as having been obtained and registered after Baylis' insolvency was notorious. This not being acceded to, Baylis brought the present action, setting forth the facts, and claiming that, as possessing all the rights of the creditors, he had a right to the radiation of these hypothecs, and concluding that appellant be condemned to discharge the hypothecs; and in default thereof, that the lands affected be declared free from these charges.

After issue had been joined and evidence adduced between Baylis and appellant, to wit, on the 27th November, 1875, McKeand intervened, and asked, as a party interested, substantially the same as Baylis demanded.

The evidence is sufficiently conclusive that when the appellant obtained and caused his judgments to be registered, Baylis was generally known to be *en déconfiture*; and that it was known by appellant, who entertained the idea

of selling his notes upon which his judgments were based, about the dates when they matured, for 50 cents on the dollar of the amounts represented by them.

The question is resolved to a mere question of law. According to our law, from Baylis' known insolvency when the judgments were obtained and registered, the appellant, as respects the creditors, could not have secured any hypothec, and would have been compelled to rank as an ordinary creditor on Baylis' estate. Does the reconveyance of the estate to Baylis and McKeand give these parties the same rights as the creditors would have had? Or is Baylis estopped from [illegible] this ground? If so, has McKeand any different or other right than Baylis?

When Baylis made his assignment under the Insolvent Act of 1869, his estate went entirely out of his hands. Thereafter he had no control of it, and could do nothing to improve his condition. When the deed of composition was made under that law, the creditors conveyed to him, or McKeand in his interest, his estate under a new law. There was novation. He did not hold his estate as before, but he held it by virtue of a purchase from the creditors, with their rights. The composition did not in all cases terminate proceedings under the assignment. Under Sect. 95 of the Insolvent Act of 1869, if the composition is conditional, and the condition is not complied with, the assignee may resume the estate.

It is said that Baylis represented to the creditors that appellant's claim was hypothecary, and they were induced thus to release him for a lesser percentage than they would otherwise have done. All that he states is in a schedule, No. 27 of the record: "A. M. Foster holds "judgment registered against real estate, and a large "amount of collaterals from W. R. Hibbard & Co." This merely states a fact; and the portion relating to the collaterals from W. R. Hibbard & Co. would tend to inform the creditors that these judgments might be in part or in whole paid by other parties, and Baylis' estate so far relieved from them. Although he was the signer of the

1877.

Foster & Baylis

notes, they were for the accommodation of A. L. Catlin & Co., who, if solvent, would be the parties to pay them. That the assignee was not led into error by this statement is apparent from his testimony. "He afterwards (that is, "Baylis and himself), prepared another statement of "accounts, for the purpose of submitting it to the "creditors in connection with his offer of a composition "at the rate of 20 cents on the dollar. This statement was "made up by the insolvent and myself; and I consider it "substantially the same as plaintiff's exhibit A." And in this statement, to the item of Foster's claim is appended: "He (Foster) holds for the debt securities sufficient "to cover it." This representation to the creditors, instead of leading them to suppose that his judgment would, as a hypothecary claim, reduce the assets of the estate to their full amount, would tend to make them believe that they would be fully paid by securities furnished by parties for whom the debt was incurred, and the estate relieved from it altogether. Whether that be so or not, it does not materially affect the legal question. If Baylis deceived the creditors, it is between him and them. He has acquired their rights as I understand it.

We can have no positive precedents to guide us. Such a case could not occur under English law, where we naturally look for precedents in bankruptcy matters. There are analogous cases occurring in France; and the one of *Murat* v. *Leblanc*, cited from "Juris. du Royaume," of the year 1855, part 2, p. 118, is exactly in point; and the authors, so far as I can gather from them, generally treat the *concordat* as a novation. Bioche, "Dict. Pro. Civ." Faillite, No. 875, speaking of the *concordat*, says: "Le "failli est replacé à la tête de ses affaires, il a continué la "gestion commencée par les syndics."

Pardessus says: "Le *concordat* est dans l'intérêt de la masse;" and he describes the difference between union and *concordat*, showing that under one the insolvent is liable for everything; under the other, for only what is contained in the *concordat*. This is on the principle that the latter is a new title, and a different one; and if he

gets his title from the creditors, and they transfer all their rights, it follows that he can be subrogated in their right to urge nullity of hypothec, because registration is after known insolvency. Esnault says that hypothecary creditors who do not hold *rang utile* in the distribution of immoveables are considered only chirographary creditors, and in this quality have to submit to the *concordat* and its effects.

I think the demand well founded, and the judgment maintaining it, in favor of plaintiff and McKeand, should be confirmed.

MONK, J.:—

I also dissent, but with a good deal of hesitation. I go upon the ground that Baylis was notoriously insolvent at the time Foster obtained the judgments, and Foster knew that he was insolvent. Still, I am forced to admit that it is hard that Baylis, after getting his estate back, should be permitted to allege his own fault, or his own fraud.

RAMSAY, J.:—

Before entering on the merits of the case, it is important to observe that the rights of Baylis and McKeand are identical. It is impossible that McKeand can have any greater rights than Baylis, for he is only his representative, clothed with his rights as a security for the guarantee he has given.

The question really is, whether Baylis is estopped from questioning the nullity of the hypothecs obtained by Foster; or, as the appellant very clearly puts it, in his factum, whether "such an action (as this) can only be "instituted in the interest of a creditor or creditors; and "that the debtor himself cannot pretend to any right of "the kind."

There has been some difficulty as to the effect of the *concordat* in the French courts; but it seems to me that the insolvent's rights are determined by the deed re-conveying his estate, unless he can show *dol*, fraud, violence or error. In a word, he can only set aside the obligations of his deed of re-conveyance as he could any other obli-

1877.

Foster & Baylis.

gation. He could have opposed the existence of the debt if it were unjust; but he returned it himself as a mortgage debt; the assignee agreed to it, and so did the creditors; and now, as representing the creditors, he turns round and urges a nullity, which was none in his mouth.

It is possible Foster gets an advantage, but the creditors do not complain of it, and their *cessionnaire* cannot claim what they have formally abandoned.

I think the judgment should be reversed with costs on both appeals.

TESSIER, J., concurred.

DORION, CH J., read the judgment of the Court, which expressed sufficiently the view which he took of the case. The judgment is as follows:—

"The Court, etc...

"Considering that the two judgments of the 30th of April, 1874, and the 27th of June, 1874, mentioned in the declaration in this cause, were respectively duly registered on the 4th of May, 1874, and created good and valid *hypothèques* on the real estate of the respondent, James Baylis, described in the notice registered with the said judgments;

"And considering that these *hypothèques* could only be impugned by the creditors of the said James Baylis on the ground of their having been acquired at a time when the said James Baylis was notoriously insolvent, or that the appellant was aware of such insolvency, and could not be impugned by the said James Baylis personally;

"And considering that the assignment by the said James Baylis under the Insolvent Act of 1869 has in no way affected the validity of said *hypothèques*;

"And considering that no proceedings were adopted by any of the creditors of the said James Baylis, nor by the assignee to his estate to amend or set aside the said two *hypothèques*;

"And considering that in and by the statement filed by the said James Baylis under the provisions of the Insolvent Act, he mentioned the said claim of the said appellant as being secured by registered judgment against real estate;

1877.
Foster & Baylis.

"And considering that the reconveyance of the whole estate of the said James Baylis to the said Anthony McKeand, one of the respondents, as security for the endorsements therein mentioned, was for the actual benefit of the said James Baylis; and was made, as regards the real estate, subject to the payment by the said Anthony McKeand of all incumbrances, *hypothèques* and privileges existing thereon at the date of the said reconveyance, and consequently subject to the said two *hypothèques* in favor of the said appellant;

"And considering that the said reconveyance did not confer on the said respondents any right to demand the rescission of the said *hypothèques*, nor any action *rescindante* or *rescisoire*, nor to the said James Baylis individually any more rights with regard to the said *hypothèques* than he had before he made an assignment of his estate under the Insolvent Act of 1869;

"And considering that there is error in the judgment rendered by the Superior Court at Montreal on the 17th of June, 1876;

"This Court doth cancel and annul the said judgment of the 17th of June, 1876, and proceeding to render the judgment which the said Superior Court should have rendered, doth dismiss the action of the said James Baylis; and doth condemn the said James Baylis to pay to the appellant the costs incurred on the said action in the Court below as on the present appeal.

"And this Court doth further dismiss the petition in intervention filed in this cause by the said Anthony McKeand, one of the respondents; and doth condemn the said Anthony McKeand to pay to the appellant the costs on his said petition in intervention, as well in the Court below as on the present appeal."

Judgment reversed; Monk and Sanborn, JJ., *diss.*

Abbott, Tait, Wotherspoon & Abbott, Attorneys for appellant.

A. & W. Robertson, Attorneys for respondents Baylis and McKeand.

(J. K.)

September 17, 1887.

Coram DORION, CH. J., TESSIER, CROSS, BABY, CHURCH, JJ.

JAMES GOODALL,
(*Defendant in Court below*),
APPELLANT;

AND

THE EXCHANGE BANK OF CANADA,
(*Plaintiff in Court below*),
RESPONDENT.

Bill of exchange—Liability of acceptor—Imputation of payments.

J., a customer of the Exchange Bank, respondent, discounted with that Bank appellant's acceptance. When it fell due appellant failed to pay it, and the Bank charged it to J.'s account, who at the time owed the Bank a small balance, which balance was augmented by subsequent transactions, wherein nevertheless if the credits were imputed to the earliest indebtedness, the balance due when the acceptance matured would be more than covered. The Bank retained possession of the acceptance and brought this suit against appellant, the acceptor, to recover its amount. Appellant pleaded payment and compensation.

HELD:—That the Bank was entitled to recover from appellant the amount of his acceptance, and that appellant was not discharged by the credits in the Bank's account with J.

The appeal was from the following judgment of the Superior Court, Montreal (LORANGER, J.), Oct. 2, 1885:—

"La Cour, etc .....

"Attendu que la demanderesse réclame une somme de $1,625 courant, balance due sur une traite tirée par un nommé William Johnson sur le défendeur, le 20 février 1883, et acceptée par le dit défendeur, laquelle traite aurait été subséquemment transportée à la demanderesse par le dit Johnson;

"Attendu que le défendeur a plaidé paiement de la dite traite par le dit Johnson;

"Considérant qu'il résulte de l'enquête que le dit William Johnson était endetté envers la demanderesse pour

des montants considérables ; qu'il a payé différentes sommes d'argent à la dite demanderesse, mais que toutes ces sommes ont été portées à son avoir sur son compte général sans imputation particulière sur la traite réclamée par la demanderesse ;

"Considérant qu'il est établi que les prétendus paiements faits par le défendeur consistant en deux traites tirées par le nommé Johnson sur le dit défendeur pour la somme de $650 chacune, lesquelles traites n'ont pas été acceptées par le défendeur et n'ont jamais été payées à la demanderesse par le dit Johnson ;

"Considérant que en sus des 35 pour cent que la demanderesse reconnait avoir reçu sur le montant total de la traite réclamée, la dite demanderesse a reçu une somme de $125, ce qui réduirait sa créance à la somme de $1,500 ;

"Considérant que la demanderesse a suffisamment prouvé les allégués de sa déclaration pour obtenir un jugement pour ce montant ;

"Condamne le défendeur à payer à la demanderesse la dite somme de $1,500 courant, avec intérêt sur icelle somme à compter du 7 de juin 1884, jour d'assignation, et les dépens distraits, etc."

March 16, 1887.]

W. W. Robertson, Q. C., for the appellant.

M. Hutchinson, for the respondent.

Sept. 17, 1887.]

CHURCH, J. (*diss.*):—

By a judgment in the Court below, the appellant was condemned to pay to the respondent the sum of $1,500, with interest from the 7th of June, 1884.

After the judgment was pronounced a *retraxit* was filed by the respondent, declaring that it reduced its claim to the sum of $1,291, with interest from the maturity of the draft sued upon in this cause, and costs of suit.

The action in the Court below was instituted on a draft made by one William Johnson, dated at Montreal the 20th of February, 1883, and addressed to the appellant at Toronto, whereby the said Johnson requested the appel-

1887.

Goodall & Exch'ge Bank.

lant to pay to Johnson's order four months after the date thereof, at Toronto, in the Province of Ontario, $2,500 for value received; the usual allegations are made in reference to the endorsation; this draft, it is alleged, was endorsed over to the respondent, was duly presented for acceptance, and duly accepted by the appellant, as follows: "Accepted, payable at my office, 26 2, 83. J. GOODALL." That when this draft became due and payable, it was presented for payment according to its tenor and effect, and payment duly demanded, but was refused, and the said draft still remains due, owing and unpaid, with the exception of 5 per cent. of the said sum of $2,500, to wit, the sum of $875, which the respondent acknowledges to have received on account of, and in part payment of the said draft, leaving a balance of $1,625, unpaid to respondent, with interest from the 23rd of June, 1883, and for which sum respondent demands condemnation against appellant.

The appellant meets this action by the following defence:—That all claims that the respondent could have against the appellant as the acceptor of the draft sued upon, were paid to the respondent long before the institution of the present action, by the said William Johnson, and the amount of the said acceptance was duly paid to the said respondent. That on, or previous to the day on which the draft or acceptance became due, it being payable in Toronto, in Ontario, the respondent ordered its agent in Toronto not to demand payment of the said draft from appellant, but to return it to respondent in Montreal, which was done, payment of the same having been arranged for between the respondent and the said Johnson; that payment of the said draft was never demanded of the respondent at Toronto on the day it was [illegible] and at the place where it was payable according to the terms of its acceptance; that on the return of the [illegible] to the city of Montreal, the same was charged to the account of William Johnson, and immediately after the [illegible] had been so charged, a large amount was paid by Johnson to the respondent on account of the said draft; [illegible] subse-

...tely, from time to time, divers sums of money were ...mitted and paid in by Johnson, and placed to the credit of Johnson in his account current with the respondent, and on account of the said draft; that on the 13th of November, 1883, the only balance that respondent could claim against the said Johnson, or against the appellant as the acceptor of the said draft, then unpaid, was the sum of $106.65; that since the 13th of November, the respondent has collected and received from Johnson, and previous to the institution of the present suit, on account of the amount of the said draft, much larger sums than the said balance of $106.65, although the amount so collected was not due to respondent; that in fact, the respondent has collected and received from Johnson, on account of the said acceptance, since the 13th of November, 1883, a sum amounting to $1,000; that the respondent, after the said draft had been charged to the account of Johnson, and the same had been settled for and arranged, repeatedly acknowledged that it had no right to hold the said draft, and frequently promised to return the same, and deliver the same to Johnson; that notwithstanding the said promises and acknowledgments, the respondent neglected to return the same, and from various excuses neglected, notwithstanding the said promise, to return the said draft to Johnson; that by reason of the premises alleged, any rights that the respondent might have to collect and receive from appellant any sum of money, by reason of respondent being the holder of the said draft, were paid and extinguished long before the institution of the present action.

Respondent answers the first plea by alleging that all the allegations in the plea, which do not agree with the declaration, are false. That long previous to, and at the time said draft was charged to the account of Johnson, the account of Johnson was largely overdrawn, to wit, in an amount exceeding said draft; that all the payments and deposits made by Johnson to said Bank since the last mentioned date, except those made to retire special obligations, notes and drafts, were made in reduction of said

1887.

Goodall & Exch'ge Bank.

overdrawn account, and none of the payments or deposits made by Johnson to said Bank, were on account of said draft, except as in the declaration set forth; that it is specially false that said draft was settled and arranged by Johnson, and the respondent never agreed to return said draft to Johnson; that the respondent never discharged the appellant on said draft, and the same is still due and unpaid by appellant to respondent.

The foregoing statement of facts is taken from the appellant's factum and is, I find, full and accurate when compared with the pleadings.

It will be seen that the first question to be decided is whether the draft in question has or has not been paid by Johnson.

It seems quite clear from the evidence of Johnson, as well as from a reference to the draft itself, and from an examination of the appellant's account in the respondent's books, that this draft was not dealt with in the usual manner as between holder, drawer and acceptor when it matured, for there is no evidence of its being protested, so as to hold the drawer. There is evidence made by Johnson that it is unlikely that it was ever presented to the acceptor at maturity, although the evidence on this point is not very conclusive. It is more than likely it was never protested, firstly because Johnson says he never received any notice of protest, and, secondly, there is no protest filed with the draft, nor any note upon its face or back, that such proceeding had ever taken place. It is pretty certain that it was returned to Montreal at its maturity and before protest (as affirmed by Johnson), because it appears charged to Johnson on the 28th June, in the books of the Bank, and there is no evidence shewn on the part of the respondent that any demand was made upon the acceptor Goodall till the writ of summons issued in May, 1884, nearly a year after the maturity of the draft in question, a circumstance, perhaps, not very important in itself, but of importance as corroborative of Johnson's statement that the Bank and he had an arrangement whereby he assumed the payment of the draft, and that

he alone was looked to for payment. Of course, all this does not alter the liability of Goodall as acceptor, but it fairly opens up the question as to whether Johnson has or has not paid the draft, and whether such payment is a *bar* to the plaintiff's (respondent's) action.

For convenience, I may at once express my opinion on the latter point first. When Johnson drew this draft on Goodall, and Goodall accepted it, they became the joint and several debtors of the Bank, should the acceptor not meet the draft at maturity, and should the drawer (Johnson) receive due notice of such default and the usual protest be made.

It will at once be admitted that either the drawer or the acceptor of a draft may provide the funds for its payment, and that the holder has nothing to complain of if his beneficial interests are liquidated by payment at maturity, whether such funds come from one or other of the parties to the instrument. If this could be done at maturity, what prevents its being done after maturity, either when protest has or has not been made?

In this case we find this draft made the subject of a charge in the holder's books against the drawer, and in the drawer's account just after it matured; we have the drawer's evidence that such entry or charge, was the result of a specific agreement between him and the holder (the Bank). We find this account made up of debit and credit entries carried on for upwards of nine months after the maturity of the draft. We have no evidence of any presentation or demand upon the acceptor during the whole time, and I think I am justified in concluding that this draft became the subject of an agreement such as Johnson speaks of in his evidence, and that the Bank refrained from pressing the acceptor for payment and dealt with the drawer respecting it, and I have no hesitation in concluding that if Johnson paid the draft, the interest of the Bank in it ceased, and that its right of action ceased with the termination of its interest.

This brings us to the question whether Johnson did pay the draft.

1887.
Goodall
&
Exch'ge Bank

I find on reference to the extract produced from the respondent's books, and which cover a period from June, 1883, to April, 1884, as well as from the drawer Johnson's pass-book kept with the Bank, that after the maturity of the draft it was charged to John[illegible] (drawer's) account. I find that frequent credits were given Johnson and frequent debits entered. I find that these credits were imputed to the specific indebtedness shewn in that account and I find that in November following the entry of the charge of this draft on June 28th, 1883, the drawer Johnson had reduced his indebtedness to the Bank to $106.65. I find the imputations of payment clearly made out as against this draft by the respondent, and by the law had it not been so, which imputes it to the more ancient of debts of a like nature, and I find by the admissions of the respondent made in its action, and by its *retraxit* to the judgment in part, that since that date it has received a sum equal to 40 per cent. upon the face of the draft, and I have thus no difficulty in concluding that the respondent had not at the time it instituted its action any beneficial interest in this draft, that neither Johnson nor Goodall was its debtor as respects it, and that its action was improvidently taken, and I am of opinion the appeal should be maintained, the judgment of the Court below reversed, and the action of the respondent dismissed with costs, but such is not the opinion of a majority of the Court, as will be explained.

In conclusion I would like to say further, that it has been urged by the respondent, that inasmuch as the two drafts which, for $650 each, and yielding $1,278.89, made by the drawer on the appellant and discounted by the Bank and credited to Johnson's account, were not accepted and were afterwards charged back against the drawer Johnson, that he (Johnson) is not entitled to the credit, but it must be observed the Bank accepted the drafts and discounted them, and it does not appear that they were ever protested for non-acceptance, and I conclude that the credit having been given after the original draft for $2,500 had been charged to Johnson, the proceeds extin-

guished *pro tanto* the draft in question, and that imputation was made, and that the charging back of the new drafts could not revive the original debt.

It has also been urged that at the time the $2,500 was charged to Johnson's account, his account was largely overdrawn, but it has been shewn that this indebtedness (if it existed) was on paper then under discount, which might or might not at that time have been held by the Bank, and which was then current, but which was not entered in his account at the time, and which was only charged to his account long after the $2,500 draft had been charged, and long after the imputation above alluded to had been made in Johnson's account, and long after the balance of $106 had been struck on the 13th November, 1883.

I should, perhaps, add that I do not think the evidence of Mr. Varey is entitled to much legal value, where it tends to explain away the entries as they appear in the books of the Bank, and this the more especially as he seems to have no personal knowledge of the nature of the transactions between the officers managing the discounts and the drawer Johnson.

Had it not been for the specific averment of the plaintiff (respondent) that the defendant (appellant) was entitled to a credit of 40 per cent. on the face of the draft, I should have thought the amount should go to the credit of the whole account of Johnson as it appeared in the Bank's books, but on that point the averment is explicit that it must go to the draft under consideration, and that alters my view to some extent and prevents any modification of the judgment as I think it should be rendered.

CROSS, J. (for the majority of the Court) :—

William Johnson, a resident at Montreal and customer of the Exchange Bank, discounted with that Bank a draft drawn by him upon the appellant Goodall, a resident at Toronto. The draft was for $2,500, payable four months from its date, the 20th February, 1883, and was accepted by the appellant. When maturing it was sent for collection to Toronto, but at the request of Johnson seems to have been withdrawn, he making provision for it otherwise by further discounts, among which were two new

1887.
Goodall & Exch'ge Bank.

drafts upon Goodall not accepted, and which he afterwards refused to accept. The Bank still had a small balance against Johnson, but charged the draft to Johnson's account. By the application of subsequent credits the balance in question would appear to have been soon after covered, but the indebtedness of Johnson, in place of diminishing, kept continually increasing, and, becoming insolvent, his estate paid the Bank some 35c. in the dollar on its general balance. The Bank having also become insolvent, its liquidators sue Goodall for a balance due on his acceptance. He pleads payment, and as proof adduces the state of the account between the Bank and Johnson at the time the draft fell due, and subsequently, showing that by the credits given to Johnson on his then and subsequent discounts and deposits, this draft would be found to be covered and compensated.

The majority of the Court think this an insufficient answer to the suit. It is nowhere pretended that the draft was paid by Goodall, the acceptor. A payment by Johnson did not discharge him. The Bank continued to be holder of the draft, and it was only Johnson who could call them to account for it or for its proceeds if collected by them. Goodall would be entitled to the delivery up to him of the draft by the holder when he, Goodall, paid it and not otherwise. As between Johnson and the Bank, it is unnecessary to determine what should be considered the equities of the case, but it is evident that so far as the new drafts on Goodall were concerned, the provision made by Johnson to take up Goodall's acceptance entirely failed; the subsequent credits may have all been applicable to special transactions, a subject which it is unnecessary to discuss in this case. Johnson still owes the Bank a large balance, and when they recover the balance they claim on the acceptance in question, Johnson's extreme rights may be satisfied by getting credit for what is recovered.

In this view of the case the judgment of the Superior Court must be confirmed.

Judgment confirmed (Church, J., *diss.*)

Benjamin & Brown, attorneys for appellant.

Macmaster, Hutchinson & Weir, attorneys for respondent.

(J. K.)

September 17, 1887.

Coram DORION, Ch. J., CROSS, BABY, CHURCH, JJ.

JOHN S. SHEA
(*Plaintiff in Court below*),
APPELLANT;

AND

JAMES PRENDERGAST
(*Defendant in Court below*),
RESPONDENT.

Principal and Agent—Agent exceeding limits of mandate—Responsibility.

HELD:—That an agent who has only a limited authority, and who by going beyond his authority, even while acting in good faith, causes his principal to suffer a loss, is obliged to pay the loss. And so, where a person instructed a bank clerk to give a cheque for the amount of a certain account, and the clerk, late at night, gave the party the money instead, thereby preventing his principal from rectifying an error which existed in the account, it was held that the clerk could not recover from his principal the amount paid in excess of what was really due.

The appeal was from a judgment of the Court of Review, Montreal (JOHNSON, DOHERTY, GILL, JJ.), March 31, 1886, reversing a judgment of the Superior Court, Montreal (JETTÉ, J.), Dec. 31, 1885.

The judgment of the Superior Court was as follows:—

"La Cour, etc...

"Attendu que dans la soirée du 5 août dernier (1885), le défendeur et le nommé Dohan, qui avaient expédié en Europe, à profits communs, certaines cargaisons de bétail, sont convenus de régler les comptes de leurs dites opérations et ont pour ce, étant tous deux illettrés, choisi deux personnes ayant leur confiance, savoir les nommés Coghlin et le demandeur Shea;

"Attendu qu'après examen et discussion des comptes susdits, il fut établi qu'une balance finale de $545 revenait à Dohan, et que le défendeur donna alors ordre au demandeur, gérant de la succursale de la Banque d'Epar-

1887.

Shea & Prendergast.

gnes, à la Pointe St. Charles, où le dit défendeur déposait ses fonds, de donner au dit Dohan pour lui un chèque pour cette balance, prenant lui-même de suite, en retour, un reçu ou quittance de Dohan, pour la dite somme ;

" Attendu qu'aussitôt après ce règlement, Dohan se rendit chez le demandeur pour avoir le chèque promis, mais que désirant partir de bonne heure le lendemain matin, et demeurant à quelque distance du bureau de la Banque, il représenta à Shea qu'il lui rendrait service s'il lui payait le montant du chèque de suite, malgré l'heure avancée de la nuit, ce à quoi le demandeur consentit ;

" Attendu néanmoins qu'après le règlement de comptes susdit, et le départ de tous ceux y concernés, la fille du défendeur ayant vérifié les calculs faits pour le règlement effectué par les dites parties, elle crut y découvrir une erreur de $236, dont crédit n'avait pas été donné à son père, le défendeur, bien que cette somme eût été antérieurement payée à Dohan, ce qui aurait réduit la balance revenant à ce dernier, à $809 ;

" Attendu que le lendemain matin, six août, la dite fille du défendeur s'empressa d'avertir son père de l'erreur par elle découverte, et celui-ci se rendit immédiatement chez le demandeur pour l'en prévenir, et lui dire de ne pas payer le chèque donné en règlement, mais que le demandeur l'informa alors que le chèque était payé comme susdit, ce que voyant, le défendeur mécontent s'adressa aux administrateurs de la Banque dont le demandeur était employé, et sur son affirmation qu'il n'avait pas autorisé le demandeur à payer la dite somme à Dohan, le gérant-général de la Banque força le demandeur de rembourser au défendeur la dite somme de $236, sous peine de destitution ;

" Attendu que le demandeur poursuit maintenant le défendeur en répétition de la dite somme qu'il a ainsi payée pour lui au dit Dohan, mais que le défendeur conteste cette demande disant que lors du règlement susdit, il n'a pas autorisé le demandeur à donner un chèque à Dohan immédiatement, mais seulement le lendemain, son intention étant d'avoir ainsi le temps de vérifier les comp-

1887.

Shea & Prendergast.

tes avant l'ouverture de la banque, le lendemain; qu'en conséquence, le demandeur a payé la dite somme à Dohan sans autorité et sans droit; que d'ailleurs elle n'était pas due à Dohan, et que l'eût-elle été, le demandeur n'avait pas droit de la lui payer et ne peut maintenant la réclamer;

"Attendu qu'il est établi en preuve que dans l'occasion sus-relatée, le défendeur a formellement autorisé le demandeur à donner au dit Dohan, un chèque pour la balance établie en faveur de ce dernier, et ce sans aucune restriction quelconque; et qu'il est aussi prouvé que le demandeur était dans l'habitude d'écrire ou de signer des chèques pour le dit défendeur, à sa demande;

"Attendu que le paiement fait ensuite par le demandeur à Dohan de la somme mentionnée au dit chèque l'a été de bonne foi et valablement, et que l'erreur subséquemment découverte, invoquée par le défendeur ne saurait affecter ce paiement quant au demandeur;

"Vu l'article 1141 du Code Civil;

"Attendu qu'ayant ainsi payé pour le défendeur une dette par lui régulièrement reconnue et admise, le demandeur est bien fondé à lui en demander le remboursement;

"Renvoie l'exception et défense du dit défendeur et le condamne à rembourser et payer au demandeur la dite somme de $236 courant, avec intérêt sur icelle à compter du premier septembre 1885, jour de l'assignation, et les dépens distraits, etc."

The following was the judgment in Review:—

"The Court, etc.

"Considering that plaintiff has not proved what he alleges in his declaration; but has merely proved that the defendant gave him a limited authority, which the plaintiff disregarded, and paid Dohan in the declaration mentioned, money which the defendant had never authorized him to pay; and that plaintiff in so doing acted at his own risk, and not within any powers given him by the defendant;

"Considering, therefore, that there is error in the said

1887.
Shew & Prendergast.

judgment of the 31st of December last, doth, revising said judgment, reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises, doth dismiss the said plaintiff's action with costs, etc."

JOHNSON, J. (in Review) :—

The plaintiff is the agent or cashier of a savings bank at Point St. Charles, and he also appears to have been a friend of the defendant, who was a cattle dealer, and had transactions with one Dohan, to settle up the accounts between these two parties. One night, after working at these accounts, it was found that there was a balance due to Dohan by the defendant, who, thereupon (as the plaintiff alleges it) told the latter to pay it out of the funds in the bank at the defendant's credit, and to draw a cheque for it, as the plaintiff had been in the habit of doing previously. This is the way in which the plaintiff states that the authority was given; and if it were established in fact, there would be no difficulty, for the plaintiff paid the money to Dohan, and opened the bank at night for the purpose. The defendant, however, found that the accounts when properly cast up showed an error had been made of $236 in the so-called settlement, and therefore called upon the plaintiff the following morning and told him so. But the plaintiff informed him that instead of giving a cheque, as he says he had been authorized to do, he had paid Dohan in cash the night before, and charged the whole sum ($545) to the defendant. The latter complained to the bank which refunded him the money, and charged it to plaintiff, who now brings his action to get it, as having been paid by the defendant's authority.

The defendant contends that he gave no authority to pay the money to Dohan by cheque or otherwise: that he only stated that it would be settled or paid by cheque; and did so purposely, because, though he had the money in the house, he wanted his daughter to verify the calculations, which she could easily do before banking hours the next morning.

The whole question is one of the extent of the authority given to plaintiff. The proof does not show that he was authorized to pay the money. He exceeded his instructions, and, of course, at his own risk. The evidence of Dohan himself puts this beyond doubt. He says Shea was making a cheque, and he told him he would rather have the money, which Shea then paid, without a cheque. The Court put the question to him: "Was it "agreed in the presence of Prendergast that Mr. Shea "would give you the money ?"

Answer: "No, sir; a cheque. He told Mr. Shea that "*he* would give *me* a cheque, and then when Mr. Shea "had the cheque written out, I told him I lived six miles "from the village, and that I would rather have the "money; and he gave me the money. The cheque was "drawn in my presence only."

By the Court: "Mr. Prendergast was not there when "you asked for the money instead of the cheque?" "Answer: "No, sir."

This is clearly not what Shea was authorized to do. The judgment goes upon the principle that the payment by a third party extinguishes an obligation. So it does, of course (see Art. 1141 C. C.), but there must be an obligation, and in the words of the article, it must be "pour l'avantage du débiteur." It also assumes as a fact that there was a final balance settled between Dohan and the defendant, which is not correct. The plea of the defendant is substantially that he did not owe the money to Dohan, and gave no instructions to pay the money; and we find that plea proved. The judgment is reversed with costs.

May 30, 1887.]

Rainville, for the appellant:—

Si l'on prend en considération la position des parties, leurs relations antérieures, la manière d'agir de l'intimée vis-à-vis des commis de la Banque, si l'on ne perd pas de vue que l'appelant payait habituellement de l'argent sur des ordres analogues; ne peut-on pas dire que l'autorisa-

1887.

Shea & Prendergast.

tion de ce dernier : *pay him by a cheque*, équivalait à un ordre de payer en argent, surtout en face du reçu donné par Dohan, et accepté par l'intimé ?

En acceptant l'ordre de payer, l'appelant ne devenait-il pas en quelque sorte obligé personnellement ? Grâce à son reçu l'intimé n'était-il pas déchargé ? N'est-il pas également vrai de dire que Dohan, en donnant son reçu, prenait la parole de l'appelant et l'acceptait pour son débiteur ?

Sans entrer dans toutes ces considérations, nous voulons bien admettre pour le besoin de la discussion, que l'ordre du demandeur n'eût pas cette portée. Mais une fois le chèque fait et en la possession de Dohan, qui empêchait ce dernier de l'escompter le soir même, si quelqu'un se trouvait qui pût en payer le montant ? Tout tiers porteur de bonne foi n'en pouvait-il pas ensuite exiger le remboursement ?

Etant donné que l'appelant avait l'autorité de signer le *chèque* le soir même, quelle objection y avait-il à ce qu'il le payât à Dohan ? Par ce paiement, ne devenait-il pas tiers porteur de bonne foi ? Comment l'intimé pourrait-il lui opposer sa propre erreur ?

L'intimé prétendra sans doute comme il l'a déjà fait que l'appelant ne peut invoquer l'article 1141 du Code Civil, vu que la dette n'était pas due.

Qu'elle le fût ou non, cela ne change aucunement la question. Votre chèque crée en faveur des tiers une présomption que la dette est due. Et vous ne pouvez désormais échapper au paiement qu'en prouvant la mauvaise foi.

Or ici, non seulement vous ne l'avez pas prouvé, mais vous étiez tellement convaincu du contraire que vous ne l'avez même pas plaidée.

C. J. Doherty, Q.C., for the respondent :—

One thing is manifest—even if we accept the testimony adduced by appellant without reserve—and it is this, that the mandate given to appellant by respondent was, on the former's own showing, merely to give a cheque.

1897.

Shea & Prendergast.

Was he under that authorization empowered to pay out cash? Respondent submits he was not.

To hold that he was is to hold that an agent being authorized to do one specific thing, may without consultation with or notice to his principal, do some other thing which he, the agent, considers equivalent, and when loss follows as a consequence of the change, shoulder that loss on his principal.

That such a holding would be opposed to every principle of the law of agency seems self-evident. The authors who treat of the subject are unanimous in condemning such a pretention. See Marcadé, on Article 1991, C. N., paragraphs 980 and 981.

Troplong, du Mandat, paragraphs 308, 309, 310, 311, 312, 314, explains and develops the same doctrine.

This very case is a striking example of the danger of departing from this doctrine. Here, (we are supposing for the argument's sake that appellant has proved his authorization to make a cheque), appellant is told to make a cheque. He does not do so, but chooses rather, unknown to the person who told him to make it, and at the request of another person, to open the Bank vaults at midnight, and pay out the funds thereof. As a consequence of this act, this other person obtains money not due him, and a loss of over two hundred dollars is sustained: And appellant asks this Court to hold that that loss should be borne not by the person whose deviation from the express terms of the mandate given him, has brought it about, has made it possible, but by the person giving the mandate, and whose instructions, had they been carried out, would have prevented the loss. Respondent, (on appellant's own showing) told the latter to make an order on respondent's banker to pay Dohan a certain sum. In the ordinary course of business known to all the parties, that order could not be presented or paid till ten o'clock the following morning. Appellant, to oblige Mr. Dohan, at his solicitation, though clearly, on his own showing, understanding his mandate to be merely to make a cheque,—as shown by his beginning to write one,—does the very

1887.

Shea & Prendergast.

unusual and certainly not expected thing of opening up the Bank and paying out the cash at midnight. Now, it is established by Mrs Kelly's evidence, that respondent, who had the money by him, and could have paid in cash had he so wished, had a special motive in desiring the payment to be effected by cheque. Being an illiterate man, he desired the calculations made to be gone over and verified by his daughter, who did all his business, before actual payment of money. This was done, and the error made in the calculation of appellant discovered in ample time to prevent the payment of any cheque, had such been given,—and the loss occurred solely by reason of appellant taking upon himself to do that which he had no right or authority to do.

Sept. 17, 1887.]

CHURCH, J. (for the Court) :—

The appellant seeks to recover from respondent a sum of $236, which he claims to have paid for the latter, and at his request, to one Christopher Dohan.

The circumstances under which this payment was made, as alleged by appellant, are the following :—On the 5th of August, 1885, respondent and Dohan having previously had some dealings in cattle in partnership or on joint account, requested appellant and one Daniel Coghlin to adjust the account between them, and upon the settlement made upon this request, it was found that respondent owed Dohan a sum of $545. This sum, appellant alleges, respondent told him to pay to Dohan out of funds lying to respondent's credit in the Montreal City and District Savings Bank at Point St. Charles, of which appellant was at the time acting manager, by making a cheque therefor. This adjustment of accounts was completed between 11 and 12 o'clock at night. Appellant, at Dohan's request, opened up the bank and paid him in cash at that hour, instead of giving him a cheque therefor. The following morning, respondent called upon appellant, and notified him that there had been an error of $236 made in the settlement aforesaid, two amounts,

one of $100 and one of $136, which respondent had previously paid Dohan, not having been credited. Appellant then informed respondent that instead of giving a cheque, he had paid Dohan in cash, and charged the sum to respondent. The latter thereupon appealed to the authorities of the bank, who refunded him the money so paid and charged it to appellant, who has been obliged to pay it to the bank, his employer.

This is appellant's case, as he states it, and he claims that respondent should make good to him the amount so charged him by the bank.

The respondent pleads that appellant has no right of action against him; that on the occasion in question appellant acted throughout for Dohan, and at the latter's request, and not for respondent, and after the figuring of the accounts had been made, he, respondent, did not tell appellant to pay the amount by cheque or otherwise, but stated it would be settled or paid by cheque; that he did this, although he had the cash in the house to pay it, had he so desired, especially because he wished that his daughter, who kept all his accounts, should go over and verify the calculations, which she could easily do before banking hours the next morning, when the cheque would be made; that she did, that evening, after the departure of appellant and Dohan, verify said accounts, and discover the error above-mentioned, of $236, of which respondent (having returned home very late, and not learning of the mistake till morning) about 8 o'clock in the morning, notified appellant, who then told him he had paid Dohan, and that he, respondent, repudiated the payment as unauthorized, and the money was refunded him by the bank. The judgment of the Superior Court, in the first instance, maintained plaintiff's pretensions, but that judgment was reversed by the Court of Review —whence the present appeal.

The question to be decided is, has the plaintiff (appellant) a right of action against the defendant under the circumstances shown in this case? It is not necessary to enter into a digest of the somewhat confused and contra-

1887.

Shea & Prendergast.

dictory statements which the witnesses and the parties have made when examined as witnesses. For the plaintiff admits and alleges that the defendant's order was that he should sign for him a cheque addressed to the City and District Savings Bank, ordering that institution to pay the man Dohan $545. This authorization was given on the evening of the 5th August; the plaintiff, it appears, did not write the cheque that evening (although Dohan says he did), but the cheque itself (which is evidently in Shea's handwriting, is dated the next day), and moreover, one of the officers of the bank says it was written the next morning. In lieu of delivering the cheque to Dohan as directed, he substituted a sum of money: viz., $545, for it, and his pretension is that he cashed the cheque out of the funds of the bank. If he cashed the cheque with the bank's money, and in his capacity of an officer of the bank, the bank became the owner of the cheque, and not the plaintiff, but the bank repudiated his authority to use its funds in that way, and the defendant repudiated and repudiates any authority to pay money on his behalf to Dohan, and the plaintiff refunds to the defendant, at the instigation of the bank, it is true, the excess ($236) over the amount which the defendant acknowledges to owe the plaintiff. This he does by a cheque drawn to his own order, but endorsed and made payable by him to the defendant's order. How, under these circumstances, can he expect to hold the defendant? He invokes in his factum Art. 1141 C. C., but that article assumes the existence of an obligation which a debtor is obliged to discharge; there is no evidence of the existence of any such debt beyond $309, and that the plaintiff does not pretend to have paid, but only the surplus over that amount to the extent of $545, viz., $236. The plaintiff's conduct was most unbusiness-like, and entirely irregular. He acted, perhaps, in good faith and with the wish to accommodate Dohan, but he acted outside of and beyond the authority which the defendant conferred upon him, and contrary to the business routine of the bank, and he must take the consequences. He cannot ask the defend-

1887. Shea & Prendergast.

ant against his will to recoup him. The appeal must therefore be dismissed with costs against the appellant, and the judgment of the Court of Review maintained. The appellant must seek redress, if redress he is entitled to, from another than the respondent.

Judgment confirmed.

Duhamel, Rainville & Marceau, attorneys for Appellant.
Doherty & Doherty, attorneys for Respondent.
(J.K.)

September 23, 1887.

Coram DORION, CH. J., TESSIER, CROSS, BABY, CHURCH, JJ.

ALLAN GILMOUR ET AL.
(*Defendants in Court below*),
APPELLANTS;

AND

REV. CHARLES A. M. PARADIS
(*Petitioner in Court below*),
RESPONDENT.*

Location ticket—Right of holder to injunction to restrain trespassers from cutting timber—Disputed title.

HELD:—1. That a location ticket issued under Sect. 13 of Ch. 22, C. S. C., is, in effect, a promise of sale of the lands to which it applies, subject to the fulfilment on the part of the locatee of the conditions on which it is granted, and gives the locatee absolute possession of such lands, and all the rights of action against trespassers which he might exercise if he held such lands under a patent from the Crown.

2. That the holder of such location ticket was entitled to an injunction, to restrain lessees of Crown Timber Limits under a license from the Commissioner of Crown Lands for the Province, from cutting timber on the lands held under the location ticket, until the question of title should be determined by the Courts.

3. The Court will not, as a general rule, decide a question of title upon a writ of injunction, more especially when there is a third party interested (here the Government of Quebec) who is not a party in the cause.

*Eight other cases, in which Gilmour et al. were appellants and other parties were respondents, were heard together, and the [illegible] reported above applies to all.

1887.

Gilmour & Paradis.

The appeal was from a judgment of the Superior Court, District of Ottawa (WURTELE, J.), Feb. 24, 1887, in the following terms :—

"The Court, etc.....

"Seeing that the complainant acquired from the Crown, on the 21st April, 1886, by location ticket bearing date the same day, lots Nos. 65 and 66 in the sixth range of the Township of Egan, in the District of Ottawa, and that he thereupon entered into and has since retained possession thereof ;

"Considering that by law the complainant can maintain under such location ticket all suits at law against any wrong-doer or trespasser as effectually as he could do under a patent from the Crown ;

"Seeing that the complainant by his petition represents that the defendants did on or about the 15th day of October, 1886, without any right or authority, and without the consent and against the will of the complainant, enter upon the said lots, by from fifteen to twenty men employed in their service, for the purpose of cutting down and carrying away all the pine and other timber thereon, and that the defendants, by and through their servants aforesaid, did on and after the last mentioned day, cut down and remove a large quantity of pine logs, and were continuing their operations, to his great damage and harm ;

"Seeing that the complainant has proved his allegations ;

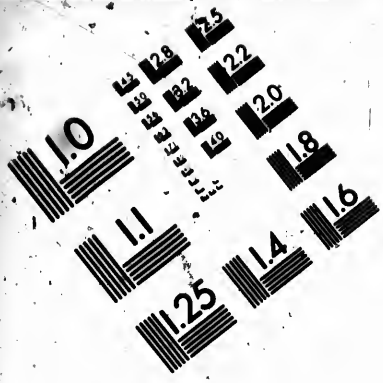
"Seeing that at the instance of the complainant, a writ of injunction was issued and was duly served upon the defendants on the 19th of November, 1886, enjoining them to immediately suspend and discontinue all their operations, works and lumbering on the said lots ;

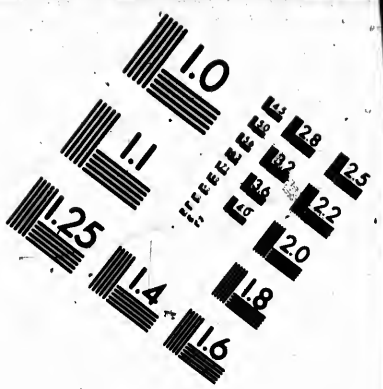
"Seeing that the defendants plead that by an Act of the Legislature of the Province of Quebec, 46 Victoria, chapter 9, it was enacted that the Lieutenant Governor in Council, as soon as the necessary information had been obtained, might set apart as "Forest Land" all the ungranted lands of the Crown held under license to cut timber, except such parts of such licensed lands on which no merchantable pine or spruce timber grew, and which

were fit for settlement, and also such other portions of the ungranted lands of the Crown as, on the recommendation of the Commissioner of Crown Lands, he might think fit so to set apart, and that when the Lieutenant-Governor in Council setting apart such forest land has been published in the Quebec Official Gazette, no land comprised in the territory so set apart should be sold or appropriated for settlement purposes until after the expiration of ten years from the date of its publication; and that the Lieutenant-Governor in Council had, by an Order in Council passed on the 10th of September, 1883, and published in the Quebec Official Gazette on the 22nd of the same month, set apart a certain territory, in which the said Township of Egan is included, as a "Forest Reserve;" that the lots of land claimed by the complainant are covered with merchantable timber and are unfit for settlement; that the defendants were on the said 21st of April, 1886, the holders of a license to cut timber on a certain limit which included the said lots of land, terminable on the 1st of May then next (1886), and that the said license was duly renewed on the 23rd of October, 1886, for the year to expire on the 1st of May then next (1887); that the location ticket granted to the complainant was issued in violation of the provisions of the above-mentioned Act; and that the said location ticket was therefore null and without effect, and could not be invoked against them nor affect their rights under their license to cut timber on the said lots of land;

"Considering that under the terms of the statute above mentioned, the Lieutenant Governor in Council is bound, in constituting a "Forest Reserve," to except the parts of the ungranted lands of the Crown held under license to cut timber, on which no merchantable pine or spruce grows, and which are fit for settlement, and must, before erecting any "Forest Reserve," obtain the necessary information in that respect;

"Seeing that the necessary information in that respect had not been obtained when the Order-in-Council of the 10th of September, 1883, was passed, erecting the Upper





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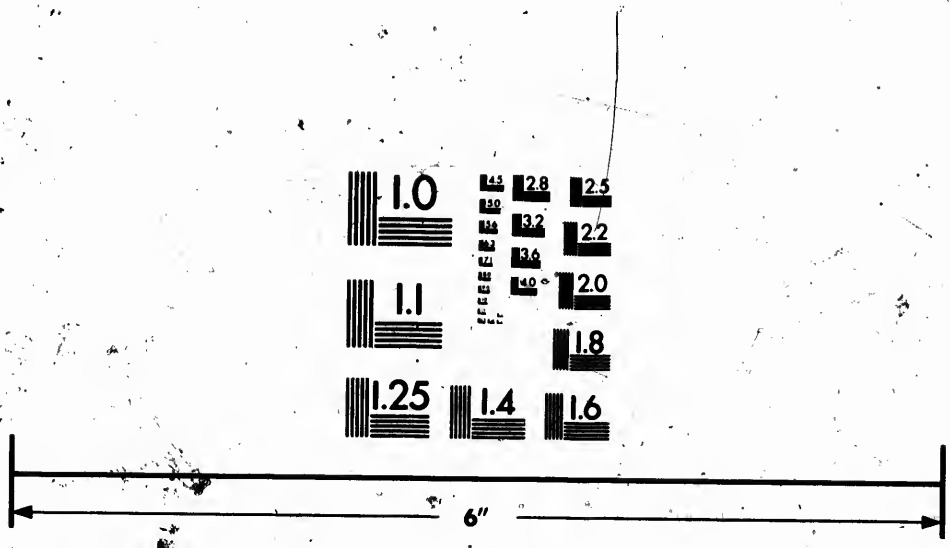

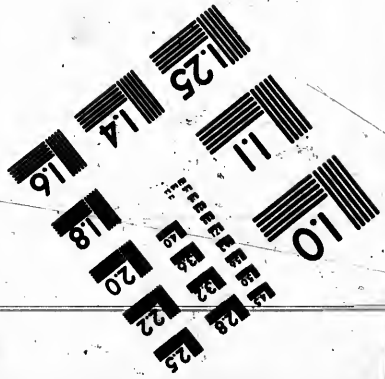

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1887.
Gilmour & Paradis.

and Lower Ottawa Agencies as a "Forest Reserve," but that the said Order-in-Council after describing the territory forming such "Forest Reserve," contains the following proviso:—"Save and except all lots situate in the "following townships, which hereafter may be found "(from inspection made by competent and authorized "persons) fit for settlement and destitute of merchantable "timber, that is in the Townships of Guigues,—and other townships including the Township of Egan;

"Seeing that the essential requirements of the statute were not complied with;

"Considering that the Township of Egan has consequently not been brought under the prohibition of sale decreed by the statute;

"Seeing that in the present case the grant of land and the issue of the location ticket to the complainant were preceded by an inspection;

"Considering, therefore, that the location ticket so issued to the complainant is not a title which is affected by an absolute nullity and is without effect, but is one which may be annulled on proof being made that the location ticket was wrongfully or erroneously issued;

"Considering, moreover, that under the terms of the said Order-in-Council, the lots in the said Township of Egan on which no merchantable pine or spruce timber grew, and which were fit for settlement, were not described and specially excluded from the "Forest Reserve," but that all lots which might thereafter be found from inspection to be fit for settlement and destitute of merchantable timber were indefinitely excepted therefrom;

"Considering that under the terms of the said Order-in-Council none of the land within the Township of Egan is absolutely excluded from sale, and that consequently a sale of land therein for settlement, even if made without an inspection, is not affected by an absolute nullity rendering it without effect and apparent on the face of the title, but is only annullable if such land should be found to have had merchantable timber growing thereon and to be unfit for settlement;

1887.
Gilmour & Paradis.

"Considering that an annullable title should have provisional execution until its nullity is pronounced by the judgment of a Court;

"Considering that in the present case the location ticket is not affected by an absolute nullity, although it may perhaps be annullable;

"Seeing that it is a condition of the license to cut timber held by the defendants that all lots sold or located by the Crown within such limit should cease to be subject to such license after the 30th of April following the sale or location;

"Seeing that the defendants were cognizant of the sale and location to the complainant of the lots above-mentioned and described, and that by letter of the 20th of September last (1886) to the Commissioner of Crown Lands, they requested him to cause the sale and location thereof to be cancelled or to give permission to them to cut the timber thereon without having to pay trespass-duty;

"Considering that the defendants cannot take exception to and complain of the sale to the complainant under the conditions of their own title, but that they are bound thereby to respect the possession of the complainant under the location ticket granted to him;

"Considering, moreover, that the said location ticket can only be annulled or cancelled at the instance of the Crown, and that the defendants have no right to demand its cancellation;

"Considering therefore that the complainant is well founded in his demand;

"Seeing the motion made by the complainant that the defendants be held in contempt of this Court for not having obeyed the injunctions laid upon them by the writ;

"Considering that it has been proved that the servants of the defendants did remove after the service of the writ certain logs cut upon the lots sold to and in the possession of the complainant, but that it was done without the knowledge and contrary to the will and intention of the defendants, and that they ordered the cessation of all

1887.
Gilmour & Paradis.

work on the said lots as soon as they became aware that work was being continued ;

"Doth declare the injunctions laid upon the defendants in this cause to be perpetual, and doth enjoin them to discontinue and cease all lumbering and all operations and works in connection therewith on lots Nos. 62 and 63 in the sixth range of the Township of Egan, now in the possession of the complainant under and in virtue of the location-ticket granted to him and bearing date the 21st of April, 1886, under the penalties ordained and prescribed by law, but doth relieve the defendants from their contempt for not having obeyed the injunctions laid upon them by the writ ;

"And the Court doth adjudge and condemn the defendants to pay the costs as well on the principal demand as on the motion to punish their contempt in violating the injunctions of the writ, and doth grant distraction thereof, etc."

May 23, 1887.]

Geo. Irvine, Q. C., and *J. R. Fleming, Q. C.*, for the appellants :—

The writ of injunction which the judgment in this case makes absolute was rendered at the instance of the petitioner, upon his petition representing, that the petitioner was proprietor in possession of lots Nos. 65 and 66 in the sixth range of lots in the Township of Egan, in the district of Ottawa, under a location ticket obtained by him from the Government of the Province of Quebec on the 21st April, 1886, on which he had made the requisite improvements, and that the defendants (now appellants), without the consent of the petitioner (now respondent), with fifteen or twenty hired men, about the 15th October last, had entered upon these lots and had there established a *chantier* for the purpose of cutting all the pine and other lumber then growing on the said lots, and had cut thereon at least five or six hundred pine saw logs and were continuing their lumber operations thereon. And upon these allegations the petitioner prayed that the appellants should be ordered to cease their work on the said lots.

1887.
Gilmour & Paradis.

The appellants pleaded first a demurrer which was dismissed, and to which it is now unnecessary to refer as the same questions are raised by the second plea which is a peremptory exception.

By this latter plea, the appellants set up that the lots in question are included within the boundaries of a timber berth held by them under license from the Crown No. 355 of 1885-6 and No. 6 of 1886-7, and are within the boundary part of the Forest Reserve established by Order-in-Council of the 10th September, 1883, published in the *Quebec Official Gazette* of 22nd September, 1883, in accordance with the provisions of 46 Vict. Ch. 9 of the Statutes of the Province of Quebec, and that the appellants being in possession of the said lumber berth under licence from the Crown, at the time of the issuing of the location ticket, and since that under the renewal of the same license, the pretended location ticket was null and void, and the respondent did not thereby acquire any right in or to the said lots.

The answer of the petitioner to this plea was in substance a general denegation of the appellants' rights and a reiteration of the petitioner's ownership of the lands in question.

Along with their petition the respondents filed a copy of a report made by a bush-ranger at the instance of these applicants for location tickets, who had set covetous eyes on the most richly timbered lots on the appellants' limits. In this report the bush ranger says that he inspected these lots, that there is a large quantity of merchantable pine growing on them and about thirty-five acres fit for cultivation on each of these lots, [illegible] No. 13 of Record.

It is hardly necessary to refer [illegible] letter filed by respondent, which was written by the appellants to the Department of Crown Lands, asking for the cancellation of this and other lots, the petitioner being only one of a number of others who had applied for the best wooded lots in the appellants' limits, the appellants considered that the Government was bound to repudiate the unjust and illegal act of their agent and thus relieve them from

1887.
Gilmour & Paradis

trouble and litigation, and the Government admitted the right of the appellants and gave notice in the *Official Gazette* of the 13th November last, that these location tickets would be cancelled. But that the appellants should on that account be deprived of the rights which the law gives them is a proposition which does not require refutation.

The appellants have admitted the signature of Joseph Comeau, Crown Land Agent, subscribed to the location ticket, and also the correctness of the copy of the letter addressed by them to the Department of Crown Lands, and of the copy of the report of the bush-ranger, Mathias Joannis.

On his part the respondent has admitted the granting of the license to the appellants and the correctness of the copies produced and filed, and of the Orders-in-Council respecting the Forest Reserve and notices of cancellation, and further that the Township of Egan is included within the boundaries of the license held by the appellants, and is also included within the boundaries of the Forest Reserve; indeed these facts were undeniable and the boundaries of the Forest Reserve are cognizable by the Court without proof, as being defined by territorial divisions of the country.

The allegations of the petition as well as the report of the bush-ranger filed by the petitioner showed that only about a third of the land was fit for settlement, and that far from being destitute of timber there was a large quantity of merchantable pine timber growing on it.

The very fact that the petitioner and the other applicants for the lots had them inspected shows that they as well as the Crown Land Agent were aware that the lots were in the Forest Reserve.

It is difficult to understand how under these circumstances, the Crown Land Agent took upon himself, in violation of the express prohibition of the law, to issue location tickets for these lots.

The judgment of the Superior Court was rendered at

Aylmer, on the 24th of February last, dismissing the appellants' pleas and making the injunction perpetual.

The grounds of this decision are first :—

That under the terms of the Statute already mentioned, the Lieutenant-Governor-in-Council is bound, in constituting a "Forest Reserve," to except the parts of the ungranted lands of the Crown held under license to cut timber on which no merchantable pine or pine timber grows, and which are fit for settlement, and must before erecting any "Forest Reserve," obtain the necessary information in that respect, and that the necessary information had not been obtained, but that the Order-in-Council after describing the territory forming such Forest Reserve save and except all lots situate in the following townships which hereafter may be found (from inspection made by competent and authorized persons) fit for settlement and destitute of merchantable timber in the Township of Guigues, and other townships of which the Township of Egan is one, and that consequently no land in the Township of Egan is absolutely excluded from sale and such sale is not null, but only annullable at the suit of the Government, in case the land so sold should be found to have merchantable timber growing thereon and to be unfit for settlement.

The appellants respectfully contend :—

That the prohibition contained in the Statute makes absolutely null any sale made by the Commissioner of Crown Lands or his agents, in violation of its provisions, and that the Court is bound to hold any such sale as absolutely null and dismiss any legal proceeding based upon it.

That there is nothing indefinite in the delimitation of the territory constituting the Forest Reserve—nor even in the exception when properly construed.

If the exception were indefinite, it might be of no avail, but that could not affect the validity of the order as respects the territory set apart as a Forest Reserve.

Because proof might be required in order to bring a lot within the exception, it does not follow that proof is re-

1887.
Gilmour & Paradis.

quired to establish the nullity of a sale of land within the limits of the Forest Reserve, which is not even alleged to be within the exception.

J. E. Robidoux, Q. C., and *Rochon*, for the respondent:—

Les appelants rencontrèrent d'abord la requête de l'intimé, par une défense en droit, qui fut renvoyée, et dans laquelle ils invoquent ce prétendu ordre en Conseil dont il est fait mention dans le jugement de la Cour de première instance. Il est évident, dans notre humble opinion, qu'une défense en droit ne peut être basée sur un semblable moyen ; c'est la conclusion à laquelle le savant juge *ad hoc* est arrivée en renvoyant celle des appelants. Nous croyons inutile d'insister sur ce point ; nous devons discuter les prétentions des appelants, telles qu'exposées dans leur exception péremptoire.

La première question qui se présente, est celle de savoir si les droits conférés à l'intimé en vertu de son billet de location, peuvent être affectés par l'ordre en Conseil qu'on lui oppose, admettant que tel ordre en Conseil existerait. Nous faisons cette restriction, car la preuve de l'existence de ce document n'est pas au dossier ; le savant juge *ad hoc* en fait mention, vu que les parties, à l'argument devant la Cour Inférieure, ont paru l'admettre ; mais nous n'hésitons pas à dire qu'il n'est pas prouvé et que la production d'un tel document n'a jamais été faite dans la présente cause : nous devons en conclure qu'il n'existe pas. D'après la défense, cet ordre en Conseil serait en date du 10 septembre 1883, et aurait été publié dans la Gazette Officielle de Québec le 22 du même mois, en conformité des dispositions de l'acte 46 Vict., Ch. 9 : or, en référant au numéro en question de la Gazette Officielle et qui est produit de record comme exhibit No. 4 des appelants, on ne trouve, à propos de " réserve de forêts," qu'une copie d'un *rapport d'un Comité du Conseil exécutif* ; il n'y a pas d'ordre en Conseil sur le sujet et nous ne croyons pas qu'aucun ait jamais été publié. Cette condition essentielle requise par la loi pour l'établissement d'une réserve de forêts, n'a donc pas été remplie. Voir section 134 de l'acte sus-cité.

Maintenant, donnons si l'on veut à ce rapport, l'effet

d'un ordre en Conseil ; nous soumettons respectueusement qu'il ne peut, dans les circonstances, être invoqué contre l'intimé. D'abord, les formalités prescrites par l'acte 46 Vict. Ch. 9 ne paraissent pas avoir été remplies ; la section 134'se lit comme suit : " *Aussitôt que les renseignements* " *nécessaires* ont pu ou pourront être pris, après le 30 mars " 1883, le lieutenant-gouverneur en Conseil a pu ou pour- " ra mettre de côté comme terres à bois, toutes les terres " non concédées de la Couronne sous licence le dit jour " 30 mars 1883, pour la coupe du bois, excepté les parties " de ces terres sous licence sur lesquelles il ne pousse pas " de bois marchand, de pin ou d'épinette *et qui sont suscep-* " *tibles de défrichement*, et aussi telles autres parties des " terres non concédées de la Couronne que le lieutenant- " gouverneur en Conseil, sur la recommandation du Com- " missaire a pu et pourra juger à propos de mettre à part, " et aussitôt qu'un ordre en Conseil ou les ordres en con- " seil mettant à part ces terres à bois *ont été publiés dans la* " *Gazette Officielle de Québec*, et à compter de la date de " cette publication, aucun terrain compris dans le terri- " toire ainsi mis à part, n'a dû être ou ne devra être " vendu ou approprié pour les fins du défrichement jus- " qu'à l'expiration d'au moins dix ans." Voir aussi 32 " Vict. Ch. 11, sec. 10, paragraphe 3.

L'on voit, par la clause du Statut que nous venons de citer, qu'avant d'établir une réserve de forêt dans une partie quelconque du Territoire de cette Province, le lieutenant-gouverneur en Conseil est tenu de faire procéder à une inspection et d'excepter toutes les terres sur lesquelles il ne pousse pas de bois marchand et qui sont propres à la colonisation. Cette disposition de la loi a évidemment pour but d'empêcher, que des terrains qui seraient susceptibles de défrichement, ne soient enlevés aux colons et ne tombent aux mains des marchands de bois. Or, ces renseignements nécessaires dont parle le statut n'avaient pas été pris, lors de la publication du prétendu ordre en Conseil, puisqu'après avoir donné la description du territoire désigné comme réserve de forêts, le rapport en question contient le *proviso* suivant : " Sauf et excepté tous les

1887.
Gilmour & Paradis.

" lots situés dans les cantons suivants, qui seront trouvés " (d'après des inspections faites par des personnes autori- " sés et compétentes) propres à être établis et sur lesquels " il n'y a pas de bois de commerce," c'est-à-dire dans les cantons de Guigues, et un certain nombre d'autres cantons comprenant le canton Egan. Les inspections requises par la loi devaient être faites avant que l'on pût mettre en force les dispositions du Statut au sujet des réserves de forêts ; on ne pouvait, comme on a semblé vouloir le faire, remettre d'une manière indéfinie, l'accomplissement d'une formalité qui est de rigueur.

Mais il y a plus, dans le cas présent, une inspection a été faite sur les terrains de l'intimé, avant l'émission de son billet de location, de sorte que les conditions mentionnées au prétendu ordre en Conseil invoqué par les appelants auraient été remplies. Nous référons la Cour sur ce point, au rapport de Mathias Joannis, garde-forestier, page 2 de l'appendice du factum de l'intimé. Ce rapport constate qu'il y a environ trente-cinq acres de terre propre à la culture sur chacun des lots de l'intimé. Le seul fait qu'il y aurait encore du bois de pin ou d'épinette, ne les rendent pas pour cela impropres à la culture ; au contraire, ce sont souvent les terrains les mieux boisés qui sont les plus susceptibles de défrichement. Il est assez difficile du reste de trouver dans la Province des cantons qui, tout en étant propres à la colonisation, ne soient pas en même temps, plus ou moins couverts de bois. Dans ces cas, le Gouvernement a une discrétion à exercer, et sur les renseignements qui lui sont fournis par ses officiers, il doit décider si tel ou tel terrain peut être avantageusement concédé pour des fins de colonization. Le Gouvernement, usant de cette discrétion, et d'un droit qui ne peut être contesté, décide dans le mois d'avril 1886, de concéder à l'intimé les lots en question en cette cause ; il n'y a là rien de contraire à la loi.

En admettant les prétentions des appelants, une terre ne pourrait être concédée ou vendue, que lorsqu'elle serait dépouillée de tout bois de construction ; en sorte que le colon, qui est obligé de lutter contre tant de misère, tant

de besoins urgents, se trouverait au milieu de la forêt, en face de la nécessité d'acheter, quelque fois fort cher, le bois de construction requis pour sa modeste exploitation. La loi ne peut avoir en vue un pareil système.

D'après les termes du rapport publié dans la Gazette Officielle, et produit par les appelants pour ce qu'ils prétendent être un ordre en Conseil, l'on voit qu'une restriction importante est faite pour certains cantons, parmi lesquels se trouve le canton Egan; on parait avoir voulu inclure d'une manière définitive et absolue dans la "Réserve de forêts," tous les cantons qui sont énumérés dans la première partie de ce rapport; quant au canton Egan, et quelques autres mentionnés dans le dernier paragraphe, il est dit que tous les terrains situés dans leurs limites, et qui seront propres à être établis, pourront être, sur inspection faite, concédés pour des fins de colonisation. Aucun de ces terrains n'est donc irrévocablement compris dans la "Réserve de forêts," et rien n'empêche le Gouvernement d'en disposer de la manière qu'il juge convenable.

Comme dernier argument sur ce point, nous soumettons respectueusement, que les appelants, par cette partie de leur défense, excipent du droit d'autrui et invoquent des moyens qui ne compètent qu'à la Couronne. Si le titre octroyé à l'intimé l'a été erronément ou sur de fausses représentations, il n'y a que la Couronne qui puisse s'en plaindre et demander sa cancellation. De plus, ce titre doit avoir pleine force et effet, tant qu'il ne sera pas annulé ou révoqué par l'autorité compétente. Ce principe fait la base d'un des principaux motivés du jugement rendu par le savant juge de la Cour Supérieure et conçu dans les termes suivants: "an annullable title should have provisional execution until its nullity is pronounced by the judgment of a court," et aussi par le considérant qui se lit comme suit: "that the said location ticket can "only be annulled or cancelled at the instance of the "Crown and that the defendants have no right to de- "mand its cancellation."

En supposant, ce que nous sommes loin d'admettre, que le titre de l'intimé serait susceptible d'annulation, il

1887.

Gilmour & Paradis.

est revêtu *prima facie*, d'un caractère d'authenticité et de validité qui ne peut être méconnu ; il pourrait être un acte annulable, mais il n'est certainement pas nul d'une nullité absolue. Il n'y a que les tribunaux, sur une action en nullité, et le Gouvernement dans les cas indiqués par la loi, qui puissent en prononcer l'annulation ; nous citerons à l'appui de cette prétention, le passage suivant de Laurent, Vol. 18 No. 533.: "Tant que le contrat n'a " pas été annulé, il existe et produit tous les effets d'un " contrat qui serait pleinement valable. Il a été jugé " qu'il en est ainsi, alors même que la nullité est absolue et " d'ordre public ; l'acte n'en a pas moins effet tant qu'il n'a " pas été annulé par les tribunaux. Cela n'est pas dou- " teux. Quand le contrat est inexistant, la loi dit que " l'obligation ne peut avoir aucun effet ; mais si l'acte est " simplement nul, il a une existence légale jusqu'à ce " qu'il ait été annulé ; donc il doit produire ses effets jus- " qu'à ce que le juge en ait prononcé l'annulation. Et il " n'appartient qu'aux parties intéressées d'agir en nullité, " elles seules peuvent savoir s'il est de leur intérêt de " maintenir l'acte ou d'en provoquer l'annulation."—Cette doctrine est partagée par tous les auteurs.

Comme le déclare le jugement de la Cour de première instance, il n'y a que la Couronne qui puisse poursuivre la nullité du billet de location octroyé à l'intimé. Le même principe a été consacré par cette Honorable Cour, dans plusieurs causes où il s'agissait de Lettres Patentes ; nous mentionnerons entre autres :—*Pacaud & Rickaby*, 1er Q. L. R. p. 245, et *MacCraken & Logue*, 6 L. N. p. 90. D'ailleurs, en supposant même que ce titre serait nul, nous soumettons que cela ne pourrait justifier les appelants de s'être emparé de la propriété de l'intimé par force et violence comme ils l'ont fait ; ils devaient, dans ce cas, au lieu de se faire justice à eux-mêmes, s'adresser aux tribunaux pour obtenir l'expulsion de l'intimé. Mais nous sommes convaincus, qu'il n'y aura pas lieu de considérer la force de cet argument, et que cette Honorable Cour adoptera la manière de voir du savant juge *ad hoc*, en décidant que le titre de l'intimé est parfaitement valide.

1887.

Gilmour & Paradis.

Comme deuxième moyen de défense, les appelants invoquent une licence ou permis de coupe de bois sur les terrains de l'intimé. Ils allèguent qu'à la date du billet de location octroyé à l'intimé, ils étaient porteurs de cette licence, dont l'effet s'étendait jusqu'au 1er mai suivant (1886), et qu'elle aurait été renouvelée en leur faveur, le 23 octobre de la même année pour jusqu'au 1er mai 1887. —La Cour voudra bien ici remarquer, qu'entre le 1er mai et le 23 octobre 1886, les appelants, d'après leurs propres allégations, ne pouvaient prétendre à aucun droit sur les propriétés de l'intimé en vertu de leur licence.—Maintenant, deux questions se présentent ; d'abord, un billet de location pouvait-il légalement émaner en faveur de l'intimé, le 21 avril 1886, alors que la licence des appelants était encore en force ? Ensuite, le renouvellement de cette licence, opéré le 23 octobre 1886, peut-il affecter les droits conférés à l'intimé par son billet de location ? En d'autres termes, y a-t-il conflit entre les deux titres ?..... Il suffit de référer à la licence même des appelants, pour trouver la solution de cette difficulté, qui n'est qu'apparente, et pour se convaincre que les droits de l'intimé restent intacts ; nous voulons parler de la clause de leur licence qui se lit comme suit : "All lots sold or located " by authority of the Commissioner of Crown Lands, prior " to the date hereof, are to be held as excepted from this " License, and lots so sold or located subsequently, shall " cease to be subject to it after the thirtieth April follow- " ing, and whenever the sales of any such lots shall be " cancelled, they shall be restored to this License."—Cette condition est imposée à tout porteur de licence. Ainsi donc, même d'après le titre qu'ils invoquent, les appelants ne peuvent justifier leur empiètement, car ils étaient tenus de respecter la possession de l'intimé, aussi longtemps que son billet de location subsisterait ; et comme le dit le jugement de la Cour de première instance, " the defen- " dants cannot take exception to and complain of the sale " to the complainant under the conditions of their own " title, but that they are bound thereby to respect the

1887.
Gilmour & Paradis.

"possession of the complainant under the location ticket "granted to him."

Voyons maintenant, si les appelants étaient de bonne foi, lorsqu'ils sont entrés sur les propriétés de l'intimé dans le mois d'octobre dernier. Les documents produits au dossier démontrent clairement qu'ils ne l'étaient pas. Il est établi, que bien avant la date de leur usurpation, ils connaissaient l'existence du billet de location en vertu duquel l'intimé était en possession des lots en question en cette cause.—Ils savaient que l'intimé, comme colon de bonne foi, avait fait et était encore à faire sur ses lots, les améliorations et défrichements voulus par la loi.

Sachant qu'ils n'avaient aucun droit sur ces terrains, les appelants firent plusieurs démarches auprès du Commissaire des Terres de la Couronne, afin de l'induire à canceller le titre de l'intimé; nous référons la Cour, sur ce sujet, à la lettre écrite par les appelants et adressée à l'Hon. W. W. Lynch, en date du 20 septembre 1886.—Malgré leurs instances et la pression qu'ils exercèrent sur l'Honorable Commissaire, les appelants ne purent obtenir leur demande et le billet de location de l'intimé ne fut pas cancellé. C'est alors qu'ils décident de passer outre et de tâcher d'atteindre leur but par la force et la violence; ce moyen leur paraissait sans doute facile, vu la faiblesse et la pauvreté de leur victime. Le 15 octobre dernier, les appelants, accompagnés d'une vingtaine d'hommes, sans droit et sans autorité aucune, entrent forcément sur la propriété de l'intimé, et là se livrent aux déprédations les plus révoltantes; et s'ils n'eussent été arrêtés dans leur œuvre de dévastation, par le présent bref d'injonction, il est probable qu'il n'y aurait plus aujourd'hui un seul arbre sur les lots de l'intimé.

Ce n'est pas la première fois que des marchands de bois commettent des empiètements aussi audacieux, encouragés qu'ils sont par l'impunité qui résulte de la pauvreté du colon. Il est temps, croyons-nous, que des abus aussi criants que ceux dont les appelants se sont rendus coupables vis-à-vis l'intimé, soient réprimés par les tribunaux. Les appelants ne peuvent apporter aucune raison plausi-

ble pour excuser leur usurpation ; à tous les points de vue, leur conduite envers l'intimé est illégale.

Avant de terminer, nous croyons devoir attirer de nouveau l'attention de cette Honorable Cour, sur le fait que nous nions formellement, qu'un ordre en Conseil au sujet des réserves de forêts, ait jamais été publié dans la Gazette Officielle de Québec ; nous avons discuté les prétentions des appelants, comme si tel ordre en Conseil eût été publié, parce que le fait semble être admis par le savant Juge de la Cour Inférieure, tandis qu'il n'y a de produit au dossier, comme nous l'avons déjà dit, qu'un rapport d'un Comité du Conseil Exécutif.

Sept. 23, 1887.]

CHURCH, J. (*diss.*):—

This group of cases presents difficult and important questions. The legislation on the subject of the sale of Crown lands and the lease of the Crown domain for the purposes of the timber traffic, and the executive authority over sales to settlers and leases to lumbermen, is in a more or less confused condition. It has grown with the growth of the country, and has always been fragmentary and tentative, and it is not easy to define the precise rights of the Crown, the lumberman and the settler, when they come into conflict, without a full grasp of the whole subject.

Looking back upon the legislation of the past, it is apparent that the control of the Crown domain was ceded to the people of this country for two purposes : First, the promotion of colonization and settlement ; second, the creation of a revenue and the fostering of the lumber traffic. These purposes are not necessarily antagonistic, but they sometimes become so when, under the guise of settlement, parties seek to obtain possession of the choice spots in some lumberman's limit convenient of access, or where lumbermen are selfish and oppose the progress of settlement by a stout assertion of rights which, however technically sustainable, are nevertheless a violation of the public policy of the country as regards development and colonization.

1887.
Gilmour & Paradis.

Long before the passing of the Act 22 Vic., cap. 23, a large part of the most accessible portions of the Crown domain became the subject of license to lumbermen, and as settlement extended, these parties have seen their territory invaded sometimes by *bona fide* settlers, but oftener perhaps by persons who, under the guise of settlement, sought to possess themselves of the pine on the lumberman's limit, and for which he had often paid very large sums either by way of bonus to the Government at the time of concession, or by direct purchase from other grantees, and on which he had expended also very large sums for creek and river improvements, etc.

The leases to the lumbermen were, by their terms, annual, but there has always been inserted in such leases the right of renewal the succeeding year on complying with the conditions imposed by the Department, and for many years renewal was obligatory, so that the tenure was regarded as a fixed one, but for the convenience, apparently, of the lumbermen an *interregnum* existed from the end of the winter and spring operations in the forest (30th April) till the 1st December succeeding, the period usually consumed in bringing the timber to market and disposing of it, during which the lease upon the face of it terminated. This was evidently to enable the lumberman, after the sale of his year's product, to make payment of the ground rent and Crown dues to the Crown, and file the necessary rerurns.

As settlement extended, and the conflicts between lumbermen and settlers became more frequent, and the value of the pine timber increased, and speculators became correspondingly more anxious to possess themselves of the pine timber under the pretence of settlement, the Legislature appears to have concluded that it was necessary to guard the public interest in the pine, and to secure it as a source of provincial revenue, rather than to allow it to fall into the hands of persons who, pretending a desire of settlement, complied with the conditions of sale and thus secured extensive groves of pine timber, passed the Act 45 Vic., cap. 10, sec. 2, whereby the pine timber, for

1887.

Gilmour & Parad'a.

the future, in all sales or promises of sale, location tickets, was reserved, and was, by the same section of the Act, declared to be the property of the Crown as against the purchaser, location ticket holder and all other persons, reserving to the location ticket holder, when he became patentee, the right to purchase it at a fixed price.

The following year, by 46 Vic, cap. 9, authority was taken to create a Forest reserve, and sec. 5 of that Act provides for that as follows:—Sec. 5. "The Lieutenant-"Governor-in-Council may, as soon as the necessary infor-"mation can be obtained, after the coming into force of "this Act, set apart as 'forest land' all the ungranted "lands of the Crown, now held under licenses to cut "timber, except such parts of such licensed lands on "which no merchantable pine or spruce timber grows, "and which are fit for settlement, and also such other "portions of the ungranted lands of the Crown, as the "Lieutenant-Governor-in-Council, on the recommendation "of the Commissioner of Crown Lands, may think fit so "to set apart; and as soon as the order or orders-in-"council, setting apart such forest land, shall be published "in the *Quebec Official Gazette*, and from and after the date "of such publication, no land included in the territory so "set apart shall be sold or appropriated for settlement "purposes, until after the expiration of at least ten years, "and, not then, until after it is established to the satisfac-"tion of the Lieutenant-Governor-in-Council, that the "whole or any portion of such territory may, with advan-"tage be opened for settlement. The order or orders-in-"council, withdrawing such territory, shall likewise be "published in the *Quebec Official Gazette*. The land so set "apart shall be known and designated as a 'Forest "Reserve.'" By this section it will be observed that all of the ungranted lands of the Crown then under license to cut timber, except such portions thereof as contained no pine or spruce timber, but which were fit for settlement, and such other portion of the ungranted lands of the Crown as the Lieutenant-Governor-in-Council, on the advice of the Commissioner of Crown Lands, might think

1887. Gilmour & Paradis.

fit to set apart as forest land, might be created a forest reserve. This was to be done as soon as the necessary information could be obtained; was to be done by order-in-council, this order-in-council was to be published in the *Quebec Official Gazette*, and from the date of such publication, and for a period of ten years thereafter, no land included in such reserve could be sold or appropriated for settlement, and not after that period until it should be established to the satisfaction of the Lieutenant-Governor-in-Council that the whole, or a portion of it, could advantageously be opened up for settlement.

The sixth section of the same Act made it the duty of the Commissioner of Crown Lands, after the publication of such order-in-council, to exclude from any license any land theretofore covered by license which was not included in the forest reserve.

This statute appeared to draw a hard and fast line when acted upon, between lands set apart for colonization and those set apart for lumbering purposes.

This Act came into force on the 30th March, 1888. In September of the same year an order-in-council was promulgated creating the forest reserve contemplated by the Act 46 Vic., cap. 9, and reciting the fact that such action was taken by virtue of the powers conferred by that Act and on information and documents of record in the Department of Crown Lands (*vide* order-in-council, *Official Gazette*, 23rd September, page 1576); and I assume these documents and reports supplied "the necessary information" spoken of in the statute.

By this order-in-council the township of Egan was made a part of the forest reserve, but there was this reserve or exception in the order-in-council:—"All lands situate "in the township of Egan and certain other townships "in the order-in-council mentioned, which might there-"after be found (from inspection made by competent and "authorized persons) fit for settlement and destitute of "merchantable timber."

This exception has led to the difficulties between the parties to these cases. And in consequence of the litiga-

1887.

Gilmour & Paradis.

tion several questions arise: 1. Was it competent for the plaintiffs, under the titles by them invoked, to bring the actions? Or 2. Could they, under their titles and on the facts stated by them in their petition, ask for the issue of a writ of injunction? And, finally, if the writ was duly issued, is the judgment maintainable, or should it be set aside?

On the first question, I observe that the statute excluded from the proposed sale of any lot the pine timber on such lot, and that it expressly reserved it to the Crown, and I think there can be no doubt that the trespass complained of and "the irreparable injury" which the plaintiff sought to be protected against, was the removal of that timber from the lot for which he held a conditional promise of sale. He, therefore, had no direct interest in this timber; his interest was contingent, and depended upon his subsequently becoming the patentee of the lot, and then only if he desired to purchase it, arranging with the Crown to do so (46 Vic., c. 9, sec. 6). It is true that it may be contended the intrusion of the defendants on his lot was a civil trespass, but when did a civil trespass under such circumstances as these become the subject of an injunction in England, or here, or in France? Especially so, when an adverse title is produced, and a possession from the Crown shown anterior to the authority to take possession by the plaintiff, coupled with a continuing right (renewal of license), and the issue of a permit (new license), as took place here. In which of the enumerated cases of the Injunction Act is authority found for the issue of this writ? Sub-section 2 of section 1 does not cover this case, for that section requires a valid title on the part of the plaintiff, and this the plaintiff certainly had not to the timber, for that he had not even professed to purchase, and as respects the land, he was not yet proprietor and might never become such. Besides, "the work" referred to in the clause of the statute is not intended to mean the acts which the appellant is described as doing on the lots in question.

But the injunction act, sub-section 6 of section 1, does

1887.
Gilmour & Paradis.

contain express provision for an injunction not, however, in favor of a private individual as in this case, but by the Crown, and seems to have been drafted expressly to cover a case such as the one now under consideration, the only distinction being, and it is one of vast import in this case, and it is this, the remedy is given to the Crown and to the Crown alone, in order to prevent any person trespassing on the property of the Crown or cutting or removing any property belonging to the Crown or in which the Crown has an interest. I do not find any similar authority in favor of private individuals. I do not deny that under the French law and on cause shown, an order substantially the same as was made here, could be made, but what I do say is that when made, it would be made on a case stated, and the rights of the parties would be litigated, and the judgment, instead of taking the form of a perpetual injunction ordering the defendants to cease and discontinue lumbering operations, would have decided the question of the alleged *trouble* and have defined the rights of the parties in the territory in question. As it appears to me, this judgment, if it is to have full scope and weight, is a perpetual bar to the defendants ever showing any rights in the timber on the lots or ever removing it by lumbering operations,—and that, too, in face of the fact that the Crown has issued its license to the defendants, authorizing them, their agents and workmen, to cut and haul this timber. I, therefore, conclude it was not competent for the plaintiff, in his own name, to ask and obtain a writ of injunction for a mere civil trespass under the circumstances shown in this case. I am aware that the statute confers upon holders of licenses of occupation the same rights against trespassers as would be those of the holder of letters patent from the Crown, but *quoad* the pine and spruce timber growing upon his lot, and in which he has no beneficial interest, but only a contingent one, he cannot prevent the limit holder whose limit comprises the same territory from going upon his lot to cut the timber, and he cannot regard him as a trespasser within the meaning of that clause of the statute.

He must find his protection through the Crown. That statute was passed when the settler had a beneficial interest in the standing pine and spruce timber.

But all this assumes, in a measure, that the lot in question was within the forest reserve, and requires an examination of the question whether it was or was not within it.

In the first place the plaintiff admits that all the township of Egan was within the forest reserve unless some part of it was excluded from it under the terms of the order-in-council of September, 1883. The words of the order-in-council are: "Save and except all lots which "hereafter may be found on inspection by competent and "authorized persons fit for settlement, and destitute of "timber."

The words of the statute are, lands upon which "no "merchantable pine or spruce timber grows, and which "are fit for settlement"—(46 Vict., cap. 9). The words of the statute and those of the order-in-council are synonymous, if not identical. I shall adopt those of the statute in the observations which follow.

A very simple query which can be easily answered from the record, and even from the plaintiff's own pleadings, disposes pretty conclusively of the question. Did merchantable pine grow on the lots in question when the sale was made to the plaintiff? The plaintiff in his petition says "the defendants have cut several hundred pine "logs, and are still cutting." The forest ranger's report filed by the plaintiff says: "Il y a encore beaucoup de "pins pour les fins du commerce." If this be true, then there was merchantable pine on the lots, and if there was, then by the terms of the order-in-council it was not excluded from the forest reserve, but was included in it; and if it was included in it, then by the plaintiff's admission filed of record in the case, it was included in the lands covered by the defendants' license to cut timber, and he could not be and was not a trespasser—*vide* admissions in record.

This brings me to say a word on the value of the sale

1887.
Gilmour & Paradis.

made by the Crown lands agent and its subsequent ratification by the Commissioner. Putting aside all question of surprise or deceit, and respecting which I don't think there is adequate legal proof, perhaps, I am of opinion the sale by the Crown timber agent and its ratification by the Commissioner was *ultra vires* and unauthorized; that the land was within the forest reserve; that as such it was without his domain for the purposes of sale for settlement until restored there by an order-in-council, and that such order-in-council could only be passed after ten years, and then only on report showing the land to be fit for settlement, and that until that period of time had elapsed and such proceeding taken, there existed a statutory disability against the Commissioner and *a fortiori* against his agent. That it is not a question of a voidable act, but that it is an utter, complete and absolute nullity as between the limit holder and the Commissioner and those holding by his assumed authority, and that the only right which such sale or attempted sale could give would be to be recouped his money and any contingent loss by the Executive.

The control of the Commissioner of Crown Lands over the Crown domain is only such as has been expressly given him by statute, and must be strictly interpreted. The fundamental principle is that the Crown domain is inalienable. The Executive Council, as the administration of the country, has necessarily great control over it, and I do not attempt to define what its powers may or may not be, since they are not in question here, but a vast distinction exists between what a Commissioner of Crown Lands may do and what the whole Executive of the country may or can do. He acts, in the matter of sales, under a delegated statutory authority, and quite independent of his functions of an Executive Councillor or Commissioner administering the Crown lands. He cannot assume an authority which the statute does not give, nor defy it when it denies him the power to act. If he does (as it appears to me he did in this case), his acts are simply null.

1887.
Gilmour & Paradis.

I am, therefore, of opinion that the respondents had no beneficial interest in the timber in question, that it was not competent for them to take the writ which they took in these cases without conjoining with it a *demande* that would have defined the rights of the parties in a final and determinate manner; that the lots were within the forest reserve, and as such removed from the control of the Commissioner and his agents for sale to settlers; that the attempted sale was absolutely null; and I think the petition in the Court below should have been dismissed, and this appeal maintained; but the majority of the Court holding a different opinion, I can only record my dissent, which I hereby do.

In the Allaire case there is this distinction from all the others, the location ticket was granted before the formation of the forest reserve; but from what I have before stated it will be gathered that I don't think he had any remedy by injunction, and that his complaint is one which should have been brought in the usual manner, with or without an application for a conservatory order to protect assumed rights in the timber, but not by the process and in the manner followed in this case.

In conclusion I cannot concur in the modification of the judgment which a majority of this Court has determined upon. If the modification is of any substantial importance, then, to that extent, it is an admission that the plaintiff was aggrieved by the judgment of the Court below, and he should not be condemned to costs; but I do not see that it is of any substantial importance, since it does not point out what direction and what extent the further proceedings which may be had in the Court below should take.

CROSS, J. (*diss.*):—

Paradis, holder of a location ticket under the Crown for lots Nos. 69 and 70 in the 6th range of the township of Egan, in the district of Ottawa, of date the 25th of April, 1886, petitions the court for an injunction to restrain Gilmour & Co. from cutting pine and other timber on

1887.
Gilmour & Paradis.

said lots, alleged to be in process on or about the 15th October, 1886.

Gilmour & Co. plead that they hold a license from the Crown to cut the timber on limits which include said lots, terminable 1st May, 1886, but renewable on the 2nd October, 1886, for the year to expire 1st May, 1887; that a statute of Quebec passed in 1883, 46 Vic., cap. 9, authorized the Lieutenant-Governor-in-council to set apart districts of land as a forest reserve, to wit, all the ungranted lands of the Crown held under license to cut timber, except such parts of such licensed lands on which no pine or spruce timber grew and which were fit for settlement, and that when the order-in-council setting apart such forest land had been published in the *Quebec Official Gazette*, no land included in the territory so set apart should be sold or appropriated for settlement purposes until after the expiration of at least ten years from the date of its publication; that such order-in-council had been passed and duly published in the *Quebec Official Gazette* on the 22nd September, 1883, setting apart a certain territory in which was included the said township of Egan as a forest reserve; that the lots in question were in the township of Egan included in the said forest reserve, were covered with merchantable timber, pine and spruce, and were unfit for settlement; that Paradis' title was issued in violation of said statute, and was null and void.

No difficulty existed as regards the license to cut the timber having been granted to Gilmour & Co., as alleged by them, nor as regards the location ticket in favor of Paradis as alleged by him. It is also admitted that Gilmour & Co. were cutting timber on the lots in question when the injunction issued to restrain them. The facts in issue being thus established, the judge of the Superior Court, who first granted a temporary injunction, made a decree in effect declaring it perpetual, from which decree or judgment the present appeal has been taken by Gilmour & Co.

Paradis relies upon the presumption in his favor re-

sulting from his location ticket, and the fact that licenses to cut timber, as in the case of the one held by Gilmour & Co., are made subject to a reserve in favor of the Crown of a power to grant the same land by location ticket to settlers, and further and more particularly to a reserve in the order-in-council and in the proclamation putting it in force, to the effect that there was excepted the parts of the ungranted lands in the said township of Egan, held under license to cut timber, on which no merchantable pine or spruce grew, yet fit for settlement, and which might thereafter be found, from inspections made by competent and authorized persons, fit for settlement and destitute of merchantable timber.

The answer to these objections is that the land in the township of Egan has been, by operation of the statute, the order-in-council and proclamation, withdrawn from the operation of any power the Government or any of its officers might otherwise have had to dispose of it; that with regard to the reserve thereby purporting to be made of lands fit for settlement, and on which no merchantable timber grew, none such had been specially excluded, nor was any date or time fixed from which it was intended to be excluded, although to be operative and legal it was necessary that the exclusion should be by definite description, from information previously obtained, and to operate from the time fixed for the creation of the reserve, viz., from the publication of the proclamation, and not to depend upon future inspections and variable times for portions of the reserve to suit the convenience of the Executive, and to require different dates for various parts of the reserve, from which to compute the ten years' duration contemplated by the statute; that if inspections had to be made they should have been obtained before the order-in-council was passed, so that any lots suitable for exclusion might have been specifically excluded by the terms of the order-in-council and proclamation, without which the reservation in question, in my opinion, can be of no force or effect whatsoever. There is now no authority in law, but, on the contrary, an express

1887.
Gilmour & Paradis

prohibition to grant by location ticket lands included in the forest reserve, and no lands under license to cut timber, as these were, were to be excluded from the forest reserve unless they contained no merchantable timber, and were fit for settlement. It is indisputable and made quite certain that the lots in question ought not to be excluded from the forest reserve, and were not in fact excluded. They certainly contain a considerable extent of merchantable timber, a fact certified by the rangers themselves in their report wherever the location tickets were granted; and the cause assigned by the petitioner himself for the injunction is that Gilmour & Co. are cutting pine timber on the lots, and the injunction is sought to prevent them from doing so, although the express condition on which the lots could be excluded from the forest reserve was that they contained no merchantable timber. Paradis himself, by his own proceeding, shows that his title is bad and in violation of the statute and the order-in-council. The report of the wood ranger, which formed the pretext for issuing the location ticket, shews the same thing.

In the judgment of the Superior Court, it is said that the location ticket of Paradis is a title not null but annullable. I think it is granted in the complete absence of authority on the part of those who issued it, and therefore absolutely void. The officers of the Government, having no authority to give it, the instrument can have no effect. [illegible], if only voidable, have Gilmour & Co., who have [illegible]d its nullity, no recourse? It is said that it can be set aside at the instance of the Crown, but Gilmour & Co. cannot move the Crown, and a perpetual decree has passed against them. How can they ever, unless by the present appeal, get rid of that decree? It seems to me that Paradis should have commenced a suit against Gilmour & Co. to establish priority of title if it was preferable, and in that suit asked for an injunction to hold temporarily until his title was established. When that occurred, it was time to ask that it should be made perpetual. If, indeed, the whole merits of the controversy

came up in the present proceeding, Gilmour & Co. must have the right to show the unauthorized action of the officers granting the location ticket and its nullity.

The land claimed by the respondent was either in or out of the forest reserve from the date of the last publication of the proclamation. It could not be shifted out or in from anything that occurred subsequently. The ten years of inalienability dated from that event, and for the whole of the reserve at once, not piecemeal by portions of territory selected from time to time at different times. The terms of the law required it to be settled by the one proceeding. Undoubtedly the order-in-council and proclamation included the township of Egan and made that township part of the forest reserve. The vague and, to my mind, inoperative reservation was inefficacious to exclude respondents' lots; but, suppose it could have had an exceptional effect, it was incumbent upon the respondent to show that he was within the exception, that is, he would have had to establish that his lots were composed of land on which no pine or spruce timber grew and which was fit for settlement. This was the condition on which the order-in-council and proclamation permitted their exemption. But in place of proving this the respondent's own averment, and the remedy which he seeks, is on the ground that the appellant is cutting pine timber on the lots in question, a fact which contradicts and nullifies respondent's pretensions to title. Nor is this left a matter discretionary with the agents of the Crown.

Again, it is urged that the respondent has a title which may be annullable but which is not null. This seems to me to be a mistaken idea. The pretended title is simply no title at all: it is not liable to be impeached for any vice for which it should be annulled, but is non-existent because the agents of the Crown who pretended to grant it had no authority whatever to do so. It therefore fails, for want of authority. The power of the agents over the domain of the Crown was derived from the statute, and that alone; apart from that, the Crown domain was in-

1887.
Gilmour & Paradis.

alienable. Again, it is urged that the respondent has a presumptive title which, in the meantime, should be enforced; but I think it will be conceded that an injunction cannot fulfil the functions of a possessory action. It is only, in fact, where the title is certain that the injunction is applicable for its protection. The judgment appealed from decrees a perpetual injunction, which, as regards the appellant, if allowed to stand, must be final. Again, respondent's title, if it were of any force, authorizes him to prosecute trespassers on the land. Appellant's title authorizes him to prosecute trespassers. In a suit between these parties, who is trespasser? Both, it may be assumed, hold titles from the Crown. Respondent claims a remedy because appellant is cutting timber, and yet respondent has no title to the timber. Appellant is to be expelled because he is cutting timber, and yet he has a title to that timber. I think it is no case for such summary, definite and final remedy as has been awarded in this case, and that the judgment should be reversed and the action dismissed.

It may, perhaps, be conceded to be within the administrative power of the Executive to determine what lands contain a sufficiency of pine and spruce timber, and what do not, and they must so determine before the reserve is created. They cannot afterwards alter its boundaries or add to or diminish its extent. It has to be fixed at and from a definite time by a definite order-in-council, put in force by proclamation, and dates from the time of its creation. If the agents of the Crown could afterwards exclude lots, they could exclude townships. There could be no distinct reserve. Its boundaries would remain variable at the will of the Executive, although the law required them to be fixed and the reserve made inalienable for ten years, necessarily to be reckoned from a definite date, not from several dates according to the discretion of the Executive by the exclusion, from time to time, of portions of the territory theretofore designated as reserve.

For the principles of law applicable, I refer to the Quebec Act of 1878, 41 Vic., ch. 14, sec. 1, which provides

that a suspensive writ of injunction may be granted in certain cases including, by § 2, the cases, Whenever any person who has not acquired the possession of the year and who has no valid title to the property, causes work to be carried on upon any land whereof another is proprietor through a valid title and of which he is in lawful possession. Also to Kerr on Injunctions, p. 294; Joyce on Injunctions, pp. 1315 and 1317; Holcomb's Introduction to Equity, an American publication, Cincinnati, 1846, note to p. 158.

TESSIER, J.:—

Cet appel est dans une cause de grande importance. Les faits sont simples, mais la question de droit est compliquée. Dans le mois d'avril 1886 le gouvernement de la Province de Québec accorda aux intimés dans ces dix causes en appel respectivement des billets de location pour certains lots de terre situés dans le canton de Egan. Le 15 octobre les Messieurs Gilmour envoyèrent une quinzaine ou une vingtaine de leurs employés couper du bois sur les dits lots de terre, et ce n'est qu'après cet empiétement allégué et dont on se plaint, c'est-à-dire le 23 octobre 1886, que les Gilmour obtinrent le renouvellement de leur licence. Sur ce, les colons firent une requête pour bref d'injonction pour empêcher les Gilmour de faire la coupe de bois sur les lots occupés par eux en vertu de leurs billets de location. Le bref émana, et après enquête faite, la Cour Supérieure, district d'Ottawa, par le jugement dont est appel, déclara le bref d'injonction perpétuel et en conséquence ordonna aux appelants de cesser leurs opérations sur les lots en question. La majorité de cette Cour confirme ce jugement à l'exception de cette partie d'icelui qui regarde la durée de l'injonction. La question est de savoir si, sous l'acte des injonctions, le titre des colons donne droit à ce bref en leur faveur. Le titre d'avril 1886 prime-t-il celui des Gilmour?—Les colons qui ont obtenu des billets de location sont en possession d'un titre de *quasi*-propriétaire, et conséquemment la loi leur accorde des moyens pour sauvegarder et faire prévaloir ces droits.

1877.
Gilmour & Paradis.

De l'autre côté les Gilmour sont en possession d'un titre qui consiste dans leur licence de couper le bois dans le canton de Egan; mais à ce droit il y a une réserve importante. Cette licence, du 23 octobre 1886, est accordée sous réserve de tous lots vendus ou pour lesquels des billets de location auraient été donnés avant le 30 avril 1886. Voilà donc le titre des colons, sinon suffisant pour leur conférer un droit de propriété parfait, au moins amplement suffisant pour leur donner droit à un bref d'injonction contre quiconque les troublerait dans l'exercice des droits conférés.

Mais ce n'est pas là tout. Par l'acte de la Législature de Québec, 46 Vic. c. 9, section 134: "Aussitôt que les "renseignements nécessaires ont pu ou pourront être pris, "après le 30 mars 1888, le Lieutenant-Gouverneur en "Conseil a pu ou pourra mettre de côté comme terre à "bois, toutes les terres non concédées de la Couronne sous "licence le dit jour 30 mars 1883, pour la coupe du bois, "excepté les parties de ces terres sous licence sur lesquel-"les il ne pousse pas de bois marchand, de pin ou d'épi-"nette, et qui sont susceptibles de défrichement, et aussi "telles autres parties des terres non concédées de la Cou-"ronne que le Lieutenant-Gouverneur en Conseil, sur la "recommandation du Commissaire a pu ou pourra juger "à propos de mettre à part, et aussitôt qu'un ordre en "Conseil ou les ordres en Conseil mettant à part ces ter-"res à bois ont été publiés dans la Gazette Officielle de "Québec, et à compter de la date de cette publication, "aucun terrain compris dans le territoire ainsi mis à part, "n'a dû être ou ne devra être vendu ou approprié pour "les fins du défrichement jusqu'à l'expiration d'au moins "dix ans, etc." Par ordre du Lieutenant-Gouverneur en Conseil, publié dans la Gazette Officielle le 22 septembre 1883, il fut déclaré que les lots en question formaient partie d'une "réserve forestière," tel que prévu par l'acte précité. De ce fait les appelants prétendent que les billets de location furent accordés aux intimés sans droit, et qu'ils sont nuls et de nul effet. Mais pour que l'ordre en Conseil soit valide il faut que ces lots tombent sous la ré-

gle du statut et qu'ils n'entrent pas dans l'exception établie par le même statut, c'est-à-dire, il faut que ces lots ne soient pas partie de terres sous licence sur lesquelles il ne pousse pas de bois marchand, de pin ou d'épinette, et qui sont susceptibles de défrichement. Est-ce à la Cour de faire une enquête pour savoir si ces lots viennent dans l'exception ? Quand le gouvernement fait un acte exécutif et administratif, et que cet acte est un fait dans sa jurisdiction, la validité de cet acte n'est plus une question en litige soumise au tribunal. La Cour en décidant quant à sa validité exigera la preuve de l'accomplissement par le Gouvernement des conditions apposées par la loi. Mais sans mettre le Gouvernement en cause, il me semble que l'exception contenue dans la section fait voir qu'il y avait lieu à une enquête par l'Exécutif et non par la Cour. Aussi les Messieurs Gilmour ont parfaitement compris ceci, et reconnaissant qu'ils n'avaient aucun droit de couper le bois sur les lots en question, ils s'adressèrent le 20 septembre 1886 au Commissaire des terres de la Couronne disant : "nous espérons que vous nous donnerez la per- " mission de couper le bois sur les dits lots ou que vous " mettrez de côté les dits billets de location." Ce fait est un aveu qu'ils reconnaissaient eux-mêmes n'avoir pas droit sans cette permission. Ils ont pourtant agi contrairement à ce qu'ils connaissaient, et sciemment ils ont dépassé les limites de leur droit.

Puisqu'il y a conflit entre les titres des parties, et jusqu'à ce que leurs droits respectifs soient finalement jugés, le bref d'injonction, qui pour le présent nous paraît avoir une raison d'être suffisante, continuera en vigueur enjoignant aux défendeurs-appelants de rester in *statu quo* jusqu'à ce que les droits de propriété des parties soient finalement décidés suivant les règles ordinaires de la loi.

DORION, CH. J. :—

This appeal arises out of a writ of injunction which the respondent has obtained, enjoining the appellants to cease cutting timber on lots nos. 65 and 66, in the sixth range of the Township of Egan, in the District of Ottawa,

1887.
Gilmour & Paradis.

which he holds under a location ticket from the Government of the Province of Quebec, bearing date the 21st of April, 1886.

The appellants had, for some years previous to the issuing of the location ticket to the respondents, been the lessees of Crown timber limits, under a license from the Commissioners of Crown Lands for the Province. By this license the appellants were authorized to cut timber on all the unconceded Crown Lands therein mentioned, including the unconceded lands in the Township of Egan, for a period of one year from 1st May to 1st May. This license was renewable from year to year at the option of the lessee upon the fulfilment of the conditions on which it was granted, and was renewed in favour of the appellants on the 23rd October, 1886. One of the conditions inserted in this, as in the previous licenses, is that "All "lots sold or located by authority of the Commissioner "of Crown Lands, prior to the date hereof, are to be held "as excepted from this license, and lots so sold and "located subsequently shall cease to be subject to it after "the 30th April following, and whenever the sales of "any such lots shall be cancelled, they shall be restored "to this license."

These licenses are issued under the authority of chap. 23 of the Consolidated Statutes of Canada and its amendments.

The location ticket under which the respondent holds the lots 65 and 66 in the sixth range of the Township of Egan, was granted under section 13 of chap. 22 of the Consolidated Statutes of Canada. Such a location ticket is, in effect, a promise of sale of the lands to which it applies, subject to the fulfilment on the part of the locatee, his heirs and assigns, of the conditions on which it is granted, and gives to the locatee absolute possession of such lands, and all the rights of action against trespassers which he might exercise if he held such lands under a patent from the Crown.

When, on the 15th of October, 1886, the appellants entered upon the lots in question in this cause, the

respondent was in possession of these lands, which he held by virtue of his location ticket of the 21st of April, 1886.

The license of the appellants to cut timber on those lands expired on the 30th of April, 1886, and although it was renewed on the 23rd of October, 1886, that is, after the day on which the trespass complained of was committed, it was not renewed as to the lots in question, which were excluded from it by the condition of their license.

We have, therefore, the respondent seeking to restrain by injunction the appellants from cutting timber on lands of which he is in possession under a title emanating from the Crown, or Provincial Government, while the appellants have neither title nor possession. It seems, therefore, that under the circumstances, the Court below was right in maintaining the injunction.

The contention of the appellants is that the location ticket was issued contrary to a recent statute, and that they are entitled to have the lands in question included in their license to cut timber. If so, they may exercise their remedy before the ordinary tribunals, but they cannot take forcible possession of the lands occupied by the respondent.

There is here a question of disputed title, and until that question is determined, either party had a right to prevent the other from committing waste, and the writ of injunction is the proper remedy in such a case.

The Court will not, as a general rule, decide a question of title on such writ, especially when, as in this case, there is a third party interested—the Government of the Province of Quebec—who is not a party in the cause.

For these reasons the judgment of the Court below is confirmed, with a slight modification both in the reasons assigned and in the adjudicating part of it.

The same judgment is rendered in the other cases between the same appellants and P. Paradis, Isaie Lapointe, Joseph Paradis, A. Boissoneau, Brouillard,

1887.
Gilmour & Paradis.

Daoust, Mauroit and Allaire, the circumstances being the same as in the present case.

In Gilmour et al, appellants, and J. B. Allaire, respondent, the circumstances are even more favorable to the respondent, inasmuch as he had a location ticket before the appellants obtained their first license to cut timber in the locality, and there can be no doubt that his lands never formed part of the timber limits on which the appellants were authorized to cut timber. The judgment in the last case is also confirmed.

BABY, J., concurred.

The judgment of the majority of the Court is as follows :—

"The Court, etc.

"Considering that the respondent has established that on the 26th of April, 1886, he has obtained from the Crown Lands Agent, acting for and on behalf of the Government of the Province of Quebec, a location ticket for lots nos. 65 and 66 in the 6th range of the Township of Egan, in the District of Ottawa, and had possession of the said lots of land when the acts of trespass complained of by him were committed by the appellants;

"And considering that by the license granted to the appellants to cut timber on the lands therein described, all lots or parts of lots for which a patent or a location ticket had previously been granted, were excluded from the operation of the said license ;

"And considering that the respondent has established that he had a *prima facie* title to the possession and property of the said lots of land, such a location ticket being a promise of sale from the Government of the Province of Quebec, on the conditions determined by law, with possession, which entitled the said respondent to claim and obtain an injunction enjoining the appellants, who, having no title to cut timber on the said lots of lands, are by law considered as having cut by trespass the timber mentioned in the respondent's petition, until the said appellants had established in the regular course of law,

the insufficiency of the respondent's title, and their right to cut the timber on the said lots of land ;

"And considering that there is no error in the judgment rendered on the 24th of February, 1887, by the Superior Court for the District of Ottawa, sitting at Aylmer, except in the expression that the writ of injunction issued in this case was declared to be perpetual, which might exclude the appellants from hereafter asserting in due course of law their right to cut the timber on the said lots of land ;

"This Court, for the above reasons, doth maintain the said writ of injunction, and doth enjoin the said appellants to discontinue and cease all lumbering and all operations and works in connection therewith on said lots, nos. 65 and 66 in the 6th range of the Township of Egan, in the District of Ottawa, now in possession of the respondent under and in virtue of a location ticket, granted to him and bearing date the 26th of April, 1886, under the penalties ordained and prescribed by law. And it is further ordered that the said appellants do pay to the respondent the costs incurred by him, as well in the Court below as in this Court. (The Honorable Justices Cross and Church dissenting)."

Judgment modified.

J. R. Fleming, Q.C., attorney for appellants.

Rochon & Champagne, attorneys for respondent.

(J. K.)

September 17, 1887.

Coram DORION, CH. J., TESSIER, CROSS, BABY, JJ.

F. X. ARCHAMBAULT,
(*Defendant in Court below*),
APPELLANT;

AND

EMERY LALONDE,
(*Plaintiff in Court below*),
RESPONDENT.

Exemptions from seizure — Damages awarded for libel and slander not exempt from seizure—Compensation.

HELD:—Affirming the decision of Torrance, J., M. L. R., 2 S. C. 410, that the amount of a judgment obtained as damages for libel is not exempt from seizure by garnishment.

Quære,—as to the right to oppose other claims in compensation of the damages a party has been condemned to pay for a *délit* or *quasi délit*, or to seize in his own hands the sums so awarded to his debtor.

The appeal was from a judgment of the Superior Court, Montreal (TORRANCE, J.), Nov. 20, 1886, maintaining a seizure by garnishment of the amount of a judgment. The judgment of the Court below is fully reported in M. L. R., 2 S. C. 410-412. The *considérants* of the judgment below are as follows:—

"The Court having heard the parties by their counsel, upon the merits of the contestation by defendant of the *saisie-arrêt* after judgment in this cause, examined the proceedings and deliberated:

"Considering the rules of our Code, in the matter of compensation (C. C. 1190), and that compensation may take place between debts *whatever* be their cause or consideration save certain exceptions which are not here in question;

"Considering that by law, the debt due by defendant to plaintiff may be compensated and paid by the debt due to defendant from the garnishee in this cause, according

to its sufficiency, and therefore that the attachment by plaintiff of the moneys in the hands of the company garnishee was legal and binding so far as the defendant was concerned;

"Doth maintain plaintiff's answer to the contestation of defendant of said attachment and doth, in consequence, dismiss said contestation with costs."

May 20, 1887.]

R. Laflamme, Q.C., and *F. X. Archambault, Q.C.*, for the appellant:—

Voici les faits qui ont donné lieu à ce jugement que nous croyons erroné.

Le demandeur intimé a, contre l'appelant, un jugement pour seize cent et quelques piastres, frais d'une contestation d'élection, non payés par l'appelant, et ce, depuis trois ou quatre ans.

Ce dernier, en 1886, a obtenu contre la compagnie de télégraphe, "The Great North Western Telegraph Company," un jugement de $500 en dommages-intérêts, pour un libel publié sur son compte par cette dernière et en exécution de son jugement, l'intimé, par voie de saisie-arrêt après jugement, a fait saisir et arrêter ce montant, entre les mains de la dite compagnie débitrice, tiers-saisie.

L'appelant a contesté cette saisie sur le principe que cette créance, vu sa nature, n'était pas saisissable, et l'intimé, par sa réponse à la contestation a soutenu qu'elle l'était, s'appuyant pour cela, comme la Cour de première instance sur l'art. 1190 de notre Code au titre de la compensation.

Nous soumettons que cet article ne saurait avoir d'application dans l'espèce, où il ne s'agit nullement de compenser une dette par une autre, entre créancier et débiteur, comme le dit l'art. 1787.

La seule question qui puisse se soulever dans l'espèce et se soulève de fait, est la suivante: Les dommages-intérêts saisis par le demandeur appelant, sont-ils, vu leur nature, saisissables ou non?

1887.

Arphambault & Lelande.

L'appelant, s'appuyant sur les autorités ci-après, soumet qu'ils ne le sont pas.

Autorités:—Merlin, vol. IV, Réparation civile, No. 6. Nouveau Denizart, page 3, No. 10, vol. V.; p. 707, vol. VI. Bourgeon, vol. II.. Ancien Denizart, Dommages-intérêts, Nos. 17 et 18, vol. II. Même, vol. IV, Nos. de 3 à 10. Guyot, vol. 15, pages 211 et 212.

Jurisprudence:—*Larocque & Burland*, 12 L. C. J., p. 292. *Painchaud & Ouellette*, C. S. Iberville, non rapportée. *Chef & Dénard* et *Décary et al.*, T. S. *Maurice* v. *DesRosiers & Leisard*, T. S., 7 Leg. News, 361.

C'est cette jurisprudence qui a toujours prévalu dans notre pays, et ce, pour les raisons énoncées et émises, dans la cause. Desrosiers plus haut citée, par l'hon. juge Papineau.

Cette cause est en tout semblable à la présente et les autorités citées au bas du rapport sont les mêmes que celles que nous invoquons.

Pagnuelo, Q. C., for the respondent:—

D'après les principes du droit, tel qu'exprimés dans le droit romain, la compensation a lieu pour toute dette, de quelque cause qu'elle procède. Ainsi:—"La compensation est admise de toute action qui naît d'un dommage, comme, par exemple d'un vol, si on en poursuit une réparation pécuniaire; il en est de même dans le cas où l'on poursuit la restitution d'une chose volée; et, même celui contre qui on a intenté l'action noxale peut aussi opposer une compensation." Digeste, livre 16, titre 2. Des Compensations; loi 10, § 2. On en excepte le cas du dépôt; la chose déposée devant être rendue elle-même.

On sait que l'action noxale est toujours une action pénale. Elle était donnée en raison du délit d'un esclave, contre le maître de l'esclave. Il était permis au maître de payer la peine infligée au délit, ou de faire abandon de l'esclave. La compensation était opposable à une réclamation de cette nature.

Dans l'ancien droit français, les opinions paraissent avoir été partagées sur la question de savoir, si le montant d'une condamnation, pour dommages résultant d'injures

1887
Archambault
&
Lalonde.

corporelles, ou pour réparation d'un crime, pouvait être éteint par compensation.

La difficulté provenait de ce que le tribunal saisi de la répression du crime, condamnait en même temps le coupable à une réparation civile ; et de ce que l'on confondait quelquefois la réparation civile avec la peine de l'amende qui pouvait être imposée pour le crime commis.

Cette confusion ne peut avoir lieu dans ce pays ; et la question se pose carrément, à savoir : si le montant accordé par la Cour, pour réparation civile d'une injure, peut être éteint par la compensation avec une dette ordinaire.

L'appelant prétend que cette compensation ne peut avoir lieu, parce que les dommages qui lui sont accordés lui sont personnels. Cette prétention est certainement erronée dans le sens que les dommages sont attachés à sa personne. Toutes les dettes sont personnelles mais toutes ne sont pas attachées à la personne. Il est certain que l'appelant pourrait transporter cette dette ; elle n'est donc pas attachée à sa personne, comme une pension alimentaire qui lui serait accordée par la justice, un droit d'usage, d'habitation, etc.

A ce sujet, nous citerons la cause de *Burland & Larocque*, en appel, 12 L. C. J., p. 292.

Larocque avait poursuivi Burland en dommages pour l'avoir diffamé dans son commerce, auprès des marchands de Montréal, dans des lettres anonymes, et obtenu $500 de dommages. Il fit ensuite cession de biens sous la loi de faillite, et son adversaire, Burland, fit motion en appel que les procédés fussent suspendus jusqu'à ce que le syndic du failli eut repris l'instance. Larocque s'opposa à cette demande, alléguant que les dommages qui lui étaient accordés ne passaient pas à son syndic ; parce que c'étaient des dommages qui lui étaient personnels, et qui lui étaient accordés pour réparation d'une injure faite à son honneur.

La Cour d'appel a rejeté cette prétention, et a ordonné que les procédures fussent suspendues jusqu'à ce que l'instance fut reprise par le syndic de Larocque. Elle a, par là, déclaré que ces dommages n'étaient pas attachés à

1887.
Archambault & Lalonde.

la personne du failli, et qu'ils étaient la propriété de ses créanciers, comme tous ses autres biens.

Telle était aussi l'opinion du *Nouveau Denizart*, vo. *Compensation*, p. 3, No. 10. Vo. *Dommages-intérêts*, p. 706, n. 3, *Ferrière*: Dictionnaire de Droit. Vo. *Compensation de délit*, p. 339. *Guyot*, vo. *Compensation*, p. 276, colonne 2e. —*Ancien Denizart*, vo. Dommages et vo. Réparation Civile —2 *Bourjon*, p. 562, No. 41.

La question nous paraît réglée d'une manière bien positive par l'art. 1190 du Code Civil, qui établit: que la compensation a lieu, *quelque soit la cause ou considération des dettes, ou de l'une ou de l'autre.* Ce sont les principes du droit romain. L'article du Code Civil fait trois exceptions:—1o. Dans le cas de la demande en restitution d'une chose dont le propriétaire a été injustement dépouillé; 2o. de la demande en restitution d'un dépôt; 3o. d'une demande qui a pour objet des aliments insaisissables.

La créance du défendeur contre le tiers-saisi n'est, ni un dépôt, ni une chose dont il a été dépouillé, ni une dette qui a pour objet des aliments insaisissables.

La cause se trouve donc régie par les principes généraux posés dans l'art. 1190, savoir: que la compensation a lieu, quelque soit la cause ou considération des dettes, ou de l'une ou de l'autre.

L'art. 1293 du C. N. correspond au nôtre; et la jurisprudence est maintenant parfaitement établie en France: que la compensation a lieu avec des dommages-intérêts accordés pour réparation d'injures.

Nous référons aux autorités citées par le juge Torrance dans le rapport de la cause actuelle, M. L. R., 2 S. C. 410, et surtout dans le jugement du juge Casault, dans la cause de *Williams* v. *Rousseau*. Voir aussi *Belisle* v. *Lyman*, 15 L. C. J. 305, en révision.—*Landa* v. *Pouleur*, 1 Leg. News, 614, C. S.

Le juge Chagnon a décidé la même chose à St-Jean, dans une cause de *Painchaud* v. *Ouellet*, dans laquelle le demandeur a obtenu $150 de dommages pour fausse arrestation sur *capias*; la Cour les a compensés avec la créance du défendeur contre le demandeur.

1897.

Archambault
&
Lalonde.

DORION, Ch. J.:—

An important point is presented by this case, which has given rise to several conflicting judgments both here and in France.

The appellant obtained a judgment for $500 damages for libel against the Great North Western Telegraph Company. The respondent issued a writ of attachment to seize this money in the hands of the Telegraph Company. The appellant contests the attachment on the ground that the money cannot be seized, being damages awarded for libel.

The question is whether damages awarded for personal wrongs are seizable or not. There was great difference of opinion in France on this point, and it is difficult to reconcile the *arrêts*. Mr. Justice Papineau has summed up the case very well in *Maurice* v. *Desrosiers*, 7 Leg. News, 361, wherein he held that damages so awarded could not be attached. In France, under the Code, such damages have been held seizable. The reason is that they are not mentioned in the article of the Code among the things which are unseizable. We have a similar article, and no mention of such damages is made in it among things exempt from seizure. There have been decisions under this article, holding that such damages are seizable Mr. Justice Casault so decided at Quebec in the case of *Williams* v. *Rousseau*, 12 Q. L. R. 116. The Court below has held the same doctrine in the present case, and we are of opinion that the judgment is correct, and it is confirmed. In so deciding we, however, wish it to be understood that we express no opinion as to the right of a party to oppose other claims in compensation of the damages he has been condemned to pay for a *délit* or *quasi délit*, or to seize in his own hands the sums so awarded to his debtor.

Judgment confirmed.

F. X. Archambault, Q. C., attorney for appellant.
Pagnuelo, Taillon & Gouin, attorneys for respondent.
(J. K.)

February 22, 1887.

Coram DORION, Ch. J., TESSIER, CROSS, BABY, JJ.

CHARLES S. BURROUGHS
(*Plaintiff in Court below*),
APPELLANT;

AND

JAMES D. WELLS
(*Defendant in Court below*),
RESPONDENT.

Sale—Real estate sold as free and clear of incumbrances—Existence of hypothec—Appeal on question of costs.

HELD:—1. That where real estate is sold free and clear of incumbrances, and it appears that the property is charged with a hypothec, the purchaser is not bound to take a deed until the vendor has caused the hypothec to be discharged.

2. An appeal will not be entertained on a question of costs, when the decision involves no question of principle, but depends on the mere exercise of the discretion of the Court in the matter of costs.

The appeal was from a judgment of the Superior Court, district of Terrebonne (BÉLANGER, J.), July 8, 1884, dismissing the appellant's action.

The appellant complained that at an auction sale of town lots, of which he was the proprietor, held at Lachute on the 2nd June, 1883, the respondent purchased four lots for $430, at terms of one quarter cash at passing of deed and balance in instalments; that respondent paid the cash deposit required and signed the conditions of sale; that respondent subsequently refused to complete the purchase of the lots as required by the conditions of sale; that appellant after due notice to respondent re-sold the lots at respondent's *folle enchère* for $260, and then sued him for the difference, $170 and certain alleged costs and damages.

The respondent pleaded that true it was he purchased lots as alleged by appellant, but that he bought free and clear of incumbrances, as appeared by the written conditions of the sale and the announcements made by the auctioneer. That he subsequently found that each lot

1887.

Burroughs & Wells.

was mortgaged for the sum of $3,000, which appellant refused to discharge, that respondent within the delay for completing the purchase made a notarial tender of the amount of his cash payment and asked for a clear deed, which appellant refused; and that at no subsequent time did appellant ever tender a deed, which respondent was always ready and willing to take; and in fact the lots were re-sold mortgaged.

The judgment of the Court below was as follows:—

"La Cour, etc...

"Considérant que le demandeur n'a pas prouvé les allégués essentiels de sa déclaration;

"Considérant que par les conditions de la vente des lots adjugés au défendeur le 2 de juin 1883, la propriété vendue est déclarée commuée et claire, et le titre parfait et garanti;

"Considérant que lors de la dite vente et dans les dix jours après icelle, il appert au dossier que la dite propriété a été grevée d'une hypothèque de $3,000 courant, créée par une obligation consentie par le demandeur à R. A. A. Jones le premier avril 1881, et passée devant Maître O. N. E. Boucher, notaire;

"Considérant que vu cette hypothèque, le défendeur n'était pas tenu de passer titre avec le demandeur, à moins que ce dernier fit préalablement décharger les dits lots de la dite hypothèque, ce qu'il a négligé et refusé de faire malgré les offres et le protêt à lui faite par le dit défendeur dans le délai fixé par les dites conditions de vente ainsi que constaté au dit protêt et acte d'offre passé devant A. Berthelot, notaire, le 12 juin 1883;

"Considérant en conséquence de ce que dessus le demandeur n'avait pas le droit de vendre les dits lots à la folle enchère du défendeur;

"Considérant que l'action du demandeur est partant mal fondée, la renvoie avec dépens distraits, etc."

The respondent's incidental demand for damages was dismissed without costs.

1887.

Burroughs & Wells.

Jan. 26, 1887.]

C. S. Burroughs (the appellant) in person :—

The appellant remarks as to the *considérant* of the judgment, that because the reduction of the mortgage by Jones, on the 12th of July, 1883, had not been accomplished within ten days from the date of the first sale (2nd June, 1883), that is by the 12th June, 1883, the said delay being a delay binding upon the appellant, the appellant had no right to proceed to the sale upon *folle enchère*, that such delay was not a fatal delay binding appellant to discharge mortgage. See *Liggett & Tracey*, 20 L. C. J. 313.

As to the equities of the case, they are with the appellant. The property mortgaged, including the lots sold, was worth $50,000. The aggregate amount of lots sold at sale 2nd June, 1883, was $2,800, and the amount of the mortgage on said property (known at the time of sale to purchasers) was only $3,000, and even this mortgage was reduced on the 12th July by the payment of $1,000, and the reduction of the balance of mortgage on lots so sold to the amount of their purchase money, so that under no circumstances could an hypothecary action lie against the purchasers except for the amount of their purchase money, and that only in accordance with the terms of said purchase.

The appellant, as he interpreted the conditions of sale, did not consider himself bound to give more than a guarantee deed. He regarded the purchasers as amply secured by his property, valued at $50,000—and the amount of the sales, $2,800, known to them all as they united in their so-called protest,—but to satisfy them still further, he passed the deed of 12th July, 1883, reducing mortgage to amount of their purchase money, and all of said purchasers, except respondent and another, paid their money and took their deeds.

J. Pâlliser, for respondent :—

It is submitted by respondent that the allegations and admissions reduce the whole issue to two questions :

1. Were the lots sold clear of incumbrances ?

1887.

Burroughs & Wells.

2. Which party is in default to grant or accept a deed?

The first question is answered by the written terms and conditions of the sale, even as filed by appellant himself and as alleged and set up in his declaration. Among others, a clause appears in the said terms and conditions, "*The title is perfect and guaranteed*"—and the next clause: "*The property is commuted and clear.*" There is no stipulation or mention that the lots were sold subject to any mortgage general or special.

The following authorities are relied on by the respondent:—*Hogan* v. *Bernier*, 21 L. C. J. 101; *Parker & Felton*, 21 L. C. J. 258; *Blondin* v. *Madon*, 7 L. C. J. 32; *Merrill* v. *Hallary*, 8 L. C. J. 38; *McDonnell & Goundry*, 1 Leg. News, 50; *Grand Trunk Ry. Co. & Brewster*, 6 Leg. News, 34; *Grand Trunk Ry. Co.* v. *Hall*, 25 L. C. J. 22.

Feb. 22, 1887.]

DORION, Ch. J., for the Court, [after stating facts]:—

The question is whether Burroughs has fulfilled the conditions of sale. He sold the property free from hypothecs. He was bound to give a clear title: he has not given a clear title. This reason alone is sufficient to support the judgment. But there is another ground. Has a vendor a right to resell lands at the *folle-enchère* of the purchaser, without any stipulation to that effect? We think that the appellant was not justified in adopting this course. It is true that the case of the respondent Wells is not very favorable, for he appears to have bought the same property through an agent subsequently; but this does not affect the legal rights of the parties.

The appellant also complains that the incidental demand was dismissed without costs. As to this, it is sufficient to say that there is no appeal on a question of costs when the decision involves no question of principle, but depends on the mere exercise of the discretion of the Court in the matter of costs.

Judgment confirmed.

C. S. Burroughs, attorney for appellant.

J. Palliser, attorney for respondent.

(J. K.)

February 22, 1887.

Coram DORION, CH. J., TESSIER, CROSS, BABY, JJ.

LOUIS M. BLONDIN,

(*Adjudicataire petitioning for nullity of décret*)

APPELLANT;

AND

MICHEL LIZOTTE ÈS QUAL.

(*Plaintiff petitioning for folle-enchère*),

RESPONDENT.

Sheriff's sale — Vacated at suit of purchaser — C. C. P. 714 — Property charged with dower claim.

HELD:—That a purchaser of real estate at a sheriff's sale is not bound to take a deed of the property, but may have the sale vacated, if it appear that the immoveable is charged with a claim for dower which is not extinguished by sheriff's sale; and this is so, even where the purchaser has knowledge, before the sale, of the existence of the hypothec.

The appeal was from a judgment of the Court of Review, Montreal (TORRANCE, PAPINEAU, JETTÉ, JJ.), December 30, 1884, reversing a judgment of the Superior Court, district of Richelieu (MATHIEU, J.), March 18, 1884.

The judgment of the Superior Court was as follows:—

"La Cour, après avoir entendu les parties par leurs avocats et procureurs respectifs sur la motion du dit requérant folle-enchère, produite le 7 mars courant, demandant que toutes et chacune de ses objections à l'enquête soient maintenues; que toutes et chacune des objections de la partie adverse soient rejetées et que toutes et chacune les décisions au contraire rendues à l'enquête soient révisées; sur la motion de l'adjudicataire et requérant nullité et décret produite le même jour, demandant que toutes et chacune de ses objections à l'enquête en cette cause soient maintenues, que toutes et chacune les objections de la partie adverse soient rejetées, et que toutes et chacune les décisions au contraire rendues à l'enquête

soient révisées, et sur le mérite de la requête du dit demandeur ès-qualité, pour folle-enchère et la réponse du dit adjudicataire et de la requête de ce dernier en nullité de décret, etc.

"Sur les dites motions :

"A renvoyé et renvoie les dites motions sans frais.

"Sur le mérite des dites requêtes :

"Attendu qu'il appert par le rapport du shérif de ce district produit et faisant partie du dossier en cette cause que Louis Marie Blondin, écr., notaire et régistrateur du comté de Yamaska, résidant en la paroisse de St-François du Lac, s'est rendu adjudicataire comme le plus haut et dernier enchérisseur à la vente de l'immeuble saisi contre le défendeur en cette cause, pour le prix de $710, et que le dit Louis Marie Blondin n'a pas payé le prix de la dite adjudication ;

"Attendu que le demandeur et requérant folle-enchère, es qualité, demande, par sa requête pour folle-enchère, produite le 18 octobre dernier (1883), l'émanation d'un bref de *venditioni exponas* pour que l'immeuble saisi en cette cause soit vendu à la folle-enchère du dit L. M. Blondin et aux dommages et intérêts résultant du défaut de ce dernier de payer son adjudication et à la charge par le dit L. M. Blondin, sous toute peine que de droit et même la contrainte par corps, de parfaire le prix qui sera adjugé sur la dite folle-enchère dans le cas d'insuffisance pour rencontrer l'adjudication du dit L. M. Blondin, tant en capital, intérêt et frais, que les frais de la dite requête pour folle-enchère ;

"Attendu que le dit L. M. Blondin, dans sa réponse à la dite requête pour folle enchère, produite le 23 octobre 1883, allègue : que le dit immeuble était lors de la vente faite par le shérif et est encore sujet à un douaire coutumier en faveur d'Elise Alie, épouse de Henri Descheneaux, cultivateur, de la paroisse de St-Thomas de Pierreville, et des enfants à naître de leur mariage ; que le dit Henri Descheneaux était propriétaire et en possession du dit immeuble, lot dès avant le 30 janvier 1882, jour auquel le dit Henri Descheneaux et la dite Elise Alie ont contracté

1887.

Blondin & Lizotte.

mariage à St-Thomas de Pierreville, dans le district de Richelieu ; qu'une copie du certificat du mariage susdit a été enregistrée au bureau d'enregistrement du comté d'Yamaska, dans lequel se trouve situé le dit immeuble, le 21 avril 1882 ; que lors de l'enregistrement du dit certificat de mariage, le dit Henri Descheneaux a fait enregistrer au dit bureau d'enregistrement un avis signé par lui, devant témoin, et daté à St-François du Lac, le 15e jour de mars 1882, par lequel il donnait avis au régistrateur du comté d'Yamaska que le dit immeuble avait toujours été, depuis le 29 janvier 1882, et était, le 30e jour de janvier 1883, en sa possession comme lui appartenant en pleine propriété, et que le 30e jour de janvier 1882 il avait contracté mariage avec la dite Elise Alie sans avoir fait de contrat de mariage, et que cet immeuble était devenu, par la célébration de son mariage, affecté au douaire coutumier légalement constitué par la loi, au profit de la dite Elise Alie et des enfants qui pourraient naître de son mariage avec elle, et que cet avis était donné aux fins d'enregistrer le dit douaire coutumier conformément à l'article 2116 du Code Civil ; qu'il appert au certificat des hypothèques produit par le shérif avec un rapport supplémentaire, le 12 octobre dernier, que le dit immeuble est sujet et affecté du dit douaire coutumier, que l'adjudicataire a fait dans l'année 1883, depuis le décret, la récolte de la dite terre, mais qu'il n'a rien touché de cette récolte qui est toute dans la grange et les bâtisses construites sur cette terre et que, par la requête en nullité de décret il remet le tout entre les mains de la justice pour le bénéfice des créanciers du défendeur ; que vu ce que dessus, l'adjudicataire est exposé à être évincé à raison du dit douaire coutumier, et qu'il est en droit de ne pas payer le prix de l'adjudication et de demander la nullité du décret fait en cette cause, et conclut en déclarant, qu'il remet la dite terre et la récolte faite comme susdit, et actuellement dans les bâtiments construits sur la dite terre, et en se constituant demandeur en nullité du décret fait en cette cause du dit immeuble, et au renvoi de la requête pour folle enchère ;

1867.
Blondin & Lisotte.

"Attendu que le dit demandeur et requérant folle enchère ès-qualité a contesté la dite demande en nullité de décret, alléguant que le dit décret a purgé le douaire coutumier qui aurait pu exister sur le dit immeuble en faveur de la dite Elise Alie et de ses enfants à naître du dit mariage, parce que le jugement en exécution duquel l'immeuble a été saisi et vendu était et constituait une créance antérieure et préférable au dit douaire sur le dit immeuble, apparente en cette cause ; que, d'ailleurs, l'hypothèque légale résultant de l'enregistrement du dit jugement et de l'avis mentionné au certificat des hypothèques en cette cause en faveur des demandeurs et de l'avocat distrayant existe longtemps avant l'enregistrement du dit douaire et avant le dit mariage ; que dès avant son mariage la dite Elise Alie a été dûment informée par le demandeur ès-qualité du fait et de la matière de son action, et que tout douaire coutumier ou préfix qui pourrait être consenti ou enregistré en sa faveur et en celle des enfants à naître de son futur mariage serait nul à l'encontre de la créance du demandeur ès-qualité ; que, lors du dit mariage, le défendeur n'avait pas d'autre bien que le dit immeuble et que sans cet immeuble il serait complètement insolvable et incapable de payer la créance du demandeur ès-qualité, et ce à la connaissance de la dite Elise Alie ; que le dit adjudicataire n'est pas exposé à être évincé du dit immeuble ni à être aucunement troublé ; que, d'ailleurs, longtemps avant la dite adjudication, l'adjudicataire connaissait personnellement toutes les circonstances du dit douaire en parfaite connaissance de cause ; que le dit adjudicataire connaissait, alors et depuis longtemps, que la créance du demandeur ès-qualité était antérieure et préférable au dit douaire et qu'il ne craignait aucune éviction ; que, immédietement après l'adjudication, l'adjudicataire a pris ouvertement possession du dit immeuble et en a récolté les fruits et qu'il a retenu les fruits et la possession depuis, offert à vendre le dit immeuble, que, s'il n'a pas payé le prix de son adjudication, ce n'a pas été parce qu'il craignait d'être évincé mais seulement parce qu'il n'avait pas alors les fonds pour payer, ce qu'il a

1887.
Blondin & Lizotte.

déclaré souvent au shérif et au procureur du demandeur, leur demandant du délai et promettant de payer ; que l'enregistrement du dit douaire l'a rendu public et apparent, et qu'il a été connu de l'adjudicataire, qu'il a acheté à ses risques et périls et ne peut maintenant demander l'annulation du dit décret à raison de l'existence de ce douaire ; que l'adjudicataire est de mauvaise foi ; et conclut au renvoi de la réponse et de la demande en nullité de ce décret du dit adjudicataire, et demande la mise en cause de la dite Elise Alie et du dit Henri Descheneaux pour voir, dire et déclarer que le dit immeuble a été purgé du dit douaire ;

Attendu que, par une ordonnance de cette Cour, en date du 30 octobre 1883, les dits Henri Descheneaux et Elise Alie ont été mis en cause ;

"Attendu que les dits mis en cause ont comparu le 17 novembre dernier et ont déclaré qu'ils ne plaidaient pas ;

"Attendu que le dit adjudicataire a répondu à la contestation du demandeur que, lors de son mariage avec le défendeur, Elise Alie était mineure, et que les fiançailles entre eux avaient eu lieu depuis le commencement de mars précédent, que le jugement rendu à la poursuite du demandeur, ès-qualité, contre le défendeur, sur exécution duquel le dit adjudicataire a acquis le dit immeuble, a été porté en appel et que cet appel est actuellement pendant ; que, du reste, l'adjudicataire n'a pas à rechercher si le douaire existe ou non, mais qu'il est autorisé par la loi à demander la nullité du décret, s'il y a des causes raisonnables d'éviction et s'il est simplement exposé à être évincé du dit immeuble à raison du dit douaire ;

"Attendu qu'il appert au certificat du régistrateur du comté d'Yamaska, daté du 8 octobre dernier, produit avec le rapport supplémentaire du shérif de ce district en date du 12 octobre dernier, que le 21 avril 1882, le certificat de mariage du dit Henri Descheneaux et de la dite Elise Alie, en date du 30 janvier 1882, a été enregistré au dit bureau, et qu'en même temps, le dit Henri Descheneaux a fait enregistrer une déclaration alléguant son mariage comme susdit sans contrat de mariage, et que le dit im-

meuble était affecté au douaire coutumier en faveur de la dite Elise Alie et de leurs enfants à naître ; que le 27 juin 1883, le jugement rendu par la Cour Supérieure du district de Montréal, siégeant en révision le 30 avril 1883, condamnant le dit Henri Descheneaux à payer au demandeur en cette cause, ès-qualité, savoir : pour la dite Catherine *alias* Arline Lizotte une somme de $100 pour frais de gésine et à Louis Henri, enfant naturel du dit Henri Descheneaux et de la dite Catherine *alias* Arline Lizotte $4.00 par mois, payable d'avance, à compter du 17 janvier 1882, jusqu'à ce que le dit enfant ait atteint sa quatorzième année, de plus les frais en Cour de première instance, liquidés à $517.25, a été enregistré, et que cet enregistrement est postérieur à l'enregistrement du dit douaire ;

"Considérant que, par les dispositions de l'article 714 du C. P. C., la vente par le shérif peut être déclarée nulle à la demande de l'adjudicataire, s'il est exposé à l'éviction en raison de quelque douaire coutumier, dont la propriété vendue n'est pas libérée par la vente du shérif ;

"Considérant qu'aux termes de l'article 1535 du Code Civil, dont les dispositions sont applicables aussi bien à l'adjudicataire qu'à l'acheteur à vente privée, l'acheteur a droit de suspendre le paiement du prix s'il a juste sujet de craindre d'être troublé par une action, soit hypothécaire, soit en revendication, jusqu'à ce que le vendeur ait fait cesser le trouble, si mieux n'aime celui-ci donner caution à moins qu'il n'ait été stipulé que, nonobstant le trouble, l'acheteur paiera ;

"Considérant que la simple connaissance par l'acquéreur ou l'adjudicataire, du fait qui pourra occasionner le trouble, ne suffit pas pour l'obliger au paiement de son prix sans la garantie qui lui est promise par la loi ; qu'il exige une stipulation expresse qui soumette l'acquéreur ou l'adjudicataire au paiement, nonobstant le trouble, et qui ne peut être privé des sûretés établies en sa faveur sans une renonciation formelle de sa part, n'étant présumé avoir renoncé à son droit ;

"Considérant que la connaissance du douaire et les circonstances prouvées en cette cause, auraient peut-être jus-

1887.
Blondin & Lisotte.

tifié une condamnation contre l'adjudicataire pour le paiement du prix d'adjudication, si le demandeur lui pût offert caution conformément aux dispositions de l'article 1585 du Code Civil, mais le demandeur n'ayant pas offert caution, et l'adjudicataire insistant sur un droit qui lui est expressément reconnu par la loi ci-dessus mentionnée, sa demande en nullité de décret doit être admise ;

" Considérant que la contestation en cette cause est entre le demandeur et l'adjudicataire et que cette Cour ne peut incidemment décider en cette cause de la validité du dit douaire, quoique les époux Deschenaux aient été mis en cause ;

"Considérant que la requête du dit demandeur ès-qualité, pour folle enchère, est mal fondée ;

" A renvoyé et renvoie la dite requête avec dépens, distraits, etc. ;

" Considérant que la demande en nullité de décret du dit adjudicataire est bien fondée, a maintenu et maintient la dite demande en nullité de décret et a déclaré et déclare le dit décret de l'immeuble vendu en cette cause, le 24 août dernier, nul, et en a déchargé le dit adjudicataire avec dépens, etc."

The judgment in review, reversing the preceding judgment, was as follows :—

" La Cour, etc.....

" Considérant que le 24 août 1883, le dit L. M. Blondin est devenu adjudicataire de l'immeuble vendu en cette cause par le Shériff ; qu'il en a pris possession, qu'il en a perçu les fruits et revenus et qu'il a refusé d'en payer le prix ;

" Considérant que, par requête en date du 18 octobre de la même année, le demandeur, ès-qualité, a demandé l'émanation d'un bref de *venditioni exponas* pour faire vendre le dit immeuble à la folle enchère du dit adjudicataire ;

" Considérant que le dit adjudicataire a, par sa réponse à la dite demande de folle enchère, contesté celle-ci et demandé la nullité du dit décret, en se fondant sur le péril d'éviction résultant du douaire coutumier, créé sur le dit

immeuble, par le mariage du dit Henri Descheneaux avec la dite Elise Alie, célébré le 30 janvier 1882, alors que le dit Henri Descheneaux était propriétaire et en possession du dit immeuble ; et de l'inscription du dit douaire, le 21 avril 1882, au bureau d'enregistrement de la situation de l'immeuble ;

" Considérant que le demandeur a, par sa réplique à la réponse de l'adjudicataire, et sa réponse à la requête en nullité de décret, persisté dans sa demande de folle enchère et contesté la requête en nullité de décret ;

" Considérant que la créance du demandeur ès-qualité, pour laquelle il a intenté son action avant la date du dit mariage, n'a cependant été enregistrée et instruite qu'après l'enregistrement du dit douaire, et que tout en ayant la priorité de date et d'origine, elle n'est pas *antérieure* ni *préférable* au dit douaire dans le sens légal que l'on doit attacher à ces mots de l'article 710 du Code de Procédure, qui ont trait à l'antériorité de rang et à la préférence, à raison d'un privilège en vertu des lois réglant les privilèges, les hypothèques et l'enregistrement des droits sur les immeubles ;

" Considérant que la créance du demandeur était purement mobilière, à la date du dit mariage, et ne pouvait pas empêcher et n'a pas empêché le dit immeuble de devenir sujet au douaire coutumier de la dite Elise Alie et ses enfants à naître de son dit mariage, quand même cet immeuble aurait été le seul bien du défendeur à la date du mariage, et que le décret fait en exécution du jugement établissant le *quantum* de la créance du demandeur n'a pas eu et n'a pas pu avoir l'effet de purger le dit douaire de l'épouse du défendeur et de leurs enfants, malgré le protêt qui lui a été signifié de la part du demandeur, et malgré que la douairière et son époux eussent été mis en cause et eussent comparu par leurs avocats ;

" Considérant que, lors de l'adjudication, l'adjudicataire avait connaissance, par l'enregistrement et autrement, du douaire en question et qu'il s'est volontairement porté adjudicataire malgré la connaissance qu'il avait du péril d'éviction résultant de ce douaire, et qu'il n'est pas rece-

1887.
Blondin & Lisotte.

vable à demander la nullité du décret et de son contrat d'acquisition, à raison de cette cause d'éviction éventuelle qu'il connaissait au moment où il a contracté ;

" Considérant qu'il y a erreur dans le dit jugement de la Cour Supérieure, siégeant dans et pour le district de Richelieu, en date du 18ème jour de mars 1884, et adjugeant sur le mérite des dites requêtes du demandeur et de l'adjudicataire, en ce qu'il a renvoyé la requête du demandeur, et accordé la demande en nullité de décret du dit adjudicataire ;

" La Cour Supérieure siégeant maintenant en Révision, renverse le dit jugement sur le mérite des dites requêtes, rejette la réponse du dit adjudicataire à la requête du demandeur et sa demande en nullité de décret, et maintient la dite requête du demandeur en date du 18 octobre 1883 ; ordonne qu'un bref de *venditioni exponas* émane pour faire vendre le dit immeuble à la folle enchère du dit adjudicataire Louis Marie Blondin, avec dépens, tant de première instance que de Révision, distraits, etc."

Jan. 25, 1887.]

A. Germain, Q. C., for the appellant :—

La seule question qui se présente sur les faits ci-dessus, à la décision de cette Cour, peut s'exposer comme suit :—

Le créancier qui fait vendre un immeuble par autorité de justice, connaissant alors une cause d'éviction de moitié de cet immeuble, peut-il exiger de l'adjudicataire le paiement du prix d'adjudication, et au cas de refus, demander la folle enchère, parce que l'adjudicataire connaissait, lui aussi, lors de l'adjudication, la cause d'éviction ? Et la connaissance, chez l'adjudicataire, de la cause d'éviction, lui enlève-t-elle le droit de demander la nullité du décret, droit que lui donne l'Article 714 du C. P. C. ci-dessus cité ?

Etant donné, sous l'autorité de l'Article 1591 C. C. ci-dessus cité, que les règles applicables aux ventes ordinaires régissent les ventes judiciaires pour ce qui concerne l'obligation par le vendeur de garantir l'acheteur contre l'éviction, il n'y a pas de doute qu'un adjudicataire, comme un acheteur ordinaire, ne perd pas son droit de refuser le

paiement du prix d'adjudication, s'il n'a pas encore déposé le prix ; ou de demander la répétition du prix s'il a payé, par le fait qu'il connaissait, lors de la vente, le péril d'éviction. Nous avons un texte de loi positif qui veut cela. En effet, d'après les Articles 1506-1507-1508 du Code Civil, le vendeur garantit l'acquéreur soit par convention, soit par l'autorité seule de la loi, contre l'éviction, en tout ou en partie, de la chose vendue, à moins qu'il n'y ait stipulation formelle de non garantie, ce qui n'est pas le cas actuel.

S'il y a éviction, le vendeur est tenu, absolument et dans tous les cas, de restituer le prix à l'acquéreur avec tous les fruits et revenus, les dommages et tous les frais, suivant l'Art. 1511 C. C. : " Soit que la garantie soit légale " ou conventionnelle, l'acheteur, au cas d'éviction, a droit " de réclamer du vendeur : 1o. la restitution du prix ; 2o. " celle des fruits lorsqu'il est obligé de les rendre à la per- " sonne qui l'évince ; 3o. les frais faits tant sur la deman- " de en garantie contre le vendeur que sur la demande " originaire ; 4o. les dommages, les intérêts et les frais du " contrat."

Il y a à cette règle exception, non pas pour le prix, car le prix doit toujours être remis dans le cas d'éviction, mais pour les dommages et les intérêts lorsque l'acheteur connaissait le péril d'éviction lors de la vente, suivant l'Art. 1511 C. C. : " Dans le cas de garantie, si l'acheteur " avait connaissance, lors du contrat, des causes d'évic- " tion, et qu'il n'y ait eu aucune stipulation à cet égard, " il ne peut alors réclamer que le prix de la chose " vendue."

Le même principe de justice et d'équité, obligeant le vendeur à restituer le prix lorsqu'il a été payé, s'applique au cas où le prix n'a pas encore été payé, mais il donne lieu à des procédés différents. Dans ce dernier cas, l'acquéreur n'est pas tenu de payer le prix, à moins que le vendeur ne fasse cesser le sujet de crainte, ou ne fournisse caution ; excepté cependant le cas où il y a stipulation contraire, ce qui n'a pas eu lieu en cette cause.

L'Article 1535 C. C. dit : " Si l'acheteur est troublé, ou

1867.
Blondin & Lisotte.

" a juste sujet de craindre d'être troublé par une action " hypothécaire ou en revendication, il peut différer le " paiement du prix jusqu'à ce que le vendeur fasse cesser " ce trouble, ou lui fournisse caution, à moins d'une sti- " pulation contraire."

La seule obligation de l'acheteur est de payer le prix de la chose vendue (Art. 1532); mais, naturellement, il n'est pas tenu d'exécuter cette obligation lorsque le vendeur, de son côté, n'exécute pas la sienne qui est de garantir l'acheteur contre l'éviction; de faire disparaître la cause de trouble ou de donner caution afin que l'acquéreur cesse de craindre.

Ces dispositions de la loi, si claires et si précises, sont une réponse péremptoire à la décision de la Cour de Révision qui veut que l'acquéreur qui connaît le péril d'éviction, soit censé acheter à ses risques et périls.

Voyons maintenant les dispositions de la loi sur ce même sujet, dans le cas de vente forcée.

Le créancier vendeur se trouve chargé de toutes les mêmes garanties que le vendeur conventionnel; si ce n'est la garantie quant à la contenance et la garantie des hypothèques qui se trouvent purgées par le décret. Quant au reste, les droits de propriété, de servitudes, d'emphytéoses, de substitutions non ouvertes et de douaire coutumier non ouvert, se trouvent garantis par la vente judiciaire, d'après les Articles 708-709-710-711 du Code de Procédure.

Dans le cas où il y a péril d'éviction par un douaire coutumier non ouvert, l'adjudicataire a un droit absolu de demander la nullité du décret, sous l'autorité de l'Art. 714 ci-dessus cité. Et nulle part l'on voit que ce droit absolu soit modifié, soit par la connaissance du douaire, soit par aucune autre cause quelconque. Quant au créancier saisissant qui fait vendre par autorité de justice, on peut, peut-être, lui appliquer la règle d'un vendeur ordinaire, et lui reconnaître le droit de forcer l'adjudicataire à payer le prix, en faisant disparaître le trouble, ou en lui donnant caution qu'il ne sera pas troublé; mais toujours

est-il, s'il a ce droit, il doit se conformer aux conditions de la loi qui le lui donne.

La Cour de Révision a considéré la connaissance du péril d'éviction comme un acquiescement à acheter la propriété avec les charges connues. Evidemment, cette décision est erronée, tout-à-fait contraire à l'esprit de notre loi actuelle, et contraire aussi, à la doctrine soutenue par les auteurs sur cette matière (Pothier, Bugnet, Vol. 10; p. 286; no. 636).

La Cour de première instance avait maintenu le principe sain, et le seul soutenable en droit, qu'une personne n'est jamais censé acquiescer à la perte de ses droits, si ce n'est par une renonciation formelle.

Geoffrion, Q. C., and *Brousseau*, for the respondent:—

Dans la vente, soit judiciaire ou extra-judiciaire, c'est le consentement des parties qui est la base de sa validité; lorsque le consentement est parfait, elle ne peut être annulée. Dans l'espèce, l'acquéreur Blondin ayant donné un consentement parfait, entaché d'aucune erreur, il ne peut donc pas demander à la justice d'annuler ce consentement, et la vente qui en est résultée.

A moins de mettre de côté les principes les plus élémentaires du droit sur la vente, qui s'appliquent aux ventes judiciaires comme aux autres, il faut conclure que l'art. 714, § 2, C. P. C., ne peut recevoir d'application qu'au cas où l'adjudicataire ignore le danger d'éviction contre lequel la loi a pour but de le protéger. Le connaissant, il n'a plus besoin de la protection de la loi; pour se protéger, il n'a qu'à ne pas acheter. Parmi les nombreux arrêts annulant des décrets, on n'en trouve pas un seul, soit ici ou en France, qui ait été prononcé en faveur d'un adjudicataire connaissant, au moment des enchères, le danger d'éviction motivant son annulation. Il est, au contraire, dans chaque espèce, comme dans "*Jobin & Shuter*," expressément constaté que l'adjudicataire ignorait ce danger, et qu'il ne l'a découvert que depuis. Et, dans quelques arrêts des cours françaises, l'annulation du décret a été refusée sur le chef que l'adjudicataire connaissait le péril d'éviction sur lequel sa demande était fondée.

1887.
Biondin & Lisotte.

The following authorities were referred to by the respondent:—

10 Pothier (Bugnet) "Procédure Civile," Nos. 636, 640, 661, 662; 21 L. C. J., p. 67, *Jobin & Shuter*; 8 Rev. Lég. p. 231, *Thomas & Murphy*. Sirey & V.—Recueil Gén., Table *Vo.* "Adjudicataire," Nos. 157-159; 43 Dalloz, Jurisp. Gén. Repert., *Vo.* "Vente," Nos. 800, 802,—878 et note 2 bas de la page; do. *Vo.* "Vente Publique," No. 2122; 2 do. *Vo.* "Acquiescement,"," Nos. 1, 457, 458, 491, 502, 503, 504, 506, 23, 787; 16 Laurent, Nos. 552 à 556; Rolland de Villargues, Dict. *Vo.* "Douaire," No. 13 & 15; Renusson, Douaire, Cap. 10, No. 4; Lacombe, Recueil *Vo.* "Décret," p. 153-4.

Feb. 22, 1887.]

DORION, Ch. J., for the Court [illegible] stating facts]:—

This Court decided in the case of *Jobin & Shuter* (1), which was a case in which an immoveable sold by sheriff's sale was charged with a substitution, that the purchaser was not obliged to take a deed, because he was exposed to a suit. A sheriff's sale discharges immoveables from all charges but those which are specially excepted, viz, dower, substitution, servitudes and seigniorial rights. In this case there is no contest as to the existence of a claim for dower. The purchaser, therefore, was not obliged to take a title.

The judgment of the Court of Review must, therefore, be reversed, and the original judgment maintained.

The following is the judgment of the Court:—

"Considérant que l'immeuble adjugé à l'appelant en cette cause était, lors de l'adjudication qui en a été faite à l'appelant, grevé d'un douaire coutumier en faveur d'Elise Alie, épouse de Henri Descheneaux;

"Et considérant que la dite adjudication n'a pas eu lieu à la poursuite d'un créancier dont la créance fut antérieure et préférable au douaire dont la dite propriété est grevée, en sorte que ce douaire n'a pas été purgé par la dite adjudication (Art. 1447 C. C.);

(1) 21 L. C. J. 67.

1887.
Blondin & Lizotte.

"Et considérant que l'appelant qui est exposé à être troublé plus tard dans la possession et propriété du dit immeuble, n'est pas tenu de payer son prix d'acquisition et de prendre un titre;

"Et considérant qu'il y a erreur dans le jugement rendu par trois juges siégeant en Révision, à Montréal, le 30ème jour de décembre 1884, et qu'il n'y a pas d'erreur dans le jugement rendu par la Cour Supérieure pour le district de Richelieu, siégeant à Sorel, le 18ème jour de mars 1884;

"Cette Cour casse et annule le dit jugement rendu par la Cour de Révision et confirme le jugement rendu par la Cour Supérieure, et renvoie la requête pour folle enchère du dit intimé."

Judgment of C. R. reversed.

Germain & Germain, attorneys for Appellant.

J. B. Brousseau, attorney for Respondent.

(J. K.)

INDEX.

ACCOUNT.

1. *Settlement between principal and agent.*] Where a principal, during a long course of years, has accepted without objection the accounts rendered by his agent of his administration, he is not entitled to sue for a complete account of the entire period of administration. Where errors in the accounts rendered are discovered subsequently, the proper proceeding is an action *en réformation de compte*, asking that such errors be rectified, and that the balance due be paid. *Stephens & Gillespie*, 167.

—— 2. *Action for.*] *See* SAISIE-ARRÊT, 155.

ACTION.

1. *Property registered in name of owner's agent.*] A creditor has a right of action against the agent of his debtor, in whose name real estate of the debtor is registered, to have it declared that such property really belongs to the debtor. *Schwob & Baker*, 191.

—— 2. *To set aside hypothec after estate has been reconveyed to insolvent.*] *See* INSOLVENCY, 421.

AGENCY. *See* PRINCIPAL AND AGENT.

APPEAL.

1. *On questions of appreciation of evidence.*] Where it is not a matter of contract, and no question of law or principle is involved, and the case resolves itself into a mere question of appreciation of evidence, the Court of Appeal will not disturb the judgment of the Court below, unless a serious injustice has been done to the appellant. *St. Lawrence Steam Navigation Co. & Lemay*, 214.

—— 2. *On question of costs.*] An appeal will not be entertained on a question of costs, when the decision involves no question of principle, but depends on the mere exercise of the discretion of the Court in the matter of costs. *Borroughs & Wells*, 492.

APPEAL BOND.

1. *Judgment reversed by Queen's Bench, but restored by Privy Council—Liability of bondsmen.*] A bond given as security for debt, interest and costs, on appeal by a defendant from the Superior Court to the Court of Queen's Bench, to the effect that the bondsmen will pay the condemnation money in case the judgment be confirmed, is binding, though the judgment of the Queen's Bench reversed the judgment of the Court below, if the

APPEAL BOND—*Continued.*

original judgment of the Superior Court has been restored by the Judicial Committee of the Privy Council, and the effect is the same as if the judgment of the Superior Court had been affirmed by the Court of Queen's Bench. *Lowrey et al. & Routh*, 364.

—— 2. *See* PROCEDURE.

ASSIGNEE.—*Sale by assignee not carried out.*] *See* INSOLVENCY, 12.

ASSESSMENT ROLL—*When it comes into force.*] *See* MONTREAL, CITY OF, 200.

ATTACHMENT. *See* SAISIE-ARRÊT.

BAILEE. *See* LARCENY AS A BAILEE, 143.

BANK.

1. *Account between bank and customer—Imputation of payments.*] *See* IMPUTATION OF PAYMENTS, 30.

—— 2. *Bill of exchange—Liability of acceptor.*] *See* IMPUTATION OF PAYMENTS, 430.

—— 3. *Cheque accepted payable at future date.*] A bank is liable for the acceptance, by its president and cashier, of cheques marked good on future dates specified, which were afterwards discounted by the plaintiff in good faith and in the ordinary course of business. *Exchange Bank of Canada & Banque du Peuple*, 232.

—— 4. *Deposit receipt of.*] *See* SURETYSHIP, 402.

BILL OF EXCHANGE—*Imputation of payments.*] *See* IMPUTATION OF PAYMENTS, 430.

BOOKKEEPER—*Statement of account by.*] *See* EVIDENCE, 147.

CADASTRE—*Of seigniory.*] *See* SEIGNIORY, 225.

CASHIER—*Powers of.*] *See* BANK, 232.

CHEQUE—*Accepted by president and cashier—Payable at a future date.*] *See* BANK, 232.

CHOSE JUGÉE.

Conclusions of second action different.] The exception of *chose jugée* cannot be pleaded where the conclusions of the second action are materially different from those of the first. And so, where by the first action, the plaintiff sought to exercise a right of redemption without complying with the conditions agreed upon, it was held that the dismissal of such action was not *chose jugée* as regards an action brought subsequently, offering to comply with the conditions. *Leger & Fournier*, 124.

COMMUNITY.

Continuation of.] Where a community existed between husband and wife, and there was one child, issue of the marriage, and the wife dying intestate, the surviving consort failed to have an inventory made of the common property, and (the child being a minor) married a second time without marriage contract—that in the absence of any demand on the part of the minor for a continued community, a tripartite community did not exist between the surviving consort, his second wife, and the child of the first marriage. *Beckett & The Merchants Bank of Canada*, 381.

COMPANY IN LIQUIDATION.

1. *Proceedings against, after order for liquidation.*] When a winding-up order has been made, no proceeding can be taken against the company in liquidation without the permission of the Court; and therefore, in the present case, the immovables of the company could not be sold in ordinary course for school taxes without such permission. *Commissaires d'Ecole d'Hochelaga & Montreal Abattoirs Co.*, 116.

—— 2. The Act 45 Vict. ch. 23 (D.) applies to incorporated commercial companies. *Ib.*, 116.

COMPENSATION.

Damages awarded for personal wrongs.] *Quære*, as to the right to oppose other claims in compensation of the damages a party has been condemned to pay for a *délit* or *quasi délit*, or to seize in his own hands the sums so awarded to his debtor. *Archambault & Lalonde*, 486.

CONSIGNOR AND CONSIGNEE. *See* PRINCIPAL AND AGENT.

CONSTITUTIONAL LAW.

Taxation of ferry boats.] The Acts 37 Vict. (Q.) ch. 51, and 39 Vict. (Q.) ch. 52, in so far as they authorised the levying of a tax upon ferry boats, including steamboats, carrying passengers between Montreal and places distant not more than nine miles, are not *ultra vires* of the local legislature. *Cie. de Navigation de Longueuil & Cité de Montréal*, 172.

COSTS.

Useless Action.] Where an action is unnecessary, though the right exists, the judgment maintaining it will be confirmed in appeal without costs in either Court. *Schwob & Baker*, 191.

—— 2. *Privilege for.*] *See* PRIVILEGE FOR COSTS.

CORPORATION. *See* MUNICIPAL CORPORATION.

COUNTY COUNCIL.—*Powers of.*] *See* MUNICIPAL LAW.

CROWN LANDS.

Location ticket.] A location ticket issued under sec. 13 of ch. 22, C. S. C., is, in effect, a promise of sale of the lands to which it applies, subject to the fulfilment on the part of the locatee of the conditions on which it is granted, and gives the locatee absolute possession of such lands, and all the rights of action against trespassers which he might exercise if he held such lands under a patent from the Crown. *Gilmour & Paradis*, 449.

—— 2. The holder of such location ticket is entitled to an injunction to restrain lessees of Crown Timber limits under a license from the Commissioner of Crown Lands, from cutting timber on the lands held under the location ticket, until the question of title is determined by the Courts. *Ib.*, 449.

CURATOR. *To Judicial Abandonment—Privilege of Lessor.*] *See* INSOLVENCY, 303.

DAMAGES.

1. *Absence of malice.*] Where damage results from the mere negligence of defendant, and there is no wilful neglect on his part, the judgment should allow only the actual damages suffered by the plaintiff, and not vindictive damages. *Stephens & Chaussé*, 270.

—— 2. *Immediate Cause.*] Where damages have been caused by the negligence of defendant, and both parties were in fault, the Court will look to the principal and immediate cause of the accident, and condemn its author to pay the damage suffered by the other party. *Canadian Pacific Ry. Co. & Cadieux*, 315.

—— 3. *Measure of, for infringement of patent.*] *See* PATENT, 133.

—— 4. *Seizure by garnishment.* *See* PROCEDURE, 486.

—— 5. *See* RAILWAY.

ELECTION ACT, QUEBEC—*Transmission of duplicate of voters' list.*] *See* SECRETARY-TREASURER, 1.

EVIDENCE.

1. *Filiation—Proof of identity.*] *See* FILIATION, 159.

—— 2. *Notes of Stenographer.*] *See* PERJURY, 360.

—— 3. *Of Attorney ad litem.*] The evidence of an attorney *ad litem* in behalf of his client is admissible, but such testimony is repugnant to the discipline of the profession. *Waldron & White*, 375.

—— 4. *Oath put by the Court.*] Where a demand is made for damages caused by an accident through defendant's negligence, and there is no evidence as to the cause of the accident, it is not a proper case for submitting the *serment supplétoire*. *Corporation of Sherbrooke & Short*, 50.

—— 5. *Onus probandi.*] *See* RAILWAY; LESSOR AND LESSEE.

—— 6. *Parol testimony.*] *See* LARCENY AS A BAILEE, 143.

—— 7. *Parol testimony of warranty.*] Verbal evidence is inadmissible to prove a warranty of a horse sold, where the value is over $50. *Tassé* v. *Ouimet dit Bastien*, 312.

—— 8. *Statement in deed.*] The borrower's acknowledgment in a deed, that he had received the amount borrowed, may be contradicted by the lender's admission that she handed the money to her notary, and the notary's admission that he had not paid over the whole amount. *Webster & Dufresne*, 43.

—— 9. *Statement of account by book keeper.*] The respondent, by notarial agreement, leased to appellant the right to mine for asbestos, on certain property belonging to the respondent. Subsequently, the respondent agreed to reduce the amount of royalty he was to receive; but to what extent, the appellant and respondent did not agree. The appellant kept no regular books, but his son-in-law and agent, at all events for some purposes, kept full accounts, and the appellant was in the habit of referring those who dealt with him to this agent, and he had even paid respondent on the statements of this agent. *Held*, that the appellant was bound by the statement of account of such agent, the amount so fixed being less than the respondent would be entitled to under the original agreement. *Jeffery & Webb*, 147.

—— 10. *See* PRINCIPAL AND AGENT.

EXEMPTIONS FROM SEIZURE. *See* PROCEDURE, 486.

EXPROPRIATION. *Of lands for use of railway—Failure to comply with legal formalities.*] *See* RAILWAY, 20.

FILIATION.

Identity.] The *adjudicataire* of a substituted immovable, who was authorised to retain part of the purchase money until the opening of the substitution, is bound by the acknowledgment made by his *auteure*, of the *état civil* of the *grevé* who is asking for the production of the money. *Beaudry & Courcelles-Chevalier*, 159.

FRAUD. *Signature to promissory note obtained by fraud.*] *See* PROMISSORY NOTE, 61.

GARNISHMENT. *See* SAISIE-ARRÊT; PROCEDURE.

HARBOUR COMMISSIONERS.

Jurisdiction of.] The jurisdiction of the Harbour Commissioners of Montreal within certain limits does not exclude the right of the city to tax and control ferry-boats plying within such limits. *Cie. de Navigation de Longueuil & La Cité de Montréal*, 172.

HUSBAND AND WIFE.

1. *Action by wife for personal wrongs.*] A married woman, authorised by her husband, can bring an action of damages in her own name for personal wrongs. *Waldron & White*, 375.

—— 2. *Household expenses.*] Where a wife *séparée de biens*, living with her husband, orders goods for the maintenance of the family, and the goods are charged to her in the books of the vendor, and the husband is without means, the wife is liable for the whole cost of such goods, under the provisions of Art. 1317 C.C., notwithstanding the fact that by the marriage contract the husband alone was bound to pay the expenses of the household. *Griffin & Merrill*, 130.

IMPUTATION OF PAYMENTS.

1. *Liability of acceptor.*] J, a customer of the Exchange Bank, respondent, discounted with that Bank appellant's acceptance. When it fell due, appellant failed to pay it, and the Bank charged it to J's account, who at the time owed the Bank a small balance, which balance was augmented by subsequent transactions, wherein, nevertheless, if the credits were imputed to the earliest indebtedness, the balance due when the acceptance matured would be more than covered. The Bank retained possession of the acceptance and brought this suit against appellant, the acceptor, to recover the amount. Appellant pleaded payment and compensation. *Held*, that the Bank was entitled to recover from appellant the amount of his acceptance, and that appellant was not discharged by the credits in the Bank's account with J. *Goodall & Exchange Bank of Canada*, 430.

—— 2. *Note discounted by bank—When held to be paid.*] The rule that the imputation of payment is made upon the oldest debt applies to

IMPUTATION OF PAYMENTS—*Continued.*

an account between a bank and a customer; and so, where the amount of a note discounted by a bank for the endorser was charged on maturity to the endorser's account, and the deposits subsequently made by the endorser, as shown by the books of the bank, were more than sufficient to cover his indebtedness to the bank at the time the note matured, such note must be held to have been paid, and the bank has no action thereon against the maker who has paid the endorser (but without obtaining possession of the note); and the fact that the endorser's aggregate indebtedness to the bank has continued to increase, does not affect the question of payment of the note referred to, in the absence of any reserve of recourse by the bank thereon. *Cleveland & Exchange Bank of Canada*, 30.

—— 3. *Note given as fraudulent preference—Knowledge by trustee.*] Where J. R., trustee to an insolvent estate, is member of a firm holding insolvent's note given it in illegal preference, and where, the purchasers of the estate having appointed the insolvent their agent for the purpose of realising its assets, the latter pays the proceeds to J. R.:—*held*, on suit brought by trustee *ès-qualité* against purchasers for balance of price, that the moneys so paid will be imputed on account of the debt due trustee by purchasers. *Ross & Paul*, 299.

—— 4. That the knowledge by J. R. of the illegal preference, which came to him as a member of the firm, is a knowledge by him in his capacity of trustee. *Ib.*, 299.

INJUNCTION.

Disputed title.] The Court will not, as a general rule, decide a question of title upon a writ of injunction, more especially when there is a third party interested who is not a party in the cause. *Gilmour & Paradis*, 449.

INSOLVENCY.

1. *Estate reconveyed to insolvent.*] A debtor against whose property a judgment has been registered, and who afterwards makes an assignment, and obtains back his estate by a composition with his creditors, in which he undertakes to pay the hypothecs on his property in full, cannot have the hypothec so registered set aside, at his own suit, on the ground that it is a fraud on his creditors. *Foster & Baylis*, 421.

—— 2. *Lessor and curator.*] The lessor who has issued a *saisie-gagerie*, is entitled to be paid out of the proceeds of the effects garnishing the leased premises, by preference to the costs of the curator appointed to the judicial abandonment made by the lessee subsequent to the seizure, with the exception of the costs incurred for the safe keeping and sale of the effects. *DeBellefeuille & Desmarteau*, 303.

—— 3. *Sale by assignee.*] Creditors, by assenting to and ratifying a deed of assignment by an insolvent trader, do not become liable to warrant the acts of the assignee. They do not act jointly and

INSOLVENCY—*Continued.*

severally in appointing a common mandatary, but each simply gives his sanction, *quoad* his individual interest, to the appointment of the assignee by the insolvent as his agent and administrator. And so, where the assignee sold the stock of an insolvent, and the purchaser was unable to obtain possession, it was held that an action of damages did not lie by the purchaser against creditors who had assented to the appointment of the assignee. *Marchildon & Denoon*, 12.

—— 4. *Suretyship.*] *See* SURETYSHIP, 402.

INSURANCE, MARINE.

1. *Condition of Policy requiring claim to be prosecuted within one year.*] A condition in a policy of insurance, "that all claims under this policy shall be void unless prosecuted within one year from the date of loss," is a valid condition, and the non-observance thereof defeats the remedy of the insured. Such condition is not a renunciation of prescription by anticipation within the meaning of Art. 2184 C. C. *Allan & Merchants Marine Ins. Co.*, 293.

—— 2. *Prosecution of Claim.*] Correspondence between the insured, or persons claiming to represent him, and the insurer on the subject of a loss, without any admission of liability on the part of the insurer, is not a 'prosecution' of the claim by the insured, within the meaning of the above condition. *Allen & Merchants Marine Ins. Co.*, 293.

JUDGMENT.

Death of several of the plaintiffs.] The death of several of the plaintiffs, during the pendency of the suit, does not render a judgment pronounced in their name absolutely null; the nullity being relative, and such as can be invoked only by the legal representatives of the deceased, on the ground that their rights have been prejudiced by the judgment. *Lowrey & Routh*, 364.

JURY TRIAL. *See* PROCEDURE.

LARCENY AS A BAILEE.

Deposit of sum of money.] The prisoner was indicted for larceny, as a bailee, of a sum of money. The complainant produced a receipt, taken at the time of the deposit in the hands of the prisoner, by which it appeared that the deposit was made "en attendant le paiement qu'il pourrait faire d'une même somme à R. A. Benoit." *Held*, that this receipt implied that the prisoner was to pay a similar sum, and not actually the same pieces of money, and that there was no larceny. Further, that parol testimony could not be admitted to vary the nature of the transaction. *Reg.* v. *Berthiaume*, 143.

LEGISLATURES, POWERS OF. *Ferries.*] *See* CONSTITUTIONAL LAW, 172.

LESSOR AND LESSEE.

1. *Accidents by fire.*] The presumption of fault established by C. C. 1629 against the lessee, cannot be invoked by the lessor who by

LESSOR AND LESSEE—*Continued.*

the terms of the lease stipulated for the delivery of the premises in as good order, etc., at the expiration of the lease, "accidents by fire excepted,"—and more particularly where the lessees undertook to pay all extra premiums of insurance which might be charged to the lessor consequent on the nature of the business carried on in the premises by the lessees. In such case, the burden of proof is on the lessor to establish fault on the part of the lessees. *Skelton & Evans*, 325.

—— 2. Where in such circumstances the cause of the fire is not established, it will be considered an accidental fire for which the lessees cannot be held responsible. And the fact that [illegible] did not conform strictly to the regulations of police [illegible] ence to the deposit of ashes, will not affect the case in [illegible] of any proof that the fire was due to such negligence [illegible] part. *Ib.*, 325.

—— 3. *Privilege of lessor.*] *See* INSOLVENCY, 303.

LIBEL. *Report of mercantile agency to subscribers.*] *See* MERCANTILE AGENCY, 69, 83.

LOCATION TICKET. *See* CROWN LANDS, 449.

MALICIOUS ARREST. *See* PROBABLE CAUSE.

MAPLE GROVE. *Road through.*] *See* MUNICIPAL LAW, 263.

MARRIED WOMAN. *See* HUSBAND AND WIFE, 130, 375.

MASTER AND SERVANT.

Negligence of foreman.] Masters and employers are responsible for the fault and negligence of the foreman placed in authority by them, whether the damage be caused to a fellow servant or not; and the fact that the person injured volunteered to perform the particular service in which he was engaged at the time he was injured does not relieve the employer from responsibility. *Allan & Pratt*, 7.

MERCANTILE AGENCY.

1. *Circulating erroneous information of a damaging nature.*] The manager of a mercantile agency comes under the general rule (C. C. 1053), which makes every person capable of discerning right from wrong responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill; and the defendant, a mercantile agency, being guilty of negligence in circulating a report of an injurious nature concerning a person in business, and in communicating it by circular and verbally to persons who had no interest in being informed of his standing, was held liable in damages. *Bradstreet Company & Corsley*, 83.

—— 2. *Report of mercantile agency to subscribers.*] Where the report of a mercantile agency to its subscribers, concerning the standing of a person in business, is true, and no malice is proved, an action of damages for such publication will not be maintained. *Girard & Bradstreet*, 69.

MISNOMER. *See* PLEADING, 116.

MONTREAL, CITY OF.

1. *Assessment roll—When it comes into force.*] An assessment roll comes into force from the date of its final completion, and deposit by the commissioners in the office of the city treasurer, and the prescription of three months under 42-43 Vic. ch. 52, s. 12, runs from that date. *Joyce & La Cité de Montréal*, 200.

—— 2. *Taxation of Ferry-boats.*] *See* CONSTITUTIONAL LAW; HARBOUR COMMISSIONERS, 172.

MUNICIPAL CORPORATION.

Condition of streets—Extraordinary circumstances.] A municipal corporation is not bound to make extraordinary exertions, out of proportion to the means at its disposal, in order to keep the streets free from snow and ice, but only to such extent as is reasonable when the means at its disposal are taken into consideration *Corporation of Sherbrooke & Short*, 50.

MUNICIPAL LAW.

1. *Powers of county council.*] A local council passed a by-law which was amended by the county council on appeal. The local council, without new proceedings or any effort to amend, passed a by-law in similar terms to the former by-law, which was then again taken to the county council on appeal, when a resolution reciting the facts was adopted, quashing the by-law. *Held*, that the county council, in thus setting aside the by-law of the local council without hearing the parties, etc., as provided by Art. 932, M. C., acted within its jurisdiction. *Corporation du Comté d'Yamaska & Durocher*, 219.

—— 2. *Road through maple grove.*] A municipal council cannot cause a public road to be made through a maple grove situated within a radius of 400 feet of the house inhabited by the occupant of such grove, without the consent in writing of the proprietor. *Masson & La Corporation de la paroisse de St-Aimé*, 263.

—— 3. *Occupant.*] The *fermier* inhabiting a house belonging to the proprietor of a maple grove is the "occupant" of such maple grove within the meaning of Art. 904, C. M. *Ib.*, 263.

NEGLIGENCE.

1. *Accident caused by negligence of foreman.*] *See* MASTER AND SERVANT, 7.

—— 2. *Condition of Streets.*] *See* MUNICIPAL CORPORATION, 50.

—— 3. *Damages where there has been no wilful neglect.*] *See* DAMAGES, 270.

—— 4. *Mutual fault.*] *See* DAMAGES, 315.

—— 5. *See* DAMAGES.

NOTARY. *Responsibility for default of.*] *See* PRINCIPAL AND AGENT, 43.

NOTICE OF ACTION. *See* PUBLIC OFFICER, 1.

NOVATION.

Extinction of obligation by granting a term to substituted debtor.] Novation is effected by the acceptance of a new debtor in the room

NOVATION—*Continued.*

of the old, whom it was intended to discharge, as evidenced in this case by a term granted by the creditor to the substituted debtor without the concurrence of the former debtor. *O'Brien & Semple*, 55.

OPPOSITION. *See* PROCEDURE.

OPPOSITION EN SOUS ORDRE. *See* PROCEDURE.

PATENT.

1. *Infringement.*] A patent of invention of machinery may be infringed by the use of a machine dissimilar in appearance, if the principle patented be interfered with. *Pinkerton & Cotê*, 133.

—— 2. *Measure of damages.*] The measure of damages for infringement of a patent of invention, by using a patented machine purchased of a manufacturer of the invention, and not the inventor, is not the profit which the purchaser derived from the use of the patent. The true measure is the loss suffered by the patentee. *Pinkerton & Cotê*, 133.

PENALTY. *Action against secretary-treasurer.*] *See* SECRETARY-TREASURER, 1.

PERJURY.

1. *Deposition on which perjury is assigned—Proof that stenographer, who took deposition, had been sworn—Answers on 'faits et articles'—Notes of stenographer.*] The fact that the stenographer, who took a deposition in a civil case, on which perjury is assigned, has been sworn, must be proved by the record of proceedings in the case in which the deposition was taken. *Reg.* v. *Doumic*, 360.

—— 2. A party summoned to appear in one division of the Superior Court, at Montreal, to answer upon *faits et articles*, and who has appeared and been sworn in another division of the same Court, where he has given his answers, may be convicted of perjury on the answers so given. *Ib.*, 360.

—— 3. *Quære.*] Whether it is now necessary, under 47 Vict. c. 8, that the notes of the stenographer should, in all cases, be read to the witnesses? *Ib.*, 360.

PLEADING.

Misnomer.] A misnomer is ground for an exception to the form, and cannot form the subject of a plea to the merits,—more particularly where the error complained of is trivial and unimportant, *e. g.*, the description of the defendant as "La Corporation des Commissaires d'Ecole d'Hochelaga" instead of "Les Commissaires d'Ecole d'Hochelaga." *Commissaires d'Ecole d'Hochelaga & Montreal Abattoirs Co.*, 116.

PRESCRIPTION.

1. *Condition in Policy making claim void unless prosecuted within one year.* *See* INSURANCE, 293.

—2. *Of three months under 42-43 Vic. (Q.) ch. 53, s. 12.*] See MONTREAL, CITY OF, 200.

PRINCIPAL AND AGENT.

1. *Account Sales rendered during series of years—Acquiescence—Proof—C. C.* 1234.] The respondents, consignees at Montreal, under a written agreement, of appellants in Belfast, Ireland, accounted from time to time for the goods consigned to them, but never made any return for the price of the cases in which the goods were packed. These cases were always charged in the appellant's accounts, but the only reference made by the appellants to the omission to account for the packing cases, was contained in a letter in which they merely said: "We observe you do not "make any return for the cases." The written agreement did not make any mention of the cases. Three years later the account was closed without any reservation as to the packing cases. The appellants afterwards brought an action in *assumpsit* for the price of the cases. *Held*, that the action could not be maintained, seeing that the appellants had notice during three years, through the respondents' accounts, that the packing cases were not being allowed for; and that parol evidence was inadmissible to vary the terms of the written agreement by proving an understanding that the cases should be paid for. *Ulster Spinning Co. & Foster*, 396.

—— 2. *Action en réformation de compte.* *See* ACCOUNT, 167.

—— 3. *Agent exceeding limits of mandate—Responsibility.*] An agent who has only a limited authority, and who by going beyond his authority, even while acting in good faith, causes his principal to suffer a loss, is obliged to pay the loss. And so, where a person instructed a bank clerk to give a cheque for the amount of a certain account, and the clerk, late at night, gave the party the money instead, thereby preventing his principal from rectifying an error which existed in the account, it was held that the clerk could not recover from his principal the amount paid in excess of what was really due. *Shea & Prendergast*, 439.

—— 4. *Consignee taking goods at fixed prices, profits over these prices to be his—Rights of consignor.*] The fact that an agent to whom goods are consigned for sale is to have for himself all that he can get over a schedule price, does not make him the owner of the goods, and the price, when collected by his assignee after his insolvency, does not fall into his estate, except such portion thereof as represents the agent's profit. And so, where an agent took over a stock on consignment, under an agreement in writing by which he was to account for goods sold as per price list supplied to him by the consignor, the profits over this price to belong to the agent—it was held that the consignor was entitled to be paid in full, per price list, for goods sold by the agent before his insolvency, but the price of which was collected by his assignee subsequently. *Schlbach et al. & Stevenson*, 391.

—— 5. *Money deposited by lender with her notary—Responsibility for default of notary.*] Where the amount of a loan was deposited by the lender with her notary, with instructions to hold it until the obli-

PRINCIPAL AND AGENT—*Continued.*

gation to be given for it was executed and registered, *held*, that the responsibility for the default of the notary to pay over a portion of the money must fall upon the lender; and it made no difference whether the notary was to pay over the amount to the borrower, or (as in the case reported) was to apply it to the discharge of certain debts in accordance with a list furnished to him by the borrower. *Webster & Dufresne*, 43.

—— 6. *Statement of account by book keeper.*] *See* EVIDENCE, 147.

PRIVILEGE FOR COSTS.

1. *Plaintiff's privilege for costs of suit.*] The plaintiff's privilege for the costs of suit, under C. C. 1994 and C. C. P. 606, § 8, as amended by 33 Vic. (Q.) ch. 17, s. 2, extends only to the costs incurred in the Court of first instance; and so, where the plaintiff obtained judgment in the Superior Court against three defendants jointly and severally, and the judgment was reversed by the Court of Queen's Bench, sitting in appeal, and, on appeal to the Privy Council, the original judgment was restored, it was held that the plaintiff was entitled to be collocated by privilege on the proceeds of defendants' movables only for the costs incurred in the Superior Court. *Beaudry & Dunlop*, 278.

—— 2. *Lien of landlord.*] The plaintiff's privilege for the costs of suit, where the suit has been against a firm, has priority, even as regards the personal effects of the individual members of the firm, over the lien of the landlord for rent of premises leased to such members. *Ib.*, 278.

PRIVILEGED COMMUNICATION. *Report of mercantile agency.*] *See* MERCANTILE AGENCY, 69, 83.

PROBABLE CAUSE.

False statement in deed.] Appellant, a jeweller, desiring to increase his business, obtained advances from respondent, a wholesale dealer, and gave as security a hypothec on his property, on which he declared there were mortgages, but he only specified one of a certain amount. There was really another. Shortly afterwards, the appellant became insolvent, and the respondent arrested him on the charge of obtaining property by false pretences. *Held*, that there was probable cause for the arrest, though it appeared that the appellant did not intend fraudulently to conceal the mortgage. *Grothé & Saunders*, 208.

PROCEDURE.

1. *Appeal from interlocutory judgment.*] Leave to appeal will not be granted from an interlocutory judgment ordering *preuve avant faire droit* on a demurrer, where to an action (which is to be tried by a jury) a demurrer has been filed to part of the declaration alleging facts generally necessary to the demand, though the development of these facts on certain points may be useless. *Rasconi Woollen & Cotton Manufacturing Co.* v. *Lancashire Ins. Co.*, 317.

PROCEDURE—*Continued.*

—— 2. *Appeal from judgment in Review.*] When a substantial change has been made in the judgment of first instance by the judgment of the Court of Review, an appeal lies from the latter judgment. *Fraser & Brunette*, 310.

—— 3. *Appeal to Privy Council.*] The execution of a judgment of the Court of Queen's Bench cannot be stayed, when the appeal to the Privy Council has not been lodged within six months from the day on which the appeal was allowed. *Allan & Pratt*, 322.

—— 4. *Delay to appeal to Supreme Court.*] Leave to appeal to the Supreme Court, after the statutory delay has expired, will not be granted, unless special circumstances be shown which retarded the application. *Massue & La Corporation de la paroisse de St-Aimé*, 319.

—— 5. *Execution—Exemptions from seizure—Damages awarded for libel.*] The amount of a judgment obtained as damages for libel is not exempt from seizure by garnishment. *Archambault & Lalonde*, 486.

—— 6. *Jury Trial.*] Where a party who has asked for a jury trial does not take proceedings to have a trial, the other party is entitled to obtain permission to inscribe the case for *enquête* in the ordinary way. *McLeish* v. *Doigall*, 313.

—— 7. *Opposition en sous-ordre—Moneys deposited in hands of prothonotary—C. C. P. 753.*] Where moneys have been attached by garnishment and deposited in the hands of the prothonotary to abide the result of a contestation, and subsequently, by a final judgment, the said moneys have been declared to be the property of the contestant, and the prothonotary, by a judgment of the Court has been ordered to pay the same to the contestant, such moneys cannot be claimed by an opposition *en sous-ordre*, there being no longer any suit pending in which such opposition could be made; and the claimant's recourse should be by *saisie-arrêt* founded upon affidavit as required by law. *Barnard & Molson*, 348.

—— 8. *Security for costs.*] An opposant who is absent from the country, even if he is a defendant opposant *afin d'annuler*, is bound to give security for costs. *Beckett & La Banque Nationale*, 274.

—— 9. *Security for costs.*] Where the party entitled to security for costs has in his possession property, belonging to the other party, sufficient to secure his costs, a motion for security for costs may be rejected. The sufficiency of the security is a matter within the discretion of the Court. *Boxer* v. *Judah*, 320.

—— 10. *Serment supplétoire.*] Where a demand is made for damages caused by an accident through defendant's negligence, and there is no evidence as to the cause of the accident, it is not a proper case for submitting the *serment supplétoire*. *Corporation of Sherbrooke & Short*, 50.

—— 11. *See* APPEAL BOND, 364; JUDGMENT, 364; SAISIE-ARRÊT.

PROMISSORY NOTE.

1. *Signature obtained by Fraud.*] Where the defendant's signature to a promissory note was obtained by fraud, under circumstances which, in the opinion of the Court, were matter of public notoriety at the time the note was transferred to B. (for whom the plaintiff was *prête-nom*), *held*, that it was incumbent on the plaintiff to prove that B. gave consideration for the note. *Exchange Bank of Canada & Carle*, 61.

—— 2. *See* IMPUTATION OF PAYMENTS.

PUBLIC OFFICER.

Notice of action.] A public officer is not entitled to notice of action under Art. 22, C. C. P., where the action is for a penalty for failing or omitting to do what the law requires him to do. *Jodoin & Archambault*, 1.

QUANTUM MERUIT. *Appeal on question of.*] *See* APPEAL.

RAILWAY.

1. *Accident caused by the breaking of a rail.*] Where damage results from an accident caused by the breaking of a rail, it is for the company to establish that the fracture was caused by *force majeure*; otherwise the presumption of negligence arises against the company. *Canadian Pacific Railway Co. & Chalifoux*, 324.

—— 2. *Expropriation.*] Where land has been taken by a railway company, without observing the formalities prescribed by the Railway Acts for the expropriation of lands for the use of the railway, the owner is entitled to oppose the sale of such land under an execution against the railway company, and to claim that it be withdrawn from seizure. *Brewster & Mongeon*, 20.

RES ADJUDICATA. *See* CHOSE JUGÉE.

RESPONSIBILITY.

1. *Negligence of foreman.*] *See* MASTER AND SERVANT, 7.

—— 2. *Of Municipal Corporation for condition of streets.*] *See* MUNICIPAL CORPORATION, 50.

—— 3. *See* DAMAGES; NEGLIGENCE; RAILWAY.

ROAD. *Through maple grove.*] *See* MUNICIPAL LAW, 263.

SAISIE-ARRÊT.

1. *Attachment in hands of creditor.*] A creditor may attach in his own hands, before judgment, moneys and effects of his debtor. *Dorion & Dorion*, 155.

—— 2. *Secretion of effects.*] Art. 834 C. C. P. refers to a secretion which is occurring at the time of the affidavit, or to a contemplated secretion. *Ib.* 155.

—— 3. *Action en reddition de compte.*] A *saisie-arrêt* before judgment cannot properly issue where the plaintiff's action is *en reddition de compte*. *Ib.* 155.

—— 4. *Exemptions from seizure.*] *See* PROCEDURE, 486.

SALE.

1. *A rémérí.*] Where a property was sold, and the purchaser bound himself to re-convey it to the vendor within three months from the time he (the purchaser) should have completed a house then in course of construction thereon, on being paid $3,000, it was the duty of the purchaser to notify the vendor of the completion of the house; and in default of such notice, the right of redemption might be exercised after the expiration of the three months. *Leger & Fournier*, 124.

2. *By Sheriff—Vacated at suit of purchaser—C. C. P. 714—Property charged with dower claim.*] A purchaser of real estate at a sheriff's sale is not bound to take a deed of the property, but may have the sale vacated, if it appear that the immovable is charged with a claim for dower which is not extinguished by sheriff's sale; and this is so, even where the purchaser has knowledge, before the sale, of the existence of the hypothec. *Blondin & Lisotte*, 496.

3. *Inferiority of quality—When goods cease to be at risk of vendor.*] Where flour was sold at Toronto, Ont., to a purchaser in Sherbrooke, Que., at $4.85 per barrel, delivered at Sherbrooke and Arthabaskaville, *held*, that the flour was at the risk of the vendor until delivered, and that the purchaser (who had paid cash, and did not examine the flour until a quantity had been sold in small lots to his customers), was entitled to recover from the vendor the difference in value between flour of the quality ordered and that which had been received. *Taylor & Gendron*, 33.

4. *Jus disponendi—C. C. 1025.*] Where a person who sells goods on credit shows by his acts his purpose to retain the property therein until the conditions of sale be complied with,—as, for example, by consigning the goods to his own agent in the city where the purchaser resides, with instructions not to part with the bill of lading until the purchaser shall have accepted a draft for the price,—the right of property in the goods does not pass to the purchaser, and an action of revendication by the purchaser (who has refused to accept a draft for the price) will not be maintained. *McGillivray & Watt*, 249.

5. *Of real estate free and clear.*] Where real estate is sold free and clear of incumbrances, and it appears that the property is charged with a hypothec, the purchaser is not bound to take a deed until the vendor has caused the hypothec to be discharged. *Burroughs & Wells*, 492.

SECRETARY TREASURER.

Transmission of duplicate of voters' list to registrar.] Where a secretary-treasurer is sued for a penalty for not transmitting a duplicate of the voters' list to the registrar of the registration division, within eight days after it came into force, as required by 38 Vict. (Q.) ch. 7, the fact that the list was still under the consideration of the Council is not a valid ground of defence, and the penalty may be recovered even where the secretary-treasurer does not appear to be in bad faith. *Jodoin & Archambault*, 1.

SEIGNIORY. 1—2

Cadastre.] An omission to enter in the *Cadastre* of a seigniory a constituted rent to represent the former seigniorial rent, cannot be rectified. *Corporation Episcopale Catholique Romaine & Eastern Townships Bank*, 225.

SHERIFF'S SALE. *Property charged with claim for dower.*] *See* SALE, 496.

SLANDER.

Mitigation of damages.] The fact that the injurious statements complained of were made principally in the privacy of the family, and that the evidence of the slander was obtained by concealing a witness for the purpose of overhearing what transpired, will be considered in mitigation of damages. *Waldron & White*, 375.

STATUTE.

1. *Consolidation.*] An Act consolidated in similar terms by a subsequent Act is not repealed by such consolidation, but is continued in force thereby. *Cie. de Navigation de Longueuil & La Cité de Montréal*, 172.

— 2. *Erratum.*] An *erratum* distributed by the Queen's Printer with the Statutes forms an integral part of the Act to which it refers. *Commissaires d'Ecole d'Hochelaga & Montreal Abattoirs Co.*, 116.

— 3. *See* TABLE OF STATUTES CITED.

SURETYSHIP.

Surety—Cash security—Deposit receipt held by Government—Failure of Bank—Responsibility.] The appellant agreed to put up a cash security of $15,000 to the Government for the performance of a contract by the respondents, which security was to remain in the hands of the Government until the contract should be fulfilled; and the respondents were to pay to the appellant $2,000 per annum until the security should be released. By arrangement with the Exchange Bank, a deposit receipt for $15,000 was accepted by the Receiver-General, and that sum was placed to his credit in the Exchange Bank and remained under his control. *Held*, that the loss of the $15,000 by the failure of the Bank, was a loss to be borne by the Government and not by the appellant, and that the appellant was entitled to recover the $2,000 from the respondents, notwithstanding the tender back to him of the deposit receipt; that the terms on which the appellant obtained the credit at the Exchange Bank were not material to the issue, the appellant having furnished what was accepted by the Government as equivalent to cash at the time it was given; that the amount being entered in the books of the Bank to the credit of the Receiver-General, the deposit thereby became a debt due by the Bank to the Receiver-General, and was at the risk of the Government. *Gilman & Gilbert et al.*, 402.

TIMBER LIMITS. *See* CROWN LANDS, 449.

TITLE, DISPUTED. *See* INJUNCTION, 449.

VENDOR AND PURCHASER. *See* SALE.

WARRANTY. *See* EVIDENCE.