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CUMULATIVE SENTENCES.

The case of *Castro* v. *Reg.*, briefly noted on p. 376, presented an interesting question of criminal law, as to which there appears to be a variance between the jurisprudence of England and the United States. Castro, the well-known Tichborne claimant, was tried for perjury on an indictment containing two counts. The first count charged that the prisoner had committed perjury by falsely swearing that he was Roger Tichborne, in an action of ejectment tried before the Court of Common Pleas. The second count charged that the prisoner had committed perjury by falsely swearing that he was Roger Tichborne, in an affidavit sworn before a commissioner. The prisoner being found guilty on both counts, was sentenced, on the first, to penal servitude for seven years, and on the second count to a further term of seven years, to commence immediately upon the expiration of the term assigned to him upon the first count.

The Attorney-General gave his fiat for a writ of error, and the following, among other grounds of error, were assigned:—(1) That the alleged perjuries constituted one offence only. (2) That the second count did not disclose a separate perjury from that disclosed in the first count. (3) That on one indictment the maximum punishment assigned by statute cannot be cumulatively exceeded.

The appeal was argued by eminent counsel, Mr. Benjamin and others for the plaintiff in error, and the Attorney and Solicitor-General for the Crown. The decision of the Court of Appeal was, however, unanimous in affirming the judgment entered upon the conviction. The Crown relied upon the case of *Rex* v. *Wilkes* 4 Burr. 2527, as settling the point. In that case it was held by the House of Lords that for several misdemeanors separate sentences could be passed, one to take effect after the expiration of the other; and the Court of Appeal in the present case, adopting the ruling in the *Wilkes* case, added that "there is no reasonable distinction between trial and conviction on several charges contained in different counts in one indictment, and several separate trials for the same charges charged in different indictments." In the Tweed case, however, in New York (*People ex rel. Tweed* v. *Liscomb*, 60 N. Y. 559), it was held that the law in the United States does not permit several sentences, exceeding in the aggregate the maximum amount of punishment for a single misdemeanor, to be inflicted in the case of a conviction for several misdemeanors charged in different counts in the same indictment. This decision was held by the New York Court to be in accordance with the English common law of 1775, and it declined to accept any later English decision inconsistent with the American practice. The English judges appeared to think that the New York Court was mistaken in its view of the English law as it existed in 1775, and they held further, that in any case the *Tweed* decision, on the authority of which the Attorney-General gave his fiat for the writ of error, was in no way binding on them. They came to the conclusion, therefore, to affirm the judgment, thus laying down the rule that where a defendant is convicted of separate misdemeanors charged in separate counts in the same indictment, the Court has power to pass separate sentences exceeding in the aggregate the maximum punishment for one offence.

APPEAL FROM SUPREME COURT.

The Privy Council, it is stated, has granted permission to appeal to England from the judgment of the Supreme Court of Canada in *Parsons* v. *The Queen Insurance Co.*, and other cases (p. 326 of this volume). We have not yet seen any report of the grounds on which leave to appeal has been granted, but it may be remarked that their lordships, in allowing the application, are not acting inconsistently in any respect with the principles already laid down by them. So long ago as 1877, in the case of *Johnston* v. *Minister and Trustees of St. Andrew's Church*, the Privy Council, after citing the 47th section of the Supreme Court Act, 38 Vict. c. 11, which takes away the right of appeal, remarked: "Their lordships have no doubt whatever that assuming, as the petitioners do as-

sume, that their power of appeal *as a matter of right* is not continued, still that Her Majesty's prerogative to allow an appeal, if so advised to do, is left untouched and preserved by this section. Therefore their lordships *would have no hesitation in a proper case* in advising Her Majesty to allow an appeal upon a judgment of this Court." (See 1 LEGAL NEWS, 13.) This was expressly affirmed in the case of *Cushing and Dupuy* (pp. 171-5 of this volume), in which an appeal to England was allowed in an insolvent case, although the right of appeal in such cases is taken away by the Canadian statute.

NOTES OF CASES.

SUPREME COURT OF CANADA.

OCTOBER SESSIONS, 1880.*

APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

FRASER, *Appellant*, v. TUPPER, *Respondent*.

Appeal—Habeas Corpus—38 *Vict. c.* 11, *s.* 23.

The appellant, imprisoned under executions for penalties for selling liquors without license (Rev. Stat. N. S., 4 series, c. 75) applied under Rev. Stats., 4 series, c. 99, "An Act for securing the liberty of the subject," for a discharge. The order was made returnable before the Supreme Court of Nova Scotia, and the discharge was refused. Before instituting an appeal from the judgment of the Supreme Court of Nova Scotia, the appellant, whose time for imprisonment had expired, was at large. On motion to dismiss the appeal for want of jurisdiction, the Supreme Court of Canada.

Held, that an appeal will not lie in any case of proceedings upon a writ of Habeas Corpus, when at the time of the bringing of the appeal the appellant is at large.

Graham, for respondent.
Rigby, Q. C., for appellant.

EXCHEQUER COURT.

ROBERTSON, *Suppliant*, & THE QUEEN, *Respondent*.

B. N. A. Act, sec. 91 & 92; 31 *Vict. c.* 60—*Fishing leases issued under authority of s.* 2 *of said Act, Validity of—Exclusive right of fishing ad filum aquæ in rivers above tidal waters in New Brunswick—Rights, as riparian proprietors, of the Nova Scotia and New Brunswick Land Company.*

On the 5th November, 1835, a grant issued to the Nova Scotia and New Brunswick Land Company of 580,000 acres, which included within its limits that portion of the Miramichi above tidal waters, covered by a fishery lease issued to the suppliant on the 1st January, 1874, by the Minister of Marine and Fisheries under the provisions of the Act of the Parliament of Canada, intituled "An Act for the regulation of fishing and protection of the fisheries," 31 Vict. c. 60. During the year 1875, J. S. and E H., with the permission and consent of and under and by virtue of conveyances from the said N. S. and N. B. Land Company, entered, and fished for, and caught salmon by fly-fishing upon the portion of the river so leased, and the suppliant prevented them from fishing thereupon. J. S. and E. H. sued and recovered against the suppliant damages before the Supreme Court of New Brunswick. The suppliant by his petition of right prayed for compensation for losses sustained through the illegal issue of a lease by the Dominion Government. The questions submitted in the special case were as follows:—

"1. Had the Parliament of Canada power to pass the 2nd section of said Act, intituled 'An Act for the regulation of fishing and protection of the fisheries?'

2. Had the Minister of Marine and Fisheries the right to issue the fishery lease in question?

3. Was the bed of the S. W. Miramichi within the limits of grant to the Nova Scotia and New Brunswick Land Company, and above the grants mentioned and reserved therein, granted to the said Company?

4. If so, did the exclusive right of fishing in said river thereby pass to the said Company?

5. If the bed of the river did not pass, had the Company, as riparian proprietors, the right of fishing *ad filum aquæ*; and if so, was that right exclusive?

6. If an exclusive right of fishing in a portion of the Miramichi River passed to said Company, could the Minister of Marine and Fisheries issue a valid fishery lease of such portion of the river?

* Head notes to cases to appear in Supreme Ct. Rep., by G. Duval, Esq.

7. Where the lands (above tidal waters) through which the said river passes, are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a lease of that portion of the river?"

And it was

Held, 1. That all subjects of legislation of every description whatever are within the jurisdiction and control of the Dominion Parliament to legislate upon, except such as are placed by the B. N. A. Act under the exclusive control of the local Legislatures, and nothing is placed under the exclusive control of the local Legislatures unless it comes within some or one, of the subjects specially enumerated in the 92nd section, and is at the same time outside of the several items enumerated in the 91st section, that is to say, does not involve any interference with any of those items.

2. That the effect of the closing paragraph of the 91st section, namely, "and any matter "coming within any of the classes of subjects "enumerated in the 91st section shall not be "deemed to come within the class of matters "of a local or private nature comprised in the "enumeration of the classes of subjects by this "Act assigned exclusively to the Legislatures "of the Provinces," is to exclude from the jurisdiction of the local Legislatures the several subjects enumerated in the 92nd section, in so far as they relate to, or affect any of, the matters enumerated in the 91st section.

3. That by sub-sec. 12 of sec. 91, B. N. A. Act, the fisheries or right of fishing in all rivers running through ungranted lands in the several Provinces, as well as in all rivers running through lands then already granted, *as distinct and severed from the property in, or title to, the soil or beds of those rivers*, were placed under the exclusive legislative control of the Dominion Parliament, and that the Statute 31 Vict. c. 60 is *intra vires* of the Dominion Parliament.

4. That by the following words in sec. 2 of c. 60, 31 Vict., viz :—"where the exclusive right of fishing does not already exist," the rights of all persons seized and possessed of the right of fishing in rivers above tidal waters, either as a right incident to ownership of the bed and soil covered by such waters, or otherwise, were preserved.

5. That the true construction of the letters patent from the crown to the Nova Scotia and New Brunswick Land Company, bearing date the 3rd of November, 1835, was to convey to them the bed or soil of the south-west branch of the Miramichi River, where it passes through the lands so granted and with the exclusive right of fishing therein, *ad filum aquæ*, and therefore that the Minister of Marine and Fisheries was not authorized under 31 Vict. c. 60 to grant a salmon fishery license for that portion of the South-west Miramichi river.

Haliburton, Q. C., for suppliant.

Lash, Q. C , for respondent.

The following are extracts from the judgment of

MR. JUSTICE GWYNNE.—The right of fishing in rivers above the ebb and flow of the tide may exist as a right incident upon the ownership of the soil or bed of the river, or as a right wholly distinct from such ownership, and so the ownership of the bed of a river may be in one person and the right of fishing in the waters covering that bed may be wholly in another or others. Now that the B. N. A. Act did not contemplate the title or ownership of the beds of fresh water rivers in the Dominion Parliament under the control of the Dominion Parliament, so as to enable that Parliament to affect the title of the beds of such rivers, sufficiently appears, I think, from the 109th section, by which "all *lands*, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the union," are declared to belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate, and this term "lands" in this section is sufficient to comprehend the beds of all rivers in those ungranted lands. We must, however, in order to give a consistent construction to the whole Act, read this 109th section in connection with and subject to the provisions of the 91st section, which places "all fisheries," both sea coast and inland, under the exclusive control of the Dominion Parliament. Full effect can be given to the whole Act by construing it, (and this appears to me to be its true construction,) as placing the fisheries or right of fishing in all rivers running through lands then already granted, as distinct and severed from the property in, or

title to, the soil or beds of the rivers, under the exclusive legislative control of the Dominion Parliament. So construing the term "fisheries" the control of the Dominion Parliament may be, and is, exclusive and supreme without its having any jurisdiction to legislate so as to alter in any respect *the title to* or *ownership* of, the beds of the rivers in which the fisheries may exist. That title may be, and is in the grantees of the crown where the title has passed, or may pass hereafter by grants to be made under the seal of the several provinces, in which the lands may be, but the exclusive right to control the "fisheries," as a property or right of fishing distinct from ownership of the soil, is vested in the Dominion Parliament.

So construing the term, it must be held to comprehend the right to control in such manner as to Parliament in its discretion shall seem expedient, all deep sea fishing and the right to take all fish ordinarily caught either on the sea coast or in the great lakes, or in the rivers of the Dominion.

Now the Act under consideration, viz: 31 Vict. c. 60, maintains the like scrupulous respect for *private* rights as the old Acts which it repealed had done; for by the 2nd section the power given to the Minister of Marine and Fisheries to issue leases or licenses are confined expressly to those places "where the exclusive right of fishing does not already exist by law," following the provision of the Canada Statute 29 Vict. c. 11, sec. 18. In all matters placed under the control of Parliament, all private interests whether provincial or persoual must yield to the public interest and to the public will in relation to the subject matter as expressed in an Act of Parliament, constituted as the Dominion Parliament is, after the pattern of the Imperial Parliament, and consisting as it does of Her Majesty, a Senate, a House of Commons, as separate branches, the latter elected by the people as their representatives, the rights and interests of private persons, it must be presumed, will always be duly considered, and the principle of the British Constitution, which forbids that any man should be wantonly deprived of his property under pretence of the public benefit, or without due compensation, be always respected. It is, however, in Parliament, upon the passing of any Act which may affect injuriously private rights, that those rights are to be asserted, for once an Act is passed by Parliament in respect of any matter over which it has jurisdiction to legislate, it is not competent for this or any court to pronounce the Act to be invalid because it may affect injuriously private rights, any more than it would be competent for the Courts in England, for the like reason, to refuse to give effect to a like Act of the Parliament of the United Kingdom. If the subject be within the legislative jurisdiction of the Parliament, and the terms of the Act be explicit, so long as it remains in force, effect must be given to it in all Courts of the Dominion, however private rights may be affected.

The Imperial Parliament, having supreme control over the title to, or ownership of, the beds and soil of all inland waters of the Dominion, and also over the franchise or right of fishing therein as a distinct property, has, at the request of the old Provinces of Canada, Nova Scotia and New Brunswick, as the same were constituted before the passing of the B. N. A. Act, so dealt with those subjects as, while leaving the title to the beds and soil of all rivers and streams passing through or by the side of lands already granted in the grantees of such respective lands, to place the franchise or right to fish, as a separate property distinct from the ownership of the soil, under the sole, exclusive and supreme control of the Dominion Parliament. Construing then the term "Fisheries," as used in the B. N. A. Act, as this franchise or incorporeal hereditament apart from and irrespective of the title to the land covered with water in which the fisheries exist, it seems to me to be free from all doubt that the jurisdiction of Parliament over all fisheries, whether sea coast or inland, and whether in lakes or rivers, is exclusive and supreme, notwithstanding that in the rivers and other waters wherein such fisheries exist, until Parliament should legislate upon the subject, private persons may be seized and possessed of the right of fishing in such waters either as a right incident to the ownership of the beds and soil covered by such waters or otherwise. * * * *

[After reviewing the nature, condition and title of the particular property in question, referring to a number of cases, the learned Judge continued.]

The principles to be deduced from all these cases seem to be that, in the estimation of the

common law, all rivers are either navigable or not navigable; and rivers are only said to be navigable so far as the ebb and flow of the tide extends. Rivers may be navigable in fact, that is, capable of being navigated with ships, boats, rafts, etc., etc., yet be classed among the rivers not navigable in the common law sense of the term, which is confined to the ebb and flow of the tide. Rivers which are navigable in this sense are also called public, because they are open to the public use and enjoyment freely by the whole community, not only for the purposes of passage, but also for fishing, the Crown being restrained by Magna Charta from the exercise of the prerogative of granting a several fishery in that part of any river. Non-navigable rivers, in contrast with navigable or public, are also called private, because although they may be navigable in fact, that is, capable of being traversed, with ships, boats, rafts, etc., etc., more or less, according to their size and depth, and so subject to a servitude to the public for purposes of passage, yet they are not open to the public for purposes of fishing, but may be owned by private persons, and in common presumption are owned by the proprietors of the adjacent land on either side, who, in right of ownership of the bed of the river, are exclusive owners of the fisheries therein opposite their respective lands on either side to the centre line of the river. Magna Charta does not affect the right of the Crown, nor restrain it in the exercise of its prerogative of granting the bed and soil of any river above the ebb and flow of the tide, or granting exclusive or partial rights of fishing therein as distinct from any title in the bed or soil; and, in fact, Crown grants of land adjacent to rivers above the ebb and flow of the tide, notwithstanding that such rivers are of the first magnitude, are presumed to convey to the grantee of such lands the bed or soil of the river, and so to convey the exclusive right of fishing therein to the middle thread of the river opposite to the adjacent land so granted. This presumption may be rebutted, and if, by exception in the grant of the adjacent lands, the bed of the river be reserved, still such reservation does not give to the public any common right of fishing in the river, but the property and ownership of the river, its bed and fisheries remain in the Crown, and the bed of the river may be granted by the Crown, and the grant thereof will carry the exclusive right of fishing therein; or the right of fishing exclusive or partial may be granted by the Crown to whomsoever it pleases, just as any person seized of the bed of a river might dispose thereof. This right extends to all large inland lakes also, for although in their case the same presumption may not arise as does in the case of rivers, namely, that a grant of adjacent lands conveys *prima facie* the bed of the river, still the prerogative right of the Crown to grant the beds of rivers above the ebb or flow of the tide, not being affected by the restraints imposed by Magna Charta, cannot be questioned, for all title of the subject is derived from the Crown, and so if a bed of a river or right of fishing therein be reserved by the Crown from a grant of adjacent lands, the right and title so reserved remains in the Crown in the same manner as it would have vested in the grantee if not reserved, and is not subject to any common right of fishing in the public, for as was said by Lord Abinger, in *Hull* v. *Selby Ry. Co.*, 5 M. & W. 327, as all title of the subject is derived from the Crown, "the Crown holds by the same rights and with the same limitations as its grantee." So in *Bloomfield* v. *Johnson* it was held that a grant by the Crown of a free fishery in the waters of Lough Erne did not pass a several or exclusive right of fishery therein, but only a license to fish on the property of the grantor, and that the several fishery remained in the Crown subject to such grants or license to fish as it might grant. In old Canada the right of the Crown to make such grants of the bed of the great lakes is recognized by Act of Parliament.

COURT OF QUEEN'S BENCH.

MONTREAL, November 4, 1880.

Sir A. A. DORION, C. J., MONK, RAMSAY, CROSS, JJ., BABY, A.J.

TRUST AND LOAN CO. & QUINTAL es-qual.

Appeal in formâ pauperis.

The respondent had been allowed to plead *in formâ pauperis* in the Court below. On application she was allowed to proceed *in formâ pauperis* in appeal, without new affidavit, it not appearing that she had become able to pay fees.

MONTREAL, Nov. 9, 1880.

Sir A. A. DORION, C.J., MONK, RAMSAY, CROSS, JJ., BABY, A.J.

THE MERCHANTS' BANK & LESLIE.

Filing omitted statement.

This was a motion by respondent to be permitted to file a statement which by an omission had not been filed.

There were two cases involving very similar questions, and the evidence taken in one case, by consent was copied into this one. Inadvertently the statement in question had been left out, and its omission was only observed when taken notice of in appellant's factum.

The appellant consented and the motion was granted.

COURT OF REVIEW.

MONTREAL, Nov. 13, 1880.

SICOTTE, TORRANCE, RAINVILLE, JJ.

BRAIS es qual. v. RACETTE et al.

[From S. C., Montreal.

Sale in fraud of creditors—Evidence.

The judgment under review was rendered by Jetté, J., Superior Court, Montreal, June 30, 1880, as follows:—

JETTÉ J. Le demandeur, Syndic à la faillite de *Siméon Racette*, demande l'annulation d'un *acte de vente*, consenti par le failli aux défenderesses, ses sœurs, le 11 février 1879, comme fait en prévision de la faillite, et pour donner une préference indue à certains créanciers au préjudice des autres.

L'article 133 de la loi de faillite, déclare telle vente par suite de laquelle un créancier obtient une injuste préférence sur les autres créanciers nulle et de nul effet, et autorise le syndic à réclamer l'objet de telle vente, pour l'avantage des créanciers en général.

Outre cette disposition générale, conforme d'ailleurs à notre droit civil (C.C. 1032, 1033), cet art. 133 établit une présomption légale de fraude contre tout acte ainsi fait dans les 30 jours avant la faillite.

Dans l'espèce, l'acte attaqué a été fait le 11 février 1879 et la faillite n'a eu lieu que le 29 mai suivant (1879), c'est à dire plus de 3 mois après la vente dont on demande la révocation. La présomption légale résultant de la disposition suscitée de la loi de faillite n'existe donc pas ici, et le succès de l'action dépend entièrement de la preuve faite.

Les preuves qu'un demandeur apporte au soutien de sa demande peuvent être soit *directes*, soit *indirectes*. *Directes* lorsqu'elles prouvent précisément le fait dont il s'agit; *indirectes*, lorsqu'elles établissent quelque circonstance d'où l'on peut induire l'existence du fait en litige.

Obliger un demandeur à fournir toujours la preuve directe du fait allégué, c'eût été, dans bien des cas priver une partie de son droit; aussi la loi admet-elle, comme un des moyens de preuve à l'appui d'une demande les *présomptions*, c'est à dire l'induction, la conséquence que l'on peut légitimement tirer de faits connus pour arriver à la connaissance d'autres faits dont on cherche la preuve.

On comprend qu'en matière de fraude, il est presque toujours impossible de fournir la preuve directe de l'acte reproché; aussi faut il nécessairement avoir recours aux présomptions, et comme la fraude prend toutes les formes possibles pour se dissimuler et se cacher, la loi abandonne à la prudence et à la sagesse du magistrat le soin de la découvrir par l'appréciation des faits et des circonstances qui tendent à l'établir.

Mais si la loi n'a pas jugé à propos d'indiquer ici de règles à suivre pour l'appréciation des faits prouvés, et si elle laisse le juge entièrement libre de prononcer selon les inspirations que sa conscience puise dans un mur examen des faits; la doctrine et la jurisprudence s'unissent pour reconnaître qu'il est certains faits qui doivent nécessairement avoir une influence considérable sur le sort du litige. Dans cette catégorie de faits que je pourrais presque appeler *déterminants*, se placent, dit *Bédarride* (Dol et fraude, No. 1446):

1o. L'aliénation de tous les biens;

2o. La qualité des parties;

3o. La rétention de la possession de la chose prétendue aliénée;

4o. La clandestinité de l'opération.

Je citerai ici en substance, ce que dit *Bédarride* sur deux de ces faits seulement, bien que les remarques de l'auteur soient applicables à l'espèce actuelle au moins quant à trois des faits indiqués.

D'abord quant à la *qualité des parties*.

Cette présomption se mesure, quant à ses effets, sur le dégré de parenté ou d'alliance existant entre les parties contractantes; la proximité fait facilement présumer la fraude.... C'est que l'intérêt de l'un est en quelque sorte l'intérêt de l'autre; qu'indépendamment du lien intime qui les unit, ils ont, en outre, la facilité de frauder au moyen de ces pactes de famille qui permettent toutes sortes d'abus. Alors, en effet, il est facile de faire revivre des droits sérieux dans l'origine, mais qui avaient été légalement éteints, de déchirer des quittances, de dissimuler des traités.... Il est donc impossible d'accepter comme l'expression de la vérité pure un acte intervenu entre de telles parties, alors surtout que par le fait, cet acte constitue un préjudice, en dépouillant les créanciers du gage sur lequel ils devaient compter (No. 1,450).

Et quant à la *clandestinité* de l'opération, l'auteur ajoute :

" No. 1,454. Les parties qui donnent à leur convention une exécution occulte et clandestine prouvent, par cela même, par leur propre témoignage, le peu de sincérité de cette convention. Si elles se cachent, c'est qu'elles craignent, c'est qu'elles ont recours au mensonge et à la ruse, c'est, enfin, qu'elles veulent tromper ceux qu'elles prétendent laisser dans l'ignorance la plus complète sur un fait qu'il leur importerait de connaître. La vérité loyale et franche n'a pas besoin de mystère, elle peut se présenter et dédaigner toutes les précautions de ce genre. Ce n'est donc pas elle que les parties ont voulu soustraire à tous les regards; comment, d'ailleurs, ne pas faire soupçonner la fraude, lorsqu'on en emprunte les allures et la forme ?"

Apprécions maintenant à la lumière de ces principes, l'acte dont le demandeur veut obtenir l'annulation.

Le 11 février 1879, *Siméon Racette*, endetté depuis plusieurs années à ses sœurs, à ses frères, à son oncle, à son cousin, à sa cousine, gêné dans ses paiements depuis deux ou trois ans comme il l'avoue lui-même, et, pressé par l'une de ses sœurs de lui donner des suretés, vend à *ses trois sœurs*, les défenderesses, un immeuble de grande valeur qu'il possédait sur la rue Sainte-Catherine.

Cet immeuble était hypothéqué :

1o. A Mme. Bureau, pour rente constituée. Capital.....	$800 00
2o. A la Compagnie de dépôt et de prêt du Canada.....	4,000 00
3o. A Mme. Eug. Archambault.....	700 00
De plus :	
4o. A Jean-Baptiste Racette, par une hypothèque non-enregistrée, mais antérieure au Code (C. C. 2047, 2130) pour une somme de.....	1,000 00
Total.....	$6500 00

Cette vente est faite naturellement à la charge de ces hypothèques, mais de plus, à la charge de payer :

Au *cousin* du vendeur, Vital Racette.....	800 00
A la *cousine* du vendeur, Marie Chevalier.....	500 00
Au *frère* du vendeur, Auguste Racette....	200 00
A un *autre frère* du vendeur, Narcisse Racette....	300 00

Enfin en paiement d'autant qu'il devait à :

Sa sœur Clémentine.....	394 00
Sa sœur Philomène	400 00
Total.....	$2594 00

toutes dettes chirographaires et nullement garanties.

Voici donc un acte qui donne ample satisfaction à la famille du vendeur, puisque tous frères, sœurs, oncle, cousin, cousine, sont assurés de leur payement.

Il y a plus, le vendeur stipule, mais en sa faveur seulement, le droit de rémérer l'immeuble vendu pendant 10 ans.

Enfin on convient de tenir cet acte secret, de n'en parler à personne et pour mieux le cacher on en retarde l'enrégistrement pendant deux mois et demi, jusqu'au 26 avril 1879, et le vendeur continue même à en avoir la jouissance et possession ostensible, il y fait des réparations à ses propres frais, etc.

Ce n'est réellement qu'après la faillite, dans le mois de mai suivant, que l'acte est connu, même par plusieurs de ceux qui s'y trouvaient favorablement intéressés.

Or cette faillite du vendeur arrive un mois et quelques jours après l'enrégistrement de l'acte,

sans que le vendeur puisse l'expliquer par aucune perte exceptionnelle ou subite, mais comme simple résultat inévitable de la gêne où le failli admet lui-même avoir été pendant les années précédentes.

Et quel est le résultat de l'acte en question? C'est que tous les parents auxquels devait le failli depuis des années, voient leurs créances assurées par le prix de vente de cet immeuble, et que les autres créanciers chirographaires sont privés de leur part dans le surplus de valeur de cet immeuble, au-delà des dettes hypothécaires, lequel surplus se trouve attribué exclusivement à la famille du failli, avec l'espoir en sus pour ce dernier, d'exercer un jour la faculté de réméré et de rentrer ainsi en possession de l'immeuble sauvé des poursuites des créanciers.

Il semble difficile de rencontrer un ensemble de circonstances plus concluant et qui laisse moins de place au doute sur le fait de la fraude que l'on reproche aux parties.

L'on a tenté de prouver que la vente avait été faite pour la pleine valeur de la propriété vendue, et que par conséquent les créanciers du failli n'en avaient pas souffert. Même que vendu aujourd'hui, l'immeuble en question ne réaliserait pas plus que le montant des créances hypothécaires, et que par conséquent les autres créanciers ne retireraient aucun bénéfice de l'annulation de cette vente. Mais il est impossible d'admettre comme preuve une telle opinion exprimée sans motifs appréciables par un ou deux des témoins, en présence des faits de fraude précis et concordants qu'établissent les circonstances que je viens d'analyser.

La preuve faite par la défense de la valeur de l'immeuble en question, me paraît d'ailleurs peu satisfaisante, et son exagération même en fait soupçonner la sincérité. Il me paraît plus probable que les défendeurs ont payé la valeur réelle et rien de plus, et partant de cette donnée, il m'est impossible de ne pas conclure que si cet acte était maintenu le failli aurait assuré à sa famille, en vue de sa faillite, une préférence indue, pour le paiement de toutes les créances de ses proches, au détriment de ses créanciers ordinaires.

L'acte doit donc être annulé; et l'action est maintenue avec dépens contre ceux qui l'ont contestée.

Quant à la demande de $1,000 de dommages pour fruits et revenus elle n'est pas prouvée.

The COURT OF REVIEW unanimously confirmed the judgment.

Judgment confirmed.

Beique & Co., for plaintiff.

Trudel & Co., for defendants.

SUPERIOR COURT.

[In Chambers.]

MONTREAL, Nov. 17, 1880.

RAINVILLE, J.

STARR v. MACDONALD et al.

Witness—Order to Protect.

In this case, one Maynard, residing in the United States, was an essential witness for plaintiff. He was willing to come to Montreal, but feared that he would be arrested by capias by his Montreal creditors. It was represented that a commission would be unsatisfactory.

McGibbon petitioned for an order to protect Maynard from arrest by civil process, *eundo, morando et redeundo*. Affidavits establishing the facts were produced. Counsel cited *Miller* v. *Shaw*, 15 L. C. J. 218.

RAINVILLE, J., granted the order.

R. D. McGibbon for plaintiff.

Hon. R. Laflamme, Q.C., for defendants.

GENERAL NOTES.

Chief Justice Coleridge, of the Common Pleas, has succeeded the late Chief Justice Cockburn as Chief Justice or President of the Queen's Bench Division.

In the 8th Texas Court of Appeals Reports there are 29 murder cases. In this State the jury have a discretion as to the punishment to be inflicted in case of conviction.

The *Albany Law Journal*, after citing a long list of murders reported by telegraph within the brief space of two days, refuses to believe that the "devil is dead" yet, although the victim of one of the bloody deeds was Olenick.