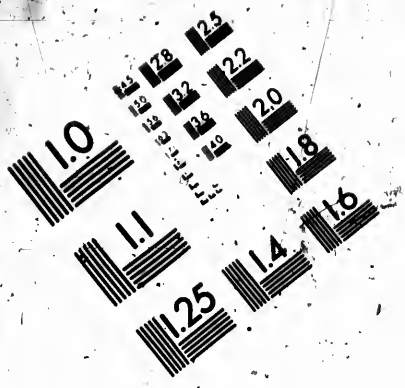

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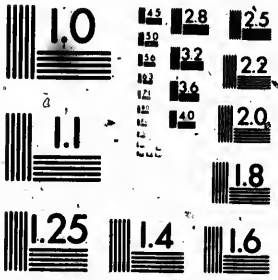

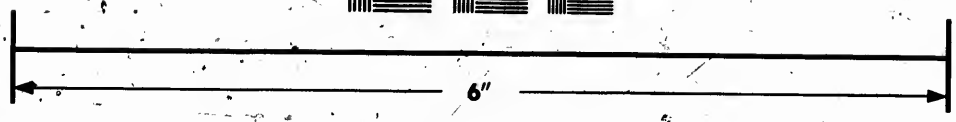

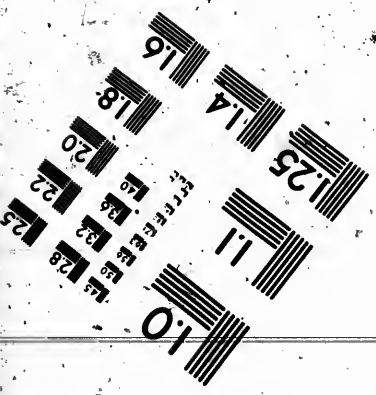

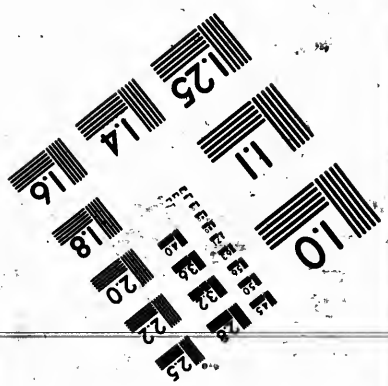

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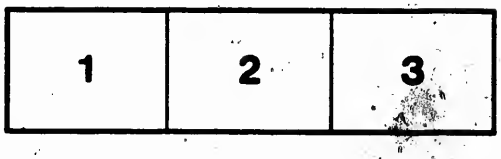

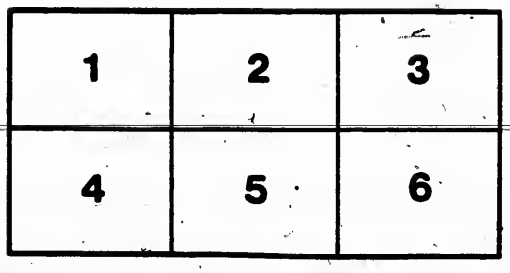

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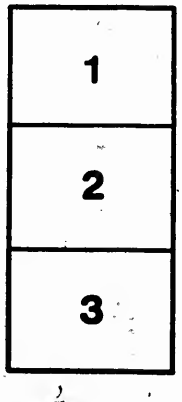

THE

LOWER CANADA

Jurist. 1474

COLLECTION DE DÉCISIONS

DU

BAS-CANADA.

VOL. XXVIII.

EDITORS:

JOHN S. ARCHIBALD, M.A., B.C.L. EDMOND LAREAU, B.C.L.

Montreal:

PRINTED AND PUBLISHED BY JOHN LOVELL & SON.

1884.

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THE

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COURT OF REVIEW, 1883.

MONTREAL, 30TH NOVEMBER, 1883.

Coram JOHNSON, J., TORRANCE, J., RAINVILLE, J.

No. 217.

Desrosiers vs. *The Montreal, Portland and Boston Railway Company.*

HELD:—That Article 1069 of the Civil Code applies to the coupons of railway debentures, and that interest runs on such coupons from the dates on which they respectively fall due, without proof that the debtor was put in default otherwise than by the mere lapse of time.

The plaintiff inscribed in review, complaining that by the judgment of the Superior Court, Montreal (DOHERTY, J.), 5th July, 1883, he had not been allowed interest on coupons from the dates when they respectively became due.

JOHNSON, J.—The only question here (and a sufficiently important one) is: whether the coupons, representing interest on certain railway debentures, themselves bear interest without a demand for payment. Judgment was given for the amount of the coupons but without interest, and it is the latter part of this judgment, refusing the $513 interest accrued since the coupons became due, that is now before us. It is said for the defendant that the coupons themselves represent interest on the bonds. That may be, but they are, nevertheless, each of them a negotiable instrument, payable on a certain day, which has elapsed; and there can be no doubt as to our own law applicable to such facts. Art.

Desrosiers vs. The Montreal, Portland and Boston Ry. Co.

1069 C. C. puts the debtor *in mora* by the sole expiration of the term of payment; and if he had any defence to make it could only be, under Art. 2323, by showing that he had the funds ready. I am told that two cases have already been decided in this sense by this Court, but I am not acquainted with them. Daniel on Negotiable Instruments, Vol. 2, Nos. 1490, 1493, 1500, 1505, 1513 and 1514, cited at the bar, place the matter beyond doubt, and the error of the judgment complained of arose from taking the text of a digest as law, while the cases relied on in the digest were the other way. We therefore reverse the latter part of this judgment, and allow the interest since the date of the maturity of these instruments.

The following is the written judgment of the Court: —

"The Court, etc.

"Considering that there is error in the said judgment in so far only as the the same dismisses the plaintiff's demand for interest, amounting to $513, upon the several coupons in plaintiff's declaration mentioned;

"Doth reverse that part of the said judgment, and proceeding to render the judgment which ought to have been rendered with respect to the said interest;

"Considering that each of the said coupons was of itself a negotiable instrument payable at a certain time therein expressed, and that the mere lapse of the said time so expressed constituted the defendants *in mora*, in virtue of article 1069 of the Civil Code, without any demand for payment, subject, however, to the defendant's right to plead and prove that they had funds ready to pay the said coupons in conformity with Article 2323 of the Civil Code.

"Doth condemn the defendants to pay and satisfy to said plaintiff *par reprise d'instance* the said sum of $513 currency for interest accrued on said coupons from their respective maturity up to the 2nd of January, 1883, in addition to the amount in principal already adjudged upon in favor of the plaintiff *par reprise d'instance* by the said judgment of the 5th of July, 1883, with interest, etc.

Judgment reformed.

Beique, McGoun & Emard, for the plaintiff.
Lonergan, for the defendants.

COURT OF REVIEW, 1883.

Coram JOHNSON, J., DOHERTY, J., RAINVILLE, J.

No. 2114.

MONTREAL, 20TH DECEMBER, 1883.

Lambert vs. *The Grand Trunk Railway Co. of Canada.*

HELD:—Where a horse was found dead near the railway track of the defendants, and the evidence did not disclose in what manner the animal had been killed, but it appeared that the fence adjoining the track was in good condition, and that the gate therein leading to the track was frequently left open by persons passing through;—that the defendants could not be held liable.

There was a case of Simard vs. The St. Lawrence and Champlain Railroad Co., decided in Appeal, 14 L. C. R. 406, which resembled this case in important respects. The Court there held that the plaintiff had failed to establish his case. Action dismissed.

PER CURIAM.—This was an action to recover the value of a horse alleged to have been killed, on 11th August, 1881, through the negligence of defendants, and their neglect in not keeping the fences separating the road from the land of one Isaie Goyette in good order. The horse was found dead at the bottom of a culvert on the railroad. He had escaped from the field adjoining, through a gate. There was no evidence of the horse having been struck by the train or locomotive, or how he was killed. As to the condition of the fence through which the horse escaped from the land of Goyette, the evidence was conflicting, but the Court preferred the evidence of defendants' employés as more satisfactory. There was this circumstance testified to by several witnesses, that Isaie Goyette, the proprietor, immediately after the accident, when asked to account for it, said that the fence was good and the gate was shut at night, and found open in the morning, through which the horse escaped. It was a common practice for people passing through the gate to leave it open. It was a suspicious circumstance that the proprietor transferred his claim six months after the accident to the plaintiff, described as a clerk, and that there was no consideration given, and that they were to share in the proceeds, if successful against the Company. The action was taken immediately after the transfer. Why was the transfer made? Probably Isaie Goyette, the assignor, had little confidence in his claim.

The inscription in Review was by the plaintiff from a judgment of the Superior Court, Montreal. (TORRANCE, J., dismissing the action.)

The following observations were made by the learned Judge in the Court below:—

JOHNSON, J. The owner of a horse which met its death on the line of the railway has assigned his claim for damages to the plaintiff, who alleges by his action that the animal got on to the track by reason of the insufficiency of the gate and its fastenings, which he attributes to the negligence of the Railway Company.

The case must be looked at, first, with reference to the liability of the defendants by reason of any want of observance on their part of their obligations respecting the gate; and, secondly, with reference to whether the horse, being

Lambert vs. The Grand Trunk Railway Co. of Canada.

once on the line of the defendants' railway, it was killed in any manner for which they alone would be responsible. As to the first question the evidence of Alex. Denis shows that the gate and its fastenings were all right, as far as the Company's obligations went; and the same thing is distinctly proved by the evidence of Alexandre Boissy, and that of Jean M. Beauchamp. These two witnesses even go further and say that Isaie Goyette, who may be considered the real plaintiff, distinctly stated, shortly after the occurrence (at a time when he probably was not thinking about going to law), that not only was the gate in a proper condition, but that he had found it open in the morning after the horse had got out; and Alexis Goyette, the uncle, says the same thing. It would therefore appear useless to look at the question of what was the immediate cause of the animal's death. It would be absurd to hold anybody else responsible for an occurrence to which the negligence of the owner or those under his control had materially contributed by leaving the gate open. The rule in such cases is very plain, and we have frequently acted upon it. Even supposing that the horse being on the line, was killed by the defendants' engine in a manner to make them otherwise responsible, if the owner by his own fault contributed to the result the defendants would not be liable. In the case of *Ware* v. *Carsley*, in this Court, I cited the rule from Campbell's treatise on the law of negligence; and it is this: "In all cases where ordinary negligence is sufficient to infer "liability, it is a good defence to show that there was contributory negligence on "the part of the plaintiff, that is to say, to show that, although the negligence "of the defendant was a cause, and even the primary cause of the occurrence, "yet that it would not have happened without a certain degree of blameable "negligence on the part of the other." The same thing was also decided in this Court in the case of *Vallée* v. *The Montreal Gas Co.*, referring to the leading English case of *Tuff* v. *Warman*, 5th Vol. Common Bench Reports, p. 573, where six judges held that, if by ordinary care the plaintiff might have avoided the consequences of the defendant's negligence, he is the author of his own wrong, and cannot recover. In the present case, however, we are not entirely relieved from considering the second part of the case, because there is another rule equally plain in respect to costs in such cases, which is, that costs are to be divided, where there has been fault on both sides; but, of course, if there has been no fault proved on the defendants' part, the plaintiff would entirely fail, and would have to bear the costs. Now we are left entirely to conjecture as to the immediate cause of this animal's death. It was found in the morning dead, or nearly so, lying at the bottom of a culvert, with some marks on it which might or might not have been made by contact with the engine or any part of the train; or it might have been frightened by the approach of the train, and in its flight have fallen into the culvert. It is impossible to say with any certainty from the evidence what was the immediate cause of its destruction; but even if it had been hit by the train, the Company would not necessarily be liable for running over anything on their track (which is their own property for the purpose of running trains), if that thing had been put there on purpose, or, which is the same thing, had got there by the fault of the owner. I say the Company would not be liable in such case unless, by ordinary care, they could have avoided the

result. Now we have no reliable evidence whatever as to how the horse was struck, if even it was struck at all. Alexis Goyette, the uncle, and young Alexis Goyette, the brother of the owner, are the only witnesses who were on the spot soon after the accident, and neither of them actually witnessed it. The elder one says that in coming down from his house he heard the whistle of the engine, as if to frighten cattle off the track, and this is all we have. There is, therefore, no evidence at all of fault or negligence on the part of the defendants; but there is evidence that the plaintiff or the owner acted in direct violation of the law in allowing his horse to stray on the railway. So that this is not a case where, properly speaking, there is only contributory negligence on the part of the plaintiff; but it is a case where he alone is to blame, therefore the action fails, and he must bear the costs.

Judgment confirmed.

Prefontaine & Major, for the plaintiff.
Geo. Macrae, Q.C., for the defendants.

COURT OF QUEEN'S BENCH, 1884.

MONTREAL, 25TH JANUARY, 1884.

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

No. 508.

TANSEY,

APPELLANT;

AND

BETHUNE ET AL.,

RESPONDENTS.

HELD:—That where a defendant, in an action of damages which has been dismissed with costs, causes an immoveable 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.

This was an appeal from a judgment of the Superior Court here (JETTÉ, J.), rendered on the 6th October, 1882, maintaining the collocation in favor of respondents for the sum of $154.40 for costs in the report of collocation and distribution prepared by the Prothonotary, of the proceeds of the sale by the Sheriff of this district of the real property belonging to Bernard Emerson, in the writ of appeal in this cause mentioned, and dismissing the contestation of appellant.

By judgment of the Superior Court here, rendered on 29th November, 1881, an action of damages brought by said Bernard Emerson, against Adam Darling, Samuel Coulson and others, was dismissed with costs, *distraction* of which was thereby awarded to the respondents, the attorneys of record of said defendants, Adam Darling and Samuel Coulson, and which costs were subsequently taxed at the sum of $154.40.

Tansey and Bethune et al.

Subsequently, respondents, as the plaintiffs *par distraction de frais*, issued execution against the goods and chattels, lands and tenements of said Bernard Emerson for the amount of their said costs, and caused the goods and chattels in his house to be seized; but the sale thereof was stopped by oppositions fyled by his wife and her sister, claiming the ownership thereof.

Thereupon respondents caused a certain lot of land and premises belonging to said Bernard Emerson, No. 718 St. Lawrence Ward, of this city, to be seized under said writ, but the sale thereof was opposed by said Bernard Emerson, on the ground of alleged irregularities in the seizure. The opposition of Bernard Emerson was contested, and on the 19th April, 1882, was dismissed with costs, which were taxed at the sum of $35.25. A writ of *venditioni exponas* was thereupon issued, ordering the sheriff to proceed with the sale of said lot of land and premises, and on the 23rd May last (1882) the said lot of land and premises were sold to said appellant for the sum of $700 (the assessed value of the property being $2000, as appears by the account fyled by the city, paper 2 of the record).

On the 19th June, 1882, a report of collocation and distribution of the proceeds of said sale ($600.40, after deduction of the sheriff's fees and disbursements) was prepared by the Prothonotary and posted.

By this judgment respondents were collocated, 1st, for the sum of $10 for prosecuting to judgment said report; 2nd, for $6.80 costs of execution; 3rd, for $35.25 costs taxed on judgment of 19th April, 1882, dismissing the opposition *afin d'annuller* of said B. Emerson; and 4th, for $154.40, amount of their costs taxed on judgment of 29th November, 1881, which dismissed the said action of said Bernard Emerson, with costs *distraits* to respondents, the attorneys of Adam Darling and Samuel Coulson, defendants in said suit.

After some further collocations, including one in favor of the City of Montreal for taxes, the appellant was collocated for the balance, in part payment of a sum of $1200 amount appearing to be due him by the Registrar's certificate under an obligation from Bernard Emerson to him, of 17th May, 1880, by which said lot of land was hypothecated.

On the 26th June, appellant contested the 5th item of said report, being the collocation in favor of respondents for $154.40 for their said costs of suit, but did not contest the other collocations in their favor.

The grounds of appellant's contestation were that by law, and specially by Article 606 of the Code of Civil Procedure, the costs of judgment in favor of a defendant and of a defendant's attorney have no privilege against and do not rank before a hypothecary claim existing against the immoveable sold, inasmuch as by said Article 606 only a plaintiff's costs of suit rank before such hypothecary claim.

That appellant was a creditor of said B. Emerson for $1200 under a deed of obligation, executed on the 17th May, 1880, and duly registered on the 1st June, 1880, by which said lot of land was hypothecated in favor of appellant, and that under said report of distribution he has been only collocated for part of said sum.

That, moreover, the original suit in this cause was not instituted until long after the registration of contestant's said hypothec.

That, furthermore, the privilege granted expressly by law to the plaintiff's costs of suit cannot be extended to the defendant's costs of judgment in the absence of an express provision of law to that effect.

The contestant had a right to have the said fifth item struck out of the said report, and the said report reformed so that he might be himself collocated for the amount of said item.

The respondents thereupon inscribed said cause for hearing on said contestation, and on the 6th October last, the contestation was dismissed with costs, and the collocation in favor of respondents maintained.

The judgment was as follows:—

"La Cour après avoir entendu les parties, savoir, le contestant Tansey et Messieurs Bethune & Bethune, créanciers par distraction colloqués pour leurs frais par le projet d'ordre de distribution préparé en cette cause, sur le mérite de la contestation par Tansey, de la dite collocation, pris connaissance des écritures des dites parties pour l'instruction de leur cause et des pièces au dossier et sur le tout délibéré;

Considérant que le contestant Tansey, créancier hypothécaire du demandeur, s'objecte à la collocation des dits maîtres Bethune & Bethune, disant, qu'ils n'ont droit à aucun privilége pour les frais par eux réclamés, attendu que ce ne sont que des frais de défense, et que l'article 606 du code de procédure civile n'accorde tel privilége que pour les frais de poursuite du demandeur dans l'action;

Considérant que le privilége pour les frais de justice n'est pas établi par l'article du code de procédure civile invoqué, mais bien par les articles 1994 et 2009 du code civil, qui ne comportent aucune restriction telle que celle alléguée par le contestant;

Considérant qu'en droit ce privilége s'étend à toutes les avances et dépenses faites par qui que ce soit, dans l'intérêt commun des créanciers, et à celles ayant pour résultat d'arriver à la réalisation du gage et à la distribution du prix pour l'avantage de tous;

Considérant en outre que l'article 606 du code de procédure civile, surtout tel qu'amendé par le statut 33 Victoria, chapitre 17, article 2, n'a pour effet que de régler l'ordre de collocation des frais de justice entre eux, et ne saurait être interprété de manière à restreindre le privilége accordé pour les frais par les articles précités du code civil;

Considérant en conséquence que le défendeur qui, par ses procédures dans l'espèce, a procuré la réalisation du gage commun des créanciers du demandeur, ne saurait dans les circonstances être privé du privilége sus-mentionné;

Renvoie la contestation du dit Tansey et maintient la collocation insérite au projet d'ordre de distribution en faveur des dits maîtres Bethune & Bethune pour leurs frais comme susdit; et condamne le dit contestant Tansey aux frais de la dite contestation distraits aux maitres Bethune & Bethune."

RAMSAY, J. (*dissentiens*):—

This is an appeal from a judgment dismissing a contestation of the collocation of advocates for their costs as *distrayants* in a suit against the owner of property hypothecated in favor of appellant.

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One Emerson was the owner of the property hypothecated. He brought an action against Darling and others; defendants appeared separately and pleaded separately. The defendants were successful, and there was judgment dismissing the action with costs *distraits* to the respondents, the attorneys of two of the defendants. They took execution and seized the land hypothecated, and on the proceeds of the sale they were collocated for their costs in Emerson and Darling et al., as being part of the costs necessary to bring the real estate to sale. Appellant, the hypothecary creditor, contested this collocation on the ground that respondents had no privilege for their bill of costs in the suit of Emerson v. Darling et al. By the judgment of the Superior Court this contestation was rejected, and the hypothecary creditor appealed. It is not denied that under the old law in France, there was no privilege for the costs of the action. There was only privilege for the *frais extraordinaires des criées* and in favor of the hypothecary creditor—the *frais ordinaires* were paid by the *adjudicataire*, 1 Pigeau, 810. But a specious argument has been put forward. It is said that this was because the hypothecary creditor could seize without an action, and therefore he gained nothing by the suit; that here it is different, that he gains by the suit all the expenses he would have to pay to get a judgment and sell. This might be a reason for altering the law; and in certain circumstances, and with some limitations, perhaps the old law migh tbe changed with advantage, but I don't think that in a matter of this kind it is competent for the Court to create a privilege of this sort or to extend any that may exist beyond the precise words of the law. It is, however, contended that, independently of all legislation, there should be a privilege here for the costs of the seizing creditor, whoever he may be, because there is no *titre paré* in this country, and that the equitable reason is so strong that it justifies the Courts in creating a privilege.

In the case of The Eastern Townships Bank and Pacaud this doctrine was maintained before the Code, 1 L. C. R. p. 126. It is, however, to be observed that this judgment is not of the highest authority. The judgment in appeal reversed the judgment of the Court of Review—it was not unanimous, and the majority was completed by the opinion of a judge *ad hoc*. But what is still more important is that the reasons given in support of the judgment appear to me to be either erroneous, or to lead to a conclusion directly the reverse of that arrived at by the Court.

In the first place, all hypothecary creditors had not a *titre paré* and all *titres parés* did not give a right to execute *de plano*. This is apparent by the very quotations from Pigeau relied upon in the case referred to (1 Pigeau, 43 and 45). In the second place the judgment is supported on a text of the Digest, 2, 3, Tit. 5 L. 6, § 3. Now this Title is *de negotiis gestis;* and a moment's examination shows how utterly the Roman Law is incompatible with the reasoning of the learned judge. The rule is this: if you act for yourself and not for me you have *not* the action *negotiorum gestio* against me; but if you mix yourself up in my affairs for your own benefit I have that action against you. But still, if you have done something about my affairs, you shall not have an action for what it cost you, but for what I gained. Judge Polette, and the majority of the Court of Appeals, said, if they really

relied on the text of law they quoted, that the party has an action for what it cost him to interfere, not what it benefits the hypothecary creditor. They have made no semblance of proof that the appellant has grown richer at their cost. I think this establishes that under the old law there was no privilege for the costs of action to the hypothecary creditor, and none certainly to the chirographary creditor, but only to the former for the costs of execution.

To what extent is this altered by the Code of C. P. ? Art. 606, § 7. "The plaintiff is next paid his costs of suit, taxed as in an uncontested case not inscribed for proof.

The "plaintiff," according to its ordinary signification, does not include those in the position of the respondents. But, it is said, they are plaintiffs on their *distraction*. I cannot think that is a fair interpretation. Nor do I think the respondents' pretensions are supported by articles 1994-5 and 2009, §5, C. C. Still less can I find any argument in support of their pretensions in the 33 Vic. c. 17, sect. 7, Q.

BABY, J.:—This is an appeal from a judgment of the Superior Court maintaining the collocation in favor of respondents for the sum of $154.40. The case involves a question of considerable interest to the members of the bar.

It appears that one Bernard Emerson brought an action of damages against Adam Darling and others, which was dismissed with costs, *distraction* of which was granted to respondents, the defendant's attorneys.

These costs were taxed at the sum of $154.40, and Emerson having failed to pay them, the respondents took out an execution, and caused to be seized a certain lot of land belonging to the said Emerson, who, by opposition to the sale on pretence of certain irregularities in the seizure, caused a further sum of $35.25 for costs to accrue.

This opposition being dismissed with costs, on writ of *Venditioni Exponas*, the lot of land in question was sold and adjudged to appellant for the sum of $700.

This sum of money having been brought into Court in the ordinary course, a report of collocation and distribution of the proceeds of said sale was prepared by the prothonotary and posted in the ordinary way.

By this report, the respondents were collocated for the two above-mentioned sums.

The appellant, who was an hypothecary creditor of Emerson to the amount of $1200, not getting the whole of his claim, as appeared by the Registrar's certificate, but only a small part thereof, contested the 5th item of the report: the collocation in favor of respondents for the $154.40, being their costs of suit. In his contestation, Tansey says that respondents were wrongfully and illegally collocated in preference to himself and to his prejudice, inasmuch as, by law, and specially by Art. 606 of the Code of Civil Procedure, the costs of judgment in favor of a defendant and of a defendant's attorney have no privilege against and do not rank before a hypothecary claim existing against the immoveable sold, the only costs ranking before an hypothecary creditor being those of the plaintiff.

This pretension of appellant was set aside by the judgment below.

It was held by the learned judge that the privileges for costs, *frais de justice*, were

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not fixed by the Code of Civil Procedure but by articles 1994 and 2009 of the Civil Code, in which were to be found none of the restrictions alleged by the contesting party, and that, in law, all the law costs and all expenses incurred in the interest of the mass of the creditors were privileged; also that Art. 606 of the Code of Civil Procedure, as amended, applied only to the order in which such law costs should come in, and was not to be taken as a restriction of the privilege granted for costs by the above-cited articles of the Civil Code: That the costs incurred and claimed by respondents had been made "*afin de procurer la réalisation du gage commun des créanciers,*" and therefore Messrs. Bethune could not be deprived of the privilege given to them by law. I may say, at once, that the majority of this Court takes the same view of the case. The costs claimed by respondents, as privileged, have been incurred, undoubtedly, in the interest of the mass of the creditors, as the claim thereof on the plaintiff had the effect of bringing the property to a sale. But, says appellant, the privilege for costs is granted to plaintiff's attorney and not to the defendant's. This is playing upon words; all that is required by law for the costs to be privileged is that they should be incurred in the interest of the mass of the creditors, and by the word *interest* is meant the bringing to sale of the *gage commun* of the creditors. Who here caused the lot of land in question to be brought to sheriff's sale and the proceeds thereof divided among the hypothecary creditors? Respondents, nobody else, as already remarked. The creditors benefited thereby, and the position of the respondents cannot be assimilated to anything but that of plaintiffs on the seizure, which they are in fact. This is the only interpretation that can be given to the articles hereinabove mentioned, notwithstanding what may be laid down to the contrary in the Roman Law or the principles which may have governed the matter in times past.

This decision is altogether in accordance with the universal practice and jurisprudence followed in the Province of Quebec since the Civil Code has become law. Previously, there was a difference between the practice followed in the District of Montreal and the one held in that of Quebec. In the latter, a certain amount of costs was considered privileged, whilst in the former, the costs of the execution and seizure alone were reputed so. But under the new law, all differences have disappeared, the practice has become uniform, and all costs incurred to bring the property to a sale have been considered to be privileged, and ranked, accordingly, on the collocation sheet. I am free to admit that, as the law stands now, an hypothecary creditor may sometimes suffer somewhat from the large amount of costs incurred by the prolonged litigation of the parties, but this is matter for the consideration of the legislator who may restrict this privilege hereafter, and not for the tribunals of justice. This Court must deal with the question according to the law as it now stands, and not on what it should be.

The judgment is, therefore, confirmed with costs.

Judgment of S. C. confirmed.

J. Calder, for appellant.

Bethune & Bethune, for respondents.

COURT OF QUEEN'S BENCH, 1884.

MONTREAL, 21st FEBRUARY, 1884.

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

No. 21.

McDONELL ET AL.,

APPELLANTS;

AND

BUNTIN,

RESPONDENT.

HELD:—That a party, whose claim against an immoveable seized and sold by the sheriff appeared in the Registrar's certificate, but has not been collocated in the report of distribution, and who has failed either to contest the report of distribution or to appeal from the judgment homologating the same, or to present a *requete civile* or an opposition against such judgment, as required by art. 761 of the Code of C. P., cannot, by direct action, recover the amount of his said claim from the party collocated in such report to his prejudice.

This was an appeal from a judgment of the Superior Court at Montreal (RAINVILLE, J.), on the 16th February, 1883, maintaining the *défense en droit* fyled by respondent to appellants' declaration and action, and dismissing their action with costs.

The appellants' action was instituted on the 14th February, 1882, against respondent and one Joseph Dier, for the recovery from respondent of a sum of $330, with interest from the 1st November, 1879, alleged to be due to them by him in the proportion of $110 to each.

The declaration alleged that the appellants are the legal owners of a *bailleur de fonds* claim for $330 and interest as aforesaid, on certain real estate, described in the declaration, which had been judicially sold, on the 22nd of December, 1880, by the Sheriff of Montreal, in the cause No. 2589, wherein one Thomas Dickson was plaintiff and said Joseph Dier was defendant.

That on the 7th February, 1881, a report of distribution of the net proceeds of the said sale was made and posted up by the Prothonotary of the said Superior Court; and by the eleventh and last item of said report the balance of the proceeds of said sale, after collocation of certain claimants, creditors and opposants, was awarded to said respondent as follows:—"11. To the opposant, Alexander Buntin, in part payment of his claim amounting to two thousand four hundred dollars, bearing interest at eight per cent., from the 18th November, 1877, founded upon an obligation and mortgage from Joseph Dier, in his favor, executed before Hunter, Notary, on the 18th May, 1869..... $2312.80
Costs of opposition to Messrs. Bethune & Bethune..... 18.60

That the said contestation was contested and finally homologated on the 17th day of May, 1881, by judgment of the said Superior Court, and the said sums have been paid to the said respondent.

The declaration then alleged that, according to the Registrar's certificate fyled in the said cause, the appellants ought to have been collocated for said sum

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of $330 and interest preferentially to said respondent, and by the conclusions of the declaration the appellants prayed that the said respondent should be declared to have received the said sum of $330 and interest through error of law and fact, and that he should be condemned to pay the same to the appellants.

The respondent fyled a *défense au fond en droit* and a plea to the merits; but as the plea to the merits does not come up on the present appeal, it need not now be referred to.

The demurrer so fyled by respondent was as follows:—

The said defendant, Alexander Buntin, for plea or *défense au fond en droit* to the declaration and action of the said plaintiffs, saith that the allegations of said declaration are insufficient in law to enable the said plaintiffs to have and maintain the conclusions of their said declaration for the following reasons:—

"Because, according to the allegations of said declaration the monies sought to be recovered by this action were awarded and adjudged to be paid to the said Alexander Buntin, under and by virtue of a judgment of this honorable Court duly and solemnly rendered, homologating the report of distribution in said declaration referred to, and the said judgment has never been vacated, revoked, reversed or otherwise annulled or set aside, either wholly or in part, and is still in full force, vigor and effect;

"Because, according to law, said judgment could not be reversed, either wholly or in part, except by judgment of the Court of Queen's Bench, on appeal to that Court, duly instituted;

"Because said judgment could not be otherwise vacated, revoked, annulled or set aside, either wholly or in part, except by means of a petition in revocation of such judgment, and then only on legal grounds, and that no legal grounds for so vacating, revoking, annulling or setting aside said judgment are assigned in said declaration;

"Because, even if said judgment were legally reversed or reformed or otherwise vacated, revoked, annulled or set aside, the said defendant, Alexander Buntin, could only be condemned to return to the Sheriff so much of said monies as the Court might order him so to refund;

"Because the present action is not, or in the nature of, a petition in revocation of said judgment, nor are there any legal grounds of such revocation assigned or alleged in said declaration;

"Because the said defendant, Alexander Buntin, cannot, by reason of anything alleged in said declaration, be legally condemned to pay to the said plaintiffs the sums of money by them claimed in and by said declaration and action, or any part thereof;

"Because the conclusions of said declaration do not legally flow from nor are they legally justified by the allegations of said declaration."

The case having been heard on the issue raised by the demurrer, the demurrer was maintained and the appellants' action dismissed with costs.

The following was the judgment so rendered by the Superior Court:—

"La cour, après avoir entendu les demanderesses et le défendeur, Alexander Buntin, par leurs avocats sur la défense en droit, plaidée par le dit défendeur Buntin à l'action en cette cause; avoir examiné la procédure et délibéré;

"Attendu que les demanderesses allèguent qu'elles avaient une hypothèque sur une partie d'une propriété connue et désignée comme étant le No. 642 des plan et livre de renvoi officiels du quartier Saint Antoine de la cité de Montréal, que le dit lot No. 642 était possédé par Joseph Dier qui l'avait acquis des auteurs des demanderesses en différents temps, et lequel lot comprenait des lopins de terre désignés comme lots Nos. 7, 8, 9 et 10, que le dit lot No. 642 aurait été vendu par le Shérif de ce district, et que sur le produit de la vente le défendeur Buntin aurait été colloqué par le rapport de distribution pour une somme de $2,312.80, et pour $18.60 frais d'opposition, la dite collocation étant basée sur une obligation consentie au dit Buntin par le dit Dier le 18 mai 1869, laquelle somme lui aurait été payée;

"Que les demanderesses auraient fait renouveler leur hypothèque sur le dit lot No. 642 suivant la loi, et que cependant elles n'auraient pas été colloquées.

"Que par son obligation le dit Buntin n'avait hypothèque que sur le lot No. 10 et non sur les lots Nos. 7, 8 et 9, et que d'ailleurs il n'a jamais renouvelé son hypothèque, laquelle n'apparaissait pas au certificat du registrateur, et qu'il n'aurait pas dû être colloqué au préjudice des demanderesses dont l'hypothèque apparaissait au dit certificat; que la collocation du dit Buntin a été contestée et homologuée par jugement de la Cour Supérieure rendu le 17 de mai 1881;

"Attendu que les demanderesses concluent à ce que le dit lot No. 642 soit déclaré avoir été à l'époque de la dite vente par le shérif, hypothéqué en faveur des demanderesses au paiement d'une somme de $330 avec intérêt, comme balance du prix de vente; et à ce qu'il soit déclaré que le dit défendeur Buntin a été illégalement colloqué de tel montant, et à ce qu'il soit condamné à en rembourser les demanderesses;

"Attendu que le dit défendeur Buntin a plaidé par une défense en droit, alléguant que le jugement homologuant le dit rapport de distribution ne pouvait être attaqué et révoqué que par un jugement de la Cour d'Appel, ou par voie de requête civile pour les raisons donnant lieu à la requête civile, ce qui n'a pas été fait, que même dans le cas où le dit jugement serait révoqué, le défendeur Buntin ne pourrait être condamné qu'à remettre au Shérif tel montant que la cour jugerait à propos;

"Considerant, qu'en vertu de l'article 761 du code de procédure civile, les dites demanderesses ne pouvaient se pourvoir contre le dit jugement que par opposition, dans les quinze jours, ou par appel, ou par requête civile; qu'elles n'ont pas produit telle opposition ou interjeté appel, et que leur présente demande n'allègue aucune des raisons donnant lieu à la requête civile;

"Considérant que la défense en droit du dit défendeur Buntin est bien fondée la maintient, et déboute les demanderesses de leur action quant au dit Buntin, avec dépens distraits à Messieurs Bethune & Bethune, avocats du défendeur, Buntin."

Cross, J.:—The appeal in this case is from a judgment sustaining a demurrer, and dismissing a suit brought by the appellants against the respondent.

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The declaration complains that Buntin received under a judgment of distribution a sum of $330, which of right belonged to the appellants, under circumstances which may be briefly stated as follows:—

Joseph Dier was owner of a property in St. Antoine suburb, consisting of lot cadastral No. 642, which was again subdivided into a number of small lots.

One Joseph Dickson held a judgment against Dier, under which he brought the property to sale. The sheriff made a return of the proceeds accompanied by the Registrar's certificate which the law required him to procure.

This certificate shewed Buntin to be a hypothecary creditor on the property to a large amount.

It also showed that the *auteurs*, predecessors of the appellants, had a prior claim for their $330, as original vendors of two of the sub-division lots, a fact which was overlooked, Buntin having been collocated for the entire balance of proceeds, after the expenses and privileged claims, and the appellants omitted from the collocation, although their registration was duly made, showing their priority.

The judgment of distribution was homologated, and Buntin awarded the proceeds.

The appellants claimed from Buntin and Dier, the defendant, that $330 of money received by Buntin should be declared the property of the appellants, and Buntin be condemned to restore it to them, as having been received by him without cause and as money not due him, but due to the appellants.

This suit was met by a demurrer, based chiefly upon Art. 761 of the Code of Civil Procedure, which reads "that any party aggrieved by a judgment of "distribution may seek redress by means of an appeal, or a petition in revocation, "if there are grounds for it, whether he has appeared in the suit, or his claim "being mentioned in the certificate of hypothecs he has not appeared."

"Any creditor mentioned in the Registrar's certificate who has not appeared "in the cause may, moreover, within 15 days, seek redress by means of an "opposition to the judgment."

The demurrer takes the further ground generally that the appellant has no legal recourse against the respondent for the causes alleged.

It is contended that the appellants having failed either to appeal in time or seek recourse within 15 days by petition in revocation of judgment, are not limited or precluded by the provisions of this article from seeking recourse by an independent action; that it is a faculty given to the party injured which he may exercise or not, as he sees fit, but that he may nevertheless sue for what belongs to him; that the amount received by Buntin, and which ought to have been awarded to appellants, was their property, did not belong to Buntin, and ought to be restored to the appellants, the real owners.

It is not strictly true that the money belonged to the appellants; they were creditors, and pretended to have a preference over Buntin, but he also was a creditor, and the question of priority is one to be determined by the Court. The appellants should have attended to their interest in the distribution of the monies, and raised any question they had to raise before the monies were disposed of by the judgment of distribution. It is of importance that it should be

so, to avoid the great amount of litigation that would ensue if every person who found himself disappointed in the result of a distribution intended to be final, should be allowed to raise the question anew by an independent suit.

Before the law was enacted, which requires the Sheriff to procure and return with the proceeds of sale a Registrar's certificate, shewing the hypothecs on the property sold, every person who had a claim was obliged at the peril of losing his recourse, to bring forward and file his claim within a very limited delay, and watch the distribution of the monies to see that he had justice done him according to his rank. Now that the Registrar's certificate is made a basis for collocating the rights of the parties, it does not follow that complete justice will necessarily be done a creditor or that he is guaranteed against mistakes, without the exercise of any diligence on his part. It is only a further protection and security to him, but goes no further than the law itself warrants. Beyond this the law remains the same, favoring the diligent, and still requiring him to watch his interest against mistakes in the distribution of the monies. In this case the appellants have to suffer the consequences of their neglect, and the judgment must be confirmed. The award of the monies to Buntin must be considered a finality.

RAMSAY, J.—This case was argued principally as if the difficulty in appellant's way was that by the judgment there was *res judicata* against appellants, and our attention was specially directed to Art. 510 C. C. P. This is not, however, the real question. Persons called in by general advertisements are not parties in the sense of Art. 1241 C. C. In the language of the old writers they are more *quibus res judicata non noceat*. Appellant's real difficulty is that appellant's declaration does not bring the respondent within Art. 1047 C. C. There was no error either of fact or of law in paying respondent. He was paid under a collocation made according to law. The prothonotary is expressly enjoined by Art. 727 C. C. P. to make his report of distribution precisely as he made it; that is, "he must act according to the apparent rights of the parties." It was for the appellant to show within certain delays that these appearances were unreal. Not having done so, he loses his order of collocation, not on the principle of *res judicata*, but because he has neglected to protect his right. It seems perfectly clear that if respondent had received, to appellant's prejudice, money which was not due to him, the appellant might recover it. And so strong is this principle that our C. C. P. has an article (751) which provides a special procedure to allow this question of indebtedness to be raised in the suit, even after homologation of the report of distribution, and so long as the money is before the Court. This article shows, what is otherwise clear, the judgment of distribution as far as regards order is final, and that it can only be set aside for the reason and in the manner in which other judgments can be set aside. Appellant's declaration contains no such reason, and therefore I think it was rightly set aside on demurrer.

Judgment of S. C. confirmed.

J. Calder, for appellants.
R. Laflamme, Q.C., counsel.
Bethune & Bethune, for respondents.

SUPERIOR COURT, 1884.

MONTREAL, 31st JANUARY, 1884.

Coram JETTÉ, J.

No. 2130.

Gauthier vs. *St. Pierre.*

HELD:—That an advocate in a case who charges a witness under examination in the case with being a liar and a perjurer, is not amenable to a civil suit in damages for making such an accusation, when he does so without malice and under the instructions of his client.

PER CURIAM:—La question soulevée par ce litige n'intéresse pas seulement les parties qui y sont concernées, mais encore et surtout les membres du Barreau, et l'on pourrait même dire tous ceux qui, à un moment donné, peuvent être appelés à comparaître devant les tribunaux.

Il s'agit en effet de déterminer l'étendue du privilége que la loi reconnaît à l'avocat pour la libre défense de son client, et d'indiquer en même temps la protection que la loi assure soit à la partie, soit au témoin, soit au tiers, qui peuvent être exposés à des abus de langage de la part de l'avocat, dans l'exercice de son ministère.

Etablissons d'abord les faits de la cause:

Le 6 octobre 1882, Me. Saint Pierre, avocat du Barreau de cette ville, était appelé à défendre, devant le Recorder, une femme accusée de tenir une maison mal-famée. Le demandeur Gauthier, était le principal témoin à charge contre l'accusée. Or, M. Saint Pierre avait appris, un jour ou deux auparavant que ce témoin avait dit en conversation, que l'accusée lui avait fait l'aveu de sa culpabilité. N'ayant aucune raison de soupçonner tant de bonne volonté de la part de sa cliente, il avait cru devoir se renseigner auprès d'elle sur la vérité de cette confession compromettante. L'accusée avait nié avec indignation avoir fait un tel aveu et avait ajouté: "Si ce témoin dit cela sous serment, il commettra "un parjure et je vous charge de l'affirmer devant la Cour."

La cause étant appelée, le demandeur Gauthier est en effet examiné comme témoin, et il déclare que l'accusée tenait une maison de prostitution *et qu'elle le lui avait avoué.* Aussitôt, dit la déclaration, Me. Saint Pierre apostrophe le témoin en lui disant: "*Ce que vous dites là est un mensonge, vous vous parjurez, vous êtes un parjure.*" De là l'action maintenant soumise à ce tribunal et par laquelle Gauthier réclame $100 de dommages intérêts.

Me. St. Pierre répond à cette demande: qu'il ne s'est pas servi des paroles qu'on lui attribue, mais que les eut-ils prononcées il est protégé par le privilége que lui assure sa qualité professionnelle; que néanmoins il s'est contenté de dire au demandeur: "*qu'il affirmait là une fausseté et que jamais l'accusée "ne lui avait fait un pareil aveu.*"

Il ajoute qu'il a prononcé ces paroles sur les instructions formelles de sa cliente, dans l'exercice de son devoir d'avocat et que l'explication du prétendu aveu de sa cliente, qu'il a ensuite forcé le demandeur Gauthier de donner, a justifié les paroles dont il s'était servi.

Malgré la négation du défendeur, la preuve établit qu'il a prononcé, dans l'occasion en question, les mots : *parjure* ou *vous vous parjurez*. M. le Recorder DeMontigny, qui a pris note de ce qui s'est ainsi passé devant lui, donne, d'après le mémoire qu'il en a gardé, la version suivante : " Sur transquestions :—La " défenderesse a-t-elle fait des aveux ?—Oui.—M. St. Pierre,—C'est faux, vous vous parjurez !" Le Recorder fait alors observer à M. St. Pierre qu'il n'a pas le droit de parler ainsi.

D'autres témoins rapportent à peu près les mêmes expressions et ajoutent que M. St. Pierre paraissait indigné et en proie à une vive émotion.

Il est aussi prouvé que le Recorder, bien qu'il dise avoir considéré l'aveu comme prouvé, a néanmoins donné le bénéfice du doute à l'accusée et l'a fait remettre en liberté.

Tels sont les faits de la cause.

La question à résoudre est donc nettement posée : Le défendeur peut-il être recherché par action civile devant les tribunaux pour les paroles qu'il a ainsi prononcées à l'adresse du témoin Gauthier, devant la Cour du Recorder ?

" La liberté de discussion—dit Grellet-Dumazeau No. 844—est une des conditions les plus essentielles de la bonne administration de la justice. Sans la faculté de dire tout ce qu'il importe aux tribunaux de connaître pour l'exacte appréciation des débats civils et criminels, la défense ne saurait être complète. Souvent l'articulation de faits de nature à porter atteinte à l'honneur d'une partie est une nécessité impérieuse de la cause. Sous un autre rapport, il est des procès dans lesquels une âpre véhémence, une brusque indignation et même une certaine dureté d'expression sont dans les droits de la partie, comme dans le ministère de l'avocat. Cette indépendance du plaideur et de son défenseur a été reconnue dans tous les temps : *advocati debent agere quod causa desiderat*, portait la loi romaine, et les annales de l'ancienne jurisprudence attestent les mêmes priviléges."

Et *Dareau*, rapportant les paroles d'un grand magistrat, M. Portail, nous dit, (chapitre 3, sec. 4, No. 4) : " Au milieu des règles de bienséance que les avocats ne doivent jamais perdre de vue, leur ministère deviendrait souvent inutile, s'il ne leur était permis d'employer tous les termes les plus propres à combattre l'iniquité ; leur éloquence demeurerait sans force, si elle était sans liberté. La nature des expressions dont ils sont obligés de se servir, dépend de la qualité des causes qu'ils ont à défendre. Il est une noble véhémence et une sainte hardiesse qui fait partie de leur ministère. Il est des crimes qu'ils ne sauraient peindre avec des couleurs trop noires pour exciter la juste indignation des magistrats et la rigueur des lois. Même en matière civile, il est des espèces où l'on ne peut défendre la cause, sans offenser la personne ; attaquer l'injustice, sans déshonorer la partie ; expliquer les faits, sans se servir de termes durs seuls capables de les faire sentir et de les représenter aux yeux des juges. Dans ce cas, les faits injurieux, dès qu'ils sont exempts de calomnie, sont la cause même, bien loin d'en être les dehors ; et la partie qui s'en plaint doit plutôt accuser le dérèglement de sa conduite, que l'indiscrétion de l'avocat."

Et l'auteur ajoute :

"Mais à part ces circonstances, un avocat doit éviter tout ce qui sent l'injure et ce qui est étranger à la cause. *Non convicium sed rationibus decertendum.* L'ordonnance de Charles VII, de l'an 1440 le recommande expressément et l'avocat est dans le cas d'être pris à partie, lorsqu'il y manque, à *moins que les injures ne soient avouées de son client.* Sur quoi nous observons que s'il y a eu des expressions peu ménagées de sa part, dans la chaleur de la plaidoirie, *et qu'alors la partie offensée n'en ait point demandé sur le champ réparation, elle n'est plus recevable à lui faire un procès à ce sujet.*" (Ainsi jugé par arrêt du 14 février 1759.)

Ces citations, bien qu'elles ne se rapportent qu'à ce qui aurait pu être dit relativement à *la partie* dans la cause, nous indiquent néanmoins bien clairement quel était l'ancien droit français au sujet du privilége de l'avocat. On peut en résumer les dispositions comme suit :

Liberté la plus étendue quant à tout ce qui n'est pas étranger à la cause, sous la surveillance cependant, du magistrat présidant le tribunal.

Prise à partie pour toute injure *étrangère* à la cause.

Et pour citer encore le même magistrat, M. l'avocat général Portail, dont *Dareau* nous rapporte les paroles : "S'il échappe à l'avocat des expressions trop hardies, ou trop peu ménagées, il est de la prudence et de la religion du magistrat, à qui appartient la police de l'audience, de venger la dignité de son tribunal en l'avertissant de ses devoirs, ou en lui imposant silence."

Denizart constate pareillement que de tout temps, suivant le principe que le juge doit avoir de la police de l'audience, tout tribunal eut le droit d'avertir et de reprendre l'avocat qui se permettait des expressions trop hardies ou trop peu ménagées, dans sa plaidoirie, ce *qui devait exclure toute plainte en injure ou calomnie.*

Denizart, Coll : de Jurisp. Vo. Avocats, Nos. 22 et 23.

Ces dispositions de l'ancien droit français sont passées dans le droit français moderne et *Grellet Dumazeau*, appréciant la loi du 17 mai 1819, nous dit : "Ainsi, tenons pour constant que la loi proclame formellement ce principe, avoué par la raison, que les discours et les écrits prononcés ou produits devant les tribunaux *ne donnent ouverture à aucune action*; que les parties peuvent réciproquement alléguer les faits les plus graves, *si ces faits rentrent dans les moyens légitimes de la cause*, et qu'aux magistrats saisis du fond appartient exclusivement le droit de résoudre les questions auxquelles les dispositions de la loi donnent naissance." (No. 887 *in fine*). Mais ajoute le même auteur [illegible] pas perdre de vue que les libertés de la défense *ne couvrent point* les faits diffamatoires *étrangers à la cause* et que ces faits peuvent donner ouverture soit à l'action publique, *soit à l'action civile des parties.*"

Telles sont donc les règles admises par l'ancien et le nouveau droit français. Ces règles ne sont pas applicables aux parties seulement, elle le sont pareille-

Mémoire

" La défense ne serait ni libre, ni complète, dit *Chassan*, si les parties ou leurs défenseurs étaient gênés par la crainte d'une action relative aux reproches qu'ils auraient à faire aux *témoins* .....Sans doute les parties ou leurs défenseurs n'ont pas à leur égard une liberté illimitée.....il ne peut être permis d'injurier ni d'invectiver arbitrairement les témoins, mais on peut dire contre eux tout ce qui, *se rapportant à l'affaire*, tend à justifier la défense; on peut avancer tout ce qui est propre à ébranler la foi due à leur témoignage, lors même qu'on ne pourrait entièrement prouver les reproches qu'on leur adresse, pourvu qu'on puisse administrer la preuve de quelques circonstances qui rendent ces reproches vraisemblables; car on doit laisser une grande latitude à la défense."

Chassan—Délits et contraventions de la parole—No. 136.

Et *Grellet-Dumazeau* ajoute; " il est de principe que les témoignages appartiennent à la cause et qu'il est permis d'en discuter la valeur par tous les moyens que réclame l'intérêt personnel et qu'avoue la bonne foi. Mais une fois la part faite au droit de la défense, le témoin nous paraît certainement fondé à se plaindre par les voies ordinaires, de l'abus de ce droit et des faits diffamatoires *étrangers à la cause.*" (No. 931 *in medio.*)

Et l'auteur conclut en répétant de nouveau au No. 932 : " La loi n'ouvre donc *l'action* que pour les faits diffamatoires *étrangers à la cause*; et elle l'accorde aux parties, au ministère public et aux tiers; mais cette action purement facultative, ne s'oppose pas, comme nous l'avons vu, à ce que la partie puisse demander aux magistrats saisis de la contestation, la suppression des écrits et des dommages intérêts. Si la partie, optant pour la voie la plus courte et la plus sûre, a incontestablement ce droit, pourquoi le dénier au tiers s'il a intérêt à l'exercer?"

Ces principes sont également ceux de la jurisprudence anglaise. Il y a déjà plus de cent ans, dans une cause de *Rex* v. *Skinner*, Lord Mansfield posait la règle dans les termes les plus larges et les plus clairs en disant : " Neither party, witness, counsel, jury or judge can be put to answer, civilly or criminally, for words spoken in office."

Depuis, à part une ou deux exceptions peut-être, les arrêts n'ont pas varié et j'en trouve l'énumération la plus complète et la plus exacte dans le No. du mois d'octobre dernier des *Law Reports*, aux pages 588 et suivantes, dans le compte rendu d'un jugement du 5 juillet 1883, dans une cause de *Munster* v. *Lamb*. Les quelques citations qui suivent suffiront pour démontrer comment on interprète et on apprécie aujourd'hui dans les tribunaux anglais, ce privilége de l'avocat.

Le premier juge devant qui cette cause fut portée, le juge Mathew, appréciant les paroles reprochées à l'avocat, dit. " It is very questionable whether the words used were defamatory per se. *If they were*, they appear to come within the probable instructions which the advocate might have received from his client, and therefore *on the narrowest view* of the privilege of the advocate, he would be protected from an action." Et comme l'avocat du demandeur M. Waddy, avait émis comme proposition : " That an advocate is protected from an action for defamation, *only* when the words which he utters are spoken *bonâ fide and are relevant to the matters before the Court;*" le même juge ajouté :

Gauthier vs. St. Pierre.

"But it seems to me there is no authority for Mr. Waddy's position. Mr. Waddy pointed out—what is greatly to the credit of the Bar of England—that in no case in which the conduct of a barrister had been called in question in an action had there been any difficulty in shewing that the language of counsel had been relevant to the matter in dispute in the strictest sense. But he failed to satisfy me that in a case in which this strict relevancy could not be proved, the advocate would not be protected. *The privilege is not needed when the advocate is in the right.*"

Et sur appel à la Cour du Banc de la Reine, *Brett*, M. R., expose la doctrine du droit anglais d'une manière encore plus absolue, en disant :

"This action is brought against a solicitor for words spoken by him before a Court of Justice, whilst he was acting as the advocate for a person charged in that Court with an offence against the law. For the purposes of my judgment I shall assume that the words complained of were uttered by the solicitor maliciously, that is to say, not with the object of doing something useful towards the defence of his client; I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the Court where they were uttered; nevertheless, inasmuch as the words were uttered *with reference to*, and *in the course of*, the judicial inquiry which was going on, *no action will lie against the defendant however improper his behavior may have been.*"

Et la décision rendue dans cette cause comporte : "That the words, being spoken by the defendant in the discharge of what he honestly considered to be his duty in the conduct of his client's defence, *and not being altogether irrelevant* to the matters in issue, were within the privilege of the advocate."

Si j'apprécie maintenant les faits de la cause qui m'est soumise à la lumière de ces dispositions de l'ancien droit français qui est le nôtre sur la matière ; et du droit français nouveau et de la jurisprudence anglaise, qui concordent parfaitement avec notre propre droit, il me paraît évident que si Me. Saint Pierre n'a pas observé, dans les circonstances, les règles de cette sage modération que les auteurs recommandent à l'avocat, la répression ne pouvait venir que du magistrat devant lequel il remplissait son ministère et qu'il est ici pleinement protégé par son privilége professionnel. En effet tous les éléments d'immunité signalés par les autorités que j'ai citées semblent se réunir ici. Ainsi, Me. Saint Pierre avait reçu des instructions formelles de sa cliente quant au reproche même qu'il a fait au témoin Gauthier ; les paroles qu'il a prononcées, loin d'être étrangères à la cause, en ressortaient au contraire tout naturellement; elles ont été dites sous l'empire d'une émotion et d'un sentiment faciles à comprendre et sans aucune malice ; enfin, j'irai plus loin, elles pouvaient peut-être même être nécessaires à la défense de sa cliente, afin d'appeler plus énergiquement l'attention du témoin sur l'incertitude de l'affirmation qu'il prenait sur lui de faire. Qui ne voit, en effet, à quelle illusoire protection serait réduite la défense si l'avocat qui transquestionne un témoin, ne pouvait, lorsqu'il a la conviction que ce témoin se trompe,

ne pouvait dis-je se servir d'un langage même sévère pour lui rappeler la sainteté de son serment et la responsabilité qu'il encourt en jurant comme il le fait ?

Mais on pourrait peut-être dire que si le privilége de l'avocat doit être aussi large, aussi étendu, il y a danger que l'administration de la justice n'en souffre, et qu'il ne soit impossible de décider les témoins à comparaître devant les tribunaux.

Le privilége de l'avocat existe depuis des siècles et l'expérience du passé doit nous rassurer sur l'avenir. Les règles qui gouvernent la profession sont d'ailleurs une sûre garantie contre l'abus que l'avocat pourrait faire de son privilége. " Car, dit *Dareau*, si la justice veille spécialement à ce que les avocats ne soient pas impunément insultés à l'occasion de leur ministère, elle veut aussi qu'ils soient eux-mêmes particulièrement réservés envers les parties contre lesquelles ils exercent leurs fonctions. Le champ de Thémis ne doit pas être pour eux une arène de gladiateurs : si avec le droit le plus légitime, on ne pouvait se présenter au temple de la justice sans y recevoir des affronts, on aimerait souvent mieux renoncer à ses prétentions, que d'être obligé de soutenir tous les assauts de l'injustice et de la calomnie pour les réclamer."

Aussi la législation de tous les pays investit-elle les magistrats d'un pouvoir souverain pour la répression et la punition de tous les écarts dont pourrait se rendre coupable l'avocat qui oublirait le devoir que lui impose la dignité de son ministère. Car dit le magistrat que j'ai déjà souvent cité, M. Portail : " Le ministère des avocats doit être un ministère pur et sans reproche. La sagesse de leurs discours doit répondre à la noblesse de leur profession. Ils doivent être zelés pour leurs parties, mais ils ne peuvent être trop attentifs et trop circonspects sur le choix de leurs expressions. Associés pour ainsi dire à la magistrature ils ne doivent parler que le langage des lois et de la jurisprudence. Ils doivent soutenir les intérêts de leurs parties sans entrer dans leurs passions ; faire valoir leurs droits, mais ne pas suivre leurs emportements ; défendre la cause, et ne pas attaquer les personnes. (Réquisitoire de l'avt. général Portail 1707.)

Et s'ils oublient ces sages conseils, la loi donne au juge dans les art. 7, 8 et 9 du Code de Procédure, tous les pouvoirs nécessaires pour réprimer leurs écarts et punir leurs fautes non-seulement par des avertissements et des réprimandes mais encore par des amendes, par la suspension et même par la prison.

Aussi sévèrement contrôlé, le privilége de l'avocat, loin d'être dangereux est au contraire une des plus précieuses garanties d'une bonne et saine administration de la justice.

M'inspirant donc de ces principes et me conformant à ces règles d'une jurisprudence constante et séculaire, j'arrive nécessairement à la conclusion que les paroles dont Me. Saint Pierre s'est servi dans l'occasion en question, n'étant pas étrangères à la cause dont il était chargé, ne pouvaient donner lieu qu'à l'intervention du magistrat devant lequel elles ont été prononcées et non à une action en dommages-intérêts devant ce tribunal.

L'action du demandeur doit donc être renvoyée, avec dépens.

Gauthier vs. St. Pierre.

The following was the written judgment of the Court :

"La Cour après avoir entendu la plaidoirie contradictoire des avocats des parties sur le fond du procès mu entre elles, pris connaissance des écritures des dites parties pour l'instruction de leur cause, examiné leurs pièces et productions respectives, duement considéré la preuve et délibéré :

Considérant que le demandeur poursuit le défendeur, avocat du barreau de cette ville, lui réclamant $100 de dommages-intérêts, à raison de certaines paroles injurieuses que le dit défendeur lui aurait adressées, le 6 octobre 1882, pendant une audience de la Cour du Recorder, dans une cause où le demandeur comparaissait comme témoin et pendant qu'il donnait sa déposition comme tel ;

Considérant que le défendeur a plaidé que les paroles qu'il a alors prononcées à l'adresse du demandeur, l'ont été dans l'exercice légitime de son droit professionnel, pour la défense des intérêts de la partie que représentait alors le défendeur et sur les instructions spéciales de sa cliente et que par suite, il est protégé contre toute action telle que celle maintenant portée contre lui ;

Considérant que bien qu'il apparaisse en preuve, que le défendeur a prononcé, dans l'occasion en question, les paroles que lui sont reprochées, il est cependant néanmoins que ces paroles, loin d'être étrangères à la cause s'y rapportaient au contraire directement ; qu'elles ont été dites sincèrement et sans malice et d'après les instructions formelles de la partie que représentait le défendeur, et que, dans ces circonstances, l'abus de langage dont le défendeur est accusé n'était soumis qu'au contrôle exclusif de la Cour devant laquelle il remplissait son ministère et ne peut maintenant l'exposer à être recherché par action civile devant un autre tribunal ;

Considérant, en conséquence, que le défendeur est bien fondé à invoquer, dans l'espèce, le privilége et l'immunité que la loi accorde à l'avocat, pour la libre défense de son client ;

Maintient l'exception du défendeur et renvoie et déboute l'action du demandeur avec dépens."

Champagne & Cornelier, for plaintiff.
St. Pierre & Scallon, for defendant.

Action dismissed.

COURT OF QUEEN'S BENCH, 1884.

MONTREAL, 27TH MARCH, 1884.

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

No. 445

LES ECCLESIASTIQUES DU SEMINAIRE DE ST. SULPICE DE MONTREAL,

APPELLANTS;

AND

LA SOCIÉTÉ DE CONSTRUCTION CANADIENNE DE MONTREAL,

RESPONDENTS.

HELD:—That the enregistration of a deed of sale of an immovable according to its cadastral number, in which the purchaser undertakes to pay the amount of a specified mortgage duly registered, cannot legally supply the want of renewal of registration of such mortgage against the cadastral number.

This was an appeal from a judgment rendered by the Superior Court at Montreal [Taschereau, J.] on the 11th of June, 1881, as follows:—

"La Cour, ayant entendu les parties, savoir: la dite demanderesse contestant le treizième item du rapport de distribution fait en cette cause, et les Ecclésiastiques du Séminaire de St. Sulpice de Montréal, créanciers colloqués au dit article, par leurs procureurs respectifs, sur le mérite de la dite contestation de la demanderesse, examiné la procédure et toutes les pièces du dossier, et sur le tout délibéré;

Considérant que l'enregistrement opéré le 14 février, 1873, de l'acte de vente du 13 février 1873, (vente par les dits créanciers colloqués à Médéric St. Jean) n'a pas été renouvelé dans le délai requis par la loi après la proclamation pour la mise en force des dispositions de l'article 2168 du Code Civil, dans la circonscription d'enregistrement où est situé l'immeuble vendu en cette cause, et qu'à défaut du dit renouvellement l'hypothèque conservée aux dits créanciers colloqués par le premier enregistrement ne peut primer l'hypothèque de la demanderesse, résultant de l'acte d'obligation consenti en sa faveur par le dit Médéric St. Jean, le 16 août 1873, et enregistré le même jour, après la mise en force des dispositions du dit article 2168;

Considérant que l'enregistrement opéré le 8 avril 1874, de l'acte de vente du 21 février 1874, (vente par Médéric St. Jean à Casimir Faille), n'a pu suppléer au défaut de renouvellement d'enregistrement de l'hypothèque susdite des créanciers colloqués, ni constituer un renouvellement du dit enregistrement aux termes des articles 2131, 2168, et 2172 du Code Civil, le dit acte du 21 février 1874, ne contenant qu'une simple indication de paiement en faveur des dits créanciers colloqués, non présents au dit acte, ne comportant aucun avis au régistrateur du renouvellement de la dite hypothèque des créanciers, et n'ayant été enregistré que pour la conservation des droits des parties au dit acte;

Maintient la contestation de la demanderesse, met de côté le dit article 13ème du rapport de distribution, déclare que la demanderesse devra prendre rang, avant les dits Ecclésiastiques du Séminaire de St. Sulpice de Montréal, pour la

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créance à elle due, ordonne au protonotaire de cette Cour de préparer une nouvelle distribution de la somme de $489.31 portée au dit article 13ème, et condamne les dits Ecclésiastiques du Séminaire de St. Sulpice de Montréal aux dépens encourus par la demanderesse sur la dite contestation."

RAMSAY, J.:—This appeal comes up on a question purely of law. It is whether the appellants have lost the priority of their hypothec by their failure to renew, according to the precise formalities of law, the registration of their claim. That is to say, whether what is equivalent will suffice.

The appellants' claim for $400 was due on a deed of sale from them to one St. Jean, dated the 13th February, 1873, registered on the following day. On the 15th July, 1873, the *cadastre* for the parish of Montreal was put in force, and consequently the time for re-registration expired on the 15th July, 1875. The appellants did not re-register. On the 16th August, 1873, St. Jean hypothecated the property in question for $1,900, which was duly registered under the new system. It is admitted that if there was nothing but this the appellants have lost the priority of their hypothec. But it is established that, on the 21st February, 1874, a deed of sale of the above property was made to one Faille, in which the debt to the appellants was reserved, the purchaser promised to pay it, and this deed referred fully to the previous deed and to its registration by date and number, and Faille's deed was duly enregistered on the 8th April, 1874.

The argument is this:—Registration is for the purpose of publicity, it is not necessary that all the formalities of the law should be observed;—it is not necessary that the registration should be done by the party interested, the registration of the deed by a stranger is as effective as the registration by the creditor or his agent, therefore the registration of the deed to Faille was a good registration of appellants' hypothec, at all events from the 8th April, 1874. Further, it is argued the requirements of re-registration cannot be greater than those of the original registration. It is specially provided by an art. (38 Vic. ch. 14), sanctioned 23 February, 1874, and consequently before the expiration of the delay to re-register, that the notices mentioned in 2172 may be given by any person for the party interested; and that as the registration of the deed to Faille would be sufficient as a registration to protect appellant's claim it is equivalent to a re-registration of the original deed from appellants, being made *en temps utile*, that is, before the delay to renew had expired, and that the failure to re-register does not put the respondents in a worse position than they were in before. They took their security subsequently to the registration of the appellants' claim, and when that claim was validly registered, and if the respondents succeed they do so simply by the omission of the appellants to do something that the respondents had no interest in having done. On the other hand, it may be said that the system of registration, like every kind of publication, is the creation of positive law. It is created not for the purpose of giving notice to a particular person who does not know, but in order that no one can plead ignorance. And so the knowledge of the existence of a prior debt does not cover the want of registration. For the same reason it is absolutely necessary to comply with the forms prescribed, and it is not sufficient to do something else that might, if the law had so willed it, have been a sufficient warning. Article 2172 prescribes the requirements for the *renewal*

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f registration. There must be a renewal containing a notice describing the immoveable affected, in the manner prescribed in article 2168, *and conforming to the other formalities prescribed in article* 2131 *for the ordinary renewal of the registration of hypothecs.*" In turning to 2131 we find there must be "a notice to the registrar designating the document, the date of its original registration, the immoveable affected, and the person who is then in possession of it. And the volume and page in which the notice of renewal is registered must be referred to in the margin of the original registration." There was no such notice, and consequently there has not even been an attempt at a renewal.

Appellants' argument is supported in this way: He says that the Cour de Cassation in dealing with this very subject has invariably laid down the broad rule that the formalities of inscription need not be followed in the renewal. It seems to me that this is unquestionably the jurisprudence in France. The doctrine as resumed by Aubry & Rau, appears to be (3. 383): 1st, that it is not absolutely indispensable that the renewal should follow all the formalities of the article 2148 C. N.; 2nd, that in default of any enunciation or indication of the previous inscription, "la nouvelle inscription ne vaudrait que comme inscription première." Upon the first point there is tolerable unanimity of opinion,* but Troplong evidently considers the requirement of the date as partaking of the character of judge-made law. (3 Pr. and Hyp. 715.)

However this may be, it has been steadily adhered to.† But the question for us is whether these decisions apply to our law and how far they apply. I am disposed to think that their abstract principle applies. That is to say, I think that here, as in France, a renewal *may* be sufficient, if the requirements of the law be substantially, though not literally, complied with. But the law as laid down in France cannot furnish a guide to us as to what is a substantial compliance with the Code, for their system differs essentially from ours.

Their renewal is prescribed by a very short article 2154: "Les inscriptions conservent l'hypothèque et le privilége pendant dix années, à compter du jour de leur date; leur effet cesse, si ces inscriptions n'ont été renouvellées avant l'expiration do ce délai." Now the discussion there arose as to whether this meant that a new inscription should be made as directed by article 2148. And the arrêts I have referred to are the judicial answer to the question of what it was necessary to do. Here, however, our legislative attention being specially directed to the Code Napoleon we deliberately devised a system totally different, and which lays down an exploit procedure which must be followed. The party desiring to renew gives the registrar a notice, specifying the particulars of the deed to be renewed. This notice is inscribed at full length in a new book, and its inscription is indicated in an index. In addition to this the registrar is obliged to enter on the margin of the original inscription a mention of the renewal. It is obvious that a man perfectly conversant with the requirements of the law

* Sir. Cass. 3 Feb.: 1819; Dalloz, 55 Feb., 1825. Troplong says there is a decision of the Cour de Cass, 14 San., 1819 contra; Dalloz Hyp., 307. I think this must be a mistake, and that properly considered, the arrêt of 1817 does not turn really on this point. It is not likely the C. de Cass. would, on the 25th Feb., 1819, over-rule so recent a decision.

† Sir. Cass. 14th June, 1831; Ib. 29th August, 1838, Ib. 16th February, 1864.

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might follow its behests to the letter for all that he desired to know, and never discover that there was a re-registration. That is, he might look at the old inscription which he knew of, and no note in the margin would tell him that that hypothec had any effect (2082); he might turn to the index of renewals and find it totally blank; he might go to the registrar and demand a copy of the deed registered, but no marginal entry would testify to the renewal (2178) or that the deed was other than it seemed,—an hypothec which had no effect. Nothing but a full search, which no one is bound to require if he only desires to know a particular fact, would have disclosed the new inscription by Faille's deed. In France, it appears, the party is obliged to make a general search and therefore he cannot fail to find the warning. But we are told, a party to the deed, like respondent, knew, and so forth. But, under our law, it is not a question of good and bad faith. With us knowledge is nothing, and therefore we are not perplexed like the Cour de Limoges when it ruled: "Le renouvellement d'une inscription hypothécaire est valable bien qu'il ne mentionne pas l'inscription renouvellée. Il en est ainsi surtout vis-à-vis des créanciers qui ont connu l'inscription primitive, et qui n'ont pu dès lors éprouver aucun préjudice de son défaut de mention dans le renouvellement." (Sir. 14 Av., 1848). It would be impossible to distribute the money arising from a sale if we were to admit this mistaken doctrine of equity. Registration is not the only institution of the law where real rights are lost by *laches*; for instance, the omission to give notice of protest to an endorser relieves, not because he suffers by not being notified, but because he *may* suffer. I am therefore to confirm.

I may remark there is a little difficulty which might perhaps be serious under certain circumstances, but which was not raised in this case, and which has no effect on the judgment rendered. Faille's deed gives an incorrect date as being that of the one it evidently intends to refer to.

DORION, C. J., said the question might be a technical one, but it was one of great importance. One article of the Code says how renewal of registration may take place; that renewal is by a notice given to the registrar that the party intends to renew such a mortgage which he has on the property. This renewal is not entered in the ordinary registration book, but in a separate book. So that a party going into the registration office, and asking whether a certain mortgage had been renewed, the registrar might give him a certificate that there had been no renewal (though it might appear on the other book). This is what would happen if a purchaser's registration of his deed was considered equivalent to a renewal of the mortgage mentioned in the deed: for the registration of the deed would not appear in the book of renewals, but in the book of registrations. The case was no doubt one of special hardship, but the Court had no alternative but to come to the conclusion that the judgment must be confirmed.

MONK, J., said he confessed that the case had perplexed him very much on the *délibéré*, but he had the advantage of knowing that four judges of this Court agreed in maintaining the judgment of the Court below, and the case was one of so much doubt that he did not feel justified in entering a dissent. The property in question was sold by the Seminary to St. Jean. The deed was registered on the same or the following day. There remained due upon the sale the sum of

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$400, which was payable at six per cent. Subsequently to that, some time in February or May, St. Jean, who had purchased from the Seminary, mortgaged the property for $1,900. There did not seem to have been any notice of the money due except this, that the respondent took communication of the deed from the Seminary to St. Jean. Notwithstanding the existence of the mortgage for the $400, the respondent thought proper to advance the sum of $1,900 to St. Jean. We had, therefore, the deed of sale from the Seminary, we had the deed of mortgage from St. Jean to the present respondent for $1,900, both deeds registered. At this time the proclamation of the *cadastre* had not been issued. After the proclamation was issued St. Jean sold the property. In the deed from St. Jean there was a full enunciation, and a reference to the $400 due the Seminary. And, not only that, but there was a reference to the $1,900 due to the present respondents. Not only was there a reference and an indication of these liabilities, but there was undertaking on the part of the purchaser, Faille, to pay the Seminary, and also to pay the present respondents. There was an indication and acknowledgment of the existence of these liabilities on the part of Faille. This deed of sale was immediately registered. His Honor's first impression was that this was perhaps sufficient publicity of the mortgage; that no one could be led astray; and he was inclined to hold that it was equivalent to a renewal of the hypothec. But the law requiring this renewal was very strict. The previous creditor, unless he adopts the formalities pointed out by the Code, will lose his claim or be postponed to the subsequent creditor, who has taken the precaution to re-enregister. This was very strict, it was very troublesome; it had been found so in France, and probably in every civilized country in the world. But, however strict, however precise and obligatory this might be, looking at it as a general rule, His Honor was disposed to say at first that this Court, if the justice of the case required it, could relax the stringency of the rule, and could mitigate the severity of the law. The question was this: Was this registration of St. Jean's deed publicity as to the hypothec? His Honor was disposed at first to think that it was sufficient, but on further consideration he had reluctantly come to the conclusion that the law as laid down in our Code must be strictly followed. This publicity did not dispense the appellants from the necessity of re-registration. It seemed hard; they would probably lose their money; but in the end, after much consideration, it appeared to His Honor that the respondents were entitled to be collocated in full for their claim, for the simple reason that the Seminary had not thought proper to re-enregister according to the exigencies of the Code. The penalty was that in the absence of this re-enregistration their claim must be postponed to that of the respondents. Therefore, with great reluctance, and after much hesitation, His Honor came to the conclusion that the judgment of the Court below was correct and must be confirmed; and, naturally, he had not less confidence that this conclusion was correct, seeing that five judges here and in the Court below concurred in the same opinion.

Judgment of S. C. confirmed.

Geoffrion & Co., for appellants.
Béique & Co., for respondents.

COUR DE CIRCUIT, 1884.

MONTREAL, 25 JANVIER, 1884.

Coram DOHERTY, J.

No. 6517.

Carmel vs. *Asselin* et al. et *Girard*, opposant, et *Carmel*, contestant.

JUGE:—1o. Que les associés en nom collectif sont tenus conjointement et solidairement des dettes de la société, qu'icelle subsiste encore ou soit dissoute. (C. C. art. 1865.)
2o. Que le créancier d'une telle société n'est pas obligé de rechercher les biens de la société avant de faire saisir ceux des associés individuellement.
3o. Qu'une irrégularité dans les avis de vente n'affecte en rien la validité de la saisie elle-même et que le défendeur ne peut se plaindre de l'insuffisance de tels avis tant que la vente des effets saisis n'a pas eu lieu. Qu'il ne pourrait à tout événement s'en plaindre qu'après la vente et dans le cas seulement où il aurait éprouvé du préjudice par suite de cette irrégularité.

Les défendeurs ont exercé l'état d'hôteliers, à Montréal, en société, sous la raison sociale de "P. Asselin & Cie."

Le demandeur a obtenu jugement contre eux et a fait saisir le mobilier de Napoléon Girard, l'un des associés.

A l'encontre de cette saisie Girard a fait l'opposition suivante par laquelle il conclut à l'annulation de la saisie:

Que tous les biens saisis en cette cause sont la propriété privée de l'opposant; qu'iceux ont été saisis au domicile particulier de l'opposant et non à la place d'affaires des défendeurs. Que le jugement en exécution duquel la dite saisie a émané, est pour une dette de la société qui a existé entre les défendeurs et qui existe encore

Que les annonces ou avis de vente n'ont pas été faits suivant la loi.

Que le temps donné depuis la saisie jusqu'au jour fixé pour la vente, est insuffisant, n'étant que de six jours.

Qu'en loi, aucune vente ne peut avoir lieu, si ce n'est huit jours francs après la publication des annonces et que les annonces, telles que faites en cette cause sont irrégulières, illégales, nulles et de nul effet.

Le demandeur contestant répondit que la dite société était dissoute et n'avait plus de place d'affaires ni de biens connus, et que dans tous les cas les défendeurs étaient responsables solidairement de la dette en question.

Quant à l'avis de vente, il était suffisant; l'original du procès-verbal de saisie contenant cet avis et la copie laissée au gardien comportaient le délai voulu par la loi; et la divergence qui se trouvait entre l'original et la copie laissée au défendeur, ne pouvait tirer à conséquence, encore moins frapper de nullité la saisie.

PER CURIAM.—La cour est contre l'opposant sur tous les points. Les avis de vente ne font point partie de la saisie qui subsiste indépendamment d'iceux et il en a été maintes fois jugé en ce sens par nos tribunaux. Du reste, l'opposant n'avait pas raison de se plaindre à moins d'avoir souffert quelque préjudice par suite de l'irrégularité en question. Quant à la saisie des biens de l'opposant, elle a été pratiquée légalement, chacun des associés étant tenu solidairement des dettes de la société. L'opposition doit donc être renvoyée avec dépens.

F. L. Sarrasin, pour l'opposant.

J. G. D'Amour, pour le contestant.

Opposition renvoyée.

COURT OF QUEEN'S BENCH, 1883.

MONTREAL, 27TH NOVEMBER 1883.

Coram DORION, C.J., RAMSAY, J., TESSIER, J., CROSS, J., and BABY, J.

No. 540.

LA CORPORATION DU COMTÉ D'OTTAWA,

(*Defendant in the Court below,*)

APPELLANTS;

AND

LA COMPAGNIE DU CHEMIN DE FER DE MONTREAL, OTTAWA ET OCCIDENTAL,

(*Plaintiff in the Court below,*)

RESPONDENTS.

HELD:—(DORION, C.J., and CROSS, J., dissenting) That under our law nominal or exemplary damages may be awarded for breach of obligation where there is no proof of actual damage.

2. That the obligation of a municipality to give debentures in payment of a subscription of shares in a railway is not to be treated as a mere obligation to pay money, in which case under C.C. 107, the damages resulting from delay consist only of interest from day of default.

The appeal was from a judgment of the Superior Court, Montreal (TORRANCE, J.), 18th April, 1882, reported in 26 Lower Canada Jurist, p. 148.

DORION, C.J. (*diss*), On the 12th of June, 1871, the Municipal Council of the County of Ottawa passed a by-law authorizing the warden of the County to subscribe for twenty thousand shares, of ten dollars each, in the Northern Colonization Railway, to be paid for in debentures, at twenty-five years' date. One hundred and fifty thousand dollars of which were to be issued as the work progressed, but not to exceed one-half of the money expended on the works made in the County of Ottawa, nor three thousand dollars per mile; the balance of fifty thousand dollars to be issued when the road should be completed from Montreal to Ottawa.

On the 19th of January, 1875, the respondents claimed from the appellants debentures for $112,096, being the amount of one half of the monies they had expended on fifty miles of Railway in the County of Ottawa, and on the 19th of June following they instituted the present action by which they claim from the appellants damages to the amount of $500,000, on the following specific grounds alleged in their declaration:

1o. That, by the refusal of the appellants to issue their debentures according to their agreement, the respondents are unable to complete their railway.

2o. That by such refusal they are exposed to lose the balance of $50,000 which are to be issued after the Railway is made from Montreal to Ottawa, provided it be completed before the first day of December, 1875.

3o. That the credit of the Company has been injured by such refusal, and that respondents have thereby been deprived of large sums of money which they were entitled to receive from the City of Montreal and from the Province of Quebec.

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4o. That the respondents have the right to claim interest since the 19th of January, 1875, the amount for which debentures should have been issued in their favor.

The appellants demurred to the declaration, and also filed a peremptory exception and a *défense en fait*.

The demurrer was dismissed, and the appellants have been condemned to pay $100 for the several damages suffered by the respondents.

The appeal is from this judgment. By the agreement entered into between the parties the appellants became shareholders in the Company now represented by the respondents, and agreed to pay their stock, not in money, but by the issue of their debentures, subject to certain conditions mentioned in their by-law. Taking for granted that the respondents have fulfilled all their obligations to entitle them to claim the $112,096 of debentures, the appellants would be in the position of a stockholder refusing to pay calls on its stock when such calls have been made and have become payable.

If these calls had been payable in money the respondents would be entitled to claim the amount of the calls due, together with interest thereon from the date of the demand, interest being the only compensation a creditor can obtain for the detention of a sum of money which his debtor refuses to pay (art. 1077 C.C.).

Corporation debentures are not money, but mere promises to pay according to the terms on which they are issued. Their actual value may be greater or less than their face value, according to the rate of interest they bear and the credit of those by whom they are issued.

The only claim the respondents were entitled to urge against the appellants was a claim for the amount of debentures earned or their value, at the time they should have been issued with interest and costs.

The loss of credit, the failure of a creditor to fulfil his engagements generally, because his debtor has not fulfilled his undertaking, have never been considered as being an element in the estimate of the damages to be allowed by a Court of justice.

The bad example given by a defaulting debtor, which encourages other debtors to become defaulters, is still a more remote cause which can neither give rise to nor support a claim for damages.

The respondents have not adduced any evidence whatsoever that they had suffered any actual loss by the default of the appellants to issue their debentures. They have neither proved the value of those debentures, nor even that their enterprise was a profitable one, which seems to be the gist of their claim.

The only evidence adduced by the respondents consist in the loose and speculative opinions of witnesses, most of whom are connected with the Railway; and who estimate the damages suffered by the respondents at from $150,000.00 to $400,000.00, without in anywise explaining how such enormous damages could have arisen from a failure on the part of the appellants to issue $112,096.00 at the time agreed upon. It is evident that the Court below was of opinion that

such wild estimate could have no substantial basis, for, instead of hundreds of thousand dollars it merely allowed one hundred dollars for the pretended damages of the respondents. There is far less evidence for a judgment for $100.00 than for one of two or three hundred thousand dollars. There is not the slightest justification to be found in the record for the finding of the Court. The three first grounds on which the action is based are totally unfounded in law. As to the fourth, which is the claim for interest, it is difficult to understand how interest can be claimed apart from the claim for the debentures on which this interest was to accrue, and neither debentures nor their value, which might include interest, are here claimed.

Moreover, by comparing the date at which the debentures were first claimed, which is the 19th of January, 1875, and the date of the action, 10th of June, 1875, it will be found that only five months had elapsed between those dates, and the first interests payable on the debentures would only have become due on the 19th of July following as, according to the agreement, the interest on the debentures was payable every six months, reckoning from their date. Supposing the action could be considered as an action for interest it would have been premature.

The Court below did not consider it an action for interest, since it only allowed $100.00, while interest alone would have amounted to several hundred dollars.

It has been said that the judgment might be considered as awarding mere nominal damages for breach of contract.

As I understand the rule in England an action will lie for a mere breach of an agreement, although no loss or injury may have resulted from such breach, but in such cases the party suing will only be awarded a very small sum, as a farthing, a penny, or sixpence, and this is what is termed nominal damages (Sedgwick on the Measure of Damages, pp. 44, 45, § 47). If this view be correct I do not think that $100.00 would in England be considered as being nominal damages.

Whatever may be in the law of England, this case has to be determined according to the rules of the French law, as applied in this Province, where an action does not lie for a mere breach of a contract where the complainant has suffered no actual loss nor been deprived of any gain by such breach. The words nominal damages or their equivalents are not to be found in the French law-books, at least in connection with claims for a breach of contract. The plaintiff must prove that he has suffered some damages from the breach of covenant complained of, in which case he will succeed, otherwise his action will be dismissed.

It is *injuriâ sine damno* for which there is no right of action. The only exception to this rule is where damages have been stipulated by the parties as provided for by Article 1076 C. C. or fixed by-law, as in the Art. 1077 C. C., which allows interest as damages resulting from delay in the payment of money, the Article adding: without the creditor being obliged to prove any loss, which

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shows that in other cases a loss must be established, and Art. 1073 C. C. says that the damages due to the creditor are in general the amount of the loss he has sustained and of the profit he has been deprived of. We may therefore safely say that an action does not lie here for merely nominal damages and the maxim *deminimis non curât lex* is especially applicable to vexatious actions of damages, which can have no practical results, the policy being rather to discourage than to promote such actions.

I would have reversed the judgment of the Court below and dismissed the respondents' action on the twofold ground that the declaration discloses no right of action and that the respondents have not proved that they had suffered any loss or damages for which the appellants could be held liable, but being in the minority the judgment will be confirmed.

CROSS, J. (*diss.*) In this action instituted 19th June, 1875, the respondents sought to recover from the appellants five hundred thousand dollars damages which they claimed on their representation of facts to the effect following:

That the appellants were subscribers to the capital stock of the respondents railway to the extent of twenty thousand shares of ten dollars each, amounting to two hundred thousand dollars, which had been subscribed for under the authority of a by-law of the appellants containing the conditions following;

1o. That the subscription would be payable in debentures of the Corporation of $100 each, payable at twenty-five years from then date, and bearing interest at the rate of six per cent. per annum, and to be taken by the Company at par in payment of their subscription;

2o. There should be payable monthly $ on the subscription in proportion as the work progressed, but so as not to exceed half the value of the work done on the road within the limits of the County nor the sum of $3000 per mile.

3o. To construct the bridges on the principal rivers with stone piers and to use steel rails of forty-eight pounds weight per yard and to build the road and its dependences equal in quality and material and in construction to the railroad called the St. Lawrence and Ottawa Railroad.

4o. To finish said railroad and put it in operation on or before the 1st December, 1875.

That in March, 1875, work had been done on said Railway within the limits of the County of Ottawa to the value of three hundred thousand dollars on a length of road of fifty miles, and that in January of that year the work had attained to the extent to entitle the Railway Company to claim from the appellants $112,096.00, and on the 14th June, 1875, a notarial demand was made to the appellants for the delivery of debentures, for this amount, which the appellants refused; that they, the Railway Company, were prepared to continue the works on the terms of the by-law and to finish it by the first of December then next, 1875, on the condition that the appellants would on their part fulfil the conditions of their said By-law.

That the refusal, negligence and omission of the appellants to deliver to the respondents their debentures to the above amount had caused and was causing

considerable damage not only by putting in peril the payment of said sum of fifty thousand dollars, but also by injuring the credit of the respondents and depriving them of considerable sums that the respondents would have had the right to receive and would have got and received, as well from the city of Montreal under and in virtue of By-law No. 59, Schedule A of the Act. 36 Vict. c. 49, as of that of the Government of Quebec, from and out of the subsidy voted to the respondents by and in virtue of the Act of Quebec 37 Vict., cap. 2, and that besides these damages the respondents had the right to claim from the appellants interest on the amount of debentures from the date of the protest 19th January, 1875.

The appellants demur to this answer.

1o. Because it was for damages for loss of credit and for non-delivery of debentures.

2o. The only thing respondents could claim was the delivery of the debentures or their value in money.

3o. The only obligation of the appellants was the payment of money and interest which respondents did not claim.

4o. Apart from the demand the appellants would still remain liable for the debt and interest.

They further pleaded that the respondents had not fulfilled the conditions of the by-law, they were insolvent, and had declared their inability to complete the road within the prescribed delay. That they had not paid for the lands taken for the road, had never had the required capital *bona fide* subscribed, no calls had been paid, the subscriptions of the Municipalities were conditional and could not be enforced. The charter had been changed from that of a Provincial to a Dominion one, to which appellants had not consented and were not bound; that respondents could not claim for damages and could only have claimed money and interest.

The Attorney General for Quebec intervened, claiming that the Railroad, the rights of the respondents, the contractor and the subscribers of stock had all been transferred to the Quebec Government by a conveyance executed before Dumoulin, Notary, the 2nd November, 1875, of which they produced a copy. By this conveyance it appeared that the Government had taken over the property of the Railroad, and assumed the liabilities of the Company, undertaking, besides, to reimburse what subscribers had paid on their shares.

This agreement was ratified by the Quebec Act. 39 Vic. c. 2. This intervention was contested by the appellants as illegal, unconstitutional, and as operating no valid change in the condition of the parties.

After evidence taken on the whole case the intervention was discontinued.

On this state of the case and on the evidence, the Superior Court pronounced its judgment on the 18th April, 1882, whereby it was declared "Considering that the plaintiffs (respondents) have proved that on the 17th day of January, 1875, they had fulfilled the conditions at that time incumbent upon them under the by-law of the Municipal Council of the County of Ottawa set forth in the

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pleadings in this cause to be entitled to the delivery of the bonds or debentures claimed by their protest of that date served upon the defendants (appellants);

Considering that defendants (appellants) have failed to make sufficient evidence in support of the allegations of their second plea to entitle them to the maintenance thereof and the dismissal of plaintiffs' (respondents') actions;

Considering that plaintiffs (respondents) have sufficiently proved the allegations of their declaration to be entitled to general damages for the default of the defendants (appellants), as set forth in their Protest of date the 17th January, 1875, which damages the Court now assesses at $100.00;

Doth over-rule defendants (appellants) said plea, and condemn them to pay to plaintiffs (respondents) the said sum of $100.00, with interest thereon from this date and costs of suit as in a first-class action.

This judgment, the validity of which is brought in question by the present appeal, assumed that the appellants are liable in damages outside and beyond the capital and interest of the debentures, which, in accordance with the conditions of the by-law and of their subscription, they undertook to deliver as the work progressed.

These consequential damages are claimed on the ground that the default of the appellants to deliver the debentures caused injury to the respondents' credit, and deprived them of considerable sums which they would have received from the City of Montreal and in subsidy from the Government of Quebec.

The appellants deny that any such damages are recoverable by law.

The respondents on their part contend that interest for delay is not the sole damage that the creditor can claim from his debtor in case of the non execution of an obligation for the payment of a sum of money; that there may be other causes of damages than the delay, and in such case the tribunal has the right to estimate and determine the damage which the creditor actually suffers.

To sustain this proposition they invoke *arrets* of the courts in France in cases arising under Art. 1175 of the Code Napoléon, which it is claimed is of the same purport as our Art. 1077; also the views of the Jurists in France on the interpretation of the same article. They have likewise cited one or two English authorities.

I would here remark that we have no such rule here as that which prevails in England of giving nominal damages for a breach of contract although no actual damage results or is proved, whatever effect that might have on a case like the present, nor do we follow a practice prevailing in France of awarding what are termed "*dommages et intérêts*" for obstructing legal recourse, as in the case of making in bad faith an unfounded opposition to the execution of a judgment this rule accounts for some of the French *arrêts* where damages were given in consequence of unfair obstruction opposed to a well founded demand; others are based upon the circumstances of the case shewing another legal ground for damages besides the mere delay of payment. I find none strictly applicable to the present case. The most appropriate of the English authorities is the case of the breach of an agreement to accept bills of Exchange to a certain amount in consideration of a commission to be paid for the acceptance; but besides that

bills of exchange are expresely excepted from the operation of Art. 1077 an agreement to accept is one of a very special nature, and is to some extent an agreement to sustain the credit of the drawer; I do not consider it applicable.

Although not prepared to deny that there may be a case where the delay of payment of money might possibly involve damages beyond the interest of the sum withheld, it seems to me it must be an exceptional one, and before the respondents could be entitled to the application of other than the general rule contained in Art. 1077 it would be incumbent on them to show that there really existed such an exceptional case recognized by-law, and that it was the present case, which I think they have failed to do.

On the other hand authorities more or less satisfactory have been cited in support of the pretensions of the appellants, see:

Code C. B. C. art. 1077.

1 Larombière Oblig. on Art. 1153 C. N. p. 565, 566.

Arrêt de Cassation, 13 January, 1852.

Fouquet Besselièvre C. Basile.

Pothier Oblig. Nos. 144, 170.

6 Toullier No. 264.

10 Duranton No. 49.

4 Marcadé, art. 1153.

Journal du Palais, 1853, Vol. 2, p. 28, arret Dionest mentioned by Demolombe Vol. 24, No. 585.

We find two *arrets* cited by Sirey, Table Decennals 1851-1860, Nos. 17 and 18, which seem to indicate that damages can be obtained beyond interest: The first is reported in the "Journal du Palais," 1855 Vol. 2, p. 555, arrêt Desseroy, where damages were claimed for chicanes and vexations, but the reporter states: "But it would be otherwise if the condemnation was founded on "a prejudice caused only by the delay in payment." The second is the *arret* mentioned by Demolombe Vol. 24, where the execution of a contract was in question.

Sirey Table Decennale Vo. Dommages-intérêts, No. 27.

1 Larombiere p. 565-570, No. 10."

I think the case is controlled by the Art. 1077. I can see no sufficient reason for departing from the sense of the text or excluding the present case from its operation. I think it would be extremely dangerous to do so; it would be embarking on an unlimited sea of expansion in the estimate of damages which the law has wisely closed; it would be admitting of a latitude where the measure would be wholly arbitrary and the results in some cases possibly oppressive.

I would be disposed to deny the respondents' right of action in the present case; I would reverse the judgment of the Superior Court and dismiss respondents' action.

RAMSAY, J.—This appeal gives rise to a question of some interest and some novelty. The County of Ottawa agreed to take 200 shares in the stock of the Company respondent, to pay for them by debentures bearing interest at six per

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cent., on certain conditions. These conditions were complied with, but the Company, on demand, refused to deliver the debentures. This appears to have deranged the affairs of the Company respondent, and to have done the respondent great damage. The respondent sued the appellant in damages, and was met by a demurrer, taking up the ground that this was an undertaking to pay money, and that the only damage for the delay in the payment of money was interest at the legal rate.

The demurrer was dismissed—we are not told why—but I think there is no difficulty in suggesting more than one good reason for its dismissal. The whole question came upon the merits, and the learned Judge in the Court below awarded the respondent $100 damages. In doing so he adopted a principle which was insisted on by the learned counsel for the respondent before this Court, and which he supported by a very respectable array of authority. It is this—that article 1077 C. C. only provides that the damages for the delay in the payment of money consist only of interest," etc., "*ne consistent que dans l'interêt*" —and that therefore there may be other damages for the non-payment of money. It is said this article is borrowed from Art. 1153 C. N., and that the writers under this article in France have held that there may be other damages than interest where money has not been paid. It is proper to remark that the *redaction* of 1153 C. N. is very different from that of Art. 1077 C. C. Art. 1153 is in these words: "Dans les obligations qui se bornent au paiement d'une certaine somme, les dommages et intérêts, résultant du retard dans l'exécution, ne consistent jamais que dans la condamnation aux intérêts fixés par la loi."

I do not, however, attach much importance to this difference of *redaction*. It seems to me to establish a distinction almost inappreciable, and one which it is evident the Codification Commissioners did not see. They say, p. 18, 1st Rep: "The section intituled, 'of damages' resulting from the inexecution of obligations, contains articles numbered from 90 (96) to 98 (103), which, with "some changes of expression and difference of arrangement, embody the rules "contained in the articles of the French Code, numbered from 1145 to 1154, "and declare the existing law."

If I have understood the meaning of the French writers cited by respondent, it is this: that Article 1153 C. N. limits the damages arising from the delay to pay money to legal interest only, when the obligation is limited to the payment of money; but that when the payment of money is portion of another substantial contract, then all the damages resulting indirectly from the delay can be exacted. This is ingenious, but very forced, and it is absolutely inadmissible under the *redaction* of our Article 1077. The opportunity of setting the legal mind astray on this question arises from the weakly pedantic and false doctrine of Article 1053 C. C., which is obviously incompatible with Art. 1074 to 1075 C. C. It is borrowed, with variations, from Arts. 1182 and 1183 C. N., which, in their turn, are even more forcible in contradiction with Arts. 1150 and 1151 C. N. Whatever may be the origin of the idea which was expressed by the application of the three degrees of comparison to *culpa*, we have the advantage of knowing that 1053 C. C.

was adopted to substitute a new basis for damages, under guise of re-asserting the true principles of law, 1st Rep., p. 18. How far the omission of the square brackets is justifiable it is not necessary now to enquire.

I am therefore of opinion that the failure to pay money at the proper time can only give rise to the immediate and direct damages resulting therefrom, and which are limited by law to the legal interest on the sum.

But the next question is, whether the obligation to give debentures bearing interest at 6 per cent. is an obligation to pay money? Strictly speaking it is not; and I think we can hardly say it is an equivalent, as when commercial paper is given. Now the rule of Art. 1077 is one of positive law, and an exception to the general rule of article 1073 C. C. If Art. 1073 had stood alone, and without Art. 1077, damages for the delay to pay money would have been the loss the creditor has sustained. I am therefore to confirm. I think these remarks dispose of the whole argument as presented at the bar, but a new view is presented by the dissent, which it becomes important to consider, in order that it may not be supposed we have overlooked it.

Before doing so, I would, however, remark that reference was made to what I said in *Ansell & The Bank of Toronto*; but it will be remembered that the judgment went on the merits, and that I only put as a question whether that case was not within Article 1077 as being equivalent to the payment of money.

I understand the argument of the learned Chief Justice to be this:

The damages sought to be recovered are specially for loss of credit, loss of prospective gains and interest; that on such a declaration no general damages could be given, not even nominal damages; that there was no such thing as nominal damages in the French law; that by that law all damages were real, and that the nominal damages of the English law were a farthing on the shilling. It was further said that in England loose speculative opinions as to probable gains were considered as inconclusive and too remote. It was also said that there could be no damages by way of interest, for the action was taken out on the 19th June, and the *mise en demeure* to deliver the bonds was only on the 19th January, so that interest on the bonds was not due till July.

I quite agree with the Chief Justice, that if the Civil Code is to be taken as embracing all the principles of damages known to the French law these damages are not sustainable; but it is evident that the articles on damages in the Code are miserable insufficient. I do not see how any one who has read Pothier and the old authors on the subject can arrive at the conclusion that there were no nominal or exemplary damages under the old French when positive proof of loss was impossible. At all events, it is pretty late in the day to set up such a doctrine, for we have here been giving exemplary damages, damages estimated by the Court, and nominal damages, ever since I have known anything of the matter. I never heard the right questioned before, except by a once well-known citizen, who made it a charge against Judge Aylwin that he had given some small damages as recognition of the right of action, although no real damage was positively proved. I don't think the criticism produced much impression. If nominal damages can only be a farthing or a shilling, then nominal damages for

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personal wrongs cannot carry costs. (478 C. C. P.) If, again, these debentures are considered as money, or equivalent to money, what has been allowed, $100, is far less than the interest on $112,000 from 17th January to 19th June. To say that interest *as damages*, could not be due because the interest on the debentures was not due till July appears to me as a fallacy. The interest on the debentures could never be due, because they never were issued. Our article only says that interest is the measure of damage for non-payment of money. It does not surely mean that the damage may not be asked for with the demand. It has also been said that if the judgment is good it is for too little. That is hardly a ground of appeal in the mouth of the party condemned. It seems to me that the judgment is highly equitable and just, and is perfectly in accordance with the law, and that is the opinion of the majority of the Court. The appeal will, therefore, be dismissed with costs.

Judgment confirmed. *

Laflamme, Huntington, Laflamme & Richard, for appellants.
De Bellefeuille & Bonin, for respondents.
(J. K.)

* The case is now before the Supreme Court.

COURT OF REVIEW, 1883.

MONTREAL, 31st OCTOBER, 1883.

Coram TORRANCE, J., JETTE, J., MATHIEU, J.

No. 125.

Arpin vs. *Roy et al.*

HELD:—Where an insolvent (under the Insolvent Act of 1875), in the statement of his affairs, described a note given by him as having been made in June, whereas it was made in December, that he was not freed from liability thereon by his discharge in insolvency.

TORRANCE, J.—The action was on a note made by Roy and indorsed by the other defendant Dubois. Roy pleaded his discharge in insolvency. Dubois pleaded that he was discharged by the negligence of Arpin in not claiming against Roy in insolvency, and that Arpin had given Roy delay, which had discharged Dubois. The Court below found for plaintiff on all these pleas. The point of chief importance was whether the discharge in insolvency had affected the claim of plaintiff. By section 61 of the Insolvent Act, Roy, in order to have the advantage of the Act, had to specify the note in the statement of his affairs. He mentioned a note made in June, and this was made in December. The Court said it was insufficient. The case of Duhamel and Payette, 1 Legal News, 162, and Bank of North America and Copeland, 4 Legal News, 154, are in point. I see no error.

JETTE, J., dissented.

Judgment confirmed.

Lorrain, for plaintiff.
Geoffrion & Co., for defendant.
(J. K.)

COURT OF REVIEW, 1884.

MONTREAL, 31st JANUARY, 1884.

Coram JOHNSON, J., TORRANCE, J., RAINVILLE, J.

No. 1327.

Joubert es qual vs. *Walsh.*

HELD:—That the expression "enfans," in a donation creating a substitution in their favor, includes "les petits enfans," in the absence of any express limitation in the deed in favor of the children only.

This was a Review by the defendant of a judgment rendered in favor of the plaintiff by the Superior Court, at Joliette, (Mathieu, J.), the facts connected with which are fully disclosed in the following remarks of the Judges in Review:—

JOHNSON, J.—The judgment in the present case was in favor of the plaintiff in a petitory action which he brought as tutor to his minor children, whom he alleged to be substitutes (*appelés*) under a substitution said to have been created by the will of their great grand-father, and great grand-mother. On the 27th of March, 1824, Louis Marie Joseph Beaumont and his wife made a settlement of their property, in the form of a donation, on their children, three daughters, and one son. One of the daughters was Marie Joseph Adelaide—whose share is now under discussion,—and the son was Louis Charles. The plaintiff contends that his children who are the grandchildren of Louis Charles Beaumont, are called to a substitution created by this deed of settlement of the 27th March, 1824; and the defendant, holding under the will of Marie Jos. Adelaide Beaumont, maintains that, under the terms of that deed, she could validly dispose of the property she got from her parents in the defendant's favor, there being no substitution that could reach the grand-children, under a proper interpretation of the settlement. The terms of the deed necessary to be referred to now are that the parents desiring—"désirant prévenir toutes difficultés entre leurs enfans après "leur décès, et assigner à chacun sa part et portion dans leurs biens, etc., ont "volontairement reconnu et confessé par ces présentes, avoir fait donation pure, "simple entrevifs irrévocable, et en la meilleure forme et manière que donation "peut se faire et valoir, et à titre de fidei commis, et pour plus grande sûreté ont "promis, et promettent solidairement, l'un pour l'autre, un d'eux seul pour le "tout, sous les renonciations requises et de droit, garantir de tous troubles, "dettes et empêchements quelconques à quatre de leurs enfans, savoir Reine "Véronique Françoise Beaumont, épouse de Pierre Graton; Rose Emile Beau-"mont, fille majeure, Marie Josette Adélaïde Beaumont, fille majeure, et Louis "Charles Beaumont, demeurant tous deux avec les donateurs, etc., etc., "à demoiselle Marie Josette Adelaïde Beaumont, pour elle, ses hoirs et "ayant cause, à l'avenir c'est-à-dire pour elle, l'usufruit, et pour ses enfans, "nés en légitime mariage la propriété, et aux conditions ci-après faites" (then follows the description of her share of the property.)

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This donation was further made subject to the charges and conditions following, viz: "Pour de tout ce que dessus donné, jouir, user, faire et disposer par chacun des dits Sieurs et Dames, donataires sus-nommés à titre d'usufruit leur vie durant, pour après leur décès être remis le tout au dit Sieur Louis Charles Beaumont, l'un des dits donataires usufruitiers qui les remettra à leurs enfans nés en légitime mariage comme susdit, à leur âge de majorité, chacun en droit soi eu égard aux présentes. * * * * * *

"Et en outre à la charge de bien cultiver, etc. et les entretenir en bon état, afin qu'elles soient remises de même aux donataires propriétaires y désignés, c'est-à-dire aux enfants nés en légitime mariage des dits sieurs et dames, donataires *usufruitiers à titre de fidei commis*, et nommés avec cette condition toujours, que si aucun des dits donataires usufruitiers décédé sans enfans nés en légitime mariage comme susdit, la part ès biens sus donnés à ses enfans sera reversible au dit sieur Louis Charles Beaumont pour par lui en jouir à titre d'usufruit seulement sa vie durant et au dit titre de fidei commis, pour en remettre la pleine et entière propriété à ses enfans nés en légitimo mariage."

Then, just at the end of the deed there is another clause of some importance, as follows: "Au moyen de tout ce que dessus les dits Sieur et Dame donateurs transportent aux dits donataires *leurs petits enfans*, tout droit de propriété, fonds, très fonds, noms, raisons, actions, saisine, possession et autres choses *généralement* quelconques qu'ils avaient et pourraient avoir, demander, ou prétendre," etc.

As to the facts: this Marie Jos. Adelaide never had any children, and survived not only her brother but also his children; and then, treating this substitution as at an end, she made a will under which the defendant claims; but, on the other hand, Louis Charles Beaumont who died in 1855, left two daughters, who both died before Marie Josette Adelaide Beaumont; but one of them (Madame Joubert) left two children now represented by their tutor, the plaintiff in this case. The judgment has maintained the plaintiff's action (I speak now merely of the substitution of the real estate, and the taking of the property by the grandchildren, because that is the only part of the case brought before us). On every part of the case, however, the judgment was most learned and exhaustive; and on this particular part with which we are now concerned it rested on the principle that the word "children" either in the disposing part or in the conditions of substitutions *fidei commissaires*, applies to more than one degree, unless it appears from the terms of the instrument that the word "children" was used in a restricted sense. This donation was made before the Code; but it cannot be maintained that the Code has changed the law in this respect. Art. 980 C. C. reads: "In the prohibition to alienate, as in substitutions, and in gifts and legacies in general, the terms children, or grandchildren, made use of without qualification, either in the disposition or in the condition, apply to all the descendants, with or without the effect of extending to more than one degree according to the *terms* of the act."

The French version says: "according *to the nature* of the act *(suivant la nature de l'acte)*." I do not know whether the learned counsel who argued the

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defendant's case with such consummate dexterity, noticed this, but he said that we must look not to the intention which the donors might have entertained, but to the intention they have expressed. I quite agree to this; but, taking either the English or the French version of the Code, the question will still be whether those intentions are sufficiently expressed. Of course we cannot resort to conjecture or to probabilities, in the absence of sufficiently expressed intention:—but if, from the instrument as a whole, the intention appears sufficiently expressed, we may disregard particular terms, and this is precisely what is said in Art. 928: "A substitution may exist, although the term usufruct be used "to express the right of the institute. In general the whole tenor of the act "and the intention which it sufficiently expresses are considered, rather than "the ordinary acceptation of particular words, in order to determine whether "there is substitution or not." I have read this deed very carefully and considered the bearing of all its parts, each on the other; I find the intention of the donors sufficiently expressed to be that each of the donees was charged with a substitution in favor of his or her children; that Louis Charles was to take and enjoy the usufruct of the property given to his sisters who might die leaving minor children, and deliver the property to them at their majority. That in case of the death of either of the female donees without leaving children, the property given to her was to revert to Louis Charles, but only during his life, and under the *charge de rendre* to his children. That under Art. 980, the word "children" here included the grandchildren, and that there is no qualification in the deed to limit it. That the clause at the end of the deed which has been quoted, and was relied upon as expressing a limitation to the children only, is neither a disposing clause nor a condition, but simply a matter of style, a sort of final flourish of the notary. And, lastly, I find that the grandchildren of Louis Charles are really *appelés* in default of children—so much so, that if Marie Josette Adelaide had died while there were both surviving children and grandchildren of Louis Charles, the grandchildren would not have been called at all, under Art. 937, which excludes representation in substitutions. I am, therefore for confirming this judgment, and it will be confirmed with costs.

RAINVILLE, J.:—Le demandeur en cette cause, en qualité de tuteur à ses enfants mineurs, a pris une action pétitoire contre la défenderesse: il revendique une propriété, au nom de ses enfants comme appelés à une substitution créée en 1824 par leurs arrières grand'père et grand'mère. Toute la question à décider en cette cause est d'savoir si dans une substitution les petits-enfants sont compris sous nom le *d'enfants* dans la disposition. En 1824, Louis Marie Joseph Beaumont et Marie Rose Gauthier, son épouse, firent un acte de donation à leurs enfants, un garçon, Louis Charles et trois filles dont l'une s'appelait Marie Josephte Adélaïde. Cette donation est une espèce de partage de leurs successions; l'acte dit: "désirant prévenir toutes difficultés entre leurs enfants après leur décès et assigner "à chacun part et portion dans leurs biens, les dits donateurs font donation à....

3o. "A Marie Josephte Adélaïde, leur fille majeure....C'est-à-dire pour elle "l'usufruit, et pour ses *enfants* nés en légitime mariage la *propriété*, (descrip-

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" tion des propriétés,) pour de ce que donné, jouir, user, faire et disposer par " chacun des dits Sieur et Dame donataires susnommés à titre d'usufruit leur " vie durant, pour après leur décès être remis le tout au dit Sieur Louis Charles " Beaumont qui les remettra à leurs enfants nés en légitime mariage à leur âge " de majorité respective.

Et en outre " à la charge par les donataires, leurs hoirs et ayant cause de " bien et dûment cultiver les dites terres et les entretenir en bon état afin " qu'elles soient remises de même aux donataires propriétaires, y désignés, c'est-" à-dire, *aux enfants nés en légitime mariage des dits Sieur et Dame* donataires *dits* " usufruitiers à titre de fidei commis y nommés, avec cette condition toujours," que *si aucun des* donataires usufruitiers décède sans enfants nés en légitime mariage comme susdit la part des biens sus-donnés à ses enfants sera reversible au dit sieur Louis Charles Beaumont pour par lui en jouir à titre d'usufruit seulement sa vie durant et au dit titre de fidei commis, pour en remettre la pleine et entière propriété à ses enfants nés en légitime mariage." A la fin de l'acte on trouve la clause suivante: " Au moyen de tout *ce que dessus les dits Sieur et Dame donateur transportent aux dits donataires leurs petits-enfants*, tous droits de propriété, fonds, bien-fonds, les noms, raisons, actions, saisine, possession et autres choses généralement quelconques qu'ils avaient et pouvaient avoir, demander ou prétendre en et sur tout ce que dessus donné, s'en démettant pour et à leur profit et *à celui des hoirs et ayant cause* voulant qu'ils soient saisis, mis et reçus en bonne possession et saisine, par et ainsi qu'il appartiendra."

Discutons d'abord la question comme si cette dernière clause ne se trouvait pas à l'acte: nous apprécierons ensuite et nous verrons si elle peut modifier la solution à laquelle nous arriverons.

Afin de dégager le point en litige de la complication des faits nous n'exposerons que ceux qui sont nécessaires à la cause, laissant de côté ceux qui n'ont aucune influence, et référant ceux qu'ils pourraient intéresser au rapport de cette cause et au jugement très élaboré de mon collègue M. le juge Mathieu. 12 R. L. 334.

Louis Charles Beaumont est décédé en 1855, laissant deux filles, dont l'une est morte en bas âge, et l'autre Marie Rosanna Georgiana en 1870, laissant deux enfants qui sont demandeurs en cette cause, représentés par leur tuteur. La donataire Marie Josephte Adélaïde, n'est décédée qu'en 1881 sans laisser d'enfants: mais croyant que la substitution créée par l'action de donation de 1824, en faveur des enfants de Louis Charles, son frère, était caduque par suite de leur prédécès elle fit un testament, et légua les biens à elle donnés par cet acte de donation, à la défenderesse ou plutôt à une personne dont la défenderesse a hérité. Comme je l'ai dit, les arrières *petits-enfants* des donateurs ont pris une action pétitoire contre la défenderesse, se prétendant appelés *sous le nom enfants*, à la substitution créée par l'acte de donation sus-relaté.

La cour de première instance a maintenu l'action du demandeur en quel sur le principe que dans les substitutions le mot *enfants* employé soit dans la disposition soit dans la condition, comprend les *petits-enfants* et *autres descendants*.

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La défenderesse soumet ce jugement à la révision de ce tribunal et si je comprends bien le factum, les mémoires et l'argument du savant avocat qui nous a soumis sa cause, le jugement serait erronné pour deux raisons.

1o. Parce qu'en matière de substitution le mot *enfants* ne comprend jamais, du moins avant notre Code, ne comprenait jamais les *petits-enfants*, lorsqu'il était employé dans la disposition.

2o. Parce que dans la présente instance, le mot *enfants* est qualifié en autant que les donateurs transportent aux dits *donataires* " *leurs petits-enfants* " tous droits de propriété, *noms, raisons*, etc., s'en démettant pour et à leur profit et à celui de leurs hoirs et ayant cause," etc., et qu'ainsi le mot *enfants* est restreint aux *petits-enfants* et ne s'étend pas aux *arrières petits-enfants*.

PREMIÈRE PROPOSITION.

Le mot *enfants* employé seul dans la disposition d'une substitution ne comprenait pas les *petits-enfants* avant le Code Civil.

Exemple.—Un père donne une propriété à son fils et il lui substitue ses enfants; le fils mourt, avant son père, laissant un enfant: cet enfant lui-même meurt avant son grand-père, mais il laisse aussi un enfant; cet arrière petit-enfant recueillera-t-il la substitution à la mort de son arrière grand'père, donateur primitif?

Non, dit l'avocat de la défenderesse, si je comprends bien son raisonnement Et il nous cite les Arts. 937 et 980 de notre Code Civil.

" La représentation, dit l'art. 937 n'a pas lieu dans les substitutions non plus " que dans les autres legs, à moins que le testateur n'ait ordonné que les biens " seraient déférés suivant l'ordre des successions légitimes, ou que son intention " au même effet ne soit autrement manifestée."

Et l'art. 980 dit :

" Dans la prohibition d'aliéner, comme dans *la substitution* et *dans les donations* et les legs en général, le terme *enfants* ou *petits-enfants employé seul*, soit " dans *la disposition*, soit dans la *condition* s'applique à tous les *descendants*, " avec ou sans gradualité, suivant la nature de l'acte." Donc, dit la défenderesse, si d'après l'art. 937 qui est admis être conforme à l'ancien droit, il n'y a pas de représentation en matière de substitution, l'action du demandeur est mal fondée; car ceux au nom desquels il poursuit ne peuvent avoir d'actions qu'en vertu du *droit de représentation* et comme *représentant* leur mère, fille de Louis Charles Beaumont. Mais, dans quel cas alors appliquera-t-on l'art. 980 pour inclure les *petits-enfants* dans le terme *enfants* employé dans la disposition d'une substitution?

On semble voir d'abord, une espèce de contradiction entre ces deux articles, et ensuite on répond que l'art. 980 dans la partie qui édicte que le mot *enfants* dans la disposition d'une substitution s'applique à tous les descendants, est de droit nouveau et que d'après l'ancienne jurisprudence le mot *enfants* ne comprenait les *descendants* que lorsqu'il était employé dans la *condition* et non pas lorsqu'il était employé dans la disposition.

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Et à l'appui de cette proposition on cite Pothier, substitution No. 66, Vol. 8, Ed. Bugnet. " Le terme *enfants*, dit cet auteur, se trouve souvent employé dans les substitutions, soit dans la disposition, comme lorsqu'on substitue à quelqu'un ses *enfants*; soit dans la condition, comme *lorsqu'on a grévé* quelqu'un de substitution, s'il meurt sans enfants. Ce terme ne reçoit pas la même interprétation."

" Lorsqu'il est employé dans la disposition, il est restreint aux enfants du premier degré. C'est ce qui résulte de l'art. 11 de l'Ordonnance de 1731."

" Au contraire, le terme *enfants* employé dans la condition, comprend tous les descendants."

" La raison de différence de ces interprétations, est que la cause de l'héritier étant défavorable, la cause de la libération étant favorable, les termes de la disposition de la substitution doivent être entendus dans le sens étroit qui étend le moins qu'il est possible la substitution dont l'héritier est chargé, au lieu que, par la même raison, les termes de la condition qui tendent à restreindre la substitution doivent être entendus dans le sens large, pour étendre la condition et restreindre la substitution."

Pothier invoque, comme on le voit, l'art. 11 de l'Ordonnance des donations, à l'appui de son opinion et comme réglant la question. D'abord l'Ordonnance des donations n'a pas force de loi en ce pays, et en référant à cet article et aux commentateurs je ne trouve rien dans les dispositions qui puisse contenancer l'opinion de Pothier.

Voici cet article:

" Lorsqu'une donation aura été faite en faveur du donataire et des *enfants* qui en naîtront, ou qu'elle aura été chargée de substitution, au profit des dits *enfants*, ou autres personnes nés ou à naître, elle vaudra en faveur des dits *enfants* ou autres personnes nés ou à naître par la seule acceptation du dit donataire."

" Cet article dit Sallé, p. 24, décide qu'une donation faite en faveur du donataire et de ses *enfants nés et à naître*, ou qui charge le donataire de substitution envers ses *enfants ou autres* quand bien même ils ne seraient ni *nés*, ni *conçus*, est parfaite par la seule acceptation du donataire."

Ricard, Donat, part. 1. ch. 4, s. 1, No. 870 (ou 850 suivant l'Edition) atteste que l'on suivait ce droit de son temps et que l'on y jugeait sans contredit que l'acceptation du premier donataire profitait à tous ceux des degrés suivants.

On sait que Ricard est mort longtemps avant que l'Ordonnance des donations eut été édictée; je ne vois donc là rien qui justifie l'opinion de Pothier, et il est étrange qu'aucun autre en parle.

Pothier lui-même ne cite aucun auteur, aucun arrêt à l'appui de son opinion, et l'on sait que son traité des substitutions et quelques autres sont loin d'être à la hauteur de son traité des obligations. La doctrine de Pothier est isolée et contraire à celle de tous les autres auteurs et de la jurisprudence netières.

Constatons d'abord que les principes applicables à l'interprétation des legs sont également applicables aux fidéi commis; c'est ce que les jurisconsulte

ont appelé *l'exéquation* des legs et des fidéi-commis, c'est-à-dire que les legs étaient égalés aux fidéi commis et réciproquement.

" Thévenot, Subst. ch. 4, No. 58,s.

Pour moi, ajoute-t-il, je dis que les legs et les fidéi-commis par testament ne diffèrent que de nom. Thévenot, Subst, loc. cit. No. 65, Ricard No. 298. Au reste ce qu'il y a de plus important à saisir et à retenir sur ce point, c'est que, d'après *l'exéquation*, toutes les règles du droit sur les legs, s'appliquent aux fidéi commis—Thévenot, No. 69.

Il est intéressant encore d'observer, *que les règles des legs* ne s'appliquent pas moins au fidéi commis par *donation* entrevifs, qu'au fidéi commis par testament. Les fidéi commis par donation, entre vifs étaient reçus chez les Romains lorsque Justinien égala les fidéi commis aux legs.

Or, en établissant *exéquation*, cet empereur parle de tout les fidéi commis sans distinguer ceux qui sont entrevifs, de ceux qui sont à cause de mort.

Thévenot, Subst. ch. 4, No. 75.

Il peut paraître étrange, qu'un fidéi commis fait par acte entrevifs soit gouverné en tout par les mêmes règles que celui qui est fait dans un acte à cause de mort.

Cependant telle fut la jurisprudence des Romains *et telle est la nôtre même.* Thévenot, loc. cit. No. 76, et ch. 10, No. 141, et seq.

On ne peut trop remarquer que les fidéi commis, transplantés dans les donations entrevifs, y portèrent leur première nature. Ils demeurèrent sujets, dans ces contrats mêmes à toutes les règles qui les gouvernaient dans les testaments et autres actes à cause de mort. Thévenot, c. 10, No. 159. Thévenot, au No. 162, conclut en ces termes: " Par conséquent les fidéi commis conservèrent dans les *donations entre-vifs* même leur ancienne nature de *disposition* testamentaire.

Voir Thévenot ch. 4 No. 58 à 76 et ch. 10 No. 141 à 172, et ch. 28, s. 8, No. 528 et ch. 79 No. 1132 et Ricard Subst. No. 130 p. 252, Ed. Bergier. Merlin, Rep. vo. enfant, § 2, résume la question dans les termes suivants:

" La question qui nous reste à examiner est de savoir si le mot *enfant* que " est si souvent employé dans les contrats et dans les testaments, renferme tous " les *descendants*. Par exemple, j'institue Pierre, et en cas qu'il meurt " *sans enfants*, je lui substitue Paul; Pierre, en mourant, ne laisse qu'un " petit-fils: étendra-t-on à ce petit-fils la signification du mot *enfant* et en conséquence fera-t-il manquer la condition?

" Autre exemple. J'institue Sempronius, et à sa mort je lui substitue ses " *enfants*. Supposé qu'au moment de l'ouverture de la substitution il ne se " trouve qu'un *petit-fils de* Sempronius, ce *petit-fils* sera-t-il censé appelé?

" L'affirmative était certaine dans le droit romain; le mot *liberi* comprenait " sans difficulté, tous les descendants, en quelque degré qu'ils se trouvassent."

Henrys soutient la négative: mais nous voyons tous nos meilleurs auteurs professer la doctrine contraire et enseigner l'affirmative.

Ecoutons Dumoulin sur la C. de Paris: " Verbum Gallicanum *Enfants* " non est de se restrictum ad primum vel alium gradum: sed indifferenter " supponit quos vis descendentes, sicut verbum *liberi* in lege Romana.

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Il cite ensuite Ricard. Substitutions, et voici ce que dit cet auteur qui a jeté tant de lumière sur la question au No. 506, ch. 8, s. 2, il dit:

" Quant à ce qui concerne le mot *d'enfants* qui est celui qui se trouve le " plus fréquemment employé dans la matière des substitutions, il passe pour " collectif dans notre langue, aussi bien que dans la latine: Et lorsque nous " parlons de nos *enfans* en général, ou de ceux *d'une tierce* personne nous enten- " dons parler *de tous les descendants* et nous y comprenons tant les *enfants* du " premier degré que ceux du *second* et *des autres suivants.*"

Et au No. 583 il ajoute.

" Nous avons ci-dessus établi que dans un fidei commis fait sous ce nom " collectif *d'enfants*, non-seulement les enfants du premier degré mais aussi " ceux des degrés suivants, étaient compris. Nous avons fait voir S. 5 de notre " traité des dispositions conditionnelles, que ce mot s'étend également aux deux " sexes et qu'il a autant d'effets que si le testateur s'était servi du mot " *descendants.* Ce qui a lieu, soit qu'il s'agisse d'empêcher l'ouverture d'un " fidei commis, en conséquence de la condition, *s'il décède sans enfants*, ou de " *donner effet à une substitution* en faveur des filles, soit qu'elles se trouvent " *seules*, ou en concurrence avec leurs frères, *ou bien au profit des petits-enfants* " si leur père est décédé, lorsque le fidei commis commence à avoir lieu: ce mot " étant général pour signifier *les deux sexes*, et tous les *degrés* de la *ligne descen-* " *dante.*

Furgol. Testam. ch. 7, Sect. 6 No. 125 dit aussi: " Ainsi le mot *enfants* " comprend par son énergie et par la signification que la loi et l'usage lui ont " attribué, et non par *interprétation* ou *extension*, tous les *descendants* à " quelque degré qu'ils soient, lorsqu'ils sont à la place de ceux du premier degré " de génération qui sont décédés sans avoir recueilli; et quoique les fidéi commis " soient des charges, et qu'ils soient par conséquent de rigueur, on doit " néanmoins y admettre les personnes qui sont *appelées* selon la signification la " plus étendue des paroles parce que *plenius interpretamur mori entum voluntates.*"

Il cite un arrêt du Parlement de Paris de 1536, rapporté par Charondas et un autre rapporté dans Sœve. Et il en rapporte un troisième de 1698 qui décide le point d'une manière bien précise. (Nous y référerons plus tard lorsqu'il s'agira de la question de la *représentation.*)

Guyot, Rep. vo. Enfant p. 720.

Denisart vol. 4 p. 598 vo. Substit. No. 116 rapporte aussi un arrêt dans le même sens.

Thévenot d'Essaule, Subst. ch. 53, p. 309, pose aussi la même question:

" Le mot *enfants* employé dans la *condition* ou dans la *vocation*, en matière " de substitution, renferme-t-il tous les descendants?

" Chez les Romains l'affirmative était certaine. *Elle l'est également dans nos mœurs.*"

Il cite Dumoulin et Ricard, et il ajoute. " L'ord. des testaments n'a pas " changé ce principe: elle le *suppose* plutôt.

Voir aussi les autorités citées par M. le Juge Badgley in re Lee & Martin, 9 L. C. R. 351.

Il est donc établi que l'art. 980 n'a fait que reproduire l'ancien droit et que, l'opinion de Pothier est restée isolée et que le mot *enfants*, soit dans la *condition* soit dans la *disposition*, comprend tous les *descendants* à quelque degré qu'ils soient. Joubert et qua vs. Walsh.

Admis, dira la défenderesse; mais les petits-enfants ne peuvent recueillir la substitution que comme *représentant* leur mère :

Or, par l'art. 937 de notre Code la représentation n'a pas lieu dans les substitutions, sauf deux exceptions : 1o. "à moins que le testateur l'ait ordonné que " ses biens seraient déférés suivant l'ordre des successions légitimes ; 2o. ou que " son intention au même effet ne soit autrement manifestée. "

Cet article correspond à l'art. 21 du Tit. 1 de l'ord. de 1747.

Aucun texte de droit n'avait introduit la représentation dans les substitutions : cependant sous l'ancien droit quelques auteurs, entre autres Ricard No. 676 et seq. avaient cru devoir l'introduire lorsqu'il s'agissait de fidei commis fait *a la famille*, ou à la *descendance*. Mais l'ord. de 1747 exclut la représentation dans les fidei commis, à moins que l'auteur de la substitution ne l'ait prescrite par une disposition expresse.

Thévenot ch. 64, No. 990 et suiv. p. 325. 2 Ricard, Subst. p. 371 et 372.

On sait que sous l'ancien droit quelques auteurs étaient d'avis qu'il y avait droit de *représentation* lorsque le *fidei commis* était fait à la famille ou aux descendants *nomine collectivo*, et une partie des parlements suivaient cette opinion et jugeaient en conformité.

Sallé, esprit des ord.

Ord. des Subst. art. 21, p. 275

Telle était l'opinion de Ricard, Subst. No. 676, p. 389, Ed. Bergier. L'ord. des Subst. a rejeté la volonté conjecturale du disposant que l'on appuyait sur une présomption de la volonté du disposant. Thévenot, Subst. ch. 64, No. 989.

" La représentation, dit l'ord. de 1747, T. 1 art. 21, n'aura point lieu dans " les substitutions soit en directe ou en collatérale ; et soit que ceux en faveur de " qui la substitution aura été faite y *aient été appelés collectivement* ou qu'ils " y aient été désignés *en particulier* et nommés *suivant l'ordre de la parenté* " *qu'ils avaient avec l'auteur de la substitution* : le tout à moins qu'il n'ait " ordonné par une *disposition expresse*, que la *représentation* y *aurait lieu* ou " que la *substitution serait déférée suivant l'ordre des successions légitimes.*"

Sallé, esprit des Ord.—Ord. de 1747 Art. 21 p. 275.

Je crois devoir faire remarquer que l'art. de l'ordonnance est plus restrictif que l'art. 937 de notre code, et qu'on n'y trouve pas la dernière exception de notre code savoir la manifestation implicite de la volonté du testateur ; il n'y a sous l'Ord. que deux exceptions à la prohibition de la représentation dans les substitutions même faite à *des appelés collectivement* (*des enfants, des descendants,*) " la 1ère. à moins qu'il n'ait été ordonné par une *disposition expresse* que " représentation y aurait lieu, la 2ème, ou que la substitution serait déférée " suivant l'ordre des *successions légitimes.*"

Qu'est-ce donc maintenant que la représentation en matière de substitution ?

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C'est l'image de la représentation en matière de succession ; c'est une fiction de la loi qui met les enfants ou les héritiers d'une personne décédée à sa place pour recueillir les mêmes droits que leur père ou leur auteur auaitr pu prétendre il eut vécu jusqu'à l'échéance ou l'ouverture du fidei-commis,

" La représentation, dit encore Furgole sur l'art. 21 de l'Ordonnance de 1747, " est une fiction, qui met les enfants d'une personne décédée à sa place, pour re- " cueillir les mêmes droits que le décédé aurait pu prétendre s'il avait vécu " jusqu'à l'échéance des droits. La représentation rapproche donc les repré- " sentants et les place au même degré que le représenté, non en subrogeant une " personne à une autre mais en mettant les représentants par une fiction légale au " même degré où le représenté se trouvait : car selon la décision des meilleurs " auteurs, les *enfants*, qui viennent par la *représentation*, *représentent*, non la " personne de leur père et mère décédés, mais *le degré*, et ils viennent *ex* " *propriâ personâ*. Ce qui établit une différence essentielle entre la *re-* " *présentation* et la *transmission* à cause que le transmissionnaire vient *ex alieno* " *jure*."

" Par suite de la représentation, dit Thévenot, il arrivait que si le père " appelé à la substitution, était décédé avant l'ouverture, le fils prétendait " y venir comme le représentant : quoique l'auteur du fidei commis n'eut point " manifesté à ce sujet sa volonté."

Mais dans la présente cause les demandeurs, petits-enfants de Louis Charles Beaumont, ne viennent pas comme *représentant* leur mère Marie Rosanna Georgiana Beaumont, mais ils viennent de leur propre chef, de leur droit propre comme appelés personnellement à la substitution tout comme si les donateurs au lieu de se servir dans l'acte de donation de 1824, du mot *enfants*, seul, avaient ajouté ; Et à défaut *d'enfants* aux *petits-enfants*." Ils ne viennent pas comme succédant à leur mère et la *représentant* mais comme appelés vulgairement au premier degré à défaut des premiers institués. Telle est l'opinion de tous les jurisconsultes sanctionnée par tous les arrêts tant avant qu'après l'ordonnance de 1747.

" La substitution, dit Bourjon, étant faite au profit des *enfants* ou descendants " de l'institué ne forme pas une substitution graduelle : car elle n'appelle que les " *enfants* et à leur défaut les *petits-enfants* : les *enfants* ayant recueilli ne sont " pas chargé de remettre et la substitution est remplie. Ce n'est toujours " qu'un seul et premier degré, dans lequel une telle substitution se consomme."

" La substitution, dit Ricard, faite en faveur des enfants, des descendants, de " la famille et toutes les substitutions faites en noms collectifs, sans rien ajouter " de plus, s'arrêtent au premier *degré* et laissent les biens libres sur la tête des " *premiers* qui recueillent. Ricard, Subst. No. 513 et suiv.

" Venons aux conséquences. De là il s'ensuit, que si les uns ou les au- " tres recueillent, ils possèdent librement, parce que c'est une simple substitu- " tion qui cesse au premier degré ; elle n'a pas plus d'étendue, ni dans la " lettre de la disposition, ni dans l'intention du testateur : il l'a bornée là. " En un mot ce n'est pas substitution graduelle, mais fidei commissaire et " limitée à un premier degré, mais qu'il faut remplir."

2 Bourjon Tit. 5 Subst. ch. 4 § 3 et 4, p. 169.
2 Basset Liv. 8, T. 2, ch. 1.
2 Journ. des Aud. Liv. 2, ch. 6.

L'expression *enfants*, dit Ricard ou plutôt Bergier en ses notes, est générique et renferme tous les *descendants*.

" Il ne faut pas cependant conclure de là que lorsqu'une substitution est faite " aux *enfants*, les *petits-enfants* concourrent avec les enfants du premier degré. " On observe entre eux la même règle que les fidei commis faits à *la famille*. " Les *enfants* du premier degré sont préférés. C'est ce qui résulte de l'art. " 62 de l'ord. de 1735. Mais, lorsqu'il n'existe point *d'enfants* au premier " degré, au moment de l'ouverture de la substitution, les *petits-enfants* pren- " nent le degré de substitution *vacant*, en vertu de la substitution vulgaire que " renferment toujours *implicitement* nos substitutions fidei commissaires, *collec- " tives ;* c'est-à-dire, qu'ils ne recueillent ni *concurremment* ni *successivement*, " mais au défaut *d'enfants* du premier degré. Dans la substitution fidei com- " missaire, il y a une espèce de vulgaire tacite : et c'est en vertu de cette vulgaire " tacite, que le substitué prend les biens, quand la personne nommément grévée " envers lui ne recueille pas.

" La substituant, n'est-il pas censé avoir dit, comme il avait en le droit. *Et en cas que le premier ne recueille pas, je veux que le second soit admis*, ce " qui eut formé la vulgaire expresse."

Thévenot D'Essaule Subst. ch. 85, No. 1234 à 1245, Ricard, Subst. ch. 10 No. 33.

Et il cite un arrêt de 1760 rapporté dans 4 Denisart vo. Subst. No. 116 qui a confirmé ce principe en déclarant, ouverte au " profit des *petits-enfants* de la " Dame d'Arquiam, à défaut *d'enfants* au premier degré, une substitution " qui était faite en faveur de ses *enfants*." Ricard subst. ch. 8, p. 372, Ed. Bergier. Un arrêt semblable rendu en 1698 est rapporté dans Guyot Rep. vo. enfant p. 720.

Thevenot D'Essaule ch. 58, No. 944 et 945 s'exprime dans les termes suivants.

" Hors le cas prévu par l'ord. des testaments, savoir le cas d'élection d'un " fidei commissaire lequel a été borné par l'art. 62 aux enfants du premier " degré, hors ce cas, le mots *enfants* est encore aujourd'hui censé renfermer " les *petits-enfants* ou autres *descendants*.

" C'est même ce que suppose sensiblement cette ordonnance puis qu'elle dit " que s'il n'y a pas *d'enfants* du premier degré, *le droit d'élire demeurera caduc* " sans ajouter que le fidei commis sera aussi caduc."

Et à la note il dit : observez que les *petits-enfants* ne sont censés appelés qu'autant qu'il n'y a point *d'enfants* au premier degré. C'est le sens que Furgole a donnée à l'art. 21, du Tit. 1 de l'ord. de 1747, p. 109 : " La " représentation, dit-il, cesse donc, soit que la substitution soit destinée vague- " ment à la famille, ou à un certain genre de personnes *nomine collectivo, au- " quel cas les plus prochains en degré doivent être admis à l'exclusion de ceux " qui sont plus éloignés*."

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"Et s'il y a plusieurs parents au même degré, ils devront *tous recueillir* "par égales parts." Ainsi, s'il existait, dans l'espèce qui nous occupe des enfants de la sœur de la mère des demandeurs, ces enfants viendraient à la substitution par tête et non par souche, de sorte que s'il y avait huit enfants dans une branche et deux dans l'autre les biens devaient être divisés en dix parts et chaque enfant en prendrait un dixième; ce qui prouve que les *petits-enfants* viennent pas alors par *représentation*, mais comme appelés *vulgairement*. Ricard, Subst. add. au ch. 8, § 4 P. 374, Ed. Bergier.

Telle était la jurisprudence universelle sous l'ancien droit même depuis l'ord. de 1747 et l'opinion unanime de tous les auteurs, sauf Pothier, et c'est ce que cette Cour de Révision a maintenu en 1869 dans la cause de Castonguay et Beaudry, rapportée au 1e Vol. de la R. L. p. 93.

Dans cette cause l'action a été renvoyée sur le principe que les demanderesses, arrières *petits-enfants* ne pouvaient pas venir avec les petits-enfants appelés à la substitution.

C'est la continuation de l'application du principe posé par Bergier à l'endroit ci-haut cité et qu'il complète en ces termes: "Ce que nous disons des *enfants* "au second degré, par rapport aux enfants au *premier degré*, est commun "aux enfants du second degré, par rapport à ceux du troisième, et ainsi de suite; "les plus proches au temps de l'ouverture, excluant toujours les plus éloignés."

Ricard, Subst. add. au ch. 8, s. 2—p. 373, Ed. Bergier. C'est ainsi que Mr. le juge Loranger a interprété notre Code en 1870 dans une cause de Brunette et Péloquin rapportée au vol. 3 de la R. L. p. 52. Jugé—"Que le mot "*enfant* employé en matière de substitution en ligne descendante, comprend "par sa propre énergie, non seulement les *enfants* de l'instituant, ou de l'ins- "titué, suivant le cas, mais encore leurs *descendants*, dans tous les degrés, sur "la *défaillance* du degré indiqué dans la *disposition*, le degré le plus *prochain* "devant néanmoins exclure les autres."

Enfin la décision la plus récente sur cette matière est celle de la Cour de Révision de Québec, Meredith, C. J., Stuart et Casault, JJ.. dans la cause de Marcotte et Noël et rapportée aux 6 Q. L. R. p. 245.

Jugé—"Que la désignation des appelés par les mots *enfants nés de mon* "*mariage*," dans un testament créant une substitution, est la manifestation de "l'intention du testateur que *représentation* ait lieu et qu'il faut des termes "clairs et précis pour ôter au mot *enfants* cette signification que lui donne "expressément la loi."

Mons. le juge Casault dans ses notes regarde une disposition semblable comme donnant droit à la représentation et la créant effectivement. A la page 248 loc. cit. il dit:

"Je ne vois pas dans ces deux arts. 93 et 980 du C. C. la contradiction que "paraît y trouver l'avocat des défenderesses.

"La règle que dans les substitutions il n'y a pas lieu à représentation, est "pour tous les cas où les appelés sont, soit nommés, soit indiqués (V. Ricard "subst. ch. 9 s. 2, No. 664 et seq.) par un terme auquel la loi n'a pas reconnu "l'étendue et la signification qu'elle donne par l'art. 980 aux mots *enfants* et

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petits-enfants employés seuls. Viennent ensuite dans le même art. 937 les "deux exceptions, résultant la première de l'expression d'une volonté contraire, "la seconde d'une intention au même effet autrement manifestée.

"Et enfin l'art. 980 qui ajoute une troisième exception et qui n'est, sous ce "rapport, que l'addition à l'art. 937 d'un *cas spécial* où la loi présume cette "intention."

On a donc décidé dans cette cause que le mot *enfants* employé seul dans la disposition donne naissance à la représentation, c'est-à-dire que les petits-enfants viennent par représentation de leur père, et de même les arrières petits-enfants, et que ces derniers concourrent avec leurs oncles, frères de leurs pères, et *enfants* du grevé. On a par là consacré la doctrine de Ricard qui était cependant combattue par le plus grand nombre des auteurs tels que Cujas, Fabre, Henrys et Bretonnier, et par la jurisprudence, et qui a été rejetée par l'ord. de 1747 —Tit. 1, art. 21.

Quelque soit le mérite de cette décision, elle n'a rien à faire avec la question de savoir si sous le mot *enfants* employé dans une substitution, soit dans la condition soit dans la vocation, les petits-enfants ou descendants sont compris. Cette question et celle de la représentation sont tout à fait distinctes et n'ont rien de commun ni rien de correlatif.

En effet la représentation peut être admise et le mot *enfants* ne pas comprendre les descendants: et réciproquement le mot *enfants* peut comprendre les *petits-enfants* et la représentation ne pas exister: en un mot le fait que la loi comprend sous le nom *d'enfants* les *petits-enfants* n'entraîne pas comme conséquence légale qu'il y a là représentation, c'est tout le contraire; de même que du fait que la loi admettrait la représentation en matière de substitution il ne s'en suivrait pas que le mot *enfants* comprendrait les *petits-enfants*: car dans ce dernier cas, c'est-à-dire en admettant la représentation les petits-enfants ne seraient pas exclus par les *enfants* comme ils le seraient s'ils ne venaient que comme se prétendant appelés sous le nom *d'enfants*.

Les dispositions de l'art. 937 de notre Code relatives à la représentation et celles de l'art. 980 relatives à la compréhension du mot *enfants* sont donc faites pour un ordre d'idées, un état de choses tout différent, et je ne puis m'expliquer comment on a pu trouver matière à contradiction entre les dispositions de ces deux art. La chose n'est pas possible. En matière de substitution les *petits-enfants* sont appelés sous donc le nom *d'enfants* non par représentation mais de *leur droit propre* et à défaut *d'enfants* sans représentation: et, c'est parcequ'il n'y a pas alors de représentation que les *enfants* excluent les petits-enfants: mais s'il n'y a que des *petits-enfants* ces derniers viennent au premier degré par l'effet de la substitution vulgaire.

Et si l'on admet comme correcte la décision rendue par la Cour de Révision de Québec il y aurait représentation, et alors la question ne souffrirait plus aucune difficulté: mais même en n'admettant pas la représentation l'action du demandeur est bien fondée. La défenderesse a fait dans son factum et lors de l'audition une objection à la prétention du demandeur; c'est que dans les

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substitutions l'ordre doit être observé, réglé d'après la proximité du degré de parenté avec le substitué ou grévé chargé de rendre et non avec le substituant.

Je ne puis comprendre la portée de cette objection: car cette question ne peut se présenter que dans le cas de fidei commis graduel au profit *de la famille*, c'est-à-dire dans le cas où un testateur aurait institué son fils aîné à la charge de substitution en faveur *de la famille*, au cas où il décéderait sans *enfants*. C'est le cas prévu par Ricard. "La condition du fidei commis arrive, " dit-il, et pour recueillir les biens qui y sont compris trois sortes de personnes " se présentent; savoir le second fils du testateur, les enfants d'un troisième " qui est prédécédé, et les petits-enfants d'un quatrième qui était pareillement " décédé avant l'ouverture de la substitution. Il n'y a point de doute que si " l'on considère toutes ces personnes au respect du testateur, qu'ils doivent tous " jouir du bénéfice de la *représentation* parce qu'ils se rencontrent en ce cas en " ligne directe, dans laquelle la représentation a lieu *infiniment*. Mais si on a " égard, pour régler le fidei commis à celui qui est chargé de restituer, pour " lors la représentation se réglera comme en collatérale et en conséquence les " petits-enfants du quatrième fils en seront exclus, d'autant que dans la ligne " collatérale la représentation n'a lieu qu'aux *enfants* des frères inclusive- " ment, et les arrières-neveux ne jouissent point du privilége.

Ricard, Subst. No. 690.

"Et au No. 691, en disant que pour régler la proximité de ceux qui se " présentent pour recueillir des fidei commis de cette qualité on doit se régler " sur la personne de celui qui est chargé de restituer."

Et au No. 547 il avait posé la difficulté dans les termes suivants:

" C'est une grande question et fort différemment résolue par les docteurs, de " savoir si dans les cas auxquels le fidei commis est *graduel* et *perpétuel* au pro- " fit de ceux d'une *famille* ou d'une *parenté*, ou qu'il doit être déféré de *degré* " *en degré*, suivant leur proximité, cette proximité doit être considérée, eu égard " à la personne du testateur, ou bien de celui qui est chargé de restituer.

Et il établit au No. suivant qu'il faut régler la préférence des appelés par le degré de proximité avec le grevé et non avec le testateur:

" Mais cela, dit-il, ne peut avoir lieu que lorsque les termes dont s'est servi le " testateur ne peuvent pas servir à régler la difficulté—" No. 552 et 563, 564.

Bergier dans ses additions sur le ch. 8 des Subst. de Ricard se pose la même question:

" Mais, dit-il, est-ce la proximité du degré de parenté avec l'auteur de la " substitution, qui donne la préférence, ou la proximité avec le substitué chargé " de rendre? Distinguons: si la substitution est faite en faveur d'une famille " étrangère au substituant, la question ne peut pas naître. Supposons donc " que Marc instituant Pierre qui lui est étranger, ajoute qu'il veut que ses " biens restent à perpétuité *dans la famille du dit Pierre son héritier*; alors la " famille du substituant étant différente de celle du grévé, et cette dernière " étant seule appelée par la *volonté expresse* du substituant, il est sans difficulté " que ce seront les plus proches parents du grévé qui seront seuls appelés.

" Au contraire, supposons que Marc, en instituant Pierre *qui lui est* " *étranger* stipule qu'en cas de décès de l'institué *sans enfants*, ses biens seront " remis à sa famille, de lui, instituant. Marc, dans une pareille disposition, " préfère un étranger, et les enfants de cet étranger, à ses enfants propres ; " mais il préfère ses parents à tous autres que *Pierre et ses enfants*." " Alors il " serait encore ridicule de demander si l'on doit considérer la proximité de la " parenté avec le grévé ou avec l'auteur de la substitution, *puisque la famille* " *du substituant est seule appelée.*

" Mais, supposons maintenant, ajoute-t-il, que le substituant et le grevé " soient de la même famille ; qu'un oncle par exemple institue son neveu, et subs- " titue ses biens à sa *famille* de *degré en degré* ; supposons ensuite que cet " héritier grevé meure sans postérité, laissant un frère et un oncle, frère du " substituant : si l'on défère la substition au plus proche parent du substituant, " elle s'ouvrira en faveur de l'oncle, si, au contraire, on la défère au plus proche " parent du grévé, elle s'ouvrira en faveur du frère."

Et il se détermine en faveur du frère, c'est-à-dire de la proximité du grévé, Ricard, Substitut. add. au ch. 8 § 4, p. 371.

Mais dans la présente cause il ne peut pas être question de la proximité du degré; car le testateur n'a pas créé de substitution *graduelle* et n'a pas appelé sa famille, mais il a appelé nommément les *enfants* de son fils ; je le répète je ne puis saisir la portée de l'argument fait sur ce point par l'avocat de la défenderesse.

Il est donc bien établi que dans notre droit, soit avant le code, soit depuis, le mot *enfants* employé dans une substitution, soit dans la *condition*, soit dans la *disposition* ou *vocation*, comprend les petits-enfants et descendants à l'infini.

Mais, dit la défenderesse, les disposants donateurs ont qualifié dans l'acte de donation le mot *enfants* : ils l'ont restreint aux *petits-enfants* par la clause suivante :

" Et au moyen de tout ce que dessus les dits donateurs transportent aux dits " donataires leurs *petits-enfants*, tous droits de propriété, noms, raisons, actions, " saisine, possession et autres choses généralement quelconques s'en dépettant " pour et à leur profit et à celui de leurs hoirs et ayant cause, voulant qu'ils " soient saisis, mis et reçus en bonne possession et saisine par et ainsi qu'il " appartiendra."

Donc, conclut la défenderesse, le mot *enfants* est limité par la volonté des donateurs à leurs *petits-enfants*, et les demandeurs étant leurs *arrière-petits-enfants* sont *sans droit*. Nous croyons cette conclusion tout à fait erronée : remarquons d'abord que la clause en question se trouve à la fin de l'acte et n'est aucunement une clause dispositive ; c'est une clause de style, le verbiage saute aux yeux, une conséquence que le notaire a cru qu'il pouvait tirer légalement de la volonté et des dispositions des donateurs ; Et au *moyen de tout ce que dessus*." N'est-ce pas là du style de notaire ? Une conclusion qu'il a cru découler des dispositions qu'il venait de consigner ? Mais sa science légale est évidemment en défaut ; comment la propriété pouvait-elle être donnée aux *petits-enfants* lors même de la passation de l'acte ? Cet acte créait évidemment une substitution. (C. C. B.C. Art. 928.) La défenderesse elle-même l'admet : or

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dans une substitution le grévé n'est-il pas propriétaire? Et les appelés n'ont ils pas qu'une espérance? Donc la propriété ne pouvait être donnée aux *petits-enfants*; mais il y a plus, c'est que cette clause appliquée à la lettre serait en contradiction formelle avec les dispositions véritables de l'acte et la volonté formelle des donateurs: en effet, va-t-on prétendre que dans le cas où Marie Josephte Adélaïde n'aurait pas laissé *d'enfants* à sa mort, mais seulement des petits-enfants (arrière petits-enfants des donateurs) que ces derniers n'auraient pas recueilli et que la substitution aurait été ouverte en faveur des enfants de Louis Charles? La chose est trop absurde pour mériter discussion et les avocats mêmes de la défenderesse repoussent une semblable interprétation. Donc, il y a un cas possible où dans une espèce qui pourrait se présenter sous cet acte où le mot *enfants* ne serait pas restreint aux *petits-enfants*: donc la conséquence que la défenderesse tire de la clause en question est erronée.

Si l'on recherche maintenant l'intention des donateurs elle ne peut être équivoque; cet acte est manifeste dans toutes ses dispositions une intention évidente de conserver les biens dans leur famille.

Le jugement, à mon avis, doit donc être confirmé et telle est l'opinion pe la Cour.

Judgment confimred.

J. A. N. McConville, for plaintiff.
Barnard, Beauchamp & Barnard, for defendant.
(S. B.)

PRIVY COUNCIL.

LONDON, 15TH DECEMBER, 1883.

Before LORD FITZGERALD, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, SIR ARTHUR HOBHOUSE.

HODGE, APPELLANT;

AND

THE QUEEN, RESPONDENT.

Federal and Local Jurisdiction—Liquor License Act of 1877. [*Ontario*]—*Delegation of powers to License Commissioners—Hard Labor.*

1. The powers conferred by "the Liquor License Act of 1877" [Ontario] are, correctly interpreted, to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they do not interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act.
2. The Legislature of Ontario in committing certain regulations to License Commissioners retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands.
3. The "imposition of punishment by imprisonment for enforcing any law," in the B. N. A. Act, includes the power to impose its usual accompaniment "hard labor, and the Provincial legislature having authority to impose imprisonment, with or without hard labor, has also power to delegate similar authority to the municipal body created by it, called the License Commissioners.

PER CURIAM.—The appellant, Archibald Hodge, the proprietor of a tavern known as the St. James' Hotel, in the city of Toronto, and who on the 7th of

May, 1881, was the holder of a license for the retail of spirituous liquors in his tavern, and also licensed to keep a billiard saloon, was summoned before the police magistrate of Toronto for a breach of the resolutions of the License Commissioners of Toronto, and was convicted on evidence sufficient to sustain the conviction if the magistrate had authority in law to make it.

The conviction is as follows, viz:—

"CONVICTION.

"Canada: Province of Ontario, County of York, City of Toronto, to wit:—

"Be it remembered, that on the 19th day of May, in the year of our Lord one thousand eight hundred and eighty-one, at the city of Toronto, in the County of York, Archibald G. Hodge, of the said city, is convicted before me, George Taylor Denison, Esquire, Police Magistrate in and for the said city of Toronto, for that he the said Archibald G. Hodge, being a person who, after the passing of the Resolution hereinafter mentioned, received, and who, at the time of the committing of the offence hereinafter mentioned, held a license under the Liquor License Act, for and in respect of the tavern known as the St. James' Hotel, situate on York street, within the city of Toronto, on the seventh day of May in the aforesaid year, at the said city of Toronto, did unlawfully permit, allow, and suffer a billiard table to be used, and a game of billiards to be played thereon in the said tavern, during the time prohibited by the Liquor License Act for the sale of liquor therein; to wit, after the hour of seven o'clock at night on the said seventh day of May, being Saturday, against the form of the Resolution of the License Commissioners for the city of Toronto for regulating taverns and shops, passed on the 25th day of April, in the year aforesaid, in such case made and provided.

"Thomas Dexter, of said city, License Inspector of the city of Toronto, being the complainant.

"And I adjudge the said Archibald G. Hodge, for his said offence, to forfeit and pay the sum of twenty dollars, to be paid and applied according to law; and also to pay to the said Thomas Dexter the sum of two dollars and eighty-five cents for his costs in this behalf; and if the said several sums be not paid forthwith, then I order that the same be levied by distress and sale of goods and chattels of the said Archibald G. Hodge; and in default of sufficient distress, I adjudge the said Archibald G. Hodge to be imprisoned in the common gaol of the said city of Toronto and County of York, and there be kept at hard labor for the space of fifteen days, unless the said sums, and the costs and charges of conveying of the said Archibald G. Hodge to the said gaol, shall be sooner paid."

On the 27th May, 1881, a rule *nisi* was obtained to remove that conviction into the Court of Queen's Bench for Ontario, to order that it should be quashed as illegal, on the grounds:—1st, that the said resolution of the said License Commissioners is illegal and unauthorized; 2nd, that the said License Commissioners had no authority to pass the resolution prohibiting the game of billiards as in the said resolution, nor had they power to authorise the imposition of a fine, or, in default of payment thereof, imprisonment for a violation of the said resolu-

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tion; 3rd, the Liquor License Act, under which the said Commissioners have assumed to pass the said resolution, is beyond the authority of the Legislature of Ontario, and does not authorise the said resolution.

It will be observed that the question whether the Local Legislature could confer authority on the License Commissioners to make the resolution in question is not directly raised by the rule *nisi*. On the 27th June, 1881, that rule was made absolute, and an order pronounced by the Court of Queen's Bench to quash the conviction. The judgment of the Court, which seems to have been unanimous, was delivered by Hagarty, C.J., with elaborate reasons, but finally it will be found that the decision of the Court rests on one ground alone, and does not profess to decide the question which on this appeal was principally discussed before their Lordships. The Chief Justice, in the course of his judgment, says:—

"It was stated to us that the parties desired to present directly to the Court the very important question whether the Local Legislature, assuming that it had the power themselves to make these regulations and create these offences, and annex penalties for their infraction, could delegate such powers to a Board of Commissioners or any other authority outside their own legislative body."

And, again, he adds:—

"We are thus brought in face of a very serious question, viz., the power of the Ontario Legislature to vest in the License Board the power of creating new offences and annexing penalties for their commission."

And concludes his judgment thus, referring to the resolutions:—

"The Legislature has not enacted any of these, but has merely authorised each Board in its discretion to make them.

"It seems very difficult, in our judgment, to hold that the Confederation Act gives any such power of delegating authority, first of creating a *quasi* offence, and then of punishing it by fine or imprisonment.

"We think it is a power that must be exercised by the Legislature alone.

"In all these questions of *ultra vires* and the powers of our Legislature, we consider it our wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point in controversy.

"We therefore enter into no general consideration of the powers of the Legislature to legislate on the subject; but, assuming this right so to do, we feel constrained to hold that they cannot devolve or delegate these powers to the discretion of a local board of commissioners:

"We think the defendant has the right to say that he has not offended against any law of the Province, and that the conviction cannot be supported."

The case was taken from the Queen's Bench on appeal to the Court of Appeal for Ontario, under the Ontario Act, 44 Vic., ch. 27, and on the 30th June, 1882, that Court reversed the decision of the Queen's Bench, and affirmed the conviction.

Two questions only appear to have been discussed in the Court of Appeal, 1st, that the Legislature of Ontario had not authority to enact such regulations as were enacted by the Board of Commissioners, and to create offences and annex

penalties for their infraction; and, 2nd, that if the Legislature had such authority it could not delegate it to the Board of Commissioners, or any other authority outside their own legislative body.

This second ground was that on which the judgment of the Court of Queen's Bench rested.

The judgments delivered in the Court of Appeal by Spragge, C.J., and Burton, J.A., are able and elaborate, and were adopted by Patterson and Morrison, J.J., and their Lordships have derived considerable aid from a careful consideration of the reasons given in both Courts.

The appellant now seeks to reverse the decision of the Court of Appeal, both on the two grounds on which the case was discussed in that Court and on others technical but substantial, and which were urged before this Board with zeal and ability. The main questions arise on an Act of the Legislature of Ontario, and on what have been called the resolutions of the License Commissioners.

The Act in question is chapter 181 of the Revised Statutes of Ontario, 1877, and is cited as "the Liquor License Act."

Sec. 3 of this Act provides for the appointment of a Board of License Commissioners for each city, county, union of counties, or electoral district as the Lieutenant-Governor may think fit, and secs. 4 and 5 are as follows:

"Sec. 4. License Commissioners may, at any time before the first day in each year, pass a resolution, or resolutions, for regulating and determining the matters following, that is to say:

"(1) For defining the conditions and qualifications requisite to obtain tavern licenses for the retail, within the municipality, of spirituous, fermented, or other manufactured liquors, and also shop licenses for the sale by retail, within the municipality, of such liquors in shops or places other than taverns, inns, alehouses, beerhouses, or places of public entertainment.

"(2) For limiting the number of tavern and shop licenses respectively, and for defining the respective times and localities within which, and the person to whom, such limited number may be issued within the year from the first day of May of one year till the thirtieth day of April inclusive of the next year.

"(3) For declaring that in cities a number not exceeding ten persons, and in towns a number not exceeding four persons, qualified to have a tavern license, may be exempted from the necessity of having all the tavern accommodation required by law.

"(4) For regulating the taverns and shops to be licensed.

"(5) For fixing and defining the duties, powers, and privileges of the Inspector of Licenses of their district.

"Sec. 5. In and by any such resolution of a Board of License Commissioners, the said Board may impose penalties for the infraction thereof."

Sec. 43 prohibits the sale of intoxicating liquors from or after the hour of seven of the clock on Saturday till six of the clock on Monday morning thereafter.

Sec. 51 imposes on any person who sells spirituous liquors without the license by law required, or otherwise violates any other provision of the Act, in respect

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of which violation no other punishment is prescribed, for the first offence a penalty of not less than twenty dollars and not more than fifty dollars, besides costs, and for the second offence imprisonment with hard labor for a period not exceeding three calendar months.

Sec. 52. For punishment of offences against sec. 43 (requiring taverns, &c., to be closed from seven o'clock on Saturday night until six o'clock on Monday morning), a penalty for the first offence of not less than twenty dollars, with costs, or fifteen days' imprisonment with hard labor, and with increasing penalties for second, third, and fourth offences; and sec. 70 provides that where the resolution of the License Commissioners imposes a penalty it may be recovered and enforced before a magistrate in the manner and to the extent that by-laws of municipal corporations may be enforced under the authority of the Municipal Act.

License Commissioners were duly appointed under this statute, who, on 25th April, 1881, in pursuance of its provisions, made the resolution or regulation now questioned in relation to licensed taverns or shops in the city of Toronto, which contains (*inter alia*) the following paragraphs, viz:—

"Nor shall any such licensed person, directly or indirectly, as aforesaid permit, allow or suffer any bowling alley, billiard or bagatelle table to be used or any games or amusements of the like description to be played in such tavern or shop, or in or upon any premises connected therewith, during the time prohibited by the Liquor License Act or by this resolution, for the sale of liquor therein.

"Any person or persons guilty of any infraction of any of the provisions of this resolution shall, upon conviction thereof before the Police Magistrate of the city of Toronto, forfeit and pay a penalty of twenty dollars and costs; and in default of payment thereof forthwith, the said Police Magistrate shall issue his warrant to levy the said penalty by distress and sale of the goods and chattels of the offender; and in default of sufficient distress in that behalf, the Police Magistrate shall by warrant commit the offender to the common gaol of the city of Toronto, with or without hard labor, for the period of fifteen days, unless the said penalty and costs, and all costs of distress and commitment, be sooner paid."

The appellant was the holder of a retail license for his tavern, and had signed an undertaking as follows:—

"We, the undersigned holders of licenses for taverns and shops in the city of Toronto, respectively acknowledge that we have severally and respectively received a copy of the Resolution of the License Commissioners of the city of Toronto to regulate taverns and shops, passed on the 25th day of April last, hereunto annexed, upon the several dates set opposite to our respective signatures, hereunder written, and we severally and respectively promise, undertake, and agree to observe and perform the conditions and provisions of such Resolution.

"2nd May, Tavern. A. C. Hodge. [L. S.]"

He was also holder of a billiard license for the city of Toronto to keep a billiard saloon with one table for the year 1881, and, under it, had a billiard table in his tavern.

He did permit this billiard table to be used as such within the period prohibited by the resolution of the License Commissioners, and it was for that infraction of their rules he was prosecuted and convicted.

The preceding statement of the facts is sufficient to enable their Lordships to determine the questions raised on the appeal.

Mr. Kerr, Q.C., and Mr. Jeune, in their full and very able argument for the appellant, informed their Lordships that the first and principal question in the cause was whether "The Liquor License Act of 1877," in its fourth and fifth sections, was *ultra vires* of the Ontario Legislature, and properly said that it was a matter of importance as between the Dominion Parliament and the Legislature of the Province.

Their Lordships do not think it necessary in the present case to lay down any general rule or rules for the construction of the British North America Act. They are impressed with the justice of an observation by Hagarty, C.J., "that in all these question of *ultra vires* it is the wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point in controversy." They do not forget that in a previous decision on this same statute (*Parsons* v. *The Citizens Company**) their Lordships recommended that, "in performing the difficult duty of determining such questions, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon the interpretation of the statute than is necessary for the decision of the particular question in hand."

The appellants contended that the Legislature of Ontario had no power to pass any Act to regulate the Liquor traffic; that the whole power to pass such an Act was conferred on the Dominion Parliament, and consequently taken from the Provincial Legislature, by sec. 91 of the British North America Act, 1867; and that it did not come within any of the classes of subjects assigned exclusively to the Provincial Legislatures by sec. 92. The clause in sec. 91 which the Liquor License Act, 1887, was said to infringe was No. 2, "The Regulation of Trade and Commerce," and it was urged that the decision of this Board in *Russell* v. *Regina* † was conclusive—that the whole subject of the Liquor traffic was given to the Dominion Parliament, and consequently taken away from the Provincial Legislature. It appears to their Lordships, however, that the decision of this tribunal in that case has not the effect supposed, and that, when properly considered, it should be taken rather as an authority in support of the judgment of the Court of Appeal.

The sole question there was, whether it was competent to the Dominion Parliament, under its general powers to make laws for the peace, order, and good government of the Dominion, to pass the Canada Temperance Act, 1878, which was intended to be applicable to the several Provinces of the Dominion, or to such parts of the Provinces as should locally adopt it. It was not doubted that the Dominion Parliament had such authority under sec. 91, unless the subject fell within some one or more of the classes of subjects which by sec. 92 were assigned exclusively to the Legislatures of the Provinces.

*5 L. N. 25, 33. †8 L. N. 234.

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It was in that case contended that the subject of the Temperance Act properly belonged to No. 13 of sec. 92, "Property and Civil Rights in the Province," which it was said belonged exclusively to the Provincial Legislature, and it was on what seems to be a misapplication of some of the reasons of this Board in observing on that contention that the appellant's counsel principally relied. These observations should be interpreted according to the subject matter to which they were intended to apply.

Their Lordships, in that case, after comparing the Temperance Act with laws relating to the sale of poisons, observe that:—

"Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada."

And, again:—

"What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and, though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law."

And their Lordships' reasons on that part of the case are thus concluded:—

"The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs. In the present case it appears to their Lordships, for the reasons already given, that the matter of the Act in question does not properly belong to the class of subjects 'Property and Civil Rights' within the meaning of sub-section 13."

It appears to their Lordships that *Russell* v. *The Queen*, when properly understood, is not an authority in support of the appellant's contention, and their Lordships do not intend to vary or depart from the reasons expressed for their judgment in that case. The principle which that case and the case of the Citizens' Insurance Company illustrates is, that subjects which in one aspect and for one purpose fall within sec. 92 may in other aspect and for another purpose fall within sec. 91.

Their Lordships proceed now to consider the subject matter and legislative character of secs. 4 and 5 of "The Liquor License Act of 1877, cap. 181, Revised Statutes of Ontario." That Act is so far confined in its operation to municipalities in the Province of Ontario, and is entirely local in its character and operation. It authorizes the appointment of License Commissioners to act in each municipality, and empowers them to pass, under the name of resolutions, what we know as by-laws, or rules to define the conditions and qualifications requisite for obtaining tavern or shop licenses for sale by retail of spirituous liquors within the municipality; for limiting the number of licenses; for declaring that a limited number of persons qualified to have tavern licenses may be exempted from having all the tavern accommodation required by law, and for regulating licensed

taverns and shops, for defining the duties and powers of License Inspectors, and to impose penalties for infraction of their resolutions. These seem to be all matters of a merely local nature in the province, and to be similar to, though not identical in all respects with, the powers then belonging to municipal institutions under the previously existing laws passed by the local parliaments.

Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency and repress drunkenness and [illegible] and riotous conduct. As such they cannot be said to interfere with the [illegible] regulation of trade and commerce which belongs to the Dominion Par[illegible] and do not conflict with the provisions of the Canada Temperance Act, [illegible] not appear to have as yet been locally adopted.

The subjects of legislation in the Ontario Act of 1877, secs. 4 and 5, seem to come within the heads Nos. 8, 15, and 16 of sec. 92 of British North America Statute, 1867.

Their Lordships are, therefore, of opinion that, in relation to secs. 4 and 5 of the Act in question, the Legislature of Ontario acted within the powers conferred on it by the Imperial Act of 1867, and that in this respect there is no conflict with the powers of the Dominion Parliament.

Assuming that the Local Legislature had power to legislate to the full extent of the resolutions passed by the License Commissioners, and to have enforced the observance of their enactments by penalties and imprisonment with or without hard labor, it was further contended that the Imperial Parliament had conferred no authority on the Local Legislature to delegate those powers to the License Commissioners or any other persons. In other words, that the power conferred by the Imperial Parliament on the Local Legislature should be exercised in full by that body, and by that body alone. The maxim *delegatus non potest delegare* was relied on.

It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in sec. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the Local Legislature is supreme, and has the same authority as the Imperial Parliament or the Parliament of the Dominion would have had, under like circumstances, to confide to a municipal institution or body of its own creation

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authority to make by-laws or resolutions as to subjects specified int he enactment, and with the object of carrying the enactment into operation and effect.

It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents of this legislation entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a Legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each Legislature, and not for courts of law, to decide.

Their Lordships do not think it necessary to pursue this subject further, save to add that, if by-laws or Resolutions are warranted, power to enforce them seems necessary and equally lawful. Their Lordships have now disposed of the real questions in the cause.

Many other objections were raised on the part of the appellant as to the mode in which the License Commissioners exercised the authority conferred on them, some of which do not appear to have been raised in the Court below, and others were disposed of in the course of the argument, their Lordships being clearly of opinion that the resolutions were merely in the nature of municipal or police regulations in relation to licensed houses, and interfering with liberty of action to the extent only that was necessary to prevent disorder and the abuses of liquor licenses. But it was contended that the Provincial Legislature had no power to impose imprisonment or hard labor for breach of newly-created rules or by-laws, and could confer no authority to do so. The argument was principally directed against hard labor. It is not unworthy of observation that this point, as to the power to impose hard labor, was not raised on the rule *nisi* for the *certiorari*, nor is it to be found amongst the reasons against the appeal to the Appellate Court in Ontario.

It seems to have been either overlooked or advisedly omitted.

If, as their Lordships have decided, the subject, of legislation come within the powers of the Provincial Legislature, then No. 15 of sec. 92 of the British North America Act, which provides for "the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section," is applicable to the case before us, and is not in conflict with No. 27 of section 91; under these very general terms, "the imposition of punishment by imprisonment for enforcing any law," it seems to their Lordships that there is imported an authority to add to the confinement or restraint in prison that which is generally incident to it—"hard labor"; in other words, that "imprisonment" there means restraint by confinement in a prison, with or without its usual accompaniment, "hard labor."

The Provincial Legislature having thus the authority to impose imprisonment, with or without hard labor, had also power to delegate similar authority to the municipal body which it created, called the License Commissioners.

It is said, however, that the Legislature did not delegate such powers to the License Commissioners, and that therefore the resolution imposing hard labor is void for excess. It seems to their Lordships that this objection is not well founded.

In the first place, by sec. 5 of the Liquor License Act, the Commissioners may impose penalties. Whether the word "penalty" is well adapted to include imprisonment may be questioned, but in this Act it is so used, for sec. 52 impose, on offenders against the provisions of sec. 43, a penalty of 20 dollars or 15 days' imprisonment, and for a fourth offense a penalty of imprisonment with hard labor only. "Penalty" here seems to be used in its wider sense as equivalent to punishment. It is observable that in sec. 59, where recovery of penalties is dealt with the Act speaks of "penalty in money." But, supposing that the "penalty" is to be confined to pecuniary penalties, those penalties may, by sec. 70, be recovered and enforced in the manner, and to the extent, that by-laws of municipal councils may be enforced under the authority of the Municipal Act. The word "recover" is an apt word for pecuniary remedies, and the word "enforce" for remedies against the person.

Turning to the Municipal Act, we find that, by sec. 454, municipal councils may pass by-laws for inflicting reasonable fines and penalties for the breach of any by-laws, and for conflicting reasonable punishment by imprisonment, with or without hard labor for the breach of any by-laws in case the fine cannot be recovered. By secs. 400 to 402 it is provided that fines and penalties may be recovered and enforced by summary conviction before a justice of the peace, and that where the prosecution is for an offence against a municipal by-law the justice may award the whole or such part of the penalty or punishment imposed by the by-law as he thinks fit; and that, if there is no distress found out of which a pecuniary penalty can be levied, the justice may commit the offender to prison for the term, or some part thereof, specified in the by-law. If these by-laws are to be enforced at all by fine or imprisonment, it is necessary that they should specify some amount of fine and some term of imprisonment.

The Liquor License Act then gives to the Commissioners either power to impose penalty against the person directly, or power to impose a money penalty, which, when imposed, may be enforced according to secs. 454 and 400-2 of the Municipal Act. In either case, the Municipal Act must be read to find the manner of enforcing the penalty, and the extent to which it may be enforced. The most reasonable way of construing statutes so framed is to read into the later one the passages of the former which are referred to. So reading these two statutes, the Commissioners have the same power of enforcing the penalties they impose as the Councils have of enforcing their by-laws, whether they can impose penalties against the person directly, or only indirectly as the means of enforcing money penalties. In either case their resolution must, in order to give

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the magistrate jurisdiction, specify the amount of punishment. In either case, their resolution now under discussion is altogether within the powers conferred on them.

Their Lordships do not think it necessary or useful to advert to some minor points of discussion, and are, on the whole, of opinion that the decision of the Court of Appeal of Ontario should be affirmed, and this appeal dismissed, with costs, and will so humbly advise Her Majesty.

Judgment affirmed.

COUR SUPÉRIEURE, DISTRICT D'IBERVILLE, 1880.

ST. JEAN, 20 FÉVRIER 1880.

Coram CHAGNON, J.

CHARLES RÉDARD,

DEMANDEUR;

vs.

CALIXTE RÉMILLARD,

DÉFENDEUR.

Garantie de droit—Garantie de fait—Clause de fournir et faire valoir.

JUGÉ:—Que la promesse de garantie de *fournir et faire valoir* rend le cédant garant de l'insolvabilité présente du débiteur et de celle qui peut arriver dans la suite, mais le cessionnaire ne peut exercer son recours contre son cédant qu'après avoir discuté les biens du débiteur et prouvé son insolvabilité.

PER CURIAM:—Notre code n'a aucune disposition expliquant l'étendue que pourrait avoir dans un transport-cession, la clause de garantie de fournir et faire valoir, très-souvent usitée pourtant dans l'ancienne jurisprudence, et constituant, sous l'ancien droit, un des degrés de la garantie de fait. Notre code ne parle que de la garantie de droit et de la simple garantie de fait. La garantie de droit va assurer même à l'encontre d'une stipulation contraire, l'existence de la créance cédée, et la simple garantie de fait répond de la solvabilité du débiteur, mais n'assure cette solvabilité qu'au temps de la vente.

Le Code Français n'a aussi aucun article à la clause de garantie de fournir et faire valoir. Je ne fais ainsi qu'énoncer la simple garantie dont l'objet est d'assurer la solvabilité présente ou actuelle du débiteur. Et, ajoute le Code Français, dans son art. 1695, cette promesse de garantie ne s'entend pour le temps à venir, que si le cédant l'a expressément stipulé.

Pou ce qui est des divers degrés de la garantie, l'étendue de la garantie simple, d'après ces deux codes, c'est-à-dire le Code Français et après lui le Code Canadien ont donc tout laissé à la stipulation.

Dans le cas actuel, le cédant a stipulé une garantie plus ample que la simple garantie reconnue tant par le code que par l'ancien droit, mais il s'est servi de l'ancien style de notaire, c'est-à-dire qu'il a promis *fournir et faire valoir* la créance.

Il faut donc recourir à l'ancien droit pour y trouver le sens attaché à cette promesse.

Cette garantie, sans aucun doute, s'étendait dans l'ancienne jurisprudence à plus qu'à la solvabilité actuelle du débiteur. Elle garantissait aussi la solvabilité future. Puis, les auteurs paraissent dans l'interprétation de cette clause avoir voulu adopter les idées de Loiseau émises par lui dans son traité de la garantie des Rentes.

Or, Loiseau étendait cette garantie de *fournir et faire valoir* jusqu'au remboursement ou amortissement final de la rente. De fait, comme sa doctrine était, que ce degré de garantie allait à répondre de la solvabilité future, il ne pouvait faire autrement que d'étendre cette garantie de solvabilité chez le débiteur jusqu'au remboursement final de la rente, car jusqu'alors il y avait toujours des échéances successives qui faisaient que la rente n'était jamais échue ni exigible en entier, et ne pouvait le devenir que par le remboursement final de la rente. Je fais cette distinction de suite, entre la garantie des rentes, dont parle Loiseau, et la garantie d'une simple dette. Celle-ci aurait une échéance fixe, et il ne s'agirait que d'en collecter le montant entier à la date d'échéance, tandis que la rente peut porter des échéances qui peuvent ne jamais cesser, s'il s'agit spécialement d'une rente foncière non rachetable. Et cette distinction, en suivant même la doctrine de Loiseau, approuvée par tous les auteurs qui ont écrit sous l'ancien droit, peut avoir son importance sur la question de négligence soulevée par les défenses.

Mais acceptant cette clause comme comportant une garantie de la solvabilité future du débiteur, quand néanmoins cette action récursoire du cessionnaire contre le cédant pouvait-elle être exercée? Pothier le dit dans son No. 564 de son contrat de vente. "Pour que l'acheteur soit admis à cette action, il ne suffit pas que le débiteur de la rente ait été mis en demeure de payer par un commandement qui lui aurait été fait, il faut qu'il soit constant qu'il est insolvable, car par cette clause, le vendeur ne promet pas que le débiteur *voudra* toujours payer mais qu'il pourra payer, qu'il sera solvable."

De fait le cédant qui donne cette espèce de garantie ne promet pas payer la dette directement comme le fait par exemple la caution, mais promet seulement que le débiteur sera solvable. Cette garantie peut bien avoir finalement pour effet une obligation de payer de la part du cédant. Mais cette espèce de garantie considérée en elle-même implique que cette obligation ne peut exister que dans le cas où le débiteur serait insolvable.

Donc c'est au cessionnaire à alléguer et prouver cette insolvabilité, et c'est cette insolvabilité seule qui peut permettre l'exercice d'une action directe contre le cédant.

Pothier dit que cette insolvabilité ne peut se constater que par la discussion du bien du débiteur, et il ajoute que cette discussion se fait par une saisie *des meubles qui se trouvent au domicile du débiteur*, ou par un procès-verbal de *carance*.

Guyot, vo. Garantie de rentes, page 728, s'exprime comme suit: "Loiseau, ch. 4 de son traité de la Garantie des rentes, dit en parlant de la clause de fournir et faire valoir, tant en principal qu'arrérages, que le cédant est tenu de garantir le cessionnaire en quelque temps que ce soit, mais il ajoute au même

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endroit la nécessité de la discussion ; de sorte, dit-il, que le débiteur étant une fois prouvé insolvable par une *discussion en acte de tous ses biens*, on peut avoir recours contre le vendeur et le contraindre désormais à payer et continuer la rente. Suivant Argou, page 178, la promesse de garantie de fournir et faire valoir, rend le cédant garant de l'insolvabilité présente du débiteur et de celle qui peut arriver dans la suite, mais le cessionnaire ne peut exercer son recours contre son cédant qu'après avoir discuté les biens du débiteur et prouvé son insolvabilité. Brodeau dit de même : on ne peut agir contre le cédant en vertu de la clause *fournir et faire valoir* qu'après une entière discussion des biens du débiteur.

Or, dans le cas actuel, cette insolvabilité n'est pas alléguée. Il est bien vrai que le demandeur allègue qu'il a poursuivi et pris jugement contre le débiteur, et qu'il a saisi au domicile de ce dernier, mais le procès-verbal de saisie ne constate la saisie que de 4 à 5 effets, lesquels ont été réclamés par un tiers comme étant sa propriété. Mais cette saisie établit-elle la discussion en acte de tous les biens du débiteur ? De ce que les 4 ou 5 effets qu'il a saisis, appartenaient à un tiers, s'ensuit-il qu'il n'y avait plus rien au domicile du débiteur qui lui appartint. Il faut d'après les auteurs, discussion pleine et entière ou procès-verbal de carence. Il n'appert nullement par la preuve qu'il ne restait plus rien au domicile à saisir. L'insolvabilité résultant de cette discussion entière de tous les biens du débiteur qui pouvaient se trouver à son domicile, n'a donc pas été prouvée.

Mais supposons l'insolvabilité suffisamment alléguée et prouvée, y a-t-il eu négligence telle dans la discussion que cette négligence ait pu libérer le cédant ? La créance cédée au demandeur devenait échue le 1er mars 1875. Or, il est constaté par la preuve, que lors de l'échéance de cette dette, le débiteur, Calixte Rémillard, était propriétaire d'une terre de 6 arpents de front, et d'un roulant de la valeur de $700 à $800, et que si alors et même subséquemment, le demandeur eut poursuivi le débiteur, il aurait été payé. Il est même constaté que ce n'est qu'il y a environ 2 ans que le roulant de ce débiteur aurait été saisi et vendu par un jugement obtenu contre lui par un nommé Robinson. Le demandeur aurait donc négligé la discussion de son débiteur durant l'intervalle de près de quatre années. En supposant donc que la procédure du demandeur contre son débiteur prouverait suffisamment l'insolvabilité, la négligence du demandeur et les atermoiements de ce dernier, devraient-ils aller à la décharge et libération du cédant.

Si l'obligation du cédant découlait de la promesse de garantir de *fournir et faire valoir*, elle devait être assimilée à toutes fois au cautionnement pur et simple ; notre code réglerait bien vite la question, car la caution peut être poursuivie de *prime abord*, et c'est à lui à requérir la discussion des biens de celui pour qui elle s'est obligée, et le créancier n'est responsable que de l'insolvabilité survenue après l'indication faite par la caution des biens à discuter.

Mais dans la garantie de fournir et faire valoir il n'y a pas de promesse de paiement directement faite par le cédant au cessionnaire comme c'est le cas pour la caution, tout ce dont le cédant est garant c'est de la solvabilité pure et

simple du débiteur : aussi, les auteurs se fondant tous sur l'interprétation donnée à cette clause par Loiseau, disaient qu'avant d'exercer aucun recours contre le cédant, le cessionnaire devra faire la discussion exacte de tous les biens du débiteur et prouver l'insolvabilité de ce dernier. Il n'y a donc pas parité sous ce rapport entre la caution et le garant.

Aussi les autres mettent à la charge du cessionnaire non-seulement la part de la créance causée par son fait, mais aussi par sa négligence. Pothier et autres auteurs donnent comme exemples de négligence dont l'effet devrait faire perdre le recours du cessionnaire contre le cédant, le fait que le cessionnaire aurait laissé prescrire la créance, ou ne se serait pas opposé au décret des biens hypothéqués. Si ces causes de négligence devaient être les seules qui auraient pu motiver la perte du recours du cessionnaire contre le cédant, le demandeur dans le cas actuel ne pourrait en souffrir dans son action. Mais telle n'est pas l'idée que nous devons attacher à la doctrine des auteurs sur cette question de négligence. Lorsque Pothier et les autres auteurs spécifient ces deux causes de négligence, ils ne parlent que de la garantie des rentes, or, disent-ils, si la rente s'est trouvée virtuellement perdue par le fait qu'on aurait laissé décréter la propriété qui en assurait les prestations successives jusqu'à son remboursement final, sans faire opposition sur les derniers, ou si on l'a laissée prescrire, le cessionnaire ne pouvait alors exiger que le cédant en continue le paiement jusqu'à son remboursement.

Mais ce que nous trouvons dans cette doctrine, c'est le sentiment général que la négligence peut absoudre le cédant de toute responsabilité vis-à-vis du cessionnaire.

Aussi Loiseau, après avoir, lui aussi, mentionné ces causes de négligence dans son traité de la garantie des rentes, en élargit grandement le cercle quand il vient à parler des créances ordinaires. Il dit que quant aux simples dettes exigibles, si le cessionnaire a laissé enlever les meubles du débiteur devenu insolvable par cette négligence, il n'a plus de recours, nonobstant la clause de fournir et faire valoir. Rousseau de Lacombe endosse cette doctrine, voir no 10, une garantie, et il dit au livré 4, même mot ; ....Celle de fournir et faire valoir emporte la garantie de l'insolvabilité à venir de la rente, mais requiert discussion des biens et sans condition.

Mais si la dette est pure et sans condition, cette clause n'emporte que la garantie de l'insolvabilité lors de la cession, si c'est la faute du cessionnaire de n'avoir pas fait payer le débiteur, quand il en avait le moyen. Ainsi quand la dette est *in diem*, c'est-à-dire, à jour, ou à échéance ultérieure, mais sans condition ; mais si la dette est actuellement exigible ou sans condition, la clause n'emporte que garantie de l'insolvabilité lors de la cession, le cessionnaire devant s'imputer à sa négligence s'il n'a pas fait payer le débiteur, quand il en avait le moyen. Bourgeon, 1er vol., p. 568, art. 26, dit aussi que la garantie de fournir et faire valoir cesse si le cessionnaire s'est laissé enlever son gage, c'est aussi le sentiment de Troplong dans son traité de la rente, p. 526, liv. 942, vol. 2. Parlant d'une créance ordinaire cédée avec la garantie de la solvabilité future, il cite d'abord Loiseau qui répudie tout recours du cessionnaire contre le cédant, quand par des attermoiements ou par négligence, il a laissé disparaître ou consommer les meu-

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bles do son débiteur sans agir, et il conclut en disant: "Tel étant le cas, le cessionnaire est responsable de n'avoir pas fait payer la dette à l'époque convenue. C'est sa faute, car, ayant moyen d'être payé, il y a négligence, et le cédant ne peut être raisonnablement tenu que de l'insolvabilité survenue avant l'échéance sans le fait ou la négligence du cessionnaire. Il en est de même quand le cédant a vendu avec promesse de *fournir et faire valoir* une créance *actuellement exigible*, le cédant ne répond que de la solvabilité présente. Mais pour le temps postérieur à la cession il est déchargé." Et il réfère ici à Rousseau de Lacombe, dont je viens de faire certaines citations. Et Troplong continue en disant: "car il pourra toujours dire au cessionnaire: Pourquoi ne vous êtes-vous pas fait payer à l'échéance? C'est votre complaisance qui a tout perdu. Si vous en prenez, qu'à vous-même d'un événement que vous avez favorisé en ne profitant pas de vos droits."

Bousquet, Dictionnaire de Droit, Vo. Cession, dit aussi: "Il en est de même lorsque le débiteur étant solvable à l'époque de l'exigibilité de la dette est postérieurement tenu insolvable, parce que si le cessionnaire n'est pas payé c'est à lui seul qu'il faut s'en prendre puisqu'il n'a pas demandé son paiement au moment de l'échéance." Il cite à l'appui de ses opinions, sur l'effet de ces garanties, Rousseau.

Duranton s'exprime de la même manière.

Voir Dalloz, jun., vo. Garantie, où la même opinion est exprimée, et il ajoute au liv. 416: "Mais si l'insolvabilité du débiteur provenait de la faute, de la négligence, ou de l'omission du cessionnaire même, il ne pourrait exercer son recours entre le cédant." Et Dalloz cite à son appui un grand nombre d'auteurs comme Loiseau, Pothier, Delvincourt, Duranton, Dalloz, et Troplong, et il ne mentionne que Toullier qui, dit-il, est d'avis que le cessionnaire ne peut souffrir de sa simple négligence.

Voir aussi Hornier *vs.* Brosseau, 22 Jurist, p. 135, où il a été jugé que dans la garantie de fournir et faire valoir il faut, pour que le cessionnaire puisse réclamer du cédant, alléguer et prouver l'insolvabilité.

Je suis d'avis que le demandeur cessionnaire aurait dû procéder contre son débiteur plus tôt qu'il ne l'a fait, et que si, pour n'avoir pas contraint son débiteur plus tôt, ce dernier est réellement devenu insolvable, la chose qu'il est obligé de prétendre pour soutenir son action c'est que sa négligence en aurait été la cause, et que par conséquent, suivant les autorités plus haut citées, il a perdu son recours contre son cédant.

Il n'est pas prouvé que le demandeur ait rien payé à A. Mérizzi, notaire de Napierville, non plus qu'à aucune autre personne pour faire collecter cette dette.

De sorte que l'action est déboutée.

MM. Carreau et Bernier, avocats du demandeur.

M. J. E. Bureau, avocat du défendeur.

SUPREME COURT OF CANADA, 1883.

OTTAWA, 2ND MAY, 1883.

PRESENT—SIR WILLIAM J. RITCHIE, KNT., C.J., and STRONG, FOURNIER, HENRY, TASCHEREAU and GWYNNE, JJ.

THOMAS GRANGE,

APPELLANT;

AND

DUNCAN McLENNAN,

RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Promise of sale, Construction of—Condition precedent—Mise en demeure—Arts. C. C., 1022, 1067, 1478, 1536, 1537, 1538, 1550.

On the 7th December, 1874, T. G., by a promise of sale, agreed to sell a farm to D. M., then a minor, for $1,200—of which $500 were paid at the time, balance payable in seven yearly instalments of $100 each, with interest at 7 per cent. D. M. was to have immediate possession and to ratify the deed on becoming of age, and to be entitled to a deed of sale, if instalments were paid as they became due, "but if, on the contrary, D. M. fails, neglects, or refuses to make such payments when they come due, then said D. M. will forfeit all right he has by these presents to obtain a deed of sale of said herein-mentioned farm, and he will moreover forfeit all monies already paid, and which hereafter may be paid, which said monies will be considered as rent of said farm, and these presents will then be considered as null and void, and the parties will be considered as lessor and lessee."

After D. M. became of age he left the country without ratifying the promise of sale, he paid none of the instalments which became due, and in 1879 T. G. regained possession of the farm. In October, 1880, D. M. returned and tendered the balance of the price, and claimed the farm.

HELD:—Reversing the judgment of the court below (Strong and Taschereau, JJ., dissenting) that the condition precedent on which the promise of sale was made not having been complied with within the time specified in the contract, the contract and the law placed the plaintiff *en demeure*, and there was no necessity for any demand, the necessity for a demand being inconsistent with the terms of the contract, which immediately on the failure of the performance of the condition *ipso facto* changed the relation of the parties from vendor and vendee to lessor and lessee.

Appeal from a judgment rendered by the Court of Queen's Bench for Lower Canada (Appeal side)* confirming the judgment of the Superior Court in favor of the respondent.

This action was to compel the appellant to grant to the respondent a deed of sale of a farm situate in the parish of St. Théodore, in compliance with a promise of sale made before Legris, a notary public, on the 7th December, 1874.

The appellant pleaded that the respondent had not fulfilled the conditions of the promise of sale which had thereby become inoperative. The Superior Court however, maintained the action and condemned the appellant to give to the res-

* 3 Dorion's Q.B. R. 212.

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pondent a deed of sale in due form and to deliver over to him the property claimed, and this judgment was affirmed with costs by the judgment of the Court of Queen's Bench (Appeal side).

The appeal is from this latter judgment.

The circumstances which have given rise to the suit are as follows:

By a deed passed before Legris, a notary public, on the 7th December, 1874, the appellant promised to sell the farm in question in this cause to the respondent, then a minor, but assisted by Roderick McLellan, his father, who promised to have the transaction ratified by his son, when he should have attained the full age of twenty-one years.

This promise of sale was made for the sum of $1,200, of which $500 were paid at the time, and as to the balance of $700, the respondent promised to pay it to the appellant in seven yearly consecutive payments of $100 each, the first of which would fall due on the first day of October, 1875, with interest at the rate of seven per cent. per annum, to reckon from the first day of October, 1874.

The deed contains the following provision, which has given rise to the present litigation:

It is especially covenanted and agreed upon between the said parties hereto, that if the said Duncan McLellan makes regularly the said payments of one hundred dollars said currency, when they will fall due respectively, together with the interest, till the full payment of said sum of seven hundred dollars, then and in that case the said Thomas Grange will be bound, as he doth hereby bind himself, to give the said Duncan McLellan a free and clear deed of sale of said farm; but, on the contrary, if the said Duncan McLennan fails, neglects or refuses to make the said payments when they come due, then the said Duncan McLellan will forfeit all right he has by these presents, to obtain a deed of sale of said herein mentioned farm, and he will moreover forfeit all monies already paid and which might hereafter be paid, which said monies will be considered as rent of said farm, and these presents will then be considered as null and void, and the parties hereto will be considered as lessor and lessee.

At the date of this promise of sale, Roderick McLennan was living on the farm with the respondent and the other members of his family. The respondent became of age in the month of January, 1875, and continued to live on the farm with his father for about a year after he had become of age. He then left to reside in the United States, and has not come to Lower Canada since, except once, on a visit of three or four days, in the fall of 1880.

The respondent never ratified the promise of sale, as he was bound to do, on his coming of age, and neither he nor his father, Roderick McLennan, has paid to the appellant any portion of the principal and interest accrued on the balance of $700 due on the price stipulated in the said promise of sale. The appellant has moreover been obliged to pay the municipal and school taxes and the seigniorial charges due on said property.

After waiting for several years without receiving either principal or interest, the appellant sought to get back the possession of his property; and on the 6th day of May, 1879, Robert McLellan, who was still in possession of it, and who, it seems, had furnished the $500 which had been paid to the appellant, when the promise of sale was passed, consented to resiliate the same and to give up to

the appellant possession of the farm, on condition that he should be allowed to occupy the house till the 1st of November following (1879). A deed was passed to that effect.

Subsequently, Robert McLellan refused to give up the possession of the house, and the appellant obtained a judgment of ouster, and finally recovered the possession of the house also.

It was not till the 23rd of October, 1880, after the appellant had been in possession of the farm for nearly eighteen months, and of the house for about a year, that a tender was made to him in the name of the respondent of the sum of $997.31 as the balance in principal and interest of the price stipulated in the promise of sale of the 7th of December, 1874.

This tender was made through a notary, and was accompanied by a demand on the appellant to grant to the respondent a deed of sale in the terms of the promise of sale.

The appellant having refused to comply with this request, the respondent brought this action whereby he renewed his tender and claimed that the appellant be ordered to give a regular deed of sale of the property in question, and to deliver him the possession of the same.

Mr. Doutre, Q.C., and *Mr. Joseph*, for appellant, and *Mr. Laflamme, Q.C.*, and *Mr. Cross*, for respondent.

The points and authorities relied on by counsel are reviewed in the judgment hereinafter given.

RITCHIE, C. J.:—I think that article 1478, which says that "A promise of sale with tradition and actual possession is equivalent to sale," means that where there is a contract of sale and tradition is made, and actual possession given with a view of there and then consummating such sale by such tradition and actual possession, such a contract of sale and such tradition is equivalent to a sale, but not as in Noel v. Laverdure,* where the contract provided that the tradition and actual possession should not be equivalent to the sale, or as in this case where such an operation would be inconsistent with the stipulations of the contract of sale, or as likewise in this case where a fair construction of the contract of sale leads to the irresistible inference that it was not the intention of the parties that actual possession should be equivalent to a sale, in other words does not apply to such a case as this where the terms of the contract of sale show clearly that it was not the intention of the parties that the sale should be brought to a completion or considered a complete sale. The tradition and actual possession in like manner as to the contract of sale was, in my opinion, to be subject to the condition that, if the payments were not made, and conditions complied with, such tradition and actual possession was to be a tradition and possession not under the contract of sale, but to be considered as the possession of a lessee holding under the vendor as lessor, for the contract expressly provides that: "The said Duncan R. McLennan will take possession of said farm and appurtenances immediately, and will enjoy the same on the following conditions;

* 4 Q. L. R. 247.

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That the tradition and actual possession only became such a tradition and actual possession as contemplated under Art. 1478 on fulfilment by the vendee of the conditions of the sale, that then and from thenceforth only was the tradition and possession such a tradition and actual possession as within the provisions would be equivalent to a sale; in other words, that until the conditions were fulfilled, the occupier of the property was in no better position than a tenant, whether it was R. McLellan on his own behalf (for it would appear that the property was in reality bought for him, and, so far as paid for, paid for with his money) or on behalf of his son, mentioned in the contract of sale as the vendee. The conditions being fulfilled the sale was then consummated, and then for the first time the plaintiff became entitled to the property as his own, or to claim a deed of sale. That it was not a real sale, subject to a revocatory condition, but, to my mind, it was in every sense of the word a conditional sale, and until the conditions were complied with there was no intention that there should be a complete sale, or that the property should be transferred.

The authority from Aubry & Raw,* cited by the learned Chief Justice in the court below, seems to cover the case :

La condition suspensive venant à défaillir, l'obligation et le droit qui y est corrélatif sont, *ipso facto*, à considérer comme n'ayant jamais existé. Ainsi, par exemple, l'acquéreur qui aurait été mis en possession de la chose par lui acquise sous condition, serait obligé de la restituer avec tous ces accessoires et avec les fruits qu'elle a produits.

I therefore have come to the same conclusion as the learned Chief Justice of the Court of Appeals, viz., that the condition precedent on which the promise of sale was made, not having been complied with within the time specified in the contract, the contract and the law placed the plaintiff *en demeure*, and there was no necessity for any demand, the necessity for a demand being entirely inconsistent with the terms of the contract, which immediately on the failure of the performance of the condition *ipso facto* changed the relation of the parties from vendor and vendee to lessor and lessee, and therefore the respondent not having fulfilled his obligation, is not in a position to insist on the appellant granting and executing to him a deed of the property in question, and therefore that this appeal should be allowed, the judgment of the Court below reversed, and the action of the respondent dismissed.

STRONG, J. :—I am of opinion that the appeal should be dismissed for reasons given by Taschereau, J., in his judgment with which he concurs.

FOURNIER, J. :—L'action de l'intimé (demandeur en cour inférieure) était fondée sur une promesse de vente en date du 7 décembre 1874 et avait pour but de forcer l'appelant à lui vendre la propriété mentionnée dans cette promesse de vente et de lui en passer titre, sinon que le jugement de la cour en tiendrait lieu.

Cette promesse de vente fut faite en considération de la somme de $1,200, dont $500 furent payés comptant et la balance stipulée payable à raison de $100 par année avec intérêt à sept p. c. Le demandeur était alors mineur, mais son

* Vol. 4, sec. 302, p. 75, sec. B.

père comparut à l'acte pour accepter pour lui. L'intimé s'obligea de ratifier cet acte à son âge de majorité.

Grange and McLennan.

Le différend qui s'élève entre les parties est au sujet de l'effet à donner à la clause suivante :

It is specially covenanted and agreed upon between the said parties hereto, that if the said Duncan R. McLennan makes regularly the said payments of one hundred dollars said currency, when they will fall due respectively, together with the interest, till the full payment of said sum of seven hundred dollars, then and in that case the said Thomas Grange will be bound, as he doth thereby bind himself, to give to said Duncan R. McLennan a free and clear deed of sale of said farm; but on the contrary, if the said Duncan R. McLennan fails, neglects, or refuses to make the said payments, when they come due, then the said Duncan R. McLennan will forfeit all right he has, by these presents, to obtain a deed of sale of said herein mentioned farm, and he will moreover forfeit all monies already paid which might hereafter be paid, which said monies will be considered as rent of said farm, and those presents will then be considered null and void, and then the parties hereto will be considered as lessor and lessee.

Le jugement de la cour Supérieure, confirmé par celui de la majorité de la cour du Banc de la Reine, a refusé de donner effet à cette convention. Les principaux motifs de cette décision se trouvent dans les considérants du jugement prononcé en cour Supérieure par l'honorable juge Papineau. Quant aux raisons du jugement de la majorité de la cour du Banc de la Reine, on ne les trouve ni dans les factums ni dans le dossier, qui ne contient que celles de l'honorable juge en chef Sir A. A. Dorion qui différait d'opinion.

Pour en arriver à cette conclusion l'honorable juge Papineau paraît s'être fondé sur les raisons suivantes : 1o délai accordé pour le paiement des sept cents piastres, balance due sur le prix convenu ; 2o que le défendeur (l'appelant) n'a jamais fait annuler la dite promesse de vente vis-à-vis du demandeur, (l'intimé ; 3o que le paiement de la dite balance du prix n'a jamais été demandé.

Il y a encore plusieurs autres considérants donnés par l'honorable juge que je me dispense d'indiquer ici, car je suis d'opinion, pour les raisons développées dans les notes de l'honorable Sir A. A. Dorion, qu'ils sont insuffisants pour soutenir ce jugement. Je ne m'arrêterai donc qu'à ceux ci-dessus indiqués.

La condition citée plus haut est-elle suspensive de l'effet de la promesse de vente jusqu'à l'accomplissement de la condition de paiement? La peine de déchéance stipulée en cas de défaut de paiement doit-elle avoir son effet de plein droit, sans autre mise en demeure que celle résultant de la convention et sans l'intervention des tribunaux?

Ces deux questions n'en doivent faire qu'une seule, car, si la convention doit en loi produire l'effet convenu, il ne saurait être question de mise en demeure et d'intervention des tribunaux.

La prétention de l'intimé est que la promesse de vente dont il s'agit, ayant été suivie de tradition et de possession, elle doit être, en vertu de l'art. 1478 C. C., considérée comme équivalente à la vente, et ne pouvait être annulée par un jugement prononçant déchéance contre lui.

L'appelant prétend au contraire que cette promesse ne peut avoir d'effet qu'à l'accomplissement des conditions de paiement, qu'à défaut de paiement la promesse de vente, en suspens jusque-là, se trouve anéantie.

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Comme le fait justement observer l'honorable juge-en-chef Dorion, l'art. 1478 ne peut aucunement appuyer la prétention de l'intimé, que la promesse dont il s'agit ici équivaut à la vente. Car dans cet article il ne s'agit que d'une promesse de vente pure et simple, et non pas d'une promesse de vente accompagnée de conditions spéciales. Ici les parties sont formellement convenues que l'intimé n'aurait pas droit à un titre de vente, à moins d'avoir payé, aux termes convenus, la balance des $700 sur le prix de vente, et que dans le cas de non paiement la promesse de vente deviendrait nulle et se transformerait en un bail de la propriété, et que les $500 payées iraient en déduction du loyer. Est-il possible, en présence d'une déclaration de volonté aussi clairement formulée, de prétendre que cette promesse est équivalente à la vente? Les parties ont précisément dit le contraire; elles ont effectivement dit: s'il n'y a pas de paiements, il n'y aura pas de vente mais bail de la propriété en question. Il ne peut pas, dans ce cas, y avoir de résolution de cette promesse, parce que la condition n'ayant pas été accomplie, la promesse n'a produit aucun effet. Aucun droit à la propriété n'est passé à l'intimé, son occupation après le défaut de paiement devant être continuée à titre de bail.

Cette transformation de la promesse de vente en un bail, ou d'un contrat en un autre peut se faire en vertu de l'article 1022 C. C.:

Les contrats produisent des obligations et quelquefois ont pour effet de libérer de quelque autre contrat, ou de le modifier.

C'est en vertu de ce principe que la Cour de Cassation a admis la validité d'une condition par laquelle des parties en se mariant avaient stipulé que la communauté de biens, limitée par leur contrat de mariage, deviendrait une communauté générale à l'ouverture des successions respectives des pères et mères des contractants.*

Qu'une promesse de vente puisse être légalement faite avec des conditions suspensives ou résolutoires, cela ne saurait être mis en doute d'après les autorités suivantes.

Ces autorités reconnaissent qu'une promesse de vente est susceptible des mêmes conditions que la vente.

Troplong,† commentant l'art. 1589 du Code Napoléon, dit:

Puisque la promesse de vente est équivalente à la vente, il faut dire qu'elle est susceptible des mêmes conditions suspensives et résolutoires que la vente. Il est même assez ordinaire qu'elle soit conditionnelle.

Et au No. 134 l'auteur ajoute:

Si celui à qui la promesse a été faite ne se présente pas à l'époque indiquée pour passer contrat, il faut distinguer s'il y a un terme indiqué ou bien si la convention ne porte pas de délai.

Dans le premier cas, la convention est résolue de plein droit et le promettant est dégagé. Dans le second cas il faut suivre la marche que nous avons tracée au No. 117.

Pothier‡ dit:

Les promesses de vente se font de deux manières: *Avec* ou *sans* limitation de temps. Lorsque quelqu'un s'est obligé de vendre une chose dans un temps déterminé, il est déchargé de plein droit de son obligation par le laps de temps .....

* Dalloz. Recueil de jurisprudence générale. Vo. condition suspensive.
† Vente, No. 132. ‡ Vente, No. 480.

Laurent * parlant de la promesse de vente conditionnelle, dit :

La promesse de vente peut-elle être faite sous condition? L'affirmative n'est pas douteuse : l'art. 1654 le dit de la vente, et la promesse bilatérale vaut vente. Il faut en dire autant de la promesse unilatérale, elle forme aussi un contrat ; donc elle peut être faite sans condition. On applique, dans ce cas, les principes qui régissent la condition.....

La promesse de vendre se trouve souvent ajoutée à un bail comme promesse de vendre sans que le preneur promette d'acheter ; la promesse peut aussi être bilatérale, soit pure et simple, soit sous condition.....

Si la promesse de vente était bilatérale, et pure et simple, quoi qu'ajoutée à la fin du bail, par exemple, il y aurait vente et translation de propriété. Partant l'indemnité (due pour expropriation) appartiendrait à l'acheteur. Mais que faut-il décider si la promesse est conditionnelle ? La vente conditionnelle ne transfère pas la propriété, tandis que la vente à terme la transfère. Tout dépendra donc de l'interprétation du contrat. Est-il conditionnel, l'indemnité sera due, et l'acheteur ne peut la réclamer parce qu'il n'y a pas encore de vente.

Une promesse de vente contenant des conditions analogues à celle dont il s'agit a été reconnue comme légale.

Dans la cause de Noël vs. Laverdure,† il a été décidé que la condition dans une promesse de vente, même suivie de possession,—que telle promesse ne serait pas équivalente à la vente, était valable. Il y avait une convention spéciale à cet effet, afin d'éviter au cas de défaut de paiement du prix, la nécessité et les frais d'une vente par le shérif. La légitimité d'une pareille condition a été admise.

Dans le cas actuel, la condition changeant la promesse de vente en un bail a aussi pour but d'éviter les frais de poursuite et d'expropriation. Il est plus facile et moins dispendieux d'expulser un locataire que de prendre une action en résolution de promesse de vente pour rentrer en possession de sa propriété. L'appelant avait intérêt à faire cette stipulation et il avait le droit de la faire.

Mais ici d'après la nature de la condition il ne peut pas y avoir nécessité de demander la résolution, car il n'a pas existé d'obligation, la condition y faisant obstacle. Voici ce que dit à ce sujet Demolombe.‡

La condition vient-elle à manquer ?

Rien de plus simple.

Le contrat est à considérer de plein droit, *ab initio* comme s'il n'avait jamais existé.

Quod si sub conditione res venierit, del Paul, si quidem defecerit conditio, nulla est emptio sicuti nec stipulatio. (*L. 8 ff. De Perii et comm. rei venditæ.*)

D'où nos anciens ont déduit cette maxime.

" *Actus conditionales, defectu conditione nihil est.*

386. Le plus souvent quand la condition manque, tout est dit de *plein droit*, comme nous venons de le remarquer, et il n'y a rien à faire de part ni d'autre. S'il était arrivé, par exception, que la chose qui faisait l'objet de l'obligation eut été livrée au créancier conditionnel, il serait tenu de la rendre avec tous ses accessoires, et même dans le cas, généralement aussi, avec les fruits qu'elle aurait produit ; car aucun contrat ne s'est formé, et il n'y a aucune cause d'où puisse résulter un effet juridique quelconque (*comp, infra* Nos 409-410. Touiller t. III, No 548 ; Zacharie, Aubry & Rau, t. III, p. 51 ; *Bufnoir*, p. 315.

§ *Aubry & Rau* disent :

La condition suspensive venant à défaillir, l'obligation et le droit qui y est corrélatif sont *ipso facto*, à considérer comme n'ayant jamais existé. Ainsi, par exemple, l'acquéreur qui aurait été mis en possession de la chose par lui acquise sous condition, serait obligé de la restituer avec tous ses accessoires et avec les fruits qu'elle a produits.

Larombière, vol. 2, p. 118, Nos 1, 2 et 3, or art. 1176 & 1177, C. N. et p. 120, No. 6.

* Vol. 24, No. 25, † 4 Q. L. R. 247.
‡ Code Napoléon, No. 375. § Vol. 4, § 302. p. 75—sect. B.

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Laurent* dit:

Les parties, en traitant sous conditions, font dépendre l'obligation de l'accomplissement de la condition; donc si la condition défaillit, il n'y a pas d'obligation. D'ordinaire, les parties ne font aucun acte d'exécution tant que la condition est en suspens; dans ce cas le contrat n'a jamais produit d'effet, les parties sont censées n'avoir jamais traité. Si le créancier avait été mis en possession, il devait restituer la chose avec tout ce qu'il en a perçu.

Les conditions imposées par l'appelant sont aussi conformes à l'article 1079 de notre code qui les permet en ces termes:

L'obligation est conditionnelle lorsqu'on la fait dépendre d'un événement futur et incertain, soit en la suspendant jusqu'à ce que l'événement arrive, soit en la résiliant, selon que l'événement arrive ou n'arrive pas.

La condition stipulée par l'appelant suspend l'exécution de la promesse jusqu'à ce qu'il y ait eu paiement, en conséquence, il ne peut pas y avoir résiliation parce qu'il n'y a pas eu l'obligation. C'est en considérant la condition dont il s'agit, non comme suspensive, mais simplement comme résolutoire d'un obligation complète que la Cour du Banc de la Reine a cru devoir faire application, au cas actuel, des principes concernant la résolution des contrats en France, matière sur laquelle il existe une différence notable entre notre code et celui de France.

On peut encore citer comme s'appliquant également à l'effet de la condition suspensive, ce que Laurent † dit au sujet de la condition résolutoire expresse:

Ce qui la caractérise et la distingue de la condition résolutoire tacite dont nous parlerons plus loin, c'est qu'elle opère de plein droit. En effet, l'art. 1183 dit que la condition résolutoire expresse " opère la révocation de la l'obligation "; la loi n'ajoute pas que la révocation se fait de plein droit, mais c'est bien là le sens des expressions qu'elle emploie; c'est le seul accomplissement de la condition qui résout le contrat, il ne faut pas autre chose, *ni sommation, ni demande judiciaire*. La raison en est très simple: c'est que telle est la volonté des parties contractantes formellement exprimée, et la volonté des parties fait bien loi (art. 1134). Voir aussi les Nos. 115, 117, 118.

Je citerai encore du même auteur au sujet de la condition résolutoire, son opinion sur l'effet de cette condition. Elle doit avoir d'autant plus d'importance dans son application à l'effet de la condition suspensive que l'auteur dit que la condition résolutoire implique une condition suspensive; l'acheteur sous condition résolutoire, dit-il, est débiteur sous condition suspensive.

Au No. 129, même volume, Laurent dit encore:

Si la condition résolutoire stipulée par les parties opère de plein droit, c'est que telle est leur volonté, et leur volonté tient lieu de loi.

Après avoir donné les raisons pour lesquelles dans le cas de la condition résolutoire tacite, il n'en est pas de même, l'auteur continue au No. 130 les développements sur l'effet de la condition résolutoire expresse:

De là suit que dans le cas de résolution expresse, le juge régulièrement n'intervient point. C'est le contrat qui d'avance a prononcé la résolution si tel événement arrive; dès l'instant où la condition s'accomplit, le contrat est résolu. Il n'y a rien à demander, *il n'y a donc pas d'action à intenter*. Quant il y a une contestation sur le point de savoir si réellement la condition s'est accomplie telle que les parties l'avaient stipulée le débat doit naturellement être porté devant les tribunaux, mais la seule question que le

* No. 100, vol. 17, p. 121. † Vol. 17, No. 114.

juge aura à décider, c'est la question de fait. Ce n'est pas lui qui prononcera la résolution, il se bornera à déclarer que la condition étant accomplie, le contrat est résolu en vertu de la volonté des parties contractantes. Le juge n'aurait même pas besoin de faire cette déclaration, il suffit qu'il soit constaté que la condition s'est réalisée; dès lors la volonté des parties reçoit son exécution et le contrat est résolu. A plus forte raison le juge ne peut-il pas décider que le contrat ne sera pas résolu quoique la condition résolutoire soit accomplie. Ce serait violer l'art. 1134, d'après lequel la convention tient lieu de loi, et cette loi oblige le juge aussi bien que les parties contractantes.

Au No. 151, le même auteur dit encore :

La condition résolutoire expresse ne donne pas lieu à une action en résolution, puisque le contrat est résolu de plein droit en vertu du contrat même. Il peut seulement y avoir lieu entre les parties à des demandes en restitution.

D'après ces autorités il est clair que ni la mise en demeure ni l'action en résolution ne sont nécessaires pour faire produire à la condition résolutoire les conséquences dont les parties sont convenues. A plus forte raison en doit-il être de même dans le cas de la condition suspensive où il n'a pas existé d'obligation.

Ainsi que l'a observé l'hon. juge en chef Dorion, avant la publication de notre Code Civil, les tribunaux ne donnaient pas à ces conditions leur plein et entier effet. Ils avaient pour habitude de les modifier suivant certaines règles d'équité, dont ils faisaient application suivant les circonstances de la cause. Toutefois, même avant le Code, la jurisprudence à cet égard avait été changée par un jugement du 30 septembre 1854, dans la cause de Richard *vs.* La Fabrique de Notre-Dame de Québec,* rendu par la Cour du Banc de la Reine, alors présidée par Sir L. H. LaFontaine, Bart., juge en chef, et composée des juges Panet, Aylwin, et C. Mondelet; dans cette cause il fut décidé " que dans un bail d'un banc dans une église, par laquelle il est stipulé qu'à défaut de paiement du loyer aux termes et époques fixés, dès lors et à l'expiration des dits termes le dit bail sera et demeurera nul et résolu de plein droit, et que le bailleur rentrera en possession du dit banc, et pourra procéder à une nouvelle adjudication d'icelui, sans être tenu de donner aucun avis ou assignation au preneur, n'est pas une clause qui doit être réputée comminatoire, mais qui doit avoir son effet. D'après le rapport de cette cause, un des arguments de l'honorable juge Duval, qui prit au jugement, en première instance, est rapporté comme suit :

The rule, in relation to this matter, is that parties to contracts have a right to insert in such contracts all clauses or conditions which are not *contra bonos mores*, or against law. Such being the rule it is difficult to understand, as it has been pretented by the plaintiff, why this covenant should not be enforced.

L'hon. juge Meredith, actuellement juge en chef de la Cour Supérieure de la Province de Québec, après avoir cité les remarques de Toullier au sujet du refus des tribunaux de donner effet aux conditions résolutoires, dit :

This jurisprudence has been condemned as arbitrary and unjust by our most eminent jurists; and I have no hesitation in saying that I think it so.

Il cite à l'appui de son opinion un grand nombre d'autorités auxquelles je réfère.

* L. C. R. 3.

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Le principe sanctionné par ce jugement reçut l'approbation des codificateurs de notre Code Civil, comme on peut s'en convaincre par les remarques suivantes que l'on trouve dans leur premier rapport, p. 19 (1865):

Les inconvénients qui résultent de la règle qui regarde certaines clauses des contrats comme seulement comminatoires et conséquemment ne devant pas être exécutées, sont indubitables et se présentent chaque jour. Sous la jurisprudence qui s'était formée, les tribunaux modifiaient les stipulations des contrats, ou sans en tenir compte, substituaient, à la volonté écrite des parties, une équité douteuse pour ajuster leurs droits. Dans ce pays cette intervention n'a peut-être pas été poussée aussi loin, mais en principe elle est également sujette à objection, et quoique soutenue de l'autorité de Dumoulin et de Pothier, elle ne paraît pas devoir son origine au Code Justinien, ni justifiée par aucune législation positive de la France. Les raisons données par les deux éminents jurisconsultes sont certainement peu satisfaisantes. Toullier qui discute la question au long, déclare que les tribunaux se sont arrogé ce pouvoir qui, par la suite, est passé en usage. Quoiqu'il en soit, il est certain que la doctrine de l'intervention judiciaire alors que le sens du contrat est clair, est désapprouvée par les juristes modernes. Deux des commissaires sont d'opinion de suggérer un changement de la loi en force par projet d'amendement soumis. De l'autre côté, M. le commissaire Morin croit plus sûr et plus équitable de s'en tenir à la règle en force. En conséquence le sujet est respectueusement soumis."

La législature a adopté la suggestion de la majorité des commissaires. Mais on fait observer que cet article n'est pas indiqué dans le Code comme établissant un droit nouveau. La raison en est claire, c'est que les codificateurs eux-mêmes n'ont considéré l'usage établi par les cours que comme un abus contre lequel ils se sont prononcés comme étant contraire à la loi. Ce qu'ils ont déclaré c'est que la loi prévaudrait contre l'usage des cours. Lorsqu'ils ont fait cette déclaration l'usage était déjà répudié par le jugement de la Cour du Banc de la Reine. Il s'agit donc dans cette cause de consacrer un principe déjà admis.

On prétend aussi que la condition, soit suspensive soit résolutoire, ne peut produire son effet qu'après la mise en demeure. La réponse à cette objection est déjà donnée par l'autorité citée plus haut de Laurent. J'ajouterai celle de Merlin.*

Suivant les principes du droit romain, dès qu'une obligation renferme un terme précis, on est obligé d'y satisfaire, sans qu'il soit besoin à ce sujet d'aucune sommation; mais dans nos usages, il en est autrement: un débiteur n'est exactement en retard ou en demeure de payer, de donner ou faire ce qu'il doit, que du jour qu'il a été judiciairement interpellé à cet effet, *à moins qu'il n'y ait à cet égard par la convention, une stipulation précise qu'une telle obligation se remplira dans un tel temps, auquel cas la stipulation faisant une partie essentielle de la convention, on ne peut y manquer sans encourir la peine attachée au retard que l'on met à l'exécuter.*

Il est évident qu'en pareil cas la mise en demeure résulte du caractère même de la stipulation,—ou que le débiteur y a renoncé en adoptant une condition qui la rend impossible. En effet, dans le cas actuel, McLennan avait délai jusqu'au 1er octobre pour faire le premier des sept paiements qui lui restaient à faire. En vertu de l'art. 1090 C. C., "ce qui n'est dû qu'à terme ne peut être exigé avant l'échéance." Donc, jusqu'au 1er octobre, l'appelant n'avait rien à demander; mais le lendemain, la déchéance étant arrivée, quelle mise en demeure pouvait-il faire? Demander paiement c'eut été renoncer [illegible] béné-

* Vo. *Demeure.*

fice de déchéance. Lui demander de résillier la promesse de vente? Elle l'était par l'effet de la convention. Il n'y avait donc qu'à demander possession de la propriété, et, au cas de refus, la contestation, comme le dit Laurent, ne devait reposer que sur la question du fait de savoir si la condition a été accomplie ou non. La mise en demeure, dans ce cas, n'était pas nécessaire,—si elle l'était, elle a eu lieu en vertu de l'art. 1067. "Le débiteur, dit cet article, peut être constitué en demeure soit par les termes mêmes du contrat, lorsqu'il contient une stipulation que le seul écoulement du temps pour l'accomplir aura cet effet." C'est ce qui a été convenu entre les parties de la manière la plus claire et la plus positive. Cette mise en demeure est suffisante pour pouvoir exiger l'exécution du contrat. Demolombe, en parlant de la mise en demeure lorsqu'on veut exiger non pas l'exécution du contrat, mais des dommages et intérêts résultant de sa non-exécution, dit :*

D'autre part, si le débiteur doit être constitué en demeure, c'est parce que le silence du créancier peut l'autoriser à croire que celui-ci a consenti tacitement à lui accorder ce délai; telle est, ayons-nous dit, la présomption du législateur.

La convention dont il s'agit repousse toute idée d'une présomption accordant un délai—puisqu'il est stipulé que l'obligation sera immédiatement anéantie et transformée en un bail.

Pour mieux établir la proposition que la mise en demeure n'est pas nécessaire dans le cas de stipulation expresse de résolution, je citerai encore un arrêt de la Cour de Cassation que l'on trouve dans Dalloz.†

Les art. 1184 et 1244 C. Nap., qui permettent aux tribunaux d'accorder un délai au débiteur contre lequel soit la résolution soit l'exécution d'un contrat sont demandées, ne sont point applicables au cas où il a été stipulé que la résolution du contrat aurait lieu de plein droit dans les formes et après les délais convenus entre les parties. De Paraza, 254.

D'après les autorités et les décisions ci-dessus citées, il résulte bien clairement que les motifs adoptés par l'honorable juge Papineau fondés sur le terme de paiement, la nécessité de la mise en demeure et de l'intervention des tribunaux ne sont pas fondés, et qu'une condition expresse de la nature de celle dont il s'agit doit avoir son effet de plein droit sans aucune mise en demeure et sans l'intervention des tribunaux.

Il a été soulevé et discuté plusieurs autres questions, mais étant d'avis que le défaut d'accomplissement des conditions expressément stipulées a eu pour effet d'anéantir la promesse de vente, il serait tout à fait inutile de les examiner. D'ailleurs, sur les questions incidentes, comme sur la question principale, je concours pleinement dans les raisons données dans son jugement sur cette cause par Sir A. A. Dorion, J.C. En conséquence, pour les raisons qu'il a si habilement développées et pour les motifs ci-dessus exposés, je suis d'opinion que l'appel devrait être alloué avec dépens.

HENRY, J.:—The only difficulty that presented itself to my mind in the argument on this case was the objection presented as to *mis en demeure*. On looking at the authorities I have come to the conclusion that that proceeding was unnecessary. The parties themselves provided by their agreement, one to sell

* Vol. I Des Contrats, p. 533. † Dalloz, Manuel de Jurisprudence, Vo. *Résolution*, 1891.

Grange and McLennan.

for a certain sum of money the land to the other, by paying so much down and the balance by instalments and there was a provision in the agreement that if he did not meet these instalments he should become the lessee of the party who sold the land, and, not only that, but he should forfeit the amount he had already paid. If the matter stopped there, possibly the party might find a necessity to resort to legal proceedings, but the plaintiff himself went to the United States, and I believe only lately returned. This agreement was entered into six or seven years ago. The father paid the money and was the real party to the transaction, but the contract was made out in the name of the son. The son being away, the father went into possession, and after being in possession and failing to make any payment he became the actual tenant of the party who sold the land, and, after remaining some time in possession, an action for ejectment was brought against him, and he was dispossessed. It appears to me all these proceedings, the agreement of the parties, and all that was done afterwards, are sufficient to satisfy any reasonable mind that there was no necessity for taking any proceedings to put this party in default. The son went away and left the father in possession and never looked after the property since; the father enters into all these arrangements, and afterwards he becomes a tenant. Six or seven years afterwards the son says: "You did not put me *en demeure*, and therefore at the end of this time I will come and offer you the amount that was due and simple interest." It would be an act of injustice to require the party to take simple interest for his money and lose the opportunity of investing these amounts as they became due. I should say under the circumstances it was not even an equitable offer. I think if he came into any English court and claimed specific performance of the agreement, it would be a matter the court would take into consideration if they at all allowed him to set that as a case against the party. They would say to him: "No, you have not paid this as you should have done by instalments, and if you ask us to enforce this agreement, we will enforce the adoption of equitable principles, and not only payment of simple interest but interest on each instalment as it fell due." Under the circumstances I do not see any equity in favor of the respondent in this case; the equities are all in favor of the appellant, and besides that, this was simply a conditional sale, a sale to be fully effected only on the full payment of all the instalments. The party having allowed himself to be put out of possession, I do not think he has a right to come in at this time and ask the other party to give him a specific performance of the contract.

TASCHEREAU, J.:—I am of opinion to dismiss this appeal for the reasons contained in the *considerants* of the judgment of the Superior Court, whose judgment was confirmed by the Court of Appeal, upon these same reasons, I presume, as we have no notes (in the case) from the learned judges of that court who formed the majority.

That there was a sale by Grange to McLennan can admit of no doubt. There was *res pretium*, and *consensus*. There was the translation of the actual possession, and such a complete transfer to McLennan of a full title and of all rights to that property that McLennan gave upon it, and Grange accepted, a mortgage for the security of the balance due on the price of sale.

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This sale was unaccompanied with a clause *resolutoire*—in default of payment at the dates agreed upon—not at all in default of ratification by McLennan, when he would become of age, as has been said. This would, however, be immaterial, as McLennan did in fact ratify the said purchase by his continuing to keep the property sold to him, when, a few weeks after this deed, he became of age, and as fully as possible, though impliedly only.

Sir A. A. Dorion, the learned Chief Justice of the Court of Queen's Bench, who dissented from the judgment, says:

> The parties have in effect declared that until the respondent should pay the $700 remaining on the stipulated price of sale, he should be the tenant of the appellant, and the $500 paid should be taken in payment of the rent, and that if the balance of $700 and interest was regularly paid as the several instalments became due, the respondent should then be entitled to claim a deed of sale of the property leased.

With greatest deference for the learned Chief Justice, whose opinions have always such weight, I think that this is a mis-interpretation of the contract between the parties. How can it be said that they in effect declared that McLennan would be only a tenant until he paid the balance of the stipulated price of sale, when by the very deed McLennan gives and Grange accepts a mortgage on that property for that balance of the price of sale? Grange evidently could not take a mortgage on the property if the title of that property had continued to be vested in him, and the fact that he accepts a mortgage from McLennan upon that same property is to me the most complete evidence that he, then and there, divested himself in favor of McLennan of the title to it.

Then, as to that clause stipulating forfeiture of the payments made and a lease, in default of the payments to be made. For how long was that lease to be? There is nothing in the deed about it. Could Grange have taken advantage of this to eject McLennan from the ground, when he failed to make the first payment—not a year after the deed—and yet keep the $500 paid, thus getting a yearly rent of $500 for a property he sold for $1,200. I believe not; yet this is what he really contends for.

Then, suppose McLennan had paid $1,100, that is to say, all the instalments up to the last, but had failed to make this last one, can Grange contend that he could have kept these $1,100, and yet consider McLennan as his tenant, and eject him at his, Grange's will, as no length for the lease is fixed? Keep both the $1,100 and the land? I say, undoubtedly, no. Yet, that is what his propositions would inevitably lead to.

This deed is, as I have said, nothing else but a deed of sale with a clause *resolutoire* in default of payment. And, it being so, an action was necessary to have the dissolution of the said deed declared. The code has made no changes in the old law on this point, arts. 1536, 1537, 1538, 1550. It has, as new law, decreed that a special stipulation as to dissolution for non-payment is necessary; it has made changes as to prescription of action in such cases. It has also decreed, as new law, that the stipulation is not to be considered as communicatory, but that the judgment of dissolution is pronounced at once, adding that: "Nevertheless the buyer may pay the price with interest and

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"costs at any time before the rendering of the judgment." Meaning clearly that though the dissolution had been stipulated, though the date fixed for the payment has lapsed, though the vendee had not paid, though even the vendor has taken an action to have the sale dissolved, yet the vendee at any time, before judgment on the action, can go up to the vendor and force him to accept the price of sale, and so relieve himself from the stipulated consequences of his default.

And adds art. 1550 (as new law), "If the seller fail to bring a suit for the enforcement of his right of dissolution within the stipulated term, the buyer remains absolute owner of the thing sold." * So that here, by an express provision of the code, Grange having failed to bring a suit for the dissolution of the sale, McLennan remained so far absolute owner of the property sold.

But, says the appellant, by the very terms of the deed, no summons of any kind was necessary, and McLennan was *en demeure* by the very terms of the Act. Art. 1067 C. C.

This cannot help the appellant. The price here was grevable and *non portable*, that is to say, payable at McLennan's domicile, art. 1152 C. C. (and at date of first payment he was in the country.)

Or, dans ce dernier cas (says Demolombe) † il ne suffit pas pour que le débiteur soit constitué en demeure qu'il existe contre lui une des trois causes, desquelles nous venons de dire que la mise en demeure peut résulter: soit un texte de la loi, soit une clause de la convention, soit une sommation. Il faut un autre que le créancier constate, par une sommation, ou autre acte équivalent, qu'il s'est présenté au domicile du débiteur. La convention porte, par exemple, que le débiteur sera, de plein droit, constitué en demeure par la seule échéance du terme, et sans qu'il ait besoin de sommation. Eh bien! le débiteur ne sera en demeure, par le seule échéance du terme, dès que la dette était grévable.

And all the authors agree on this.

So that, even taking the appellant's own interpretation of this deed as to this, the respondent was never legally put *en demeure* to pay the amount of his purchase. Of course, that the payment of it is a condition precedent to his getting a full deed, he does not deny. He has offered the full amount before instituting his action, and even before it was all due, and has deposited it in court. If the appellant had taken an action to have this sale dissolved, the respondent would clearly, according to the code, have been in time, at any period of the case before judgment, to pay the price of sale and prevent the dissolution. Because he paid before the appellant instituted any action at all the appellant would have us declare that he is too late. With the two courts below, I cannot reach that conclusion.

Then art. 1184 of the Code Napoléon, expressly enacts that the party who has to complain of the default by the other party to fulfil his engagements has the choice either to demand a specific performance of the obligation, if possible, or that the contract be dissolved; but that the dissolution must be asked by an action in justice. That is what art. 1065 of our code expressly (except as to

* See Codifiers' Report, vol. 2, pp. 16, 17, 18, 55, 56. † Ier des Contrats, page 341.

the last part) says, and the Codifiers say,* that they have not expressly re-enacted this art. 1184 of the Code Napoleon because its enactments, so far as consistent with other articles of our code, are contained in this art. 1065 of our own code.

And though, under art. 1088, with us, as in France under art. 1183, a resolutive condition effects of right, when accomplished, the dissolution of the contract, yet, when this condition depends on the act of one of the parties.

On ne peut exercer le droit résultant de la condition, qu'en le faisant ordonner par le juge, parce qu'alors elle tient de la clause pénale.

La résolution, ni la peine, ne sont acquises de plein droit: elles doivent être prononcées en justice, encore que le contraire soit stipulé au contrat.†

These authorities, and the general principle of our law, demonstrate that an action in justice is necessary to ask the dissolution. If not taken, the creditor is supposed to have waived his right to ask it, and to have granted delay to his debtor for the payments due. Arts. 1537 and 1538 of our Code, I have already referred to, make this as plain as possible as to sale. See also Delvincourt ‡ and authorities cited in Code Civil annoté par Lahye.‖

It is clear that this right to ask the dissolution of the sale for non-payment is a right given to the vendor, and not to the vendee, who, according to all authority, would be estopped from invoking his non-execution of this contract to ask the rescision of it. The vendor has an action for the price of sale, though the contract stipulated that the sale would be rescinded by non-payment on the part of the vendee.§ Here the appellant was bound to notify McLennan by some act that he intended to avail himself of his right to have this sale rescinded, and to hold him, McLennan, as his tenant only. The appellant had to make or declare his option to ask the dissolution, if he intended to avail himself of his privilege. The lease provided for in the deed never began, never was in existence. If the appellant had sued the respondent for the price of sale, this one could never have contended that the contract had *ipso jure* lapsed, that he was only a tenant, and on these grounds have refused to pay the price of sale.

As to moveables, the code has thought it better that the dissolution of the sale for non-payment should take place without the necessity of a suit, but it has declared so, in express terms, by art. 1544, so giving it here again clearly to be understood that, for immoveables, a suit is necessary.

In fact, the law, under art. 1536, 1537, 1538 and 1550, is now clearly that "No sale of immoveables shall be rescinded for default of payment of price, unless there is an express clause to that effect, and not then, until judgment of rescision is pronounced, and the judgment may be prevented if the buyer pays the price, with interest and costs, after action is commenced, at any time before judgment." This being so, McLennan having duly offered the price of sale to *Grange*, even before an action of dissolution, he surely must have been in time to do it, since he would have been in time after an action had been brought.

* See report 1st vol. p. 20. † Lahaye Code Civil Annoté, arts. 1183, 1184.
‡ Vol. 2, Note 6, page 17. ‖ Under arts. 1654 and 1654C. N. § Art. 1542 C. C.

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For these reasons, I am of opinion that the judgment of the two courts below maintaining the plaintiff's action is right, and that this appeal should be dismissed with costs.

GWYNNE, J. :—I find it difficult to put upon an instrument, so inartistically and equivocally expressed as that upon which this case turns, a construction which can be said to be clearly free from doubt. I think, however, it does appear to have been a very prominent, and, indeed, the most prominent, feature in the intention of the parties to the instrument, that in case of default in payment of any of the instalments of the purchase money agreed upon, the instrument should operate only as a lease, and that the payments already made should, in such case, be treated as paid on account of rent. Now, this important feature in the intention of the parties would be wholly frustrated, if by reason of the clause which speaks of the vendor having an hypothec on the property for the purchase money the instrument should be construed as a completed sale. The construction, therefore, which has been put upon the instrument by the learned Chief Justice of the Court of Queen's Bench in Montreal, in appeal, appears to my mind to be most in accordance with what was the real intention of the parties to the instrument, an effect, I think, should be given to such intention although not very felicitously expressed by the notary who prepared the deed. I am of opinion, therefore, that the appeal should be allowed.

Appeal allowed with costs.

Doutre, Joseph & Dandurand, Solicitors for appellant.

Davidson & Cross, Solicitors for respondent.

PRIVY COUNCIL, 1883.

LONDON, 27TH NOVEMBER, 1883.

Coram SIR BARNES PEACOCK, SIR MONTAGUE SMITH, SIR ARTHUR HOBHOUSE.

DUCONDU ET AL.,

AND — APPELLANTS;

DUPUY, — RESPONDENT.

A person sold his right and title to certain Crown timber licenses. He was unable to deliver two of the licenses, and to make up the deficiency assigned two other licenses. The second deed contained a warrant "against all troubles generally whatsoever."

HELD:—That the vendor was not liable when the vendee was evicted by the holder of a prior license.

The appeal was from a judgment of the Supreme Court of Canada, reported in 6th Supreme Court Reports, page 425.

PER CURIAM:—On the 10th July, 1858, Edward Scallon, who is the predecessor in title of the appellants, contracted with one Benjamin Peck, the predecessor in title of the respondent, to sell to him certain property called timber limits.

The nature of a timber limit is this:—Annual licenses are granted by the Commissioner of Crown Lands to take possession of certain areas of land, to cut timber within those areas or limits. There is an express provision in the Statute that if any license is found to cover ground already occupied by a prior license the subsequent license shall, to that extent, be null and void.

Such being the nature of the property, Scallon contracted to sell all the right and title obtained by him from the Crown. The purchase money was to be paid by instalments, and when the last instalment was paid the conveyance was to be completed by Scallon. The money was paid; and Scallon being dead, his heirs, the present appellants, executed a deed, dated the 16th March, 1865, for the purpose of completing the conveyance to Cushing, in whom Peck's interest was then vested. In that deed it is stated that they are acting in execution of the prior contract; and they convey and release, with a guarantee against disturbance, all the immoveable property and rights which Scallon had promised. Then they proceed to describe it; and they describe it in precisely the same terms as are used in the contract of 1858. The property so described is said to be comprised in 13 different licenses, which purport to convey a title to an area of 256 miles.

Among those licenses are two, numbered 97 and 98, which purport to convey title each to an area of 25 miles on the Assumption River; and the heirs of Scallon declare that the licenses have been renewed up to that time by Peck and his representatives. It turned out that in point of fact Nos. 97 and 98 had not been renewed, and it seems doubtful whether they were in existence at the time of the contract of 1858. Mr. Fullarton [illegible] his case on the hypothesis, which he takes as most favorable to him, that they were not in existence at that time.

Ducondu, et al., and Dupuy.

On that discovery the parties come together [illegible] and the heirs of Scallon agree to make good the loss accruing to the successors in title of Peck by the non-existence of licenses 97 and 98. The arrangement made by them is contained in a deed of the 22nd October, 1866, executed by one McConville, who for the present purpose is assumed to be the lawful agent of the appellants. The language used by the parties in that deed is, as stated in English, to the following effect:—After referring to the prior transactions, they say, "In virtue of "that deed"—that is, the deed of 1858,—"Scallon was bound to sell 256 miles "of limits for cutting wood on Crown lands; and as there is found a deficit of "50 miles to complete the said quantity of 256 miles granted to Cushing, "McConville, in the name of his principals, desiring to fill up the deficit which "has been found, has by these presents granted and conveyed, with warranty "against all disturbances generally, whatsoever they may be, to Cushing, the "said quantity of 50 miles of limits on the said River Assumption, described "as follows in the English tongue." The description is contained in two other licenses, Nos. 25 and 26. License 25 is in these terms:—"Commencing at "the upper end limit No. 94 on the southwest side of L'Assomption River, "granted to late Edward Scallon, and extending five miles on said river and five "miles back from its banks, making a limit of 25 square miles, not to interfere "with limits granted or to be renewed in virtue of regulations." *Mutatis mutandis* license 26 is in the same terms. The deed states that McConville has, [illegible] principals, paid the sum of $500 to Cushing, on account generally of all [illegible] which Cushing may have against the heirs of Scallon, and Cushing [illegible] declares that by reason of this deed he has nothing to claim, for any cause or reason whatever, against the heirs of Scallon; and a general release is given. McConville on his part gives a general release to Cushing for all claims by the heirs of Scallon.

It is on that deed that the present question arises. The difficulty which has arisen is this: that when the grantee, Cushing, came to work on the limits contained in the licenses 25 and 26 he was stopped by a man of the name of Hall, who claimed to be possessed of the same land in virtue of a prior license from the Crown. There has been a great deal of controversy as to whether the interference by Hall has been properly proved in this suit; but for the purposes of the present decision all that part of the case is assumed in favor of the respondents. Cushing could not get the benefit of all the land described in licenses 25 and 26, by reason of a prior grant to Hall. Cushing accordingly, or his assignee, Dupuy, the present respondent, sues the heirs of Scallon upon the warranty which he alleges that they have given for 50 square miles of timber limits. The question is whether the appellants have given a warranty for those 50 miles of limits absolutely, or only a warranty for the licenses which purport to give a title to the 50 square miles. It is a question of very considerable difficulty. The Courts in Montreal have taken one view, in favor of the appellants; and the majority of the Supreme Court has taken the other view, in favor of the respondent.

There has been a good deal of question, both in the Courts below, and at the

bar here, whether it is proper to go behind the deed of October, 1866. It is quite plain what the course of a court of justice must be. In one sense we cannot go behind the deed of 1866, that is to say, the rights of the parties must be regulated by the construction of that deed, [illegible] deed alone. In another sense we have to go behind it, because t[illegible] prior transactions. It professes to be founded upon the li[illegible] ose prior transactions; and a court cannot properly constr[illegible] ascertaining what the position of the parties was at the time [illegible] execute it. Now the position of the parties appears to their L[illegible]ins Scallon contracted to sell his right and title to the 13 licenses, [illegible]rport to contain 562 square miles. He was not liable to make good a [illegible]e to the 256 square miles any further than the licenses themselves made a title to them. But he was liable to have and to deliver the licenses which he purported to sell. In point of fact he had not got two of those licenses, and when that fact is discovered his heirs come to make up the deficit, as they call it "*compléter le déficit*," that is to say, to do that which Scallon was bound to do. At that time Scallon was bound to make good in some way the loss sustained by the non-existence of licenses 97 and 98.

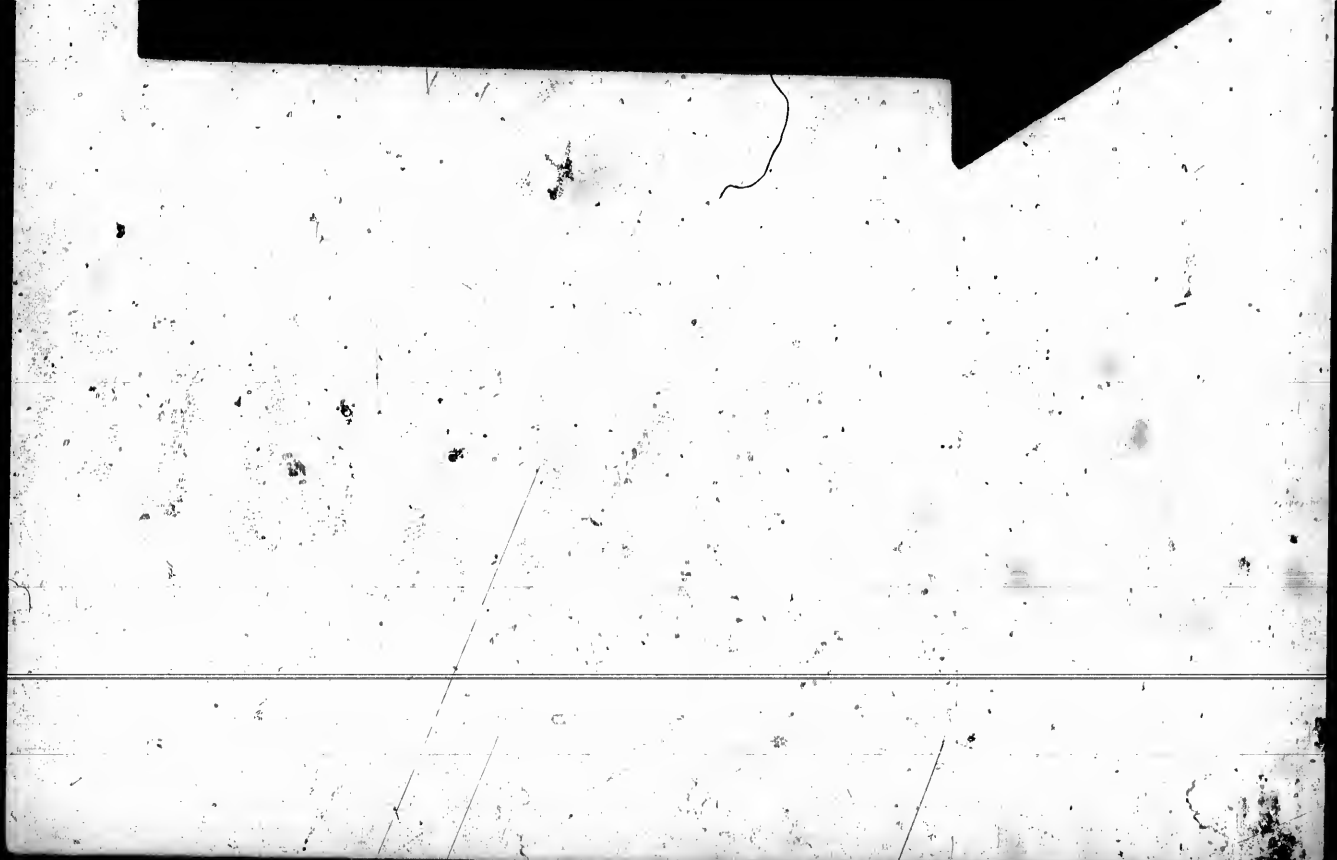
What, then, do the parties do? They make up the deficit by assigning two other licenses. They call it, "50 miles of limits described as follows." Even taking the world "limits" to be an ambiguous term, their Lordships are of opinion that "limits described as follows" must be taken to indicate the thing which is sold according to the description which is given. Into that description is imported the condition that the license sold is not to interfere with limits granted or to be renewed in virtue of regulations. Therefore the two licenses which formed the subject of the assignment of 1866 are to be taken exactly as the two missing licenses which form the subject of the contract of 1858 were taken, viz., as conveying only such right, title, and interest as the vendors had obtained from the Crown. Now the guarantee can only extend to the thing that is sold, the very subject of the assignment. If the licenses 25 and 26 were not forthcoming, or if there was any defect in the title of the heirs of Scallon to those licenses, the guarantee might have some operation; but the licenses are forthcoming, and have been handed over, and there is no guarantee against a deficiency by reason of prior grant.

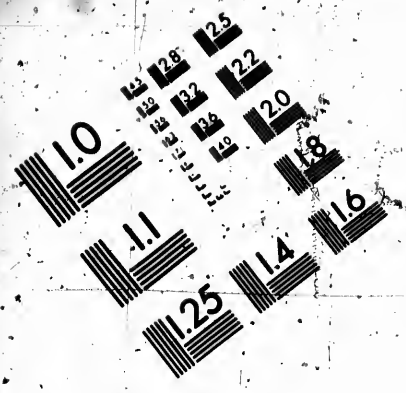
The result is, that, assuming the respondent to be right in all the issues raised by him with respect to the breach of the alleged guarantee, their Lordships are of opinion that no guarantee exists to cover that alleged breach.

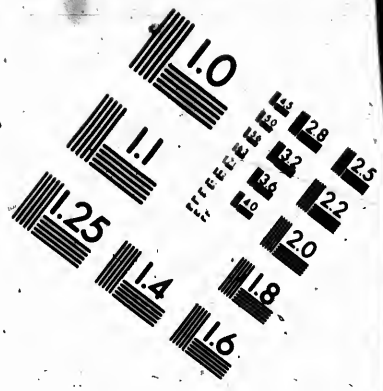
Under these circumstances their Lordships will humbly advise Her Majesty that the decree of the Supreme Court be reversed, and the decrees of the lower Courts restored. The costs of the Appeal will follow the result.

S. Pagnuelo, Q. C., & Kenelm E. Digby, for appellants.

F. L. Beique & M. Fullerton, for respondents.







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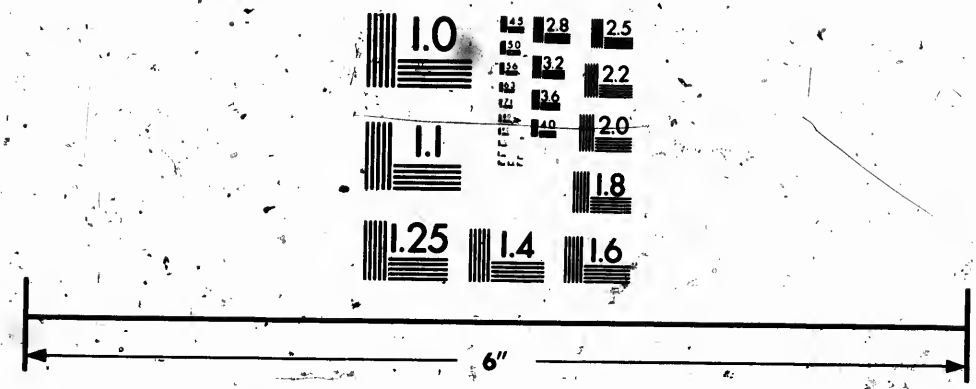

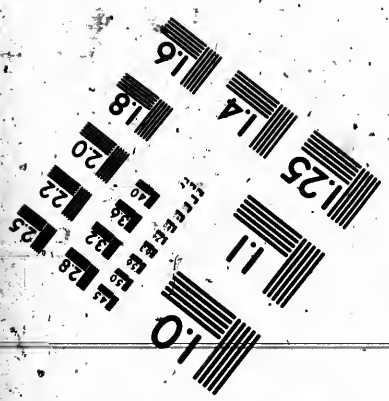

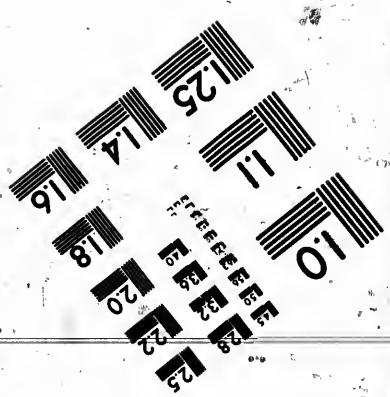

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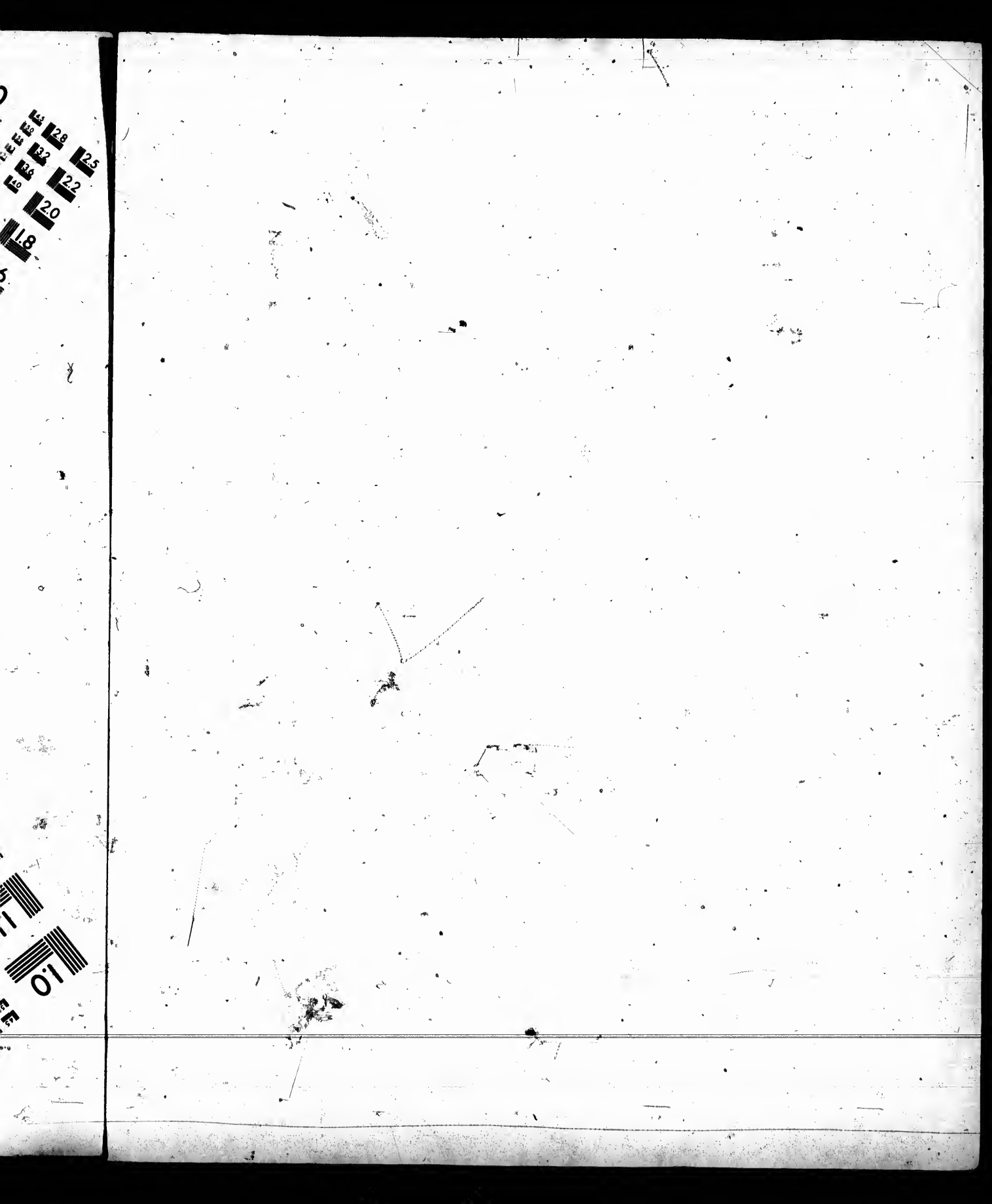

COURT OF QUEEN'S BENCH, 1884.

MONTREAL, 26TH FEBRUARY, 1884.

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

No. 211.

LORD ET AL., APPELLANTS;

AND

DUNKERLY, RESPONDENT.

Held:—1. That where a charter-party stipulates simply that the vessel shall be loaded with despatch, it is implied that such despatch shall be such as is usual, and according to the custom of the port of loading.

2. That in the present instance the delays caused by loading with coal the tenders of "The Great Eastern," lying at Newfoundland, at a distance of 500 miles from Sydney, the port of loading, was justifiable under the rules and customs of said port.

The present Appeal was from a judgment rendered on the 21st May, 1880, by the Hon. Mr. Justice Torrance, holding the Superior Court, condemning the appellants to pay the respondent $3,650.00 interests and costs. The judgment was in the following terms:—

The Court having heard the parties by their counsel, upon the merits of this cause, examined the proceedings, proof of record, and evidence adduced, and deliberated:

"Considering that defendants failed to load the steamship 'Tagus' with due despatch at Sydney, Cape Breton, as required by the charter-party, of date the 27th of May, 1873, referred to, by reason whereof the said vessel was detained fifteen days, for which defendants are liable to pay to plaintiff as demurrage, £750 sterling money of Great Britain, for fifteen days' delay at the rate of £50 sterling *per diem*, doth overrule defendants' plea, and doth condemn the said defendants jointly and severally to pay to said plaintiff the said sum of £750 sterling, equal to $3,650 currency of Canada, with interest thereon from the 21st of July, 1873, day of service of process, until paid, and costs of suit, *distraits* to Messrs. Lunn and Cramp, the substituted attorneys for plaintiff."

TESSIER, J. (dissentient), simply remarked that in his opinion the judgment appealed from was correct, and ought to be confirmed.

RAMSAY, J.—This case presents a great resemblance to the case of *Lord & Elliot*, decided in favor of the appellant in this Court, but which has since been rendered by the Privy Council. It appears to me that the likeness is only superficial and that the judgment now to be rendered must turn on a question totally different from that decided by the Privy Council.

The charter-parties in the two cases are not precisely similar, but it is unimportant to consider their differences as we view this case. Both fixed no specified time for discharging and loading, and both had express stipulations that the charterers should use despatch. In the former case the majority of this Court considered that in a coaling station such as Sydney, where the pier is merely

the continuation of the mines, the facilities of the mines had to be considered in giving a fair interpretation to the charter-party. The Privy Council took a different view, and, basing their judgment on the answer of Mr. Gisborne that "the facilities of the pier were greater than the production of the mine," they held that, "in consequence of the delay in getting the coals down from the mines, there was not a sufficient supply at the port, by which the loading of the 'Hibernia' was delayed. This deficiency of coals was the cause of the 'Gresham' not sooner obtaining her cargo." Probably in this case the same question could not arise, for the charter-party contains a stipulation not to be found in the other, namely, that the "Tagus" should load in the usual manner, with a "full and complete cargo of coals, which was to be *brought alongside as is customary at ports of loading and discharge.*" There is also no evidence to establish that the facilities of the pier were greater than the production of the mine, or that there was any lack of coal at the mine or at the pier.

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But the question of diligence in this case turns upon the regularity of turn. It is contended that lighters or vessels attendant on the "Great Eastern," then employed in laying the Atlantic cable, at a distance of at least 500 miles from the port of Sydney had precedence in loading over vessels reported before them. The argument used by Mr. Gisborne is this—"The Great Eastern" was reported before the "Tagus," and her lighters had to be loaded whenever they came into port, just as if they had been "The Great Eastern" herself. Another argument is that the "Tagus" had no right to her turn till she had discharged all her ballast, which she did not do till the 30th June, and this by the regulations of the port, which are dated the 1st of July, 1873,—the day after the "Tagus" was clear of ballast.

There is a manifest contradiction in these arguments. If it be a good reason to say that a ship has no right to her turn till she is quite clear of ballast then "The Great Eastern" never had a right to turn, for it will scarcely be contended that "The Great Eastern" was without ballast when laying the Atlantic cable several hundred miles from shore. Again the ballast rule is not shown to be in force or the reason given, that the date appeared to be the 1st of July, because the printers at Sydney work slowly is simply absurd. A resolution is not dated the day it is printed, but the day it is passed. Further the rule is without meaning, except in so far as the ballast being on board renders the ship unfit for loading. In this case it is proved, without contradiction, that the "Tagus" was ready to receive cargo on the 16th June, and that it was Mr. Gisborne who told the captain not to throw out all his ballast.

This, however, is not the point upon which the Court considers the case turns. Mr. Gisborne swears, that all extra large vessels are loaded by tender, "that it was the custom to load all high vessels and warships by tender at the port of Sydney, —in fact, it is the custom of all ports." Very little evidence on this point will suffice, for it is difficult to see how it could be otherwise unless all vessels that could not come to the pier were to be excluded from coaling. Besides the coal for the Great Eastern was not a cargo, it was coal with which to move, and, therefore, by necessity, it followed the rule for bunker coal. If there was not a

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rule of that description in all coaling stations steamships would come to a standstill and the first persons to suffer from such short-sighted policy would be owners of steamers like Mr. Dunkerly.

The motion of last year turns entirely on this. It is true the certificate of the port entry books is not a very satisfactory document, but Mr. Gisborne states that no vessels but the Great Eastern's lighters passed before the "Tagus" and the captain's evidence seems to confirm this. Moreover, the appellants have not attempted to show that precedence was given to other vessels.

We are therefore to reverse and to dismiss the respondent's action with all costs.

The following was the written judgment of the Court in appeal:—

"The Court * * * considering that in and by the charter-party in this cause fyled, to wit, the deed or contract passed at Montreal, on the 27th day of May, 1873, between David Shaw, as agent for the plaintiff, now respondent, and the said appellants, defendants below, it appears that the steamship "Tagus" therein mentioned should proceed to the port of Sydney, or so near thereunto as she might safely get, and there load in the usual manner, from the factors of said appellants, a full and complete cargo of coal, to be brought to and taken from alongside, as customary, at ports of loading and discharge;

"Considering that it was further promised and agreed with appellants that the said vessel should be loaded with despatch at Sydney, and that there was no specified number of days during which the said vessel should be loaded.

"Considering that the stipulations aforesaid imply the obligation to use such despatch as is usual and according to the custom of the port of loading;

"Considering that there is no evidence to establish that despatch was not used according to the terms of the said contract, but that all due diligence, according to the usage and custom of the port, was used by the said appellants;

"Considering that there is error in the judgment [redacted] from, to wit, the judgment rendered by the Superior Court at Montr[redacted]he 21st day of May, 1880

"Doth reverse, annul and set aside the said judgment and, proceeding to render the judgment which ought to have been rendered, doth dismiss the action and demand of the said respondent, with costs as well of the Court below as of this Court. (The Honorable Mr. Justice Tessier dissenting); and on motion of Messrs. Kerr & Carter, attorneys for the appellants, the Court doth grant their *distraction* of costs in this cause."

Judgment of S. C. reversed.

Kerr & Carter, for appellants.
Strachan Bethune, Q.C., counsel.
Lunn & Cramp, for respondent.

COUR DU BANC DE LA REINE, 1883.

(En Appel.)

MONTRÉAL, 17 DÉCEMBRE 1883.

PRÉSENTS :

SIR A. A. DORION, Juge-en-Chef, et les Honorables Juges RAMSAY, TESSIER, CROSS et BABY.

LA COMPAGNIE DE NAVIGATION DU RICHELIEU ET D'ONTARIO,

APPELANTE;

vs.

CORDÉLIA ST. JEAN,

INTIMÉE.

Responsabilité du maître à l'égard de son employé—Article 1054, C. C.—De la négligence contributive.

Le jugement dont est appel a été rendu le 30 juin 1882, par Son Honneur le Juge Mathieu, par lequel jugement, l'appelante a été condamnée à payer à l'intimée la somme de $500 de dommages, avec intérêt et les dépens de l'action.

Voici ce jugement; il explique au long les faits de la cause:

"La Cour, après avoir entendu les parties par leurs avocats et procureurs respectifs, sur le mérite de la présente cause, avoir examiné tout le dossier de la procédure, et les pièces produites, dûment considéré la preuve, et sur le tout mûrement délibéré; sur la dite motion, accorde la dite motion, sans frais; et sur le mérite;

Attendu, que le 29 juillet 1881, la demanderesse était l'épouse de Siméon Paulet, navigateur, de la ville de Sorel, qu'ils vivaient ensemble comme mari et femme, en bonne intelligence, et que le dit Siméon Paulet était un bon époux pour elle, et pourvoyait à tous ses besoins; que le dit Siméon Paulet était alors engagé à la Compagnie défenderesse comme second, ou contre-maître, à bord du bateau à vapeur de la défenderesse "Le Chambly," voyageant de Montréal à Chambly, passant par Sorel; que le dit Siméon Paulet était un bon serviteur, un bon garçon, comme il est constaté par la preuve, aimé de tout l'équipage et de tous les officiers de la Compagnie, et plein de zèle pour faire son devoir.

Attendu que le dit jour, 29 juillet 1881, le dit bateau à vapeur "Chambly" et un petit remorqueur, le "John Brown," accostèrent ensemble, en descendant le fleuve St. Laurent, vis-à-vis la paroisse de Varennes, à un endroit où le courant est un peu plus rapide qu'à l'ordinaire, pour prendre un certain nombre de boîtes vides à bord du vapeur "John Brown," et les transborder à bord du dit vapeur "Chambly;" que pour ne pas causer de dommage ou faire faire de l'eau au vapeur "John Brown," qui paraît être un vieux vaisseau, le mouvement du vapeur "Chambly" fut arrêté, lorsque ces deux vapeurs s'accostèrent l'un contre l'autre; qu'on a mis une seule amarre pour tenir les deux vaisseaux l'un près de l'autre, et que cet amarre fût placée en avant des vaisseaux à l'endroit du vapeur "Chambly," où se place ordinairement la passerelle; que les deux vaisseaux, ayant suspendu leur marche, ne faisaient que suivre le courant de

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l'eau, et étant retenus par l'amarre placée sur le devant, le courant du fleuve, en descendant les fit s'écarter peu à peu, à l'arrière des vaisseaux.

Attendu qu'il est prouvé que, lorsqu'on était à transporter une boîte du vapeur "John Brown" au vapeur "Chambly" et que cette boîte se trouvait au point de jonction des deux vaisseaux; ces deux vapeurs étaient déjà éloignés d'une certaine distance en arrière, ce qui fesait un espace vide assez considérable à l'endroit de la passerelle; que le dit Siméon Paulet se tenait alors à l'endroit où était cette boîte, s'appuyant d'une main sur l'échelle qui conduit au deuxième pont du "Chambly," et aidant à d'autres à prendre cette boîte du "John Brown" pour la mettre sur le "Chambly"; que les hommes qui donnaient cette boîte du "John Brown" ayant été obligés de la lâcher à cause de l'éloignement de leur vaisseau du "Chambly" cette boîte tomba à l'eau, entre les deux vaisseaux, et entraîna dans sa chûte, Siméon Paulet qui, en supportant cette boîte, pour la déposer à bord du "Chambly," perdit l'équilibre et tomba à l'eau; que le capitaine du dit vapeur "Chambly," François Lamoureux, n'eût pas personnellement connaissance de la chûte du dit Siméon Paulet, et qu'il donna quelques instants après, ordre de partir à petite vitesse (easy-way); qu'on vint immédiatement ensuite l'avertir que Siméon Paulet était à l'eau et qu'alors il donna le signal d'arrêter l'engin; que plusieurs témoins jurent qu'il a donné le signal de renverser l'engin, pour reculer en arrière et que le capitaine lui-même jure cela, et que ce fait paraît être suffisamment établi, quoique cependant l'ingénieur qui conduisait la machine du "Chambly" jure, lui, que le mouvement n'a pas été renversé.

Considérant que lorsque le dit Siméon Paulet, s'est noyé, et a enfoncé dans l'eau, pour ne plus reparaître, il était à une bien petite distance, à une cinquantaine de pieds environ du vapeur "Chambly" et que le capitaine lui-même déclare qu'il a retardé le mouvement à reculons pour ne pas frapper le dit Siméon Paulet qui flottait alors sur l'eau et battait l'eau de ses mains.

Considérant qu'il est prouvé qu'on avait l'habitude d'accoster ainsi le remorqueur pour prendre ces boîtes qui devaient lui être remises au retour du voyage, pleines d'effets, et qu'on n'aurait pas autrement, les deux vaisseaux qu'ils ne l'ont été cette fois, quoiqu'il paraisse cependant qu'ordinairement on n'arrêtait pas les vapeurs, ce qui diminuait le danger, vû la vitesse des vapeurs et la force motrice qui les empêchaient de s'éloigner comme le courant les a fait s'éloigner lorsqu'ils ont été arrêtés dans la circonstance dont il est question.

Considérant qu'il est prouvé que c'est au second ou contre-maître à exécuter les ordres du capitaine ou commandant, et à commander les matelots à bord du vaisseau, pour mettre à exécution ces ordres, et qu'il pourrait peut-être, être aussi de son devoir, de voir à l'amarrage d'une manière prudente du vaisseau, mais que cependant il est bien établi que le second, le dit Siméon Paulet, dans la circonstance dont il est question, a fait ce que le capitaine lui-même considérait suffisant et ce qu'on a toujours fait dans les mêmes circonstances, et qu'on peut dire que cet amarrage a été approuvé par la défenderesse par l'entremise de son capitaine, qui a toujours permis qu'on fit l'amarrage de cette manière.

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Considérant qu'il est prouvé que cet amarrage n'était pas suffisant, et que le fait dont il est question et cette cause prouve évidemment que cet amarrage n'était pas suffisant, puisqu'il a été la cause que le dit Siméon Paulet s'est noyé.

Considérant que s'il y a eu faute ou imprudence dans la circonstance en question, lors de cet amarrage des deux vaisseaux, le plus qu'on puisse dire en faveur de la défenderesse qui a toujours permis l'amarrage de cette manière, c'est que cette imprudence ou faute a été commune à la défenderesse et au dit Siméon Paulet, quoiqu'il ne paraisse pas bien établi que ce fût au dit Siméon Paulet à voir à cet amarrage, et qu'il en eût seul la responsabilité.

Considérant que dans notre droit, lorsqu'il y a faute, imprudence ou négligence commune, la victime de l'accident qui a éprouvé du dommage ne peut être condamnée à le supporter seule, et qu'en ce cas le dommage doit être partagé entre ceux qui ont participé à la faute, ou l'imprudence, ou à la négligence.

Considérant de plus qu'il était du devoir des officiers du dit vapeur "Chambly" de faire tout en leur pouvoir pour sauver la vie du dit Siméon Paulet, et que bien qu'ils aient agi avec la meilleure volonté possible, cependant dans l'excitation où il se sont trouvés, ils n'ont pas usé de tous les moyens en leur pouvoir pour se mettre en position de le sauver, et que notamment ils n'ont pas, lorsque le vaisseau reculait pour approcher le dit Siméon Paulet, alors à l'eau, préparé les chaloupes pour les mettre à l'eau afin de lui porter secours, mais qu'ils paraissent au contraire s'en être fiés absolument à ce que les employés du "John Brown" et d'autres étrangers feraient pour sauver le dit Siméon Paulet ;

Considérant qu'il est prouvé que le capitaine du vapeur "Chambly" n'a pas exercé une fois par semaine son équipage à descendre et à manœuvrer les dites chaloupes, comme il y était tenu par la section 2 du chap. 30 des Statuts du Canada de 1874, 37 Victoria, et qu'il paraît assez probable que si on eût eu cette habitude, on se fût servi des dites chaloupes dans cette circonstance ;

Considérant qu'il résulte de la preuve, qu'il y a une grande probabilité que si on eût préparé et mis à l'eau une des chaloupes du vapeur "Chambly," on eût pu sauver la vie du dit Siméon Paulet ;

Considérant que la défenderesse ne peut se sauver de la responsabilité que la demanderesse veut mettre à sa charge en alléguant que les officiers du dit vapeur "Chambly" se seraient trouvés tellement excités et surpris par cet accident qu'ils n'ont pas pensé à faire usage des chaloupes ou d'autres moyens de sauvetage, vû qu'il est du devoir des officiers d'un bateau à vapeur de se tenir toujours prêts dans le cas d'accident, et qu'on ne peut pas dire qu'un officier soit compétent lorsqu'un accident auquel il peut s'attendre, le surprend tellement qu'il le rend inhabile à accomplir ses devoirs.

Considérant que lors de la mort du dit Siméon Paulet, la dite demanderesse, son épouse, était enceinte, et qu'un enfant lui est né depuis, issu du dit mariage, et est encore vivant; que la demanderesse n'a aucun moyen de subsis-

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tance pour elle et son enfant, et que le décès de son mari qui était encore très jeune, l'a laissée dans la misère et un dénûment complet.

Considérant que les dommages que la demanderesse a soufferts, par suite de cet accident et du décès de son mari, sont considérables, mais que, prenant en considération le fait qu'il y a eu peut-être une certaine imprudence de la part du dit Siméon Paulet, et que la demanderesse, à cause de cela, doit supporter une part des dommages résultant de cet accident; cette Cour établit les dommages que la demanderesse a le droit de réclamer de la défenderesse en cette cause, par suite de cet accident et du décès de son dit époux, à la somme de $500 courant;

Considérant que l'action de la dite demanderesse est bien fondée jusqu'à concurrence de la dite somme de $500, et que la défense en fait de la dite défenderesse est mal fondée.

A renvoyé et renvoie la dite défense en fait, et a maintenu et maintient l'action de la dite demanderesse, et a condamné et condamne la dite défenderesse à payer à la dite demanderesse, pour les causes et raisons ci-dessus énoncées, la dite somme de $500 courant, avec intérêt sur icelle, à compter de ce jour, jusqu'au payement, et les dépens, distraits à M. Théo. Bertrand, avocat de la demanderesse; déboutant la dite demanderesse du surplus de ses conclusions."

Le jugement, dit l'appelant dans son factum, affirme les propositions de droit suivantes, savoir:

1. Que le patron est responsable des accidents arrivés à son employé dans l'exécution de son travail;

2. Qu'il est responsable, même lorsque le travail, pour l'exécution duquel l'employé est engagé, expose ce dernier au danger et qu'il connaît le risque de ses fonctions; même lorsque l'employé, qui connaît le danger qu'il court, manque de prudence en faisant ce travail, et augmente ainsi le danger par sa faute;

3. Que lorsque l'on peut attribuer l'accident à la faute du patron et de l'employé et qu'il y a, de la part des deux, négligence contributoire, il y a lieu de faire supporter les dommages également, par le patron et par l'employé;

4. Que dans le cas actuel, Paulet étant un jeune homme, sans expérience, et peu versé dans les devoirs de sa charge, la défenderesse était tenu d'en avoir plus soin que d'un autre; et est responsable des conséquences de sa légèreté;

5. Que la défenderesse est responsable de l'accident, et doit en payer les conséquences, mais que, vû que l'on peut aussi attribuer la cause de l'accident à la faute de Paulet, la défenderesse ne doit payer que $500 de dommages;

Si ces propositions étaient mises en pratique, il s'en suivrait, qu'une Compagnie comme la défenderesse, serait obligée de se procurer un double service d'hommes, savoir: une partie pour travailler, et une autre partie pour avoir soin des travaillants. Le travail des employés à bord d'un steamboat est toujours plus risqué qu'un travail ordinaire. Il y a plus de risques à rencontrer dans un voyage qu'à la maison. On est plus exposé sur l'eau que sur terre. Sur un vapeur, les officiers supérieurs comme les subalternes, sont à tout moment, exposés à tomber à l'eau, s'ils ne prennent pas les précautions nécessaires à leur emploi. Presque toutes les manœuvres des matelots, à bord des

steamboats et surtout lors des accostages, exigent de la prudence, et, non dangereuses en elles-mêmes, elles peuvent le devenir cependant, faute d'attention ou de prudence, de la part de l'employé qui les exécute.

Ainsi, un homme qui prend de l'eau à la rivière avec un seau, en dehors du vapeur, peut tomber à l'eau. Un matelot peut encore tomber à l'eau, en jetant une amarre au quai de dessus les ponts. Un employé peut encore tomber à l'eau en montant l'échelle qui conduit du premier au second pont et qui se trouve sur le bord du vaisseau. Et ainsi, il y a une multitude de circonstances, où il peut y avoir danger immédiat. Ces dangers sont connus de tous ceux qui s'engagent pour naviguer à bord des vaisseaux ; et leur engagement n'implique pas la responsabilité des propriétaires pour les accidents qui pourraient arriver à l'employé, sans d'autre participation du patron, que celle de donner un travail qui est plus risqué que dans d'autres circonstances. Sans doute que le maître est responsable, s'il est la cause du péril de son employé, en ne lui fournissant pas les moyens de se prémunir contre le danger. Ce n'est ni plus, ni moins, que l'application, dans ce cas-là, des articles 1053–1054 du Code Civil.

Mais là se borne la responsabilité du maître. Il faut qu'il y ait de sa part faute pour le rendre responsable vis-à-vis de son employé. Si l'employé fait un travail risqué et qu'il le sait, le maître est déchargé de toute responsabilité envers lui, en lui fournissant tout ce qui lui est nécessaire pour se prémunir contre le danger. Là où cesse la responsabilité du maître, commence la responsabilité de l'employé. Celui-ci connaissant les risques de son état, en l'embrassant, il s'engage ainsi à en supporter tous les risques. Il se trouve, par là même, en demeure d'opérer son travail avec la précaution et la diligence nécessaires. S'il ne le fait pas, il est en faute, il est responsable de ses faits ; il y a lieu de lui appliquer l'article 1053 du Code Civil. C'est là, la seule doctrine raisonnable qui puisse résulter des articles 1053–1054 du Code Civil.

En scrutant cette doctrine on peut en venir à la conclusion que ces questions de responsabilité sont toujours plutôt des questions de preuve que des questions de droit. Les auteurs donnent bien des règles générales à suivre pour savoir sur qui repose la responsabilité, mais l'application de ces règles dépend toujours de la preuve.

Dans une cause de Sarault et Viau, rapportée au 11e Vol. de la *Revue Légale*, page 216 (Les Nos. 3 et 4 de l'année 1882) il a été décidé, il semble à l'appelante, des principes contraires à ceux qui sont maintenus dans la présente cause. Cela tend à confirmer les prétentions de la défenderesse, à savoir : que c'est le poids de la preuve qui guide et qui doit toujours guider les juges pour rejeter la responsabilité sur l'accusateur ou sur l'accusé. Dans la cause de Sarault et Viau, l'Honorable Juge a décidé, ce qui suit : " Jugé : Que l'ouvrier " blessé dans l'exécution d'un travail qui ne devient dangereux que par l'inattention de celui qui l'exécute n'est pas fondé à réclamer des dommages-intérêts " au maître d'atelier qui l'en avait chargé, si, connaissant depuis longtemps " toutes les précautions à prendre, il n'a pu être victime de l'accident que par " l'effet de sa faute et de son imprudence."

C'est ce principe qui doit être appliqué dans le cas actuel.

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L'appelante offre à l'appui ne sa cause, les citations suivantes:

Larombière—Obligations—Vol. 5, page 708.

" No. 29. Il arrive, même souvent, que tel est le degré de la faute imputable " à la personne qui se prétend lésée, que le fait, quelque dommageable qu'il soit, " ne présente plus les caractères d'un délit ou d'unquasi-délit. Celui qui éprouve " un dommage par sa faute est censé ne pas en éprouver du tout; *quod quis ex " suâ culpa damnum sentit, non intelligitur damnum sentire.* Il n'a du moins " qu'à s'en prendre à lui-même du préjudice qu'il a souffert, et nul autre n'est " responsable du tort qu'il s'est causé par sa propre faute."

Page 710—Même vol.

" No. 31. Lorsque celui qui a éprouvé le dommage s'y est exposé volon- " tairement, il n'existe à la charge de qui que ce soit, aucune obligation de le " réparer. *Volenti non fit injuria.* Il ne doit l'imputer qu'à lui-même; et n'a " de recours à exercer contre personne."

Sourdat—Responsabilité.

Vol. 2—Pages 9 et 10.

" No. 560. La responsabilité est donc inséparable de l'idée d'une faute, " etc., etc."

" Par suite, le jugement qui condamne l'agent à une réparation, doit cons- " tater l'existence de cette faute, sinon d'une manière expresse, au moins impli- " citement. Il faut qu'il n'existe pas de doute à cet égard, sans quoi la con- " damnation ne porterait pas avec elle sa justification. Elle ne serait pas " juridique, et donnerait ouverture à cassation."

Page 19—Même vol. 2.

" No. 660. Si la partie lésée a elle-même offert occasion au dommage, par " une faute personnelle, elle est non recevable à s'en plaindre; si cette faute " n'est qu'une imprudence, il est naturel d'en opérer la compensation avec la " faute de même nature, commise par l'agent *immédiat du dommage* etc., etc.

" Dans l'un et l'autre cas, il est toujours vrai de dire, que celui qui s'est mis " le premier en faute, vis-à-vis d'un autre, a perdu ses droits à l'application des " principes de la sociabilité et des lois protectaires du droit de chacun."

Laurent—Vol. 20—Pages 494 et 495.

" No. 464. Quand y a-t-il faute dans le sens de l'art. 1382? C'est essen- " tiellement une question de fait que les juges décident d'après les circonstances " de la cause. Ils jouissent, à cet égard, d'un pouvoir souverain; leur apprécia- " tion échappe à la censure de la Cour de Cassation; dès qu'ils décident qu'il y " a faute, celui qui l'a commise doit être condamné à des dommages-intérêts, " qu'il appartient également aux tribunaux de déterminer."

" Nous disons que le juge doit constater la faute; en effet, toute condamna- " tion doit être motivée et la condamnation aux dommages-intérêts se fonde sur " la faute. Il ne suffit donc pas que le juge établisse le fait matériel qui a causé " le dommage, il faut qu'il ajoute que le dommage a été causé par la faute de " l'auteur du fait. L'arrêt d'une Cour d'assises acquitte l'accusé, et le con- " damne néanmoins à des dommages-intérêts, donnant comme unique motif que " l'accusé est l'auteur de la mort de la victime. Cette décision a été cassée. Il

" faillat de plus, dit la Cour de Cassation, que l'arrêt reconnût et déclarat que " la mort avait été causée par le faute de l'accusé."

Cassation, 12 décembre 1873, Dalloz, 1874, 1,230.

Pages 500 et 501.

" No. 469, Un seul et même fait peut constituer une faute à l'égard d'une " personne et ne pas être une faute à l'égard d'une autre, etc., etc. (Bas de la " page 500) et l'usage général du commerçant étant de ne recommander que les " lettres contenant des valeurs au porteur. De dernier point nous paraît décisif: " *l'usage a une grande autorité en matière de commerce* : celui qui s'y con- " forme ne peut donc pas être taxé d'imprudence."

Même page 501—Bas de la page.

" Les tribunaux s'attachent parfois au fait matériel du dommage et con- " sidèrent comme quasi-délit tout fait dommageable. C'est violer l'article " 1382, qui exige formellement qu'il y ait faute."

Page 515.

" No. 485. Il y a un vieil adage qui dit que celui qui éprouve un dommage " par sa propre faute, n'est pas censé être lésé, c'est-à-dire que, quoique lésé, il " n'a pas l'action en dommages-intérêts."

" No. 486. L'adage est applicable quand aucune faute ne peut être repro- " chée à celui qui, par son fait, a causé un dommage."

Page 517, suite du No. 486.

" Le principe s'applique aux accidents qui surviennent dans les fabriques: " quand toutte l'imprudence est du côté de l'ouvrier et qu'aucune imprudence " n'est reprochée au patron, le juge doit se prononcer contre la malheureuse " victime, quelque dure que la décision paraisse. Le juge décide en droit, et " en droit il n'y a aucun doute. L'équité même ne peut réclamer quand il " s'agit d'un ouvrier employé comme chef d'équipe ou contre-maître, comme " tel, il connaît plus que tout autre le danger, et on doit lui supposer l'in- " telligence nécessaire pour s'en garantir. La Cour de Paris a poussé la " rigueur plus loin, sans dépasser les limites du droit, en refusant des dom- " mages-intérêts à un ouvrier mécanicien, qui fut blessé en employant, pour " réparer un laminoir, un burin que son maître lui avait envoyé ; l'instrument " était tout-à-fait insuffisant pour l'opération, il se brisa, et l'éclat qui en " jaillit, fit perdre un à œil l'ouvrier imprudent. Il était imprudent, parce que " c'était un habile ouvrier; il aurait dû refuser l'instrument que le maître " lui remettait sans le lui imposer."

Page 521—Suite du No. 489.

" Quand la partie lésée a enfreint un règlement, et que c'est par suite de cette " infraction qu'elle a éprouvé un dommage, elle ne peut pas, en général, se plain- " dre ; c'est le cas de dire avec l'adage qu'elle est censée n'avoir pas été lésée."

Page 523.

" Il peut se faire que les fautes réciproques des deux parties soient de " telle nature qu'elles excluent toute cause de responsabilité."

Page 585–586.

" No. 547. Quelles sont les preuves que le demandeur doit faire? Il doit

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" prouver le fondement de sa demande, c'est-à-dire l'existence d'un fait domma-
" geable, dans le sens des articles 1382 et 1383. Or, d'après ces articles, il faut,
" pour qu'il y ait délit ou quasi-délit, que le demandeur ait éprouvé un dom-
" mage par la faute du défendeur. Il ne suffit pas d'établir le fait matériel du
" dommage causé, il faut prouver qu'il y a faute, négligence ou imprudence.
" C'est le droit commun ; quand l'obligation résulte d'un délit ou d'un quasi-
" délit, le demandeur doit prouver qu'il y a délit ou quasi-délit ; il doit donc
" prouver qu'il y a faute."

Page 496.

" No. 465. Toullier dit que les dispositions des articles 1382 et 1383 sont
" tellement générales et tellement étendues, qu'il est presque impossible, et
" heureusement inutile, d'énumérer tous les cas où elles doivent s'appliquer.
" Sans doute, il serait inutile d'énumérer toutes les décisions judiciaires qui ont
" été portées sur des quasi-délits ; mais il importe de faire connaître celles qui
" touchent à une question de principe. Il s'élève tous les jours de nouveaux
" procès sur l'application des articles 1382 et 1383 ; au lieu de diminuer, le
" nombre va plutôt en augmentant ; les relations sans cesse plus étendues que
" font naître le commerce et l'industrie sont une source de richesses, mais aussi
" de cruels accidents. De là le grand nombre de faits dommageables ; il est
" donc bon de noter les précédents qui peuvent servir à décider les contesta-
" tions nouvelles."

Hilliard, on Torts, vol. 1, pages 140, 141, 142 (Edition de 1861).

" 1. Having considered the general question what is necessary, with more
" particular reference to the wrongdoer himself, to constitute in law a tort or
" private wrong, we proceed to state and illustrate another comprehensive prin-
" ciple upon the same subject, which applies more specially to the party com-
" plaining of such tort, and not to the party charged of committing it."

" 2. The general rule is that a plaintiff suing for culpable fault or negligence,
" must himself be without any misconduct or fault, and have used ordinary
" care ; and that where an injury has resulted from the negligence of both parties,
" more especially if without any wanton or intentional wrong on the part of
" either, an action cannot be maintained. So it is the prevailing doctrine that,
" to sustain an action on the case for negligence, *the burden of proof* is on the
" plaintiff to show negligence, wilful or otherwise, on the part of the defendant,
" and *ordinary care* on his own part ; or, if he did not exercise ordinary care,
" that this did not contribute to the alleged injury. So there must be affirmative
" proof of due care, *at the very time of the accident*, and it is said neither the
" urgency of business, nor the calls of humanity can be taken into account, and
" negligence on the part of the plaintiff *is an admissible defence under the plea*
" *of not guilty*.....So although the defendants were guilty of gross negli-
" gence, causing damage to the plaintiff, but the plaintiff was also guilty of want
" of ordinary care, contributing essentially to the injury, he cannot recover.

Page 140—Note A.

" The legal maxim applicable to the subject are *in pari delicto potior est con-*
" *ditio defendentis*, and, *volenti non fit injuria*. Also that a plaintiff must come

" into court *with clean hands.*" The plaintiff must show that he stands on a fair " ground, when he calls on a court of justice to administer relief to him. Per " Lord Kenyon, Booth and Hodgson, 6. T. R. 409.

Page 159.

" The general principle, however, above stated and illustrated, that one party " cannot recover damages from another, where both are in fault, or in *pari* " *delicto*, is subject to many qualifications and exceptions (see § 3). It is " said, although there may have been negligence, on the part of the plaintiff, yet, " unless he might, by the exercise of ordinary care and prudence, have avoided " the consequences of the defendants' negligence, he is entitled to recover; if " by ordinary care and prudence, he might have avoided them, he is the " author of his own wrong."

Vol. 2, page 479, (Edit. de 1861):

" 24 a. But when an injury happens to a servant while in the actual use of " an instrument, engine, or machine, in the course of his employment, of the " nature of which he is as much aware as his master, and the use of which is, " therefore, the proximate cause of the injury, he cannot, at all events, if the " evidence is consistent with his own negligence in the use of it, being the real " cause, nor in case of his dying from the injury can his representative, under " Lord Campbell's Act (9 and 10 Vict., c. 93), recover against his master " there being no evidence that the injury arose through the personal negligence " of the master."

Page 478.

" 25. And while, on principles of public policy, a master is liable to third " persons for the misfeasance, negligence, or omissions of duty of his servant, " while acting within the scope of his employment; the courts have refused, " upon considerations, peculiar to the relation of master and servant, to apply " this rule to cases, where *one receives an injury from the negligence of another*, " while both are acting in the common business of the same master, who is " chargeable with no personal negligence or wrong. It is said: They have " both engaged in a common service, the duties of which impose a certain risk on " each of them; and, in case of negligence on the part of the other, the party " injured knows, that the negligence is that of his fellow-servant, and not of his " master. He knew, when he engaged in the service, that he was exposed to " the risk of injury, not only from his own want of skill or care, but also from " the want of it on the part of his fellow-servant; and he must be supposed to " have contracted on the terms that, as between himself and his master, he " would run this risk."

Page 479.

" And the general rule more especially applies, if the plaintiff himself has " also been guilty of negligence. Thus, where several servants were engaged in " the same work, and one of them was injured by an act of negligence, in which " all participated, the master being absent at the time; held, in a suit brought " against the master, for the injury, that the servant could not recover, though " the act complained of was done under the superintendence of a servant

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"appointed by the master. The rule also applies to a person who is injured "whilst voluntarily assisting the servants in their work."

Addison on Torts, page. 18.

"*Torts founded on negligence.* The action for negligence proceeds upon the "idea of an obligation, on the part of the defendant, towards the plaintiff, to use "care, and a breach of that obligation to the plaintiff's injury. As a rule, there "must be affirmative proof of negligence, on the part of the defendant, to support "an action, for where it is a perfectly even balance on the evidence, whether "the injury has resulted from the want of proper care, on the part of one "side, or the other, the party who founds his claim on the imputation of "negligence, fails to establish it, etc., etc."

"The damage, too, must be proximately caused by the negligence, and must "not be the immediate result of any intervening negligence, on the part of the "plaintiff himself (ante pp. 5, 6); for the plaintiff's own carelessness has directly "conduced to the damage he has sustained, he is the author of his own misfor- "tune, and cannot charge it upon others."

Page 19.

"*Contributary negligence on the part of the plaintiff*, who complains that he "has been damnified by the negligence of the defendant, is, in general, an "answer to the action, on the ground, that a man cannot complain of that which "he has himself helped to bring about."

Pages 186, 187, et 188.

"*Injuries to servants from dangerous premises or employment.*"

"Every master who employs servants and workmen, to work upon his land, "house or premises, is bound to take all reasonable precautions for their safety, "and, if hidden and secret dangers exist upon the premises, to him, and un- "known to his workmen, it is his duty to disclose them to the latter, that they "may take precautions against them, etc., etc.

"It is otherwise, if the servant accepts of employment, knowing of the risk "he runs, etc., etc."

Page 187.

"*Exemption of the master from liability, when the danger is known to the "servant.*"

"But the master is not responsible for the dangerous state of his premises, "if those dangers are known to the servant, and the latter has accepted the "employment, knowing of the attendant risks, and having an opportunity of "guarding against them, by his own vigilance and care, etc., etc.

"A person, observes 'Erle, J.,' must make his own choice, whether he will "accept employment, upon premises in this condition; and if he do accept such "employment, he must also make his own choice whether he will pass along the "floor in the dark, or carry a light. If he sustain an injury, in consequence of "the premises not being lighted, he has no right of action against the master, "who has not contracted that the floor shall be lighted. If the servant wishes "the premises to be kept in any particular state, with respect to lighting and "fencing, he must provide for it by express contract.

" *Where the workman is employed in the use of dangerous machinery* " (page 188), furnished by the employer, and is, or professes to be, acquainted " with the use of the machinery, and the care necessary to be taken, to guard " against accident, and, notwithstanding this, sustains injury from his own want " of care and caution in the use of it, he has, of course, no ground of action " against the employer."

Pages 397 et 398.

" *Negligence of masters, causing injury to their servants.*" —

" Every workman, who engages in a dangerous employment, takes it, as we have " seen, ante p. 186, 187, with all its ordinary risks. The master is bound to " provide for the safety of his servant, in the course of his employment, to the " best of his judgment; but the law does not impose upon the master the obli- " gation of taking more care of the servant than he may be reasonably " expected to take of himself. The servant is not bound to risk his safety in the " service of his master, and may, if he thinks fit, decline any service in which he " reasonably apprehends injury to himself; and in most of the cases in which " danger may be incurred he is just as likely to be acquainted with the pro- " bability and extent of it as the master. The master, therefore, is not " responsible for injuries sustained by his servant, through the viciousness of the " horse which the servant is employed to groom, or through the breaking down " of a van or carriage in which the servant is directed by the master to ride or " drive, or from the employer's keeping an insufficient staff of servants for the " performance of the work he has to do, or through the use of dangerous " machinery, with the use of which the servant is or professes to be acquainted, " and which he has voluntarily undertaken to use, or for the dangers attendant " upon the mounting of scaffolds, or unfinished staircases and landings, which " the workman has voluntarily undertaken to mount, with as much knowledge " of the attendant risk as the person who employs him, etc., etc.

" There would be no end of action if we were to hold that a person, having " once done a piece of work carelessly, should, independently of honesty of pur- " pose (or contract) be fixed with liability in this way, by reason of bad ma- " terials or insufficient fastening."

Page 399.

" *Injuries to one fellow-servant, from the negligence of another fellow-servant.*'

" Where several servants are employed by the same master, in one common " employment, the master is not responsible for injury, resulting to one of them " from the negligence of another, provided the master has taken due care not " to expose his servant to unreasonable risks, and has been guilty of no want of " care in the selection of proper servants. The principal laid down is that a " servant, when he engages to serve a master, undertakes, as between him and " his master, to run all the ordinary risks of the service; and this includes the " risk of negligence on the part of a fellow-servant, whenever he is acting in " discharge of his duty, as servant of him, who is the common master of both; " and when the risk of injury, from the negligence of the one, is so much a " natural and necessary consequence of the employment, which the other accepts,

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"that it must be included in the risks which are to be considered in his wages. "But the servants (page 400) must be fellow-servants, engaged in a common "service; etc., etc. And it is not enough that the servant injured, and the "servant causing the injury, should be servants of the same master; they must "be employed in the same work, etc., etc. Nor is it sufficient, that they are "temporarily subject to the samé superintendent, if they are not, in fact, the "servants of the same master, etc., etc. A sub-contractor and his servants, "engaged in doing the common work of a particular contract, under a "contractor, are all fellow-servants, engaged in one common employment, "though each directs and limits his attention to particular branches of the work, "and they all are held to undertake, as between themselves and the contractor, "to run all the ordinary known risks of the service, including the risk of "negligence of the other servants, engaged in discharging the work of their "common employ."

Sarault et Viau—11 Rev. Lég.—Nos. 3 et 4, 1882—sus citée.

Desroche *et al.* et Gauthier—sus citée—Jugement rendu par cette Cour en novembre dernier.

Gagnon *vs.* Forsyth—Vol. 5—Rev. Lég.—Page 228.

Legal News—Vol. 5—No. 7 de février 1882—Page 56.

Lyon, 9 mai 1874—P. 1874—1298—S. 1874—2—316.

Cassation, 26 nov. 1877, P. 1878, 374; S. 1878, 1148.

Jugé dans les deux dernières causes sus citées, de la jurisprudence française, "que le patron n'est responsable qu'autant qu'une faute lui est imputable. Ainsi l'ouvrier blessé dans un travail dangereux, mais dont les dangers étaient inhérents à sa profession, ne peut actionner le patron en responsabilité."

Après avoir discuté la question de fait, l'intimé, dans son factum, ajoute:

Non, il n'y a point eu de négligence de sa part et il n'y a pas lieu, dans l'espèce, d'appliquer la loi qui régit les dommages dans les cas de négligence commune.

Maintenant, en supposant qu'il y ait eu négligence contributive de la part du défunt, le jugement doit encore être confirmé.

La jurisprudence est constante et uniforme en France sur ce point; et l'intimée ne peut mieux faire que de référer cette honorable Cour aux notes du savant juge de première instance rapportées aux pages 381 et suivantes du 11e. vol. Revue Légale. On y trouve les autorités citées par elle et plusieurs autres ducs aux recherches du savant Juge.

Voir aussi:

1. Décisions de la Cour d'Appel, Wilson *vs.* The Grand Trunk Railway Co., confirmé par la Cour Suprême.

Desroches et al. & Gauthier, Cour d'Appel, Montréal, 5 Legal News.

Voici comment se lit le jugement de la Cour d'Appel:

Considérant que l'intimée n'a pas prouvé les allégués essentiels de sa déclaration et notamment que son mari feu Siméon Paulet, ait perdu la vie par la faute et la négligence de la Compagnie appelante ou de ses employés, mais qu'au

contraire il appert par la [redacted] que le dit Siméon Paulet s'est noyé par un pur accident auquel il était [redacted] par suite des devoirs qu'il avait à remplir à bord du "Chambly" l'un des vaisseaux de l'appelante.

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Et considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure siégeant à Montréal, le trentième jour de juin 1882.

Cette Cour casse et annule le dit jugement du 30ème jour de juin 1882, et procédant à rendre le jugement qu'aurait dû rendre la dite Cour de première instance, renvoie l'action de l'intimée avec dépens, tant ceux encourus en Cour de première instance que sur cet appel.

Jugement renversé.

M. Adolphe Germain, pour l'appelante.
M. Théophane Bertrand, pour l'intimée.

COURT OF QUEEN'S BENCH, 1883.

MONTREAL, 29TH MARCH, 1883.

Coram Hon. Sir A. A. DORION, CH. J., MONK, J., RAMSAY, J., CROSS, J., BABY, J.

No. 431.

MOLSON, APPELLANT;

AND

CARTER, RESPONDENT.

HELD:—That after permission has been granted to appeal to the Privy Council, from a judgment which has the effect of setting aside an attachment of rents payable to the appellant, the latter cannot obtain an order to execute the judgment provisionally, on the ground that the rents were really *aliments*; and that appellant is in great want.

This was a petition by the appellant for an order that the judgment rendered in this cause on the 24th instant should be executed provisionally.

The reasons assigned were that the judgment had the effect of setting aside the attachment in the Court below of certain rents payable to the appellant, which were really *aliments*, and that the appellant was in great need, and absolutely required the same for the support of his family.

The respondent resisted the application, on the ground that permission had been granted to him to appeal from said judgment to Her Majesty in Her Privy Council.

The Court, after taking time to consider, rejected the petition.

Petition rejected.

Barnard, Beauchamp & Barnard, for appellant.
Abbotts, Tait & Abbott, for respondent.
Strachan Bethune, Q. C., counsel.

COUR SUPERIEURE, 1884.

MONTREAL, 8 FEVRIER 1884.

Coram TORRANCE, J.

No. 167.

Major vs. *Paris.*

JUGE :—1o. Qu'il n'est pas nécessaire que la procuration requise de l'absent et mentionnée en l'art. 120, No. 7 du C. Pr. C., soit consentie en faveur du procureur *ad litem* du demandeur ; qu'au contraire, il suffit qu'une telle procuration soit donnée à une personne quelconque autre qu'un procureur *ad litem*.

2o. Qu'une procuration en termes généraux, autorisant *sur tel* a instituer en justice des poursuites contre tous les débiteurs, du créancier y dénommé, sans cependant indique leurs noms, ni le montant de par chacun d'eux, est suffisante, pourvu que la cette réclamée du défendeur, se trouve au nombre des créances aussi mentionnées d'une manière général dans la procuration.

Le demandeur en cette cause réside à Chicago, et pour se conformer aux exigences de la loi, a produit au dossier une procuration générale, autorisant Alexander McKenzie, tailleur, et François Xavier Major, marchand ; à acheter pour lui et en son nom, toutes les dettes actives, livres de comptes, billets et obligations provenant de la faillite de F. X. Major, les autorisant en outre par le même acte, à instituer toutes poursuites nécessaires pour le recouvrement de ces créances.

Par son action en cette cause, le demandeur réclame le montant de onze des billets provenant de la dite faillite de F. X. Major, lesquels sont indiqués en termes généraux dans la dite procuration, sans que ni le nom du débiteur, ni le montant des dits billets n'y soient aucunement mentionnés.

Le défendeur prétendant cette procuration insuffisante, fit la motion suivante à l'effet de la faire rejeter du dossier :

"Attendu que la procuration produite en cette cause, comme l'exhibit B du demandeur, pour satisfaire à la demande continue en l'exception dilatoire du dit défendeur est une procuration générale, n'ayant aucun rapport à la présente cause et ne faisant même pas mention du nom du défendeur, ni de la somme réclamée par l'action en cette cause ;

"Attendu que le demandeur ne pouvait instituer contre le défendeur, la, dite action, à moins de fournir à ses procureurs *ad litem* MM. Trudel, Charbonneau, Trudel & Lamothe, une procuration les autorisant *spécialement* à instituer la dite action contre le défendeur, Louis Paris ;

"Attendu que la dite procuration est en termes trop généraux, trop vagues et trop indéterminés pour remplir les exigences de l'art. 120, No. 7 du Code de Procédure Civile et qu'elle n'atteint en aucune manière le but du dit article :

"Motion du défendeur que la dite procuration soit déclarée insuffisante et rejetée du dossier, avec dépens."

La cause fut prise en délibéré sur cette motion et après mûr examen, la cour déclara que cette procuration remplissait suffisamment les exigences de la loi, il renvoya la motion du défendeur avec dépens.

Motion renvoyée.

Trudel & Associés, pour le demandeur.
J. G. L'Amour, pour le défendeur.

SUPREME COURT OF CANADA, 1884.

OTTAWA, MARCH 5, 1884.

PRESENT:—Sir W. J. RITCHIE, C.J., and STRONG, FOURNIER, HENRY, TASCHEREAU and GWYNNE, JJ.

ALPHONSE POULIN, APPELLANT;

AND

THE CORPORATION OF QUEBEC, RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

42 & 43 Vic., ch. 4, sec. 1 (P.Q.), Construction of—Prohibition, Writ of—Sale of liquors—Police regulation.

Under the authority of the Act of the Legislature of Quebec, 42 & 43 Vic., ch. 4, sec. 1, a penal suit was, on the 20th of January, 1880, instituted against P. in the name of the corporation of Q., before the Recorder's Court of the city of Q., alleging that "on Sunday the 18th day of January, 1880, the said defendant has not closed, during the whole of the day the house or building in which he the said defendant, sells, cause to be sold, or allows to be sold, spirituous liquors by retail, in quantity less than three half pints at a time, the said house or building situate, &c." P. was convicted.

A writ of prohibition, to have the conviction revised by the Superior Court, was subsequently issued, and upon the merits was set aside and quashed.

HELD:—(Per Ritchie, C.J., and Strong and Fournier, JJ.),—That the provisions of the Provincial Statute 42 & 43 Vic., ch. 4, ordering houses in which spirituous liquors, &c., are sold, to be closed on Sundays and every day between eleven o'clock of the night until five of the clock of the morning, are police regulations within the power of the Legislature of the Province of Quebec, and as the complaint was clearly within the Act, the recorder could not be interfered with on prohibition.

Per Henry, Taschereau and Gwynne, JJ. That the penalty imposed upon P. by the recorder was not authorized by the statute, even if such statute was *intra vires* of the Provincial Legislature, and that the prohibition was therefore rightly granted.

The Court being equally divided, the appeal was dismissed without costs.

Appeal from a judgment of the Court of Queen's Bench for the Province of Quebec (Appeal side). The following case was submitted to the Supreme Court of Canada;

"At its session of 1879, the Legislature of *Quebec* passed an Act containing the following enactments:

"Every person licensed or not licensed to sell by retail in quantities less than three half pints in any city, town or village whatsoever, spirituous liquors wine, beer, or temperance liquors, shall close the house or building in which such person sells or causes to be sold, on any and every day of the week from midnight until five o'clock in the morning, and during the whole of each and every Sunday in the year; and during the same period, no person shall sell, or cause or allow to be sold or delivered, in such house or building, or in any other place, spirituous liquors, wine, beer, or temperance liquors, the whole under a penalty

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for each and every infringement of the provisions of a fine not less than thirty dollars and not exceeding seventy-five dollars and costs, and in default of payment of such fine, to an imprisonment for a period not exceeding three months in the common gaol of the district in which the said infringement occurred."

"On the 18th of January, 1880, the appellant was, and had been for some time before, keeping a restaurant within the limits of the city of Quebec.

"Being prosecuted by the respondent before the Recorder's Court of the city of Quebec for infringement of that Statute, he pleaded to the jurisdiction of the court, and especially the unconstitutionality of the Act as being *ultra vires* of the Legislature of *Quebec*. He was, nevertheless, on the 17th of February, 1880, condemned to pay a fine of $40 and $1.65 costs.

"The appellant sued out and obtained a writ of prohibition to prevent execution of that judgment.

"It was proved in the case that on the day mentioned in the conviction, viz., the 18th of January, 1880, the appellant was keeping a restaurant within the limits of the city of Quebec, where he used to retail spirituous liquors in quantities less than a half pint, and that, although the said day was on Sunday, he had not kept his establishment closed.

"On that proof the Superior Court quashed the writ of prohibition."

Mr. F. Langelier, Q. C., for appellant:

This appeal involves the decision of two questions of law: 1st. Can a local Legislature pass a law prohibiting the sale of spirituous liquors on Sundays and at certain hours of other days? 2nd. Does the statute of Quebec, 42-43 Vic., ch. 4, sec 1, punish the selling only of liquors within the prohibited time, or also the opening of the establishment where they are sold.

1st. Can a local Legislature prohibit the sale of spirituous liquors on Sundays and at certain hours of other days?

It is now beyond all doubt that local Legislatures cannot totally prohibit the sale of such liquors. This Court, in the case of the City of Fredericton *v.* The Queen * has laid down as a rule: 1st. That the power to enact such a prohibition cannot belong to both the local Legislatures and the Parliament of Canada. 2nd. That it belongs to the Parliament of Canada; and that ruling has been confirmed by the Privy Council in the case of Russell *v.* The Queen.†

There would be no difficulty, therefore, if the statute in question contained a complete prohibition: but it is contended that the ruling of this Court cannot apply to it because it does not prohibit, but only restricts, the sale of spirituous liquors.

I submit that this a mere quibble. A restriction is a partial prohibition; in the present case the prohibition is for Sundays and for certain hours of other days. If this reasoning was to prevail, nothing would be easier for a local Legislature than to encroach upon the exclusive power of the Parliament of Canada to prohibit such trade; all they would have to do would be to prohibit the sale at all times, save a few minutes every day, or every week.

* 3 Can S. C. R., 505 & 574. † 7 App. Cases, 829.

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It has been contended that such a statute is within the class of local statutes, or of statutes concerning municipal institutions.

Even were that true, it would not affect the question at issue. That statute unquestionably deals with and regulates a certain trade or commerce. Therefore, according to the decision in the case of Fredericton, it cannot be considered as being within the powers of local Legislatures.

But it is not true that the statute in question is a mere municipal regulation, or law of a local nature. It is admitted to be intended to repress intemperance, to prevent drunkenness; therefore its object is one of general interest; intemperance and drunkenness are just as much evils in Halifax as in Quebec.

If the object of the law is of general interest, are the means enacted for that purpose of a local nature? Not at all; those means consist in compelling those who sell spirituous liquors by retail, to close their establishments at certain times, and in preventing them from selling within certain hours. Now there is nothing local in those means; they would be just as effective at Winnipeg as at Charlottetown. Russell v. The Queen *

The power to enact such a law is not included in the power given to local Legislatures to regulate municipal institutions. The object of such institutions is to give each locality the particular regulations required by its local wants. No municipal institutions would be needed if the making and keeping of roads, bridges, the prevention of abuses prejudicial to agriculture, could be regulated in the same manner all over the country. But they are necessary on account of the fact that a special regulation is required for each locality.

My second point is that, even under the statute (if constitutional) the conviction is illegal.

The object of the statute is the prevention of drunkenness on Sundays. The means adopted to arrive at it consist in prohibiting sale on such days of intoxicating liquors. Therefore, what it must punish is the selling, not the keeping open of the establishments where such liquors are sold. The order given to close them is only to secure the non-selling, it is a mere directory enactment. Knowing that there is more danger of liquor being sold there than elsewhere, it is directed that those establishments must be kept closed.

So much for the spirit of the law. The letter of the statute is in accordance with it. It orders first the closing of establishments where spirituous liquors are retailed, but enacts no penalty against those who keep them open. Then, in another sentence it forbids the selling of such liquors, either in those establishments, *or in any other place* under a penalty of $30 to $75 *for every infringement of the present provisions.* The present provisions are those prohibiting the selling, the causing to be sold, the allowing to be sold, the allowing to be delivered, spirituous liquors.

The statute being a penal law, it is needless to say that it cannot be extended from one case to another; the penalty it inflicts cannot be imposed for an offence for which it does not enact it.

Mr. C. P. Pelletier, Q.C., for respondent:

* 7 App. Cases, 829.

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The writ of prohibition is an extraordinary remedy, which cannot be used as collateral if there exists any other recourse. In the present instance, the law (42-43 Vict., ch. 4, sec. 3) seems desirous to admit such recourse, by enacting: that if a writ of certiorari is issued to have a conviction rendered under the said law revised by the Superior Court, the party convicted shall be obliged to deposit into the hands of the clerk of the inferior court the amount of the fine and costs.

The writ of prohibition, moreover, cannot be issued after conviction, unless the want of jurisdiction of the inferior tribunal appears upon the face of the record. See High, Extraordinary Legal Remedies.*

Then as to appellant's contention that the only fact of not closing his tavern during the time prescribed, for that by the statute does not constitute an offence, and that, according to the wording of the statute there is no offence if there is not at the same time a sale of liquors. Such pretension will be found not maintainable, if we merely refer to the preamble of the statute above cited, 42-43 Vic., ch. 4, which reads as follows:

"Whereas doubts have arisen with respect to the right of certain city and town corporations, in virtue of the laws and statutes relating to them, to compel tavern keepers to close their taverns at certain hours of the day; and whereas it is expedient to dispel such doubts, and to clearly define and extend the powers which the said corporations should possess: Wherefore, &c., &c."

Before the other courts, the appellant has pretended not only that to establish an offence it would have been necessary for the respondent to prove a sale of liquors, but he has also pretended that the Legislature of Quebec had no right to prohibit the sale of intoxicating liquors on Sundays.

As the complaint in this case is only "for not having closed," and not for "having sold," if the statute is interpreted as making an offence of the mere fact of "not closing," and if the conviction against the appellant is found to be valid, it is of little moment, for the ends of this case, to consider the question of the prohibition of selling liquor on Sundays.

However, as that incidental question has been strongly dwelt upon before the other Courts, and as the other courts have considered it with much attention, it may be convenient also to consider it just now.

Although the Parliament of Canada, under the power given to it to regulate trade and commerce alone, has the power to prohibit the trade in intoxicating liquors, yet the Provincial Legislatures, under the power given to them, may for the preservation of good order in the municipalities which they are empowered to establish and which are under their control, make reasonable police regulations, may to some extent interfere with the sale of spirituous liquors;

The provisions of the Provincial Statute 42-43 Vic., ch. 4, ordering houses in which spirituous liquors, etc., are sold to be closed on Sundays and every day between eleven o'clock of the night until five of the clock of the morning, are police regulations within the power of the Legislature of the Province of Quebec.

The reasons for arriving at this conclusion are fully stated by the Chief Justice Meredith in the case of Blouin v. The Corporation of the City of Quebec, † and I rely upon that decision.

* Nos. 767, 769, 770, 772, 774.
† Q. L. R. 18.

RITCHIE, C. J. :—

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I cannot see how it can be said that prohibition will not lie without first determining whether the Act is *ultra vires* or not, for if the Act is *ultra vires*, then I can see no reason why prohibition would not be a proper remedy, because there could then be no pretense that the Recorder's Court could have jurisdiction over an offence alleged to be created by a statute which had no legal existence; but holding the Act to be *intra vires*, I fully appreciate the position taken by Mr. Justice Ramsay, that the Recorder's Court having jurisdiction over the subject-matter legislated on, however badly it may judge, it cannot be stopped by prohibition, on the pretext that it has misconstrued the Act.

Mr. Justice Ramsay clearly acted on this view, for, before holding that prohibition would not lie, he expressly held that the Local Legislature had authority to prohibit or regulate the sale of liquors in saloons or taverns on Sundays or at particular times, as being purely a matter of police regulation, and consequently within the powers of municipal corporations.

When the case of Regina and the Justices of Kings * I was called upon to adjudicate on the right of the Provincial Legislatures to prohibit absolutely the sale of spirituous liquors, and I arrived at the conclusion that the legislative power to do this rested with the Dominion Parliament, I advisedly and carefully guarded the enunciation of that conclusion in these words: "We by no means wish to be understood that the Local Legislatures have not the power of making such regulations for the government of saloons, licensed taverns, &c., and sale of spirituous liquors in public places as would tend to the preservation of good order and prevention of disorderly conduct, rioting or breaches of peace. In such cases, and possibly others of a similar charater, the regulations would have nothing to do with trade or commerce, but with good order and local government, matters of municipal police and not of commerce, and which municipal institutions are peculiarly competent to manage and regulate."

I still think, as I did then, that a provision such as section 1, of the 42 and 43 Vic., ch. 4, Quebec Act, is within the legislative authority of the Provincial Legislature, as being simply a local police regulation, and which the Local Legislature has, as incident to its power to legislate on matters in relation to municipal institutions, a right to enact.

As at the time of the passing of this Act and at the time of the committing of and conviction for the alleged breach of the law there was no Dominion legislation contravening in any way the provisions of this provincial law, it is not necessary, for the purpose of deciding this case, to inquire or determine if, and in what particulars and to what extent, the legislation of either will prevail over that of the other, when the Dominion Parliament is legislating for the peace, good order, &c., of the Dominion—or on the subject of trade and commerce in connection with the traffic in intoxicating liquors—should the Dominion legislation conflict with the Provincial.

In the view I take of the inapplicability of the remedy by prohibition, the Act being, in my opinion, *intra vires*, it is unnecessary to express any opinion as

* 15 New Brunswick R. (2 Pugs.) 535.

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to the construction of the 1st sec. 42 and 43 Vic. ch. 4, though I by no means wish it to be understood that I think the construction placed on the statute by the Recorder's Court incorrect. I merely express no opinion on it, as not being necessary for the determination of the case before us.

STRONG, J.:—I agree with the Chief Justice that the attempt to impeach the constitutional validity of the statute under which the appellant was convicted, as being *ultra vires* of the Legislature of the Province of Quebec, altogether fails. In the Queen v. Taylor * I expressed my concurrence in the decision of the Supreme Court of New Brunswick, in the case of the Justices of Kings, in which it was held that under the authority conferred by the British North America Act to legislate respecting Municipal Institutions, the Provincial Legislature possessed that power generally denominated the police power, to regulate the sale of spirituous and intoxicating liquors, and I adhere to that opinion. Then I think that this appeal must be disposed of without pronouncing any opinion upon the question of statutory interpretation which was argued before us, for it is plain, as I read the authorities, that this is not a case in which the writ of prohibition will lie.

Article 1031 of the Quebec Code of Civil Procedure is in these words:

Writs of prohibition are addressed to courts of inferior jurisdiction whenever they exceed their jurisdiction.

This is an exact definition of a writ of prohibition, according to English therefore assume, in the absence of any further provision upon that head in the Code of Procedure and of any jurisprudence of the courts of the Province of Quebec to the contrary, that the use of and the proceedings upon this writ of prohibition, which is derived from the law of England, is to be regulated by the well-established practices of the English courts relating to it.

The office of the writ of prohibition is, as in the article of the Code of Civil Procedure before extracted is declared in so many words, to restrain inferior courts from exceeding their jurisdiction,—that is, not from exercising a jurisdiction which they alone can exercise if any Court can exercise it at all, but from usurping jurisdiction by encroaching upon that of other and superior tribunals.

That the proper use of the writ is restricted to such cases as those first mentioned is shown by Mr. High in the following passage from his treatise on Extraordinary Remedies: †

It follows from the extraordinary nature of the remedy, as already considered, that the exercise of the jurisdiction is limited to cases where it is necessary to give a general superintendence and control over inferior tribunals, and it is never allowed, except on a usurpation or abuse of power, and not then unless the existing remedies are inadequate to afford relief. If, therefore, the inferior court has jurisdiction of the subject matter in controversy, a mistaken exercise of that jurisdiction, or of its acknowledged powers, will not justify a resort to the extraordinary remedy by prohibition.

And the case of Lord Camden vs. Home, ‡ referred to in the judgment of Mr. Justice Ramsay in the Court of Queen's Bench, is decisive to the same effect. In that case it was expressly decided that it afforded no ground for a

* 36 U.C.Q.B. 218.

† Sec. 767.

‡ T. R. 382.

prohibition that a Court having a special statutory jurisdiction, which it alone, to the exclusion of all other Courts, possessed had so construed a statute as to exclude from its operation a case which, upon a proper legal construction of the enactment, was embraced in its terms. Mr. Justice Ashurst there says:

It is admitted that the Courts of Admiralty have exclusive jurisdiction in all cases of prize; and, if so, they must have the same jurisdiction over all other matters that arise incidentally, either in construing Acts of Parliament or proclamations, in order to form their opinion on the principal question.

Again, in the same case Mr. Justice Buller says:

In such cases the only point for our consideration is whether the court to which the prohibition is prayed has a jurisdiction over the subject. Whatever may have passed in the several cases on this subject in the last century, the grounds for granting and refusing prohibitions are now clearly and accurately defined. If the Court below have jurisdiction over the subject, though they mistake in their judgment, it is no ground for a prohibition, but is only matter of appeal.

Upon the principles of these authorities it has long since been decided that this writ cannot be used as a substitute for a *certiorari* or an appeal, for it is now well settled to be a preventive and not a corrective remedy. Applying these authorities to the present case, it is clear that in the proceedings before the Recorder of Quebec there was no such excess of jurisdiction as warranted the issuing of a writ of prohibition. It cannot be pretended that if any offence within the 42 and 43 *Vic.*, cap. 4, sec. 1, was committed by the appellant, the Recorder's Court had not jurisdiction of it and was not bound to proceed to try and determine the complaint summarily; there was, therefore, no encroachment upon the jurisdiction of any other Court in the course which was taken by the Recorder. He was bound to interpret the statute and to convict or acquit according to his interpretation of it, and upon the evidence before him, and he did this and no more.

To say this, is sufficient to show that the writ of prohibition issued improvidently and was properly quashed. No one can say it was not the bounden duty of the Recorder to interpret the Statute and proceed according to the construction he placed upon it,—and if that be so to award a writ of prohibition in such a case would be to prohibit a judicial officer from doing his duty. At most, the appellant can only complain that he has been aggrieved by an erroneous judgment, not that he has been prejudiced by the sentence of a Court which had no jurisdiction of the subject matter, and his proper remedy in this case is an appeal, if one is given by statute, or a writ of *certiorari* to remove the conviction into the Superior Court, where it may be quashed if error appears upon its face.

I am of opinion that we ought to hold the writ of prohibition to have been properly quashed, and to dismiss the appeal.

FOURNIER, J., concurred with the Chief Justice.

HENRY, J.:—Independently of the question—the main one argued before us—of the constitutionality of the statute under which the prosecution in this case was commenced, there are two others demanding our previous considera-

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The particular section of the Act in question is as follows: (His Lordship read the section *.)

The appellant was prosecuted under that section by the respondent corporation in the Recorder's Court of the city of Quebec, and the charge against him is that—

On Sunday, the eighteenth day of January, one thousand eight hundred and eighty, said defendant (now appellant) has not closed during the whole of the day, the house or building in which he, the said defendant, sells, causes to be sold, or allows to be sold, spirituous liquors by retail, in quantity less than three half-pints, at a time, the said house or building situate at the corner of St. John and St. Ursule streets, in the Province of Quebec.

The first question then is, does the charge against the appellant, as so stated, of not keeping closed on the Sunday named his house or building, he being a person holding a license to sell spirituous liquors in quantities less than three half-pints, render him liable to the penalty imposed by that section; or, in case of failure to pay the fine, as therein mentioned, to be imprisoned for a period not to exceed three months. Penal statutes are to be strictly construed; and, if the construction is reasonably doubtful as to the offence created by a penal Act, we are bound, by every authority, to declare it inoperative to that extent. A penal offence must be reasonably certain and, if open to two constructions, it cannot be so. There are two provisions in the section, one obliging the keeping closed, during every Sunday, the house or building in which a person sells liquors, the other, forbidding the selling, during the same period, in such house or building, or in any other place, spirituous liquors, wine, beer or temperance drinks, "the whole under a penalty for each and every infringement of the present provisions of a fine," &c. The second provision is coupled to the first by the copulative "and," which makes, as I read the section, the one a part of the other, and requiring a breach of both to constitute the offence, "the whole under a penalty for each and every infringement of the present provisions." The penalty is for the infringement of the present provisions,—that is a breach of both. When the provisions are connected by the word "and," I read the section and construe it as if, instead of the words used, the provision was worded thus: "and during the same period shall not sell, &c., in such house or building, or in any other place, spirituous liquors, &c.,—the whole that is, for not closing the house and for selling spirituous liquors, &c., under a penalty, &c." We are to construe the language of a statute as it is commonly used and un[illegible]. We may speculate as to what the Legislature intended; but we are bo[illegible]in the true meaning of a statute by its own language; and if the[illegible]roceed to any particular conclusion, we are not permitted to say that the Legislature meant other than what the language used warrants. If the two provisions had been coupled by the disjunctive "or," with suitable accompanying language, we [illegible]t be disposed and permitted to give a different construction to that part of [illegible] which creates the penalty for infringement. An opposite construction [illegible]al [illegible], open to serious doubts, and the double penalty should not [illegible]osed. I am of opinion that the writ against the appellant

* See page 186.

charges no complete offence, but merely one of the two ingredients necessary to constitute it. No offence in law being charged there could be no valid conviction.

The other question, although not raised on the argument, is taken by one of the learned Judges in the Court below, and therefore is entitled to consideration. The learned Judge referred to gave it as his opinion, that "prohibition" does not lie in this case, and that the writ should be quashed under the decision in the case of Lord Camden v. Home, * but more especially from the dicta of Mr. Justice *Buller* in that case. I have studied that case and the dicta referred to. The learned Judge referred to, in his judgment in that case, said that however they may have passed in the several cases on this subject in the last century, the grounds for granting and refusing prohibitions are now clearly and accurately defined. If the Court below have jurisdiction over the subject, and though they mistake in their judgment, it is no ground for a prohibition, but is only a matter of appeal. —And the rule equally clear is, that after sentence the courts of common law never grant a prohibition to inferior courts, unless the want of this jurisdiction appear on the face of the libel.

I will deal with the matter before us in the light of the two rules so laid down.

In the first place, as to the jurisdiction of the Recorder's Court over the subject. If I am right in my construction of the section before given, can it be said that that Court had jurisdiction to try, as an offence, what was not one? The prosecution against the appellant was to cause the imposition of a penalty upon him for not keeping his house closed on a Sunday. If that was *per se* an offence for which no penalty was imposed, how could the Recorder's Court give itself jurisdiction to try what was not an offence and to impose a penalty, under circumstances unauthorized by the section? As I construe the statute, he would have jurisdiction only where the two provisions were alleged to have been infringed. I think, therefore, the prohibition in this respect was properly awarded, and the want of jurisdiction was sufficiently apparent on the face of the process by which the prosecution was commenced. I think this case is, therefore, within the terms of the two legal propositions asserted by Mr. Justice Buller.

The writ of prohibition in this case was issued after judgment. Lloyd, in his treatise on the writ of prohibition, at page 11, says:

No prohibition, therefore, can go before the commencement of the action, but as soon as the action is commenced, for instance, as soon as the plaint is entered in the new County Courts, the application may be made. * * * This, however, can only be done in cases where the defect of jurisdiction appears on the face of the pleadings.

At Page 12:

It has long been settled that whenever the want of jurisdiction appears on the face of the proceedings, prohibition will go after judgment. It is thus laid down in all the old authorities, and this doctrine has been frequently confirmed since, and is now fully established in practice.

So, if the matter be apparent on the face of the proceedings, it will go after appeal, though the parties have thereby affirmed the jurisdiction of the inferior Court. Gouche v. Bishop of London*.

In Buggin v. Bennett, † Lord Mansfield said:

If it appears, on the face of the proceedings, that the Court below have no jurisdiction, a prohibition may issue at any time, either before or after sentence, because all is a nullity: it is *coram non judice*.

* 4 T. R. 398
† Str. 816.

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There is a case to be found, Jones v. Owen * where prohibition was granted by the Court of Queen's Bench, in 1848, which overrules the judgment attributed to Mr. Justice Buller, and which goes to show that the writ is grantable, even if the Court to which it is directed had jurisdiction over the subject-matter, and that even after the judgment was executed.

Several other cases, with the same result, are cited by Lloyd.

I am of opinion the writ of prohibition in this case was properly issued after judgment.

I am, for the reasons I have given, of the opinion that the appeal herein should be allowed, and that the prohibition should be sustained, with costs.

TASCHEREAU, J.:—This Act, 42 and 43 Vic. ch. 4, sec. 1, enacts that:

[His Lordship read the section 1.]

Under the said Act, the present appellant has been prosecuted for that:

On Sunday, the eighteenth day of January, one thousand eight hundred and eighty the said defendant (now appellant) has not closed during the whole of the day, the house or building in which he, the said defendant sells, causes to be sold or allows to be sold spirituous liquors by retail in quantity less than three half-pints at a time, the said house or building situate at the corner of St. John and St. Ursule streets, in the city of Quebec.

And, on the 17th day of February, 1880, was condemned for the said offence to pay a fine of $40, and $1.65 for the costs, and in default of payment of the said sum, to an imprisonment in the common gaol of the district of Quebec for a term of two months.

One of the grounds (one taken at the trial before the Recorder) upon which the appellant impugns that conviction is, that it is not authorized by the statute as no penalty is, as he contends, imposed thereby for keeping open on Sunday a house or building where liquors are usually retailed; his contention being that the penalty imposed by this latter part of the section for every infringement of the present provisions, must be read as applying only to the selling, the causing to be sold, the allowing to be sold, the allowing to be delivered, spirituous liquors, in such house or building or in any other place.

I think that this objection is well taken. The clause is ambiguous, and the appellant is entitled to the strict construction that must be given to all penal statutes. Assuming, but without deciding, that it had power to do so, the Legislature has no doubt made it an offence to keep a tavern open on Sunday, but, as I read this statute, no penalty is provided for that offence. It, then, is simply an indictable misdemeanor, according to the Federal Act, by which it is decreed that "any wilful contravention of any Act of Legislature, of any of the Provinces within Canada, which is not made an offence of some other kind, shall be a misdemeanor and punishable accordingly."

I am of opinion, consequently, that the penalty imposed upon the appellant by the Recorder, and that the conviction against him, is not authorized by the statute, and that it is a complete nullity. The Recorder cannot have had jurisdiction to impose a penalty that the statute does not authorize. The whole proceedings before him were *coram non judice*, even if the Act in question was

* 18 L. J. Q. B. 8.

intra vires. In the Province of Quebec, there are a number of cases where the prohibition has been held to lie in such a case. I would not, in fact, have any doubt upon the subject, if it was not for what has been said by some of my learned brethren.

And while it is undoubtedly true that after a Court has proceeded as far as verdict and judgment, or sentence, prohibition will not lie for a want of jurisdiction not apparent upon the record, yet the rule is supported by an overwhelming array of authority, that, where the defect or failure of jurisdiction is apparent upon the face of the proceedings which it is sought to prohibit, the superior tribunal may interpose the extraordinary aid of a prohibition at any stage of the proceedings below, even after verdict, sentence or judgment.*

In Buggin v. Bennett (2), Lord Mansfield says:

If it appears upon the face of the proceedings that the Court below have no jurisdiction, the prohibition may be issued at any time, either before or after sentence, because all is a nullity—it is *coram non judice*.

I am of opinion to allow the appeal.

GWYNNE, J.: I am of opinion that the Statute in question, namely, 42nd and 43rd Vic., ch. 1, of the Province of Quebec, does not impose the penalty in that section mentioned, upon the person who, although licensed to sell spirituous liquors in quantities in that section mentioned, does not close the house or building in which he sells, or causes to be sold, such liquors during the whole of the Sunday, unless such keeping open, which I take to be equivalent to not closing such building, is accompanied by the sale or delivery in such house or building of some spirituous liquor, wine, beer or temperance liquor. The words of the Statute, shortly expressed, so far as is necessary for the decision of the point in question, are—[His Lordship read the words of the Statute].

It appears to me to be free from reasonable doubt that this language does not profess to impose the penalty upon the person so licensed to sell for the not closing alone, without more, of the house or building in which the sale usually takes place. If the Legislature contemplated making the not closing, without more, the house or building during the whole of Sunday a distinct offence in itself, subjecting the proprietor of the house or building to the penalty, such intention, to say the least, is very inadequately expressed, and I confess, that to my mind, it is not clear what would constitute the offence in the absence of the fact of any liquor being sold or delivered to any person in the house or building; for example, whether, if the licensed person usually sells the liquors in a room or shop forming part of the house in which he lives, the whole house is to be closed, so that nobody, not even the proprietor, can enter or leave it; or if the door from the street into the room or shop in which the liquors are usually sold, constitutes the sole mode of egress and ingress for the proprietor, between the house and the street, must that door be so closed that the proprietor himself shall not pass out of it, although to go to church or on his return re-enter his house by it? Or if the liquors are all kept in cases behind a bar or counter, would the Statute be sufficiently complied with by keeping the cases and the bar or counter locked?

* High Extr. Legal Rem., sec. 774, and cases there cited.

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Or should the keeping closed be considered as being directed against all persons frequenting the house for the purpose of procuring spirituous liquors there?

But we are not now, in my opinion, called upon to decide what state of facts would constitute the committal of the offence of not closing, if not closing, without more, be an offence under the Statute, but whether it is made by the Statute an offence in itself, and subject to the penalty mentioned in the statute, and in my opinion it clearly is not—the words "the whole" in the sentence which enacts "the whole under a penalty for each and every infringement of the present provisions of a fine," &c., &c., seem, I think, to express the intention of the Legislature to be that to subject a person to the penalty he must be guilty of a violation of the whole of what is prescribed and prohibited in the section; so, likewise, the use of the words, "'every infringement of the present provisions," indicates an intention to attach the penalty to each infringement of all the provisions of the section. The penalty is not imposed upon every infringement of any of the present provisions, but upon every infringement of the provisions in the plural; that is, of both the provisions of the section, viz.:—on the keeping open and selling.

So reading the Act, it is plain that the complaint charged no offence cognizable under the statute, and the prohibition was therefore rightly granted; and inasmuch as there is no pretence that any spirituous liquor was sold or delivered to any person on the occasion referred to in the complaint, the case does not, in my opinion, raise the question whether the statute which prohibits such sale or delivery be or be not ultra vires of the Provincial Legislature, and I do not think that we are called upon to express an opinion upon a point which the facts of the case do not raise, and which is, therefore, unnecessary for the decision of the case before us, and this is the course we pursued in a recent case from New Brunswick.

The appeal, in my opinion, should be allowed with costs.

Appeal dismissed without costs.

Montambault, Langelier & Langelier, solicitors for appellant.
Pelletier & Chouinard, solicitors for respondent.

SUPERIOR COURT, 1884.

MONTREAL, 30TH JANUARY, 1884.

Coram TORRANCE, J.

The Belmont Manufacturing Company vs. *Arless.*

HELD :—Where the defendant subscribed for one share in the capital of a company about to be incorporated under the name of the Lawlor Manufacturing Company, and in the Act of Incorporation, the name appeared as the Belmont Manufacturing Company, and the defendant's name was omitted in the list of shareholders filed in the office of the Provincial Secretary :—that the alteration of the name of the company and the omission of the defendant's name did not make his subscription void.

The demand was for $100 subscription by defendant for one share in the capital of the Lawlor Manufacturing Company. The subscription was denied.

The evidence of John B. Lawlor was that the defendant signed in his presence one share in the stock of the company. The heading of the subscription book signed by defendant read as follows: "Subscriptions for the capital stock "of the Lawlor Manufacturing Company, capital, one hundred thousand dollars "($100,000), Montreal, Canada. The undersigned hereby agree to take, and "they hereby do take and subscribe to the number of shares in said Company "set opposite to their respective signatures, or any portion thereof, as may be "allotted by the Board of Directors, the whole subject to the conditions con-"tained in the Act incorporating said Company." This heading had reference to the Company (plaintiff) under another name. The defendant subscribed about the 7th November, 1879. Notice of an application to the Lieutenant-Governor for Letters Patent under the Act was dated 31st December, 1879. The list of shareholders filed in the office of the Provincial Secretary did not contain the name of defendant.

PER CURIAM.—The omission to insert the defendant's name does not appear to me of any consequence. He had rights as a shareholder which could not be affected by such omission. His argument against his liability would seem to be based upon the pretension that he had the right to refuse the share in the company after its incorporation. I have examined carefully the case of The Union Navigation Co. vs. Couillard, 7 Rev. Légale, 215. The constitution of the company there as incorporated was changed from what was subscribed for by Couillard, and he was held not to be bound. As was remarked by one of the judges in the case of Couillard, the question is purely one of contract. I find here that the defendant bound himself for one share in the company, and he should be held to his bargain.

Judgment for plaintiff.

MacMaster, Hutchinson & Weir, for the plaintiff.
S. Lebourveau, for the defendant.

COURT OF QUEEN'S BENCH, 1884.

MONTREAL, 27TH MARCH, 1884.

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

No. 240.

The Exchange Bank of Canada vs. *Craig et ux.*, and *Potter, mis en cause.*

HELD—That it is not competent to any party in a cause to inscribe for the adduction of evidence at length without the consent of all the parties.

SEMBLE—That any party may insist upon proceedings at *enquete* and merits at the same time.

DORION, C. J.—An application was made in this case for leave to appeal from an interlocutory judgment of the Superior Court, granting the plaintiff's motion to reject the defendant's inscription for the adduction of evidence at length. The real question in the case was whether a party could be forced to go to enquête at length. Article 243 of the Code of Procedure says: "Any party may, either in his declaration or in any other pleading, or by a notice served upon the opposite party, declare his option that the case shall be inscribed at the same time for proof and for final hearing immediately after proof." This was not done here. The article 234 says: "When the case is not to be tried by a jury either of the parties may inscribe it upon the roll for the adduction of evidence." The defendant contended that under this article he had the right to inscribe for enquête generally; that is, if the other party did not make the option under Article 243, the defendant had the right to inscribe under article 234. Article 236, which had some bearing upon the case, was in these words: "The evidence is taken down in writing, either at length or in notes, according to the provisions contained in this section." Then article 284, upon which the plaintiff relied to reject the inscription, was in these terms: "Upon the consent in writing of all the parties to a case, the proof may be taken down in writing in the manner hereinafter provided, either before a judge or before the prothonotary," etc. From this the plaintiff argued that you cannot in any case take the enquete in the ordinary form unless you have got the consent of both parties. There was no doubt a contradiction to some extent between articles 234 and 284; but, taking all these articles together, the court had to give an interpretation to them, and the interpretation which it put upon them was this—that no enquête shall be proceeded with in the old manner without the consent of both parties. In the case of the Queen vs. Martin, an enquête was proceeded with in the old manner, and it was held by Mr. Justice Ramsay that the witness could not be prosecuted for perjury upon the deposition because there was not a consent in writing. The effect of the present judgment was that one party could always insist upon proceeding at enquête and merits. The motion for leave to appeal was therefore rejected.

MONK, J., dissenting, thought this appeal should be allowed. The defendant inscribed for enquête alone. It was true that he put "for the adduction of evidence at length" in his inscription. The inscription was objected to on the

ground that the defendant had no right to inscribe for enquete at length without the consent of the opposite party. His Honor could not understand how it was practicable to carry on an enquete for the adduction of evidence in that way, if, before inscribing, you must have the consent of the other party. His Honor was of opinion that under article 234 the defendant's inscription should be maintained.

RAMSAY, J.—There is always difficulty in deciding as to matters of procedure on the articles of the code, and our procedure will probably continue to create unnecessary embarrassment as long as it is subjected, without control, to fitful experiments. But in this case the history of the Legislation before us is recent and well-known. The old enquête system, which was a subject of diversion to travellers who visited the court house, was to be remodelled, and the scheme adopted was to take the evidence and hear the case at once before a judge, as if it were being tried before a judge and jury. The inscription for merits and hearing then became the ordinary proceeding, and an *enquete* at length under the old system was a matter of consent (Art 284 C. C. P.) But it has been urged by the party moving for leave to appeal that under Article 234 he had a right to inscribe, and that it then perhaps became a matter of consent whether it should be proceeded with at length. There are two answers to this. In the first place article 234 belongs to section 1, which enters into no special details as to the mode of proof, but is general. In the second place the inscription was for the adduction of evidence at length, which could not be carried out without consent. This inscription had, therefore, to be dealt with to clear the record of a useless procedure, and the Court below properly dismissed it on motion. As to the case of the Queen vs. Martin, to which reference has been made, I do not consider that it has any special bearing on this case. The question was whether perjury could be assigned upon a deposition where the consent in writing was not produced, and upon the authority of an English case the Court held that it could not. It was a question under the criminal law.

Motion for leave to appeal rejected: Monk, J., dissenting.

MacMaster & Co., for plaintiffs.

L. H. Davidson, for defendants.

COURT OF QUEEN'S BENCH, 1884.

MONTREAL, 19TH MAY, 1884.

Coram Hon. Sir A. A. DORION, Ch., J., MONK, J., RAMSAY, J. CROSS, J., BABY, J.

No. 630.

ABBOTT, *es qual.* ET AL., APPELLANTS;

AND

McGIBBON, *es qual.* RESPONDENT.

HELD:—That the power given by a testator to a legatee in trust, to divide the estate so bequeathed among his children in such proportion as the legatee should appoint by his will, included the power to exclude one or more of such children from any benefit in the legacy.

This was an appeal from the following judgment, rendered by the Superior Court at Montreal (TORRANCE, J.), the 13th of December, 1884 :—

"The Court * * *

Considering that it is in evidence that the late William Macrae, in and by his last will and testament, executed before witnesses, on the 3rd day of March, 1868, gave and bequeathed unto his executors, for the use, benefit and behalf of the children, issue of the then present, or any future marriage of his son, John Octavius Macrae, one-third of the residue and remainder of his estate, to pay the rents and revenues thereof to his said son, during his lifetime, and after the death of the said John Octavius Macrae to pay the capital thereof to his children in such proportion as the said John Octavius Macrae should decide by his last will and testament, but in default of such decision, then share and share alike, as their absolute property for ever;

Considering that it is also in evidence that the said John Octavius Macrae was twice married: firstly, to Dame Victoria St. George Ritchie, of which marriage there was issue four children, to wit: Lucy Caroline Macrae, now of age, and one of the defendants, John Ogilvy Macrae, Ada Beatrice Macrae and Catherine Alice Lennox Macrae, who are still minors, and are now represented by their tutor, Harry Abbott, the other defendant; and, secondly, on the 29th of November, 1879, to Dame Mary Ann Jennay, of which marriage there is issue one child, to wit: Humphrey Gordon Eversley Macrae, born on the 25th of January, 1881, and now represented by his tutor, the plaintiff in this cause;

Considering that the said John Octavius Macrae died on the 12th of May, 1881, after having made his last will and testament, of date the fifth of April, 1880, whereby he directed that his son, John Ogilvy Macrae, and his three daughters,—Lucy Caroline Macrae, Ada Beatrice Macrae and Catherine Alice Lennox Macrae—should be entitled equally, share and share alike, to the trust fund over which the said John Octavius Macrae had a power of appointment under his father's will;

Considering that the said John Octavius Macrae had merely the power and right, under the will of the said William Macrae, to decide by his last will and

testament in what proportion the succession left to him should be divided among his children, but had no right to exclude any one or more of his children from the benefit of said succession to which all were entitled ;

Abbott, es qual. et al., and McGibbon, es qual.

Doth overrule the plea of the defendants, and doth declare the said Humphrey Gordon Eversley Macrae to be entitled to one-fifth of the said bequest with the profits thereof, from the date of the death of the said John Octavius Macrae, to wit, the 12th of May, 1881; and doth condemn the said defendants, Harry Abbott, in his said quality, and Lucy Caroline Macrae, to pay and satisfy to the said plaintiff in his said quality, the said one-fifth of the said bequest : and doth condemn the said Harry Abbott to render unto the said plaintiff, within thirty days from the date of the present judgment, an account of his administration and management of the said moneys in his hands, and of all receipts, revenues and profits received and collected on account of the said fund, as well as all vouchers and *pièces justificatives* of the said account, in order that the proportion due to the said plaintiff *ès qualité* may be judicially established, and the Court doth order that the costs, so far incurred in the present suit, be paid out of said succession of said John Octavius Macrae, the Court reserving to pronounce on the other conclusions of the declaration."

The learned Judge prefaced said judgment with the following remarks :—

" The construction to be put upon such a power as that given by the will of William Macrae to John Octavius Macrae has frequently been considered in England, and it was agreed that when power was given to appoint property, real or personal, among several objects, no one of the objects could be excluded, or some one or more of the objects of the power could not be excluded by the donee of the power, from a share of such property, but it was also agreed that it was not necessary to give a substantial share of such property to each object of the power. This was the construction on the 30th of July, 1874, and it frequently happened that instruments intended to operate as executions of such powers were invalid, in consequence of the power appointing in favor of some one or more of the objects of the power, to the exclusion of the other or others of such objects, and the law was accordingly amended by the Imperial Statute 37 and Vic. chap. 37. This enacted that no appointment which, from and after the passing of this Act, should be made in exercise of any power to appoint any property among several objects, should be invalid on the ground that any object of such power had been altogether excluded, but every such appointment should be valid and effectual, notwithstanding that any one or more of the objects should not thereby or in default of appointment, take a share or shares of the property, subject to such power. The construction put upon such powers in England is not binding upon us but as written reason, such construction is of the highest value. The question before us is one of pure construction, and I cannot do better than cité the words of Farwell's Work on Powers, published in 1874. In page 294 we read, ' Each case must depend on the intention expressed in the particular instrument creating the powers ; no general rule can be laid down, except that the words " all " and " every " are mandatory, and make it necessary that each object should have a share, and that " such " authorizes exclusion,

Abbott, es qual. et al. and McGibbon, es qual.

unless a contrary intention appears.' Jessel M. R. in Veale's Trusts (4. L. R. Chan. Div. 65) says :—I have no doubt that is the law ; looking then at the words employed by the testator, he made the bequest to the children of John Octavius Macrae, which may be regarded as the same "all" the children, and he did not use the word "such" of the children as John Octavius Macrae might select. *Stolworthy vs. Suncroft* (in 10 Jur. N. S. 762,) is in point, and it is approved of by *Redfield on Wills*, Vol. 1 of 4th Edition, A. D. 1876. The plaintiff will have judgment."

RAMSAY, J.—This is an action by the tutor of Humphrey Gordon Eversley Macrae claiming on behalf of his ward one-fifth part of a legacy under the will of the grandfather of the minor Mr. Macrae, as being one of the children of John Octavius Macrae, son of the testator. The clause of Wm. Macrae's will under which respondent claims is as follows :

"I give and bequeath unto my executors hereinafter named, for the use, "benefit and behalf of the children, issue of the present or any future marriage "of my son, John Octavius Macrae, one-third of the residue and remainder of "my estate and succession, to have and to hold the same upon trust; firstly, to "invest the proceeds thereof in such securities as to them shall seem sufficient. "and from time to time to remove and re-invest the same, and during the life of "my said son, John Octavius Macrae, to pay the rents and revenues derived "therefrom to my said son for his maintenance and support, and for the maintenance "and support of his family. And, secondly, upon the death of the said John "Octavius Macrae, then the capital thereof to his children, in such proportion "as my said son shall decide by his last will and testament; but in default of "such decision, then share and share alike, as their absolute property forever."

J. O. Macrae, on the 5th April, 1880, made his will, by which he disposed of the above trust funds thus : "I will, bequeath, direct and appoint that my son John Ogilvy Macrae, and my three daughters, Lucy Caroline Macrae, Ada Beatrice Macrae, and Catherine Alice Lennox Macrae, shall be entitled equally, share and share alike, to the trust fund over which I have a power of appointment under my father's will." On the 25th January, 1881, J. Oct. Macrae had a son, to wit, the said Humphrey, and on the 12th May, 1881, J. Oct. died.

It is contended that, by the will of Wm. Macrae, a substitution was created in favor of all the children of John Oct., that the *grévé* had power to distribute the fund in reasonable proportions, giving a substantial part to each, but that he could not exclude any one or more of the children, nor could he give merely an illusory sum to one or more, thus practically excluding him. That as John Oct. had excluded one of the children he had not executed the power conferred upon him by the will of Wm. Macrae, and that, therefore, the children came in, share and share alike.

Appellant, on the other hand, contends that the right to distribute the fund among the children of John Oct. "in such proportion as my said son shall decide by his last will and testament" permitted John Oct. to select those of his children he chose.

Curious to say, this question of purely French law has been argued an-

decided in the Court below, without reference to a single French authority; but we have been referred to the English law as "written reason" "of the highest value." It will readily be admitted that written reason, wherever it comes from, is of the highest value, and not the less valuable because it is very scarce; but, unfortunately, the English law referred to seemed to be nearly akin to unreason. It is only by the help of repeated legislation that the law there has come down to that reason from which I apprehend our law states. It was therefore quite unnecessary for us to make any Act similar to the English Act 37 & 38 Vic. Cap. 37.

Under the Roman Law and under the old regime in France, there was a great question as to the effect of the substitution of the children, or of a class, as, for instance, relations, and at last it seems to have been determined that when the children of the *grevé* were called *nominative* they held of the original testator, and that the father could not affect the disposition. When the children of the *grevé* were called *collectively* there was great difference of opinion as to whether the father could select among the children, so as to give to some and exclude others. Although the affirmative of the proposition cannot be supported on a strictly logical argument, it seems to have prevailed. The argument, such as it was, is as follows: The object of the testator is the governing consideration in the interpretation of wills (de Reg., par. xii), creating a substitution in favor of children or of relatives indicates an intention of keeping the property in the family, therefore when the *grevé* selects one or more in the class named, but particularly among his children, he is giving the most beneficial effect to the disposition of the testator. This argument is to be found in du Perier Liv. 3, Qu. 2.

The following are some of the authors who have supported the affirmative:

"Si le testateur en faisant le fidéi-commis a usé d'un nom collectif, et sans nommer les personnes, a généralement appelé les enfants de l'héritier, ou ceux de la famille, en ce cas l'héritier est en faculté d'élire tel des substitués que bon lui semblera; d'autant qu'en cette disposition, le testateur n'a pas considéré les personnes, mais la qualité des fidéi-commissaires, laquelle se trouvant toute semblable en chacun d'eux, il est suffisamment satisfait à la volonté du défunt par l'héritier qui transporte tout l'héritage à un des substitués: *verum est enim in familia, vèl liberis reliquisse, licet uni reliquerit*, dit Martian. Et c'est à cette espèce que les réponses de Papinian, et autres Jurisconsultes doivent être rapportées. (Arrêts d'Olive, Livre 5, ch. XIV. p. 705.)

"Il est vrai que si le testateur n'a point appelé les fidéi-commissaires en particulier, mais en général, par un nom collectif, et que la restitution soit conçue en termes fidéi-commissaires, dirigés à la personne de l'héritier, comme s'il l'a chargé de laisser les biens à ses enfants, ou à ceux de la famille, il peut choisir entre ses enfants au premier cas, ou parmi ceux de sa famille, au second, celui qui lui sera le plus agréable, et il satisfait à la volonté du testateur, pourvu qu'il ne mette pas les biens hors de sa famille ou s'il les laisse à l'un de ses enfants." (Ricard Tom. II, Traité III, ch. XI, Part. II, No. 63.)

It will be observed, however, that this is not exactly the question here.

Abbott, es qual. et al., and McGibbon, es qual.

There is a special power given to select, and, so far as I know, the exercise of that power to favor one, to exclude absolutely another, has never suffered any difficulty. See du Perier, already cited, p. 237, 8.

"Mais ces mêmes lois nous font voir aussi qu'il n'est pas absolument nécessaire que la faculté du choix et de l'élection soit donnée expressément par le testateur, et qu'elle le peut être tacitement, et par les conjectures tirées des termes de sa disposition et de la qualité des personnes et autres circonstances, qui montrent que l'élection favorise l'intention et la disposition du testateur, qui est une proposition d'autant plus équitable, qu'il peut rarement s'ensuivre de fâcheux inconvénients; et qu'au contraire elle peut produire de très-bons effets."

* * *

"C'est pourquoi encore que régulièrement l'héritier grévé n'ait point de choix et d'élection quand le testateur ne la lui a pas donnée, cette règle doit cesser quand les circonstances de la disposition font voir que l'élection n'est point opposée à l'intention et à la fin que le testateur s'est proposée; et c'est ainsi que Berengarius Fernandus l'a entendu, et que les Arrêts du Parlements de Toulouse l'ont jugé, comme il paraît par le discours de tous ces auteurs; etc. But it may be said that giving to one child is not giving each a proportion. The answer is not strictly, but it is an exercise of the power as substantially as if the *grévé* had given a nominal sum, which, evidently, he had a right to do. To adopt the notion of English equity, now abandoned, would be to involve ourselves needlessly in a labyrinth of troubles, into which we are not invited by any authority of our law. To contend that the original testator's manifest intention was to be defeated, because of the failure to do what is meaningless, appears to me to be untenable under any reasonable system of law, and certainly cannot be entertained for an instant under ours.

The following was the written judgment pronounced by the Court of Appeal:

"The Court * * * considering that the late Wm. Macrae, in and by his last will and testament, executed before witnesses, on the 3rd of March, 1868, gave and bequeathed unto his executors for the use, benefit and behalf of the children, issue of the then present or any future marriage of his son, John Octavius Macrae, one-third of the residue and remainder of his estate, to pay the rents and revenues thereof to this said son during his lifetime, and after the death of the said John Octavius Macrae, to pay the capital thereof to his children, in such proportion as the said John Octavius Macrae should decide by his last will and testament; but, in default of such decision, then share and share alike, as their absolute property for ever;

"Considering that it is also in evidence that the said John Octavius Macrae was twice married, firstly to Dame Victoria St. George Ritchie, of which marriage there was issue four children, to wit, Lucy Caroline Macrae, now of age, and one of the defendants (now appellants), John Ogilvie Macrae, Ada Beatrice Macrae, and Catherine Alice Lennox Macrae, who are still minors, and are now represented by their tutor, Harry Abbott, the other defendant (appellant); and secondly, on the twenty-ninth November, 1879, to Dame Mary Ann Jennay,

of which marriage there is issue one child, to wit, Humphrey Gordon Eversley Macrae, born on the 25th of January, 1881, and now represented by his tutor, the plaintiff (respondent) in this cause;

"Considering that the said John Octavius Macrae died on the 12th of May, 1881, after having made his last will and testament, of date the 5th of April, 1880, whereby he directed that his son, John Ogilvie Macrae, and his three daughters, Lucy Caroline Macrae, Ada Beatrice Macrae and Catherine Alice Lennox Macrae, should be entitled equally, share and share alike, in the trust fund over which the said John Octavius Macrae had a power of appointment, under his father's will;

"Considering that the said John Octavius Macrae had by law, under the disposition of the will of his late father, William Macrae, not only the right to apportion between all his children, as well those of his then existing marriage or of any future marriage, but also the right to dispose of said property in favor of one or more of his said children, to the exclusion of the others, as he has done by his said last will;

"And considering that the respondent in his said capacity has no right to any portion of the property claimed by his action, and that there is error in the judgment rendered by the Superior Court, etc., etc.—This Court doth reverse, etc. and action dismissed."

Judgment of S. C. reversed.

Abbott & Co., for appellants.
Strachan Bethune & Co., counsel.
Girouard & Co., for respondent.

COURT OF QUEEN'S BENCH, 1884.

MONTREAL, 21st MAY, 1884.

Coram Hon. Sir A. A. DORION, Ch. J., RAMSAY, J., CROSS, J., TESSIER, J., BABY, J.

No. 12.

SUNDBERG,

APPELLANT;

AND

WILDER,

RESPONDENT.

HELD:—That this Court has no jurisdiction to order the record to be remitted to the Court below for the purpose of correcting an error in the copy of judgment forming part of the transcript, much less to order the Court below to rectify such order.

DORION, C. J.—In this case the respondent asked that the record be sent back to the Court below, in order to have an error corrected in the copy of judgment, and that the necessary order be given to the Court below and to the Judge thereof to cause the said error to be rectified. It appears that the draft of judgment as prepared by the judge was correct, but in the registration a clerical error had been made by which a wrong number was given in the description of certain land. The judgment as registered was not the judgment of the Court. There were English precedents which went a long way in permitting such errors to be rectified. But it was evident that the Court here had no authority. This error must be corrected by the Court below. It was not necessary to send back to record. The Court below could correct the error in the registration, and when that was accomplished it was possible that a correct copy could be produced here and admitted in the place of that which contained the error in question. At present the motion must be rejected.

RAMSAY, J., concurred, but for somewhat different reasons. The judgment, in his view, was the judgment registered, but a purely clerical error could be corrected whether it was made by the judge or by the clerk. Here it was a mere question of misdescription of property—one of those things which members of the bar ought to settle among themselves. If they did not do so the Court had a means in its power of letting them know what should have been done.

Motion rejected.

Ives, Brown & French, for appellant.
Camirand, Hurd & Fraser, for respondent.

COURT OF QUEEN'S BENCH, 1884.

MONTREAL, 21st MAY, 1884.

Coram Hon. Sir A. A. DORION, Ch. J., MONK, J., RAMSAY, J., CROSS, J., BABY, J.

No. 455.

THE ST. LAWRENCE AND CHICAGO FORWARDING CO.,

APPELLANT;

AND

THE MOLSONS BANK,

RESPONDENT.

HELD:—1. That the respondent had not a legal assignment of the bill of lading, the subject matter of the present suit, or of any part of the cargo represented hereby, before it had been fulfilled, was exhausted, and had become effete.

2. That prior to any assignment of the bill of lading to the respondent the appellant had delivered the cargo to the true holders of the bill of lading and consignees of the cargo.

This was an appeal from the judgment of the Superior Court at Montreal, reported in the 25th L. C. J. p. 324.

The following is a copy of the written judgment so rendered by the Superior Court:—

La Cour * * *

Considérant que la demanderesse a prouvé les principales allégations de sa demande, et spécialement que le blé en question en cette cause, a été transporté par la défenderesse, de Portsmouth, près Kingston, dans la Province d'Ontario, en vertu d'un contrat tacite ou verbal, qui n'était que la continuation du contrat contenu dans le connaissement Exhibit numéro deux de la demanderesse; que la défenderesse et ses employés n'avaient pas d'autre autorité, pour transporter ce grain de Kingston à Montréal, que celle contenue dans ce connaissement qui mettait la cargaison à ses soins, et qu'elle a accepté ce soin, et qu'elle a, en conséquence, fait le transport à Montréal avec l'entente qu'elle serait payée pour ce transport, au taux ordinaire du fret par le propriétaire de la cargaison, propriétaire dont la connaissance lui serait dévoilée au moyen de la production du connaissement en question qui indiquait que la cargaison devait être livrée à l'ordre de Reynolds Brothers, les chargeurs

Considérant que ce connaissement, tout en n'étant pas strictement conforme aux dispositions de la loi, était connue de la défenderesse qui en avait une copie pour son propre usage, et qui de fait s'y est conformée partiellement en transportant le blé à Montréal: Considérant que le dit connaissement était suffisant pour faire connaître à la défenderesse et à ses employés et officiers, que la cargaison n'était livrable qu'à l'ordre de Reynolds Brothers ou de leurs cessionnaires;

Considérant que la demanderesse est devenue, pour valable considération et par endossements réguliers, propriétaire d'une portion de la cargaison mentionnée dans le dit connaissement; savoir de 15,500 boisseaux de blé de la qualité y mentionnée et valent $16,275;

The St. Lawrence and Chicago Forwarding Co. and The Molsons Bank.

Considérant que la défenderesse n'a pas prouvé les allégations de sa défense, et spécialement qu'elle n'a pas prouvé avoir fait un contrat distinct et indépendant du dit connaissement avec Crane & Baird, à Montréal, pour le transport de la cargaison de Portsmouth ou Kingston, Ontario, jusqu'à Montréal, quoiqu'elle est spécialement allégué avoir fait tel contrat distinct avec Crane & Baird, à Montréal;

Considérant que sur offre par la demanderesse de la remise du dit connaissement à la défenderesse, celle-ci a refusé de lui livrer les dit $15,500 boisseaux de blé qui sont la propriété de la demanderesse;

Considérant, cependant, que les différentes parties de cette transaction ont été faites avec un grand relâchement des règles propres à conserver l'ordre dans les affaires commerciales, et que les deux parties ont participé à ce relâchement qui a été la cause du présent litige;

Renvoie les défenses de la défenderesse et condamne celle-ci pour les causes énoncées dans la demande, à livrer à la demanderesse, sous quinze jours de cette date, la quantité de $15,500 boisseaux de blé de la qualité mentionnée dans la demande et dans le connaissement, et qui sont la propriété de la demanderesse et à défaut par la défenderesse de ce faire dans le dit délai, elle est condamnée à payer à la demanderesse la dite somme de $16,275 valeur du dit blé, avec intérêt sur cette somme à compter du 29 Décembre, 1880, jour de l'assignation et les dépens, excepté ceux d'Enquête, distraits à Messieurs Abbott, Tait & Abbott, Avocats de la demanderesse, chaque partie payant ses frais d'Enquête, en par la demanderesse payant les charges suivant le connaissement, lesquels sont de $1240, dont neuf cent trente piastres pour le fret de Toledo à Portsmouth, et $310 pour le fret de Portsmouth ou Kingston, dans la Province d'Ontario à Montréal susdit."

CROSS, J.—As appears by the bill of lading produced in this case, Reynolds Bros. shipped from Toledo 16,500 bushels red winter wheat by the schooner Falmouth, L. D. Becker, master, bound for Kingston, Ontario, the cargo to be delivered as per address in the margin as follows: "Order Reynolds' Bros.; "notify Crane & Baird, Montreal, P. Q.; care St. Lawrence & Chicago For- "warding Co.," implying that, although the voyage of the schooner ended at Kingston, the cargo was intended to be put in charge of the appellants, destined for Montreal, Crane & Baird to be put upon their diligence by notice for any interest they had or might acquire in the cargo. The Falmouth arrived at Portsmouth, near Kingston, on the 3rd or 4th of September, 1880, where the appellants, accustomed to take charge of similar cargoes for Crane & Baird, received it, and put it on board one of their barges, the Mohawk, together with 4,000 bushels similar wheat transhipped from the schooner Willie Keeler. The appellants, acting as agents for the owners of the cargo, or whomsoever it might concern, the ordinary carriers for Crane & Baird, paid the lake freight to the master of the Falmouth, taking a receipt, which runs as follows:—

KINGSTON, PORTSMOUTH HARBOUR,

6th September, 1880.

The St. Lawrence and Chicago Forwarding Co. and The Molsons Bank.

"$990 received from the St. Lawrence and Chicago Forwarding Co., as "agents for the owners of cargo, the sum of $990, being payment in full of "freight on cargo of wheat carried in schooner Falmouth, from Toledo to "Kingston, Portsmouth Harbour, and all other claims to date.

"(Signed), L. D. BECKER."

No new bill of lading was issued by the master of the Mohawk, nor by anyone representing that vessel, but Mr. Macfarlane, agent for the appellants, and acting for them at Kingston, signed a memo across the face of the bill of lading of the Falmouth as follows: "Received this cargo St. L. & C. F. Co., signed J. "H. Macfarlane," thus constituting themselves agents or trustees for the owners of the cargo, with the knowledge that the bill of lading made it deliverable to the order of Reynolds Bros., with the indication that Crane & Baird had, or were to have, something to do with the cargo as consignees or otherwise. The appellants, apparently from the first, looked upon them as consignees, and that they were carrying the wheat for them, which perhaps was correct, as the Falmouth's bill of lading appears to have been transmitted to them. The Mohawk left Kingston on the 6th September in company with the barge Alfred, another of appellants' vessels, carrying the balance of the cargo of the Willie Keeler, the Mohawk reaching Montreal on or about the 10th of September, and on that day, at the request of Crane & Baird, there was delivered of her cargo to the steamship Canadian 15,500 bushels, and on the 11th September to the steamship Dalton, for Magor Bros., 1,900 bushels, in all 17,400, or an excess of the Falmouth's cargo to the extent of 900 bushels. This surplus was a portion of the 4,000 bushels which had been discharged into the Mohawk from the schooner Willie Keeler. The balance of the cargo of the Mohawk, consisting of 3,088 bushels, was delivered to Messrs. Beddall & Co., on an order as follows:—

MONTREAL, 11th September.

"No. 3907.

"ST. LAWRENCE AND CHICAGO TOWAGE CO.

"Please deliver Messrs. Beddall & Co., or bearer, 15,500 bushels red winter "wheat.

"(Signed), CRANE & BAIRD,

"Per W. J. CRAIG."

	Bushels.
"September 14th, ex Mohawk to steamship Pappina for Beddall & Co.	3,088
"September 16th, ex Alfred to steamship Pappina for Beddall & Co.	6,455
"September 17th, ex Alfred to steamship Pappina for Beddall & Co.	5,524
"September 18th, ex Alfred to barque Sarah for Beddall & Co.....	429
	15,496

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The appellants paid for fourteen bushels, the quantity short on the entire of the cargoes of the Falmouth and Willie Keeler, making the last mentioned delivery amount to net 15,500 bushels. On the 14th September Beddall & Co. applied for and obtained from the Molsons Bank an advance of $16,275 on the strength of the bill of lading per schooner Falmouth, which then bore the following endorsement :—

"Reynolds & Co.

"D. Macphie, Esq.

"Deliver to Messrs. Beddall & Co., or order, 15,500 bushels of the within "cargo.

"Signed, CRANE & BAIRD.
"Endorsed, BEDDALL & Co."

"The transaction was entered in the special loan book of the bank as follows: —"September 14. Demand Loan, 7 p. c., $16,275. Bill of lading dated 28th "August, 1880, 16,550 bushels No. 2 red wheat: 15,500 endorsed over by "Crane & Baird. Schooner Falmouth, Toledo, O."

The Molsons Bank, contending that the loan they made never having been repaid, and the wheat pledged to them never having been delivered to them, nor the proceeds thereof paid to them, they are entitled, as the holders of the Falmouth's bill of lading, to call upon the appellants, as the carriers of the wheat, to produce it or to pay them its value. They have accordingly brought their suit to enforce the claim so made by them, in which suit they allege that, by the custom of trade, the appellants, forwarders of the wheat from Kingston, are held to the same obligations as if they had been signers of the original bill of lading, which they allege has force and effect until the cargo reached its destination at Montreal, and the appellants, as such forwarders, were bound to have demanded and secured the surrender of the Falmouth's bill of lading on delivery being made by them to the holder thereof. The appellants, on their part, plead and contend that they did not undertake to carry the wheat in question under the bill of lading of the Falmouth, to which they were no party, but undertook to carry both cargoes, that is of the Falmouth and Willie Keeler, from Kingston, for Messrs. Crane & Baird, the consignees of both cargoes, to whom they were duly delivered in the manner already explained; that the attempted endorsement for part of the cargo was invalid, and they had no notice thereof until long after the due delivery of the wheat, and that Molsons Bank was guilty of gross negligence in the matter. That Molsons Bank was aware of the delivery of the wheat and authorized Beddall & Co. to ship it in the manner in which it was done, and substituted for the original bills of lading the shipment to Europe and exchange drawn against them, whereby the Molsons Bank suffered no loss; to which the Molsons Bank replied, that they had bought from a broker the exchange appellants referred to, and paid for it in cash without any knowledge of its being the proceeds of the wheat in question. The bill of lading, endorsement and orders above referred to are put in proof, as well as the deliveries of the wheat, the advance of the bank, and their entry

of the loan in their special loan book. The proof makes it apparent that the two cargoes, that is of the Falmouth and Willie Keeler, transhipped by the appellants into their barges Mohawk and Alfred, were both controlled and disposed of by Crane & Baird as the consignees thereof, and that the cargo of the Willie Keeler was by them substituted to replace the previous delivery they had made of the cargo of the Falmouth, but that the Molsons Bank failed to get their quantity or any part of it from any source. Witnesses have also been examined in support of the alleged custom of trade, which imposes the obligations incurred under the first bill of lading upon the carrier, who accepts a cargo carried to an intermediate port to forward it to its final destination by an additional transit, and such ultimate carrier being required to procure the surrender of the original bill of lading, to free himself from responsibility, and have given these opinions affirmatively on these propositions. An attempt was also made on behalf of the appellants to show that the Molsons Bank got the bills of exchange drawn against the last delivery of wheat which Beddall appears to have claimed was a repayment of the loan, and although it may be supposed his view of the imputation of certain subsequent payments left the advances in question covered, this is not consistent with the statement of the bank manager, Mr. Elliott, who explains that this being a special loan, the money subsequently received applied to other transactions. Mr. Beddall being shortly after the transactions in question suffering from his last illness, and having died soon after, his explanation could not be obtained as part of the evidence; but it appears certain that if the Molsons Bank did not recover the wheat in question, they would fall short of being covered to an amount at least equal to that in dispute in this suit. As a ground of defence, this pretension of the appellants may be discarded as not proved. Then as regards the grounds on which the liability of the appellants is claimed; such liability if it exists must result from the obligations assumed by them in accepting the cargo at Kingston, and a failure on their part to fulfil these obligations. The first enquiry should be, therefore, as to the extent of these obligations. The usage of trade might be useful in determining the manner and conditions on which cargoes in the like circumstances were forwarded to their destination, but could scarcely alter the established significance of the documents used, or the legal relations of the parties according to the facts of the case, or make liability depend upon obtaining the surrender of a document if it had exhausted its efficiency and ceased to have any operation. The appellants, being carriers, accepting a cargo with the knowledge of the conditions and objects for which their predecessor held it, knowing that it had been made deliverable to the order of Reynolds & Co., that its destination was Montreal, and that there Crane & Baird were to be notified, implied that the appellants took upon themselves the duty of delivering to Reynolds or assigns, and that Crane & Baird, for some interest, present or prospective, should be notified. That they, the appellants, were to hold the cargo in trust for these purposes; but it was not thereby implied that they held it under the Falmouth's bill of lading, or that they were subjected to all the conditions thereof, or that they were obliged to obtain its surrender to free themselves from liability. It is true that in a certain sense a

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carrier is held on his bill of lading until complete delivery of the goods has been made, and Capt. Becker would no doubt be liable under his bill of lading until he showed that he had complied with it by a complete delivery according to its tenor. The cases cited on this point turn upon the necessity of a delivery to a warehouseman in place of merely landing the goods. In this instance the appellants may be said to occupy towards the holder of the Falmouth's bill of lading, or rather towards the owner of the wheat, a similar position to that of a warehouseman who has received the goods from the ship, and should keep them for the owner or holder of the bill of lading, which the appellants contend they have done. They might be liable for fault in delivering to other than the apparent proprietor against a party having a good title and doing diligence to assert it. Let us now see whether a title to the delivery of the wheat in question ever passed to the respondent. The endorsement by Reynolds & Co. was general, and passed the bill of lading to the bearer. The Molsons Bank got any title they had through Crane & Baird, that firm must consequently have been holders of it, and this accords with the assumption of the appellants that Crane & Baird were the consignees of the cargo, which other facts would seem to indicate, although perhaps not conclusively as to the exact time at which the cargo was assigned to them. There is no date to the partial endorsement by Crane & Baird to Beddall & Co., it being in the form of an order addressed not to the appellants but to D. Macphie; but it was only on the 14th September that Beddall presented himself at the Molsons Bank to obtain a loan, the presumption is that Beddall & Co. did not get their title before the 14th, and certainly Molsons Bank could have had no title before that date, but at that date none of the cargo of the Falmouth remained; it had all been delivered into ocean-going vessels, on the order of Crane & Baird, at that time in possession as assignees of the Falmouth's bill of lading, and consequently established as the true consignees of the cargo. There was, no doubt, intended to be substituted in place of it the wheat ex Willie Keeler, 900 bushels of which only had been absorbed in the previous deliveries; hence the order addressed to the appellants, dated 11th September, "Please deliver Messrs. Beddall & Co., or bearer, 15,500 bushels," applying to wheat that remained of the cargo of the Willie Keeler, and being doubtless the substituted wheat intended to be transferred to the Molsons Bank in place of the cargo of the Falmouth, and being only for part of the cargo, viz., 15,500 bushels remaining in place of the full cargo of 16,400 bushels, the difference, 900 bushels, having been absorbed in the previous deliveries, consequently, when the loan was granted, no wheat of the cargo of the Falmouth remained, nor could be transferred to the Molsons Bank, and the substituted wheat, according to the pretensions of Beddall and the respondents, was afterwards accounted for to the Molsons Bank, but not as far as the proof goes in such manner as to extinguish the loan in question. The negotiability of bills of lading have never been put upon the exact footing of bills of exchange. If the comparison were made, they would be found to have some resemblance to negotiable bills whose date of maturity was uncertain. An overdue bill of exchange has to be taken subject to the equities opposable by the previous holder. This

should be peculiarly applicable to a previous holder of a bill of lading. The law which imparts to it a negotiability does not exempt the holder from the exercise of reasonable diligence. An advancer on a bill of lading should exercise reasonable diligence as regards the cargo it purports to represent. With sea-going vessels it is customary to give a general notice through the press when the ship discharges its liability by placing the goods on the wharf. In the present instance the cargo was overdue when the Bank took the bill, and an unreasonable time elapsed before they made enquiry concerning it. Although some vague enquiries seem to have been previously made, it was not until the 19th October that the Bank made a serious demand upon the appellants for the wheat. A custom of trade which would hold the carrier until he procured the surrender of the bill of lading of the previous carrier would not be reasonable. If even the Bank were regular endorsers of the bill of lading there is a question as to what interest the endorsement would pass. By Art. 2421 of the Civil Code the holder of a bill of lading to order may transfer his right, endorsement and delivery, and the ownership of the goods, and all right and liabilities in respect thereof, are held to pass thereby to the assignee, subject, however, to the rights of third persons. The power conferred by the statutes to accept transfers of bills of lading as collateral security for advances, may not be quite so ample. The language used in sec. 46 of the Dominion Act 34 Vic. cap. 5, still in force, is as follows: —"And such bill of lading, specification or receipt being so acquired, shall vest in the bank from the date of the acquisition thereof all the right and title of the last previous holder thereof." When Beddall endorsed the bill in question to the Molsons Bank he had already parted with all his interest in the cargo. Could any title to it pass to the Bank under the circumstances? There is a further difficulty:—Was the order given by Crane & Baird to Beddall & Co. on the back of the Falmouth's bill of lading and endorsement of it? The order was addressed not to the appellants but to Macphie, without any indication of quality as agent or otherwise, and, therefore, incomplete, even as a delivery order. It was not for the entire cargo but only for a portion thereof. It was, in fact, not an endorsement, but a mere delivery order, therefore of no effect until the holder of the wheat should attorn to the person who was to receive and consent to hold on his account, or at least be notified to do so. Beddall & Co.'s signature after this order was rather an endorsement of the order than an endorsement of the Falmouth's bill of lading. The Superior Court, however, took a different view of the case, and held that the Molsons Bank had got a valid transfer of the bill of lading of the Falmouth; that its conditions were obligatory on the appellants, who were liable for the cargo, having failed to procure the surrender of the Falmouth's bill of lading when they parted with the cargo. They consequently condemned the appellants to restore the wheat in question, or pay its value. This Court, for the reasons above given, reverses that judgment and dismisses the action of the Molsons Bank.

MONK, J., dissenting, was of opinion that the judgment should be confirmed. There were one or two points which he thought were essential: first, were the

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appellants bound to deliver the wheat at Montreal according to the exigencies of the bill of lading? Secondly, did the bank use diligence before they entered into this transaction, and afterwards? As to the first point, the appellants received the wheat at Portsmouth near Kingston. They took a copy of the bill of lading, acknowledged receipt of the wheat, and transferred it into one of their barges. This showed that they understood their obligations. It was said that there was no new and distinct contract. His Honor did not think it was necessary to have one. The arrangement was for the convenience of trade and forwarding cargoes. The custom of trade was proved to be a reasonable one. The appellants undertook to forward the wheat under precisely the same obligations as were contained in the first bill of lading. The result was that the wheat was deliverable by the appellants only on the production of the original bill of lading, and this stated that the wheat was to be delivered to Reynolds Bros. or their assigns. But the bill of lading was not presented at all; the appellants delivered this wheat upon the production of a mere delivery order. They stated so themselves, Mr. McPhie says in his evidence: I delivered this wheat upon a delivery order, when I should have had the bill of lading. The delivery then goes for nothing at all. So the case stood thus: the wheat pledged to the bank was delivered irregularly. The forwarding company was deceived by Beddall. His Honor was of opinion that unless the Court was prepared to sanction something which resembled fraud, the claim of the bank should be sustained, and the appellants should be held to fulfil the obligations of the bill of lading.

DORION, C. J., concurred in the judgment of the majority. The bill of lading was an obligation to carry the wheat from Toledo to Kingston, and deliver it either to Reynolds or his assigns. The wheat arrived at Kingston, and was delivered there to the Forwarding Company. They were acting for Crane & Baird, who were the holders of the original bill of lading. When the carrier who had signed the bill of lading delivered at Kingston his obligation was fulfilled. But it was said that the Forwarding Company which carries goods from Kingston to Montreal had become liable for the obligations of another company which could not be sued upon the bill of lading at all. The bill of lading was at an end when the wheat was delivered at Kingston. No doubt the Forwarding Company had an obligation to fulfill. They were liable to Crane & Baird, and they delivered the wheat to Crane & Baird four or five days before the Molsons Bank ever came into possession of the bill of lading. There was no authority for the pretension that the carrier was bound to take back the bill of lading. The Molsons Bank trusted Beddall, who deceived them. The appellants delivered the goods to the rightful owner and their obligation ceased there. Therefore the bank had no claim against the Forwarding Company, and the judgment of the Court below, which maintained the action of the bank, was wrong. There was another point: His Honor doubted whether there was a valid transfer of the bill of lading, as only a part of the goods was included in it. However, the decision of the Court did not rest on this point. The ground of the judgment was that the bill of lading had become effete when the goods were delivered at Kingston.

RAMSAY, J.—The bank brought an action on a bill of lading transferred to the bank for an advance to the firm of Beddall & Co. The bill of lading is in the following form :—

TOLEDO, O., August 28, 1880.

Shipped in good order and condition by Reynolds Bros., as agents and forwarders, for account and at the risk of whom it may concern, on board the schooner Falmouth, whereof S. D. Becker is master, bound from this port for Kingston, Ontario, the following articles as here marked and described, to be delivered in like good order and condition, as addressed on the margin, or to his or their assigns or consignees, upon paying the freight and charges as noted below (dangers of navigation, fire and collision excepted).

In witness whereof, the said master of said vessel hath affirmed to two (2) bills of lading, of this tenor and date, one of which being accomplished the other to stand void.

16,500 bush. No. 2 red wheat.
Freight to Kingston to be
6 cents per bushel.

(Signed), S. D. BECKER,
Master.

Order Reynolds Bros. Notify Crane & Baird, Montreal, P. Q. Care St. Lawrence & Chicago Forwarding Company at Portsmouth Harbour, near Kingston, Lake Ontario.

The declaration then goes on to allege that the meaning and intent of the address on the margin of the bill of lading was, that the wheat should be carried and conveyed to Portsmouth Harbour on board the Falmouth, and then be delivered to the appellants, to be carried and conveyed by them to Montreal, and to be there delivered to the order of Reynolds Bros., and that the said firm of Crane & Baird should be notified of the arrival of the wheat. That, upon the execution of the bills of lading, Becker delivered the original to Reynolds Bros., and retained the copy or duplicate. That Reynolds Bros. endorsed the original bill of lading, and delivered it to Crane & Baird and that Crane & Baird thereupon endorsed it specially by an endorsement addressed to D. Macphie, the agent of the appellants, by which endorsement they required him to deliver to Messrs. Beddall & Co., 15,500 bushels of the cargo mentioned in the bill of lading, they (Crane & Baird) paying all freight charges. That having so endorsed the bill, Crane & Baird delivered it to Beddall & Co. That, by the custom of trade and of merchants from time immemorial, when grain destined for Montreal is shipped from Western ports like Toledo, on a schooner like the Falmouth, under bills of lading like the one set forth in the declaration, such grain is conveyed on board the schooner to Portsmouth Harbour and is there transhipped from the schooner into other vessels belonging to other carriers by the water, to be by them conveyed to Montreal, and to be there delivered in accordance with the terms of the bill of lading, or according to instructions received from the master of the schooner. And that, by such custom, the grain so transhipped is conveyed to

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Montreal by such other carriers, and delivered there in accordance with the terms of the bill of lading, or instructions received from the master. It was further alleged that Beddall & Co., being holders of the bill and owners of 15,500 bushels of the wheat, obtained the advance in question to the extent of $16,275 from the bank on the 14th September, 1880. It seems that the wheat arrived at Portsmouth Harbour on the 8th of September, and was delivered to appellant who put it on board of one of their barges called the Mohawk, and it arrived at Montreal on the 11th of September. The bank made a demand of the wheat on the 19th of September, and they were told it had been already delivered. The appellants met this action by a demurrer, which seems not to have been pressed to judgment separately from the merits on which, substantially, the whole case was decided. The pretensions of defendants, as well in law as in fact, were that they were never parties to the bill of lading in question, that it was not on the 14th of September a negotiable instrument, that even if it was a negotiable instrument it could not be transferred for a part, that the contract entered into by defendants was not a portion of any convention set out in the bill of lading but "a separate and non-negotiable agreement entered into with the owners of the cargo in Montreal and written on the copy in the possession of the captain of the schooner Falmouth." They further say that at the same time the Falmouth arrived at Portsmouth, another schooner, the Willie Keeler, also arrived with 16,400 bushels of the same kind of wheat consigned to Crane & Baird, that 4,000 bushels of the Willie Keeler's cargo was put into the Mohawk with the cargo of the Falmouth, the rest of the cargo of the Willie Keeler being transhipped to the barge Alfred, and that the barges Mohawk and Alfred started for Montreal where they arrived on or about the 11th Sept., and then and there 15,500 bushels of the cargo of the Mohawk was, on the order of Crane & Baird, delivered to the steamship Canadian, and 1,000 bushels to the steamship Dalton making the total of the cargo of the Mohawk. It is further alleged that subsequently, to wit, about the 14th day of September aforesaid, Messrs. Crane & Baird endorsed the Falmouth's bill of lading to Messrs. Beddall & Co., in the following terms:—

"D. MacPhie, Esq.,

"Deliver to Messrs. Beddall & Co., or order, 15,500 bushels of the within cargo, we paying all freight and charges.

(Signed), CRANE & BAIRD,"

It is also alleged that when Crane & Baird and Beddall & Co. endorsed the bill of lading to the bank, they knew that the wheat had been delivered. The defendants further allege that on the 14th September the firm of Crane & Baird gave to Beddall & Co., the following order for the same wheat, dated Montreal, 11th September, 1880:—

"No. 3,967.

"St. Lawrence & Chicago Forwarding Co.

"Please deliver Messrs. Beddall & Co. or bearer, fifteen thousand five hundred (15,500) bushels red winter wheat ex barges.

"(Signed,) CRANE & BAIRD.

"Per M. J. Craig."

That in obedience to this order the defendants delivered to Beddall & Co.

14th September, ex barge Mohawk to ship Pappina, bushels	3,088	
17th September, ex barge Alfred, to ship Pappina, bushels	6,445	30-60
18th September, ex barge Alfred, to ship Pappina, bushels	5,524	
Bushels	15,057	30-60
18th September, ex barge Alfred, to ship Sarah, bushels	429	
Total bushels	15,486	30-60

That these deliveries were made without the production of any bill of lading whatever, and that plaintiffs were aware that B. & Co. had received this wheat, and had authorized them to ship it to Europe.

It will be seen that there is no material difference between the parties as to the question of fact, and that the decision of the Court must be based on questions of law. The Banking Act of 1880, 43 Vic. c. 22, s. 7, substitutes certain provisions for sections 45, 46, 47, 48, 49 and 50 of the 43 Vic. cap. 5. The substituted section 46 provides that "the bank may acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favor in the course of its banking business; and the warehouse receipt or bill of lading so acquired shall vest in the bank, from the date of the acquisition thereof, all the right and title of the previous holder or owner thereof," and under this law it is contended: 1. That the bill of lading was extinct, and was not therefore such a security as would give the bank a lien on the goods; 2, subsidiarily, that the goods were delivered under that bill of lading and were not carried on from Kingston to Montreal on that or on any bill of lading; 3, that Beddall & Co. had no right to this wheat on the 14th September, it having been all disposed of under the order of C. & B., therefore Beddall could convey no right to the bank."

The substituted article 45 defines a bill of lading: "The words 'bill of lading' when used herein, shall comprise all receipts for goods, wares or merchandise, accompanied by an obligation to transport the same from the place where they were received to some other place," etc. Avowedly this action is brought on the bill of lading set out above, and the first question that presents itself is whether it is a receipt for goods accompanied by an obligation to transport the same from a place where they were received to some other place. If not, then it was not one of the documents to which the Banking Act has given the qualities of negotiability referred to. It seems to me that this is another way of saying that the goods having been delivered under the bill of lading it was effete. At the argument some little confusion was created by comparing the negotiability of warehouse receipts and bills of lading to the negotiability of promissory notes. But

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there is a vast difference between them. Both pass by endorsement, that is to say, the title passes, but in the case of the promissory note there is nothing but a title, while in the case of the warehouse receipts and the bills of lading there is or ought to be something more—a specific object which is pledged, and evidently that cannot pass unless it exists under the bill, as we said with regard to a warehouse receipt in Williamson and Rhind (22 J. 166). Of course the parties to the bill of lading who transferred it to the bank are liable for the production of the goods or to indemnify the bank; but it is impossible to conceive on what principle the appellants, who are not liable on the bill of lading in any way, can be condemned upon it. There may be some special action that might implicate the respondents, but its existence is not even suggested. The action contends they were custodians of the wheat under the bill of lading, which clearly they were not. I am to reverse.

Judgment reversed, Monk, J., dissenting

The following was the written judgment in appeal:—

The Court * * *

Considering that the respondents have failed to prove the material allegations of their declaration, or that the appellants became parties to, or assumed the same obligations as the master of the schooner Falmouth contained in the bill of lading by him granted for the carriage of the 16,500 bushels of wheat in question in this cause from Toledo to Kingston, or that they, the respondents, had a valid assignment of the said bill of lading, or of any part of the cargo represented thereby, before it had been fulfilled, was exhausted and had become effete; And considering that the appellants have proved that prior to any pretended assignment of the said bill of lading to the respondents, they, the appellants, delivered the said 16,500 bushels of wheat to the order of the said Crane & Baird as the true holders of the said bill of lading and consignees of the said 16,500 bushels of wheat, and entitled to receive the same.

And considering that in the judgment rendered in this cause by the Superior Court at Montreal, on the 19th November, 1881, there is error.

The Court of Our Lady the Queen, now here, doth reverse, cancel, annul and set aside the said judgment, and proceeding to render the judgment which the said Superior Court ought to have rendered, doth dismiss the action of the said respondents with costs, as well of this Court as of the said Superior Court.

(The Hon. Mr. Justice Monk dissenting.)

And on motion of MM. Girouard & McGibbon, attorneys for appellants, the Court doth grant them distraction of costs."

Judgment of S. C. reversed.

Girouard & Co., for appellants.
N. W. Trenholme, counsel.
Abbott & Co., for respondent.
Strachan Bethune, Q.C., counsel.

SUPREME COURT OF CANADA.

OTTAWA, APRIL 19, 1883.

Present:—Sir W. J. RITCHIE, C.J., and STRONG, FOURNIER, HENRY, TASCHEREAU and GWYNNE, J.J.

WILLIAM HARRINGTON ET AL.,
(Defendants en garantie in the Superior Court),
APPELLANTS;

AND

NORTON B. CORSE, ES-QUALITÉ,
(Plaintiff en garantie in the Superior Court),
RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Will, Construction of—Art. 889, *Civil Code—Liability of Universal Legatee for hypothec on immoveables bequeathed to a particular Legatee.*

On the 30th April, 1869, H. S., being indebted to J. P. in the sum of $3,000, granted a hypothec on certain real estate which he owned in the city of Montreal. On 28th June, 1870, H. S. made his will, in which the following clause is to be found: "That all my just debts, funeral and testamentary expenses be paid by my executors hereinafter named as soon as possible after my death." By another clause he left to W. H. in usufruct, and to his children in property, the said immoveables which had been hypothecated to secure the said debt of $3,000. In 1879 H. S. died and a suit was brought against the representative of his estate to recover this sum of $3,000 and interest.

HELD:—(Reversing the judgment of the Court of Queen's Bench, Strong, J., dissenting): That the direction by the testator to pay all his debts included the debt of $3,000 secured by the hypothec.

Per FOURNIER, TASCHEREAU and GWYNNE, JJ.: When a testator does not expressly direct a particular legatee to discharge a hypothec on an immoveable devised to him, art. 889 of the C. C. does not bear the interpretation that such particular legatee is liable for the payment of such hypothecary debt without recourse against the heir or universal legatee.

Appeal from a judgment of the Court of Queen's Bench for Lower Canada (Appeal side) confirming the judgment of the Superior Court (Montreal).*

An action was brought by Kate Ann Parkin against the respondent N. B. Corse, as sole surviving executor of the last will and testament of the late Hiram Seymour, for the recovery of $3,150 and interest due under an obligation of date the 30th April, 1869, given by the late Hiram Seymour to the executors of the late James Parkin, and transferred to the plaintiff Kate Ann Parkin, by which the house and premises, No. 9 Beaver Hall, were specially hypothecated, the said obligation being duly registered. The respondent thereupon called *en garantie* the now appellants, special legatees under the last will and testament of Hiram Seymour, requesting them to discharge the debt, alleging that the universal legatees under Hiram Seymour's will had notified him not to pay the debt, but to claim it from the special legatees. The appellants refused to take up the *fait et cause* of Corse and pleaded to this action *en garantie*. The following question of law was submitted to the Court, viz.:—

* 26 L. C. Jur. 79.

W. Harrington et al., and Norton ès-qualité

Does the special legatee of an immoveable property, hypothecated by the testator for a debt of his own due at the time of his death, take the property subject to the hypothec upon it, or is the universal legatee, or legatee by general title, bound to discharge the hypothec, that is to pay the debt, when not obliged to do so by the will?

The chief point submitted to the Court turned upon the interpretation of articles 735, 740, 741 and 889 of the Civil Code Lower Canada.

These articles are as follows:—

Art. 735. An heir who comes alone to the succession is bound to discharge all the debts and liabilities. The same rule applies to a universal legatee. A legatee by general title is held to contribute in proportion to his share in the succession. A particular legatee is bound only in case of the insufficiency of the other property, and is also subject to hypothecary claims against the property bequeathed, saving his recourse against those who are held personally.

Art. 740. An heir or universal legatee or a legatee under general title, who, not being personally bound, pays the hypothecary debts charged upon the immoveable included in his share, becomes subrogated in all the rights of the creditor against the other co-heirs or co-legatees for their share.

Art. 741. A particular legatee, who pays an hypothecary debt for which he is not liable, in order to free the immoveable bequeathed to him, has his recourse against those who take the succession, each for his share, with subrogation in the same manner as any other person acquiring under particular title.

[Art. 889. If before or since the will, the immoveable bequeathed have been hypothecated for a debt of the testator remaining still due, or even for the debt of a third person, whether it was known or not to the testator, the heir, or the universal legatee, or the legatee by general title, is not bound to discharge the hypothec, unless he is obliged to do so by the will.]

A usufruct established upon the thing bequeathed is also borne without recourse by the particular legatee. The same rule applies to servitudes.

If, however, the hypothecary debt of a third person, of which the testator was ignorant, affect at the same time the particular legacy and the property remaining in the succession, the benefit of division may reciprocally be claimed.

Mr. *Doutre, Q.C.*, for appellants; and Mr. *Strachan Bethune, Q.C.*, and Mr. *Robertson, Q.C.*, for respondent. The arguments of counsel and authorities relied on are fully noticed in the judgments of the Court of Queen's Bench, reported in 26 L. C. Jurist, p. 79, and in the judgments hereinafter given.

RITCHIE, C.J.: The clauses in the will and codicils relied on are the following:

Thirdly.—That all my just debts, funeral and testamentary expenses be paid by my executors hereinafter named, as soon as possible after my death.

Now therefore I give, devise and bequeath to the said Wm. Harrington during the time of his natural life, the use, usufruct and enjoyment of my house No. 19 Beaver Hall terrace, Montreal, aforesaid, with the lot of ground on which the same is built as aforesaid, the whole as described in the said will, and after the death of the said Wm. Harrington, I give, devise and bequeath the same *en pleine propriété* to the four children issue of his marriage with my said late daughter Laura, and to the survivors of them in equal proportions, share and share alike.

And by the said codicil the said testator ratified and confirmed said last will.

By article 919 "The Testamentary Executor pays the debts and discharges the particular legacies with the consent of the heir, or of the legatee who receives the succession, or, after calling in such heir or legatee, with the authorization of the Court." This article and article 889, read in connection with the

* No. 140, p. 363

evidence in this case, leaves in my mind no difficulty in satisfactorily determining this case without discussing the other question raised.

This places the office and duty of executors on a very different footing from that of an executor under the English law, where the absolute duty is cast on the executor of paying the debts of the deceased without any consent or authorization, and therefore while it may be said, under the English law, that a clause directing the executor to pay the debts of the testator is a mere formal one, adding nothing to the position or legal obligations of the executor, it is, under article 919 C. C., clearly defined and affects the position and duty of the executor and imposes on him others than that obligatory by the law without such a provision, viz., absolutely to pay the debts without either consent or authorization, and that the testator intended that this was to be an absolute duty obligatory on the defendant sufficiently to relieve the immoveable bequeathed from the hypothecary debt appears from the clause read in connection with the other provisions of the will which, to my mind, very clearly indicates that such bequest was free from such hypothecary claim. The will shows, in no uncertain manner, in my opinion, that the daughter was to be on a par with her sisters, which could not be if this hypothecary debt wiped away the bequest to her.

Therefore there is a clear indication on the face of the will, as well as in the express words of the Code, that he intended to oblige his executor to pay all his debts, including the hypothec in question, and the appeal should be allowed.

STRONG, J., was of opinion that the appeal should be dismissed for the reasons given by the majority the Court of Queen's Bench.

FOURNIER, J. :—La première question soulevée en cette cause est de savoir lequel, du légataire universel, ou du légataire particulier, doit, depuis l'adoption de l'article 889 C. C., acquitter une dette en paiement de laquelle le testateur a hypothéqué un immeuble compris dans un legs particulier. 2°. D'après les dispositions du testament dont il s'agit en cette cause, y a-t-il lieu de faire application au cas actuel de l'article 889?

Avant la promulgation du Code Civil cette question ne pouvait souffrir de difficulté. Il est indubitable que dans l'ancien droit français c'était à l'héritier ou légataire universel à acquitter l'hypothèque grevant une propriété comprise dans un legs particulier. Les codificateurs chargés de déclarer quel était l'ancien droit à ce sujet ont formellement exprimé leur opinion comme suit.*

If a thing bequeathed by a particular title be pledged or hypothecated for a debt due by the testator, or for any other debt, which, either before or after his will, be known to affect the particular legacy, the heir, or the universal legatee by general title, is bound to free it from such debt.

L'article 889 a-t-il changé l'ancien droit sous ce rapport et imposé au légataire particulier au lieu de l'héritier ou légataire universel l'obligation de payer cette hypothèque? La Cour Supérieure, siégeant à Montréal, dont le jugement a été confirmé par une majorité de la Cour du Banc de la Reine, a décidé cette question dans l'affirmative.

* No. 140, p. 363, Nos. 4 et 5 des Donations testamentaires.

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L'article 889 est ainsi conçu :

Si, avant le testament, ou depuis, l'immeuble légué a été hypothéqué pour une dette restée due, ou même s'il se trouve hypothéqué pour la dette d'un tiers, connu ou non du testateur, l'héritier ou le légataire universel, ou à titre universel, n'est pas *tenu de l'hypothèque*, à moins qu'il n'en soit chargé en vertu du testament.

L'usufruit constitué sur la chose léguée est aussi supporté sans recours par le légataire particulier. Il en est de même des servitudes.

Si, cependant, l'hypothèque pour une dette étrangère, inconnue au testateur, affecte en même temps le legs particulier et les biens demeurés dans la succession, rien n'empêche que le bénéfice de division ait lieu réciproquement.

Dans le cas particulier dont il s'agit il était à peine nécessaire d'entrer dans l'examen de la première question, mais puisqu'elle a été soulevée, il vaut mieux dans l'intérêt public qu'elle soit décidée de suite. Après avoir non-seulement lu mais étudié attentivement, les savantes dissertations des honorables juges de la Cour du Banc de la Reine sur ce sujet, je me suis convaincu que les raisons données par les honorables juges Tessier et Cross devaient l'emporter sur celles de leurs collègues et je pense comme eux, que l'article 889 n'a pas changé l'ancien droit à cet égard. C'est encore, suivant moi, à l'héritier ou au légataire universel à acquitter l'hypothèque grevant une propriété comprise dans un legs particulier.

Le testateur a, en outre, lui-même décidé cette question par les dispositions de son testament.

Par l'article 3 de son testament il ordonne en ces termes le paiement de ses dettes :

That *all* my just debts, funeral and testamentary expenses be paid by my executors hereinafter named, as soon as possible after my death.

Mais, objecte-t-on, cette clause est insuffisante pour décharger le légataire particulier de l'obligation d'acquitter l'hypothèque. Les exécuteurs testamentaires étant déjà obligés par la loi de payer les dettes du testateur (art. 919), cette clause est de style et n'ajoute rien aux obligations légales de l'exécuteur, et elle n'est pas une preuve que le testateur avait l'intention de faire payer par les légataires universels une dette hypothécaire payable par le légataire particulier. Je ne puis adopter cette manière de voir.

La comparaison de la disposition testamentaire au sujet du paiement des dettes avec l'article 919, semble conduire à une conclusion tout-à-fait contraire. Les pouvoirs de l'exécuteur testamentaire au sujet du paiement des dettes sont très restreints d'après cet article. Ils ne le sont aucunement d'après le testament qui fait l'objet de notre examen. En effet l'article 919 dit :

Il (l'exécuteur) paie les dettes et acquitte les legs particuliers, du consentement de l'héritier ou du légataire qui recueillent la succession, ou iceux appelés, avec l'autorisation du tribunal.

Voilà bien des formalités auxquelles la loi assujétit l'exécuteur testamentaire dont les fonctions n'ont pas été modifiées par une extension de pouvoir qu'il est loisible au testateur de faire suivant l'article 921.

L'exécuteur testamentaire ordinaire ne peut donc, suivant l'article 919, payer ni une dette ni un legs sans avoir obtenu le consentement de l'héritier ou légataire universel ; s'il ne fait pas les démarches nécessaires pour obtenir le consentement il est alors obligé de lui faire des sommations pour les appeler au

paiement ou du moins leur en donner un avis préalable. A défaut de ces procédés il doit recourir à l'autorisation judiciaire. Dans le cas actuel l'exécuteur est en vertu de l'article 3 du testament dispensé de recourir à toutes ces formalités. Il a un pouvoir général et absolu de payer les dettes et les legs sans recourir à toutes ces formalités. Si l'intention du testateur eût été de laisser ses exécuteurs soumis aux restrictions légales, il se serait contenté de les nommer sans définir leurs obligations. Mais il est évident qu'il a voulu exercer le privilége que donne l'article 921 de "restreindre ou étendre les pouvoirs, les obligations et la saisine de l'exécuteur testamentaire, et la durée de sa charge."

Lorsque l'on compare l'article 3 du testament avec la clause contenant la nomination des exécuteurs, il ne peut plus y avoir de doute sur la signification à donner à l'obligation imposée dans ce cas de payer toutes les dettes. Le testateur se dessaisit entre leurs mains de tous ses biens, tant mobiliers qu'immobiliers. Il prolonge l'exercice de leurs pouvoirs au delà de la durée légale. Il leur donne le pouvoir de vendre tous ses biens immobliers, non légués, à tels prix et conditions qu'ils croiront avantageux, et enfin le pouvoir d'administrer tous ses biens comme s'ils leur appartenaient à eux-mêmes. Il n'était guère possible de donner à des exécuteurs testamentaires des pouvoirs plus étendus que ne le comporte cette clause. Ils avaient non-seulement le devoir de payer *toutes* les dettes, mais ils avaient également le pouvoir de vendre toutes les propriétés. N'est-il pas évident, en prenant ensemble les deux clauses du testament, que le testateur a soustrait l'exécution de ses dernières volontés à l'opération de la loi. Il a profité des pouvoirs que lui donnait l'article 921 pour faire sa propre loi aux exécuteurs testamentaires. Dans l'exécution des devoirs qu'il leur a tracés, il ne leur a fait d'autre loi que ses volontés, manifestées par le testament, et il ne les a soumis, en outre, à d'autres règles que celles que leur dicteraient leur conscience, leur prudence et leur bon jugement, comme hommes d'affaires.

L'effet de telles dispositions était évidemment de mettre de côté l'article 889, tout aussi bien que les autres articles concernant le paiement des dettes, la saisine des immeubles, la durée de l'exécution testamentaire.

L'obligation de payer *toutes les dettes* résultant inévitablement du testament, peut-on distinguer entre les dettes celles qui sont garanties par hypothèques de celles qui ne le sont pas, lorsque le testateur n'a pas distingué? A moins que la loi n'ait fait à ce sujet une distinction qui s'impose, on ne peut pas non plus faire cette distinction sans enfreindre la volonté du testateur et sans faire pour lui une distinction qu'il n'a certainement pas voulu faire.

Mais la loi fait-elle une distinction entre une dette garantie par hypothèque et celle qui ne l'est pas? La première est-elle d'une nature différente de la seconde, forme-t-elle une classe distincte soumise à des principes différents? La loi ne fait aucune différence à cet égard. Une hypothèque ne peut pas exister par elle-même et indépendemment d'une dette dont elle est l'accessoire. Elle n'est (l'hypothèque) dit le code art. 2017, qu'un accessoire et ne vaut qu'autant que la créance ou obligation, qu'elle assure subsiste. Il faut inévitablement en conclure qu'en disant à ses exécuteurs testamentaires de payer toutes ses dettes, le testateur dans le cas présent a compris également celles qui étaient garanties par hypothèques.

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En venir à une autre conclusion serait dans les cas actuel contrevenir aux intentions du testateur ; ce serait déranger la distribution équitable et, autant que les circonstances le lui ont permis, égale de ses biens entre ses enfants. Le testateur avait trois filles et deux garçons. Parmi les biens de sa succession se trouvent trois maisons situées au Beaver Hall Hill, Montreal, étant les Nos. 19, 21, 23. Il donne à sa fille Maria Eliza Seymour, veuve de Jean Bruneau, en usufruit, la maison No. 21, et la propriété à ses enfants pour être partagée par égales proportions. Le No. 23 est légué en usufruit, à son fils C. E. Seymour et à sa femme, et après leur décès en pleine propriété à leurs enfants. A Laura Seymour, épouse, depuis décédée, de l'appelant, il lègue la propriété du No. 19 pour en disposer comme bon lui semble.

A dame Charlotte Seymour, épouse de B. S. Heinsley, il lègue $4,000, avec cette déclaration :—

This bequest I desire my daughter to regard as an expression of love and esteem, she being by God's blessing amply provided for. I have therefore not placed her on a par with my other daughters in this my will, who are more in need of it.

Son fils, Melancthon H. Seymour, ayant eu par anticipation tout ce qu'il aurait eu droit d'avoir dans sa succession, il lui fait en outre remise de tout ce qu'il peut lui devoir.

Il donne encore à ses deux filles, Maria Eliza, veuve Bruneau, et Laura, épouse de Harrington, $3,000 chacune, payables après la mort de leur mère.

Il y a un legs en faveur de cette dernière de tous les biens mobiliers contenus dans la maison No. 23.

Enfin, il veut qu'après la mort de son épouse et l'exécution de ses divers legs dûment faite (*and after the foregoing bequests duly made*), que le résidu de sa succession, quelqu'en soit le montant, soit également divisé entre ses trois filles, ci-dessus nommées, par parts égales (*share and share alike*), les instituant ses légataires résiduaires.

Il termine son testament par la clause citée plus haut définissant les pouvoirs des exécuteurs testamentaires.

Ce testament ne démontre-t-il pas clairement que l'intention du testateur était de régler lui-même sa succession et de n'en rien laisser à l'opération de la loi ? Ne fait-il pas voir en même temps à l'évidence qu'il voulait autant que possible conserver l'égalité entre ses enfants, surtout entre ses filles, en donnant la raison pour laquelle il ne place pas Madame Heinsley sur pied d'égalité (*on a par*) avec ses deux autres filles. Il donne encore à chacune de ces premières une somme de $3,000, et enfin, les institue toutes trois par parts égales légataires résiduaires. On voit aussi qu'il voulait mettre ses deux fils sur un pied d'égalité par la déclaration qu'il fait, que son fils, M. H. Seymour, ayant déjà reçu sa part, il lui fait remise de ce qu'il peut encore lui devoir. Peut-on croire après toutes ces déclarations, et surtout après l'injonction formelle de payer *toutes* ses dettes, que le testateur avait en vue de déranger le partage si bien ajusté de sa succession en laissant porter à l'un des légataires seul la charge d'acquitter l'obligation de $3,000, effectant une des propriétés léguées. Il n'y a certainement pas songé un instant. Mais on peut dire qu'il avait pu avoir l'idée de la difficulté si ingénieusement soulevée ici, difficulté que ne soupçonnait

certainement alors ni les testateurs ni les notaires. On pourrait dire encore qu'il a pris les moyens nécessaires de la trancher en ordonnant le paiement de toutes ses dettes comme première disposition de sa succession. En se mettant au point de vue du testateur on comprend mieux toute la portée de cette déclaration.

La mort de sa femme et celle de Laura, Madame Harrington, ont forcé le testateur de modifier son testament par deux codiciles. Les dispositions de ces codiciles n'affectent aucunement la signification que doit avoir dans le testament l'injonction de payer toutes les dettes. Par le premier de ces codiciles il institue, en conséquence du décès de sa femme, ses deux fils légataires résiduaires conjointement avec ses trois filles. Ainsi il y a maintenant cinq légataires résiduaires au lieu de trois. Par le deuxième, en conséquence de la mort de Madame Harrington, légataire en pleine propriété de la maison No. 19, il institue Harrington, mari de cette dernière, légataire en usufruit et leurs quatre enfants légataires en pleine propriété. Ce codicile semble n'avoir pas eu d'autre objet que d'étendre la libéralité du testateur jusqu'à l'appelant, qui par le prédécès de son épouse se trouvait à ne recevoir aucun avantage personnel dans la succession du testateur. L'idée de réparer cette omission semble avoir été [illegible] préoccupation du testateur. Pensait-il par hasard que le legs de [illegible] la part attribuée dans le résidu de la succession à Madame Harrington passeraient aux enfants de cette dernière? Malheureusement il n'en peut être ainsi. Ces legs sont devenus caducs par le précécès de leur mère. Il ne reste à ces petits-enfants du testateur que la propriété de la maison No. 19.

Qu'arrivera-t-il si la prétention de faire porter aux légataires particuliers la charge de payer seuls l'hypothèque affectant la maison No. 19 qui leur est léguée, est maintenue? Privés sans doute par pure inadvertance des deux autres legs faits à leur mère, ils se verraient encore enlever la meilleure partie de leur legs s'ils étaient condamnés à payer l'hypothèque de $3,000 affectant la maison qui leur est léguée. En recherchant dans les dispositions du testament quelle a été l'intention du testateur est-il possible d'en arriver à une conclusion semblable? Rien ne me paraît avoir été plus loin de l'intention du testateur dont les dispositions repoussent toute idée d'un pareil résultat.

Bien plus, les légataires universels dans ce cas n'étant légataires que du résidu de la succession aux conditions formellement imposées par le testateur aux exécuteurs testamentaires, savoir: 1° paiement de toutes les dettes, 2° exécution de tous les legs particuliers, ne faut-il pas avant que l'on puisse constater un résidu, faire défalcation de toutes les dettes et de tous les legs particuliers.

Si les exécuteurs testamentaires saisis de tous les biens veulent exécuter leur mandat (*trust*) c'est l'opération qu'ils sont obligés de faire avant de remettre aux légataires universels le résidu des biens. Ceci est d'autant plus évident que le testateur en ne dépassant son actif, assurait à son point de vue l'exécution de toutes ses libéralités.

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Il me paraît, en conséquence, clair que la nature du testament dont il s'agit rend impossible l'application au cas actuel de l'article 889.

Il me semble que cette question ne pourrait guère être soulevée que dans un cas où le testateur n'ayant fait aucune disposition quant au paiement de ses dettes, c'est alors à la loi à régler ce qui ne l'a pas été par le testament. J'ai donné à cette importante question si habilement traitée de part et d'autre dans les savantes dissertations des honorables juges qui ont été appelés à exprimer leurs opinions, toute l'attention qu'elle mérite; cependant je n'ai pu arriver à la même conclusion que ces Honorables juges sur l'interprétation à donner à l'art. 889, et je suis d'opinion que celle qu'ils ont adoptée ne devrait pas prévaloir.

Je me permettrai d'ajouter que l'interprétation de l'art. 889 adoptée par la majorité de la Cour du Banc de la Reine ne peut manquer d'entraîner des conséquences de la plus haute gravité. Cette question, soulevée en cette cause pour la première fois, n'a jamais attiré, que je sache, l'attention des testateurs ni des notaires. Si cette interprétation devait prévaloir? que d'arrangements de famille, faits depuis la publication du code civil, vont être troublés. N'y aurait-il pas lieu dans ce cas à l'intervention de la législature pour donner à l'interprétation qui paraîtra la plus en harmonie avec l'esprit du code civil, la sanction législative?

HENRY, J.:—I think the intention of the testator is very clear to divide his property among his daughters, and I think the direction to the executor was merely intended to take away the right of the party in whose favor the bequest was made to call upon the heir at law to pay off the hypothec. The effect of the law in the Province of Quebec is a little different from what it would be in other provinces. The executors in the other provinces and in England are called upon to pay the debts, while in Quebec they have nothing to do with the debts unless the testator calls upon them to do so. In this will there is a clear direction to pay all the debts, and it includes this hypothecary debt as well as the other debts. I think, therefore, the appeal should be allowed.

TASCHEREAU, J.:—On both of the points urged by the appellant, I am of opinion to allow this appeal.

In addition to the cogent reasoning of Tessier and Cross, J.J., in the Court of Queen's Bench, in support of the view that art. 889 of the Code does not make a particular legatee liable, without recourse, for the debt of the testator hypothecated upon the immoveable bequeathed to him, I remark that the said article of the Civil Code relates only to immoveables; and this not inadvertently, since art. 140 of the report of the codifiers, which it purports to amend, gives the law both as to pledge of moveables and as to hypothec of immoveables, so that clearly as to moveables, the rule is still that a debt of the testator is not payable by the particular legatee. If, for instance, he leaves to his particular legatee a watch which, at his death, is pledged for a certain debt, this debt has to be paid by the heir or universal legatee. Have the codifiers intended that a different rule should prevail as to immoveables? Up to the Code, moveables and immoveables have certainly always been on the same footing in this respect, and

there were no reasons that I can see for creating a difference between them. I entirely concur in the reasoning of Tessier and Cross, J.J., in the Court of Appeal, and hold with them that this article does not bear the interpretation that the particular legatee is liable for the payment of the debts hypothecated on the immoveable left to him, without recourse against the heir or universal legatee.

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On the other point, I am also with the appellant.

I am of opinion that if, as held by the courts below, the law was now that, unless otherwise ordered by the testator, the particular legatee is liable for the debt hypothecated on the immoveable bequeathed to him, the respondent here would even then not be liable for the debt in question in this cause, because Seymour, the testator, has ordered the contrary. The clause of his will relating thereto is:

> That all my just debts, funerals and testamentary expenses be paid by my executors hereinafter named as soon as possible after my death.

Does not this mean, nay, more, say, in as clear terms as possible, "all my debts!" Can it be read as meaning only his chirographary and not his hypothecary debts? I cannot see upon what principle this could be done. Now, when the testator said "all my debts," we cannot make him say "not all my debts," or may be "no debt at all," for this debt in question here may be the only one the testator owed

This debt of $3,000 Seymour had contracted on the 30th April, 1869. On the 28th June, 1870, he begins his will by ordering his executor to pay all his debts, and then makes to the respondent and others certain particular legacies. This, it seems to me, shows not only that the testator intended these particular legacies to be free from all debts, but that he had this particular debt in his mind when he ordered his executor to pay all his debts. I cannot accede to the proposition that we may treat, as a matter of form and of no meaning whatsoever, this clause of the will by which Seymour orders the payment of his debts. I know of no rule under which we would be authorized to set at naught any part of a will under pretence that it is merely a matter of form. This clause, like all the others, must have its execution. If the law is, as it was before the Code, that the particular legatee is not liable for the debts of the testator, the appellant must succeed independently of this clause of the will. If, on the contrary, the law was now, as held by the courts below, that the particular legatee must pay, without recourse, the debt hypothecated upon the immoveable bequeathed to him, unless the heir or universal legatee is obliged to do so by the will, then the clause of the will ordering all the debts to be paid by the executor is far from being a clause *banale*. To say that, as the law orders the executor to pay the testator's debts, this clause of Seymour's will means nothing, seems to me to be taking for granted that it does not include the debt hypothecated on the property bequeathed to the appellant. The law does not order the executor to pay this particular debt, if the interpretation given to the Code by the majority of the court below is correct, but this clause of Seymour's will does it, as I read it, in as plain terms as possible.

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Two *arrêts* of the Parlement de Paris, cited in Merlin's Rep.*, relating to the meaning of the words in a will "pay my debts," have some analogy with the present case.

In the first case the will was as follows:—

"Je lègue à Madame de Malloc et à Madame de Buvson tout ce que je peux leur donner je les prie de faire prier Dieu pour moi, *payer mes dettes* et récompenser mes domestiques." Cette disposition (says Merlin) a fait naître la question de savoir si les héritiers des propres devaient contribuer aux dettes. Une sentence par défaut du châtelet avait prononcé l'affirmative. Mais par arrêt rendu le 22 juin 1728, cette sentence a été infirmée, et il a été ordonné que les héritiers jouiraient des propres sans être tenus de contribuer à aucune dette.

The second case is given by Merlin as follows:—

La dame de Talard faisant son testament, s'était expliqué en ces termes: "Je veux que mes dettes soient payées sur mes biens patrimoniaux. J'institue le prince de Rocheford légataire universel de tous mes sus-dits biens en toute jouissance et propriété, à la charge toutefois de payer les dettes de ma succession et acquitter sur les biens fonds le legs que j'ai faits." Après sa mort, contestation entre les héritiers et le légataire universel pour la contribution aux dettes. La difficulté naissait de ce que la dame de Talard avait d'abord chargé ses biens patrimoniaux d'acquitter les dettes, et qu'elle en avait ensuite chargé son légataire universel, auquel elle ne pouvait laisser qu'une partie de ses propres. Le légataire universel disait que, dans de pareilles circonstances, il faillait consulter le droit commun, suivant lequel les réserves coutumières contribuent aux dettes, avec les objets compris dans le legs universel: "Mais par sentence des requêtes du palais, du 24 avril 1755, confirmée par arrêt rendu le 17 juillet de la même année, sur les conclusions de M. Joly de Fleury avocat-général, le parlement de Paris jugé que les héritiers ne contribueraient pas aux dettes pour les réserves coutumières, et que le légataire universel le paierait seul."

I am of opinion to allow the appeal and to dismiss the action *en garantie*, with costs in the three courts against the respondent.

I remark that, though the registration of the obligation upon which is based the principal action is admitted at the *enquête*, such registration is not alleged either in the principal demand nor in the declaration *en garantie*. In the first, such an allegation was not necessary, but was it not in the second? I also remark that the action is upon a transfer to the plaintiff by the original creditors of the sum due by the late Seymour, and that the only signification of that transfer alleged by the plaintiff is a signification to Corse. If Corse, as held by the court below, was not liable for this sum, is the signification of the transfer upon him sufficient?

GWYNNE, J.:—Although I fully concur in the judgment of my brother Taschereau (which I have had the opportunity of seeing) upon the question which has been so fully and ably discussed by the learned judges in the courts below and by the learned counsel in their argument before us, as to the true construction of the expression in article 889 of the Civil Code of the Province of *Quebec*, namely:—"L'héritier ou le légataire universel ou à titre universel n'est pas tenu de l'hypothèque," as it is in the French text, and "The heir or the "universal legatee or the legatee by general title is not bound to discharge the "hypothec," as it is in the English text, still it is not, in my opinion, necessary

* Vo. Légataire.

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that our judgment should be rested on that point, for, assuming the true construction to be that the universal legatee is not bound to pay the mortgage debt, I am of opinion that upon the other point argued the appellants are entitled to our judgment in their favor. The article provides that:

If before or since the will an immovable bequeathed be hypothecated for a debt of the testator remaining due, or even for the debt of a third person, whether it was known or not to the testator, the heir, or the universal legatee or the legatee by general title is not bound to discharge the hypotheque unless he is obliged to do so by the will.

Reading then these words "discharge the hypotheque" as synonymous with "pay the mortgage debt," I am of opinion that the testator has, by his will, sufficiently clearly expressed his intention to be that the special legatee shall in this case enjoy the immoveable bequeathed free from all liability to pay the debt secured by hypotheo upon it, for payment of which special provision is made by the will.

Construing the words used in the article as above, a somewhat similar provision is made by the English Act, 17th and 18th *Vic.*, ch. 113, by which it was enacted that when any person should, after the 31st December, 1854, die seized on or entitled to any estate or interest in any land or other hereditaments which should, at the time of his death, be charged with the payment of any sum or sums of money by way of mortgage, and such person should not, by his will, or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments should descend or be devised should not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but that the lands or hereditaments so charged should, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof.

It will be convenient to review the decisions upon this Act. In Woolstencroft v. Woolstencroft* the question arose before Sir J. Stuart, V.C., whether a direction by the testator to his executors to pay all his debts out of his estate made his personal estate primarily liable for the payment of a mortgage debt charged on real estate devised by his will. The learned Vice-Chancellor was of opinion that the mortgage debt must be paid out of the personal estate, and he stated the ground of his decision to be, that where there was a direction by the testator that his debts should be paid by his executors, that exonerated the mortgaged estate. In the same year, but after the above decision of Sir J. Stuart, the question arose before Vice-Chancellor Sir W. Page Wood, in Pembrooke v. Friend,† under a will whereby a testator directed that all his just debts, funeral and testamentary expenses should be paid as soon as might be after his decease; but he did not direct the payment to be out of any particular fund, nor did the will contain the words that the payment was to be made "by

* 6 Jur. N. S. 866. † 1 J. & H. 132.

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his executors," and he devised a house which he occupied to his wife in fee. The testator had created an equitable mortgage on the house by a deposit of title deeds before his death, and the question was whether or not the personal estate should pay this mortgage. The Vice-chancellor held that this will contained no sufficient expression of intention of the testator that the mortgage should be paid otherwise than under the provisions of 17th and 18th *Vic.*, ch. 113, that is by the specific devisee of the house, and he supports this conclusion by the following language:

> The testator does not say that the debts are to be paid out of his personal estate or by his executors. Had he used the words "by my executors" there would have been something on which to build the conclusion that he meant to express an intention that the general statutory rule should not apply. There would have been more room for argument if the property had been devised in strict settlement, but the gift to the widow being in fee, there was nothing to prevent a sale for payment of the mortgage debt immediately after the testator's decease.

Woolstencroft v. Woolstencroft came up before Lord Chancellor Lord Campbell in appeal* who reversed the decision of Sir J. Stuart, V.C. The Lord Chancellor says:

> I will not say that the words here relied upon are mere words of style, like the pious phrases with which wills usually begin, but they do not seem to me to show that the testator had in his mind the option given him of making the debt fall upon the mortgaged land or on the personal estate. He does not say that the payment is to be out of his personal estate, but out of his estate generally, and the real estate being charged with all the debts, and the payment having to be made by the executors, the executors would have the means of effecting a sale of part of the real estate, if necessary for that purpose.

And Pembrooke v. Friend having been cited, the Lord Chancellor says that there the Vice-Chancellor, Sir W. Page Wood, seemed to him, merely by the observations made by him, to intend to distinguish the decision of Sir J. Stuart in Woolstencroft v. Woolstencroft from the case of Pembrooke v. Friend; and the Lord Chancellor attribute no weight to the words "by my executors," used in the will in the case before him because he held and laid down as a rule that a testator could only signify his intention that the personal estate should pay the mortgage debt by express words, declaring that the devisee of the land mortgaged should take the land free of debt; that the same rule should be observed with respect to exempting the mortgaged land from the payment of the mortgage debt as was before observed with respect to exempting the personal estate, the mortgage land being by the statute made primarily liable as the personal estate had been previously; but in Mellish v. Vallins† Sir W. Page Wood takes the opportunity of showing that the learned Lord Chancellor had fallen into an error in laying down the above rule, arising from a want of due appreciation of the principle upon which the rule of the law that to exempt the personal estate express words to that effect must be used was established, and he held that the rule, as laid down by the Lord Chancellor, could not be of general application, and he held that a bequest of personalty, subject to the payment thereout of all the testator's just debts, following a devise of land in mortgage, which devise

* 2 DeG. F. & J., 347 † J. & H. 194.

made no reference to the mortgage, sufficiently indicated the intention of the testator to be that the land should not be primarily liable to the payment of the mortgage debt, and the decree was that according to the true construction of the testator's will, the mortgage debt and interest ought to be borne by and paid out of his personal estate in exoneration of his real estate.

In Allen v. Allen,* where a testatrix had an estate which she had herself mortgaged, and another estate which had been mortgaged by a former owner, and she devised the former for sale and payment of certain legacies, and the residue of her real and personal estate, including that which had been mortgaged by a former owner, to the defendants, directing that mortgages, debts, or other incumbrances on her residuary real and personal estate should be exclusively borne by the premises charged therewith, and that all her debts and funeral and testamentary expenses should be paid out of her said residuary real and personal estate, Lord Romilly, Master of the Rolls, held that the mortgage debt incurred by herself was primarily payable out of the residuary real and personal estate, and not out of the mortgaged estate.

In Newman v. Wilson,† where a testator, by his will, devised an estate, which he had subjected to a mortgage, to his wife for life, and afterwards to four of his children and their issue, and he devised all his freehold and leasehold estates and all other his real estate, except what he otherwise devised by his will, unto trustees for sale, and he bequeathed all his personal estate to the same trustees upon trust to call in and convert, and he declared that his trustees should stand possessed of the monies to arise from the sale of his real estate, and from the calling in and conversion of his personal estate, upon trust, in the first place, to pay his funeral and testamentary expenses and certain legacies; and it was held that the personal estate and the real estate devised in trust for sale were primarily liable to pay the mortgage debt on the estate devised to the wife, for life, etc., etc.

In Rowson v. Harrison ‡, where a testator directed that all his just debts, and funeral and testamentary expenses should be paid and discharged by his executors thereinafter named as soon as conveniently might be after his decease out of his personal estate, the Master of the Rolls, holding this case to be governed by the judgment of the Lord Chancellor in Woolstencroft v. Woolstencroft, held that this will did not indicate the intention of the testator to be that the devisee of the land mortgaged should take the land otherwise than as primarily charged with the mortgage debt; but in Eno v. Tatam ‖, Vice-Chancellor Sir J. Stuart held that a devise of personal estate, subject to the payment of the testator's debts, funeral and testamentary expenses, was a sufficient indication of intention to make the personal estate the primary fund for the payment of a debt charged upon an estate particularly devised. The learned Vice-Chancellor there said:

If I find a will in which there is some intention contrary to the mortgage being a burthen upon the mortgage estate, I am bound by the language of the Act.

* 30 Beav. 395. † 31 Beav. 33. ‡ 31 Beav. ‖ 2 Jur. N.S., 225.

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Finding there that there was such intention he came to the conclusion that the devisee of the personal estate did not take anything until she should pay the mortgage debt.

The Lord Justices, Sir J. L. Knight Bruce and Sir George Turner, upon appeal,* affirmed this decision, and laid down the rule that the mortgaged estates are not liable where the debts are directed to be paid out of some other fund; and Sir George Turner, referring to the observations of Lord Campbell, in Woolstencroft v. Woolstencroft, that the same rule which was applied to exempt the personal estate should now be applied to exempt the mortgaged estate, says that he thought that meant no more than that the intention must appear, and that if it meant that it was necessary for the expressions to show an intention, not merely to charge some other fund with the debt, but also to discharge the estate mortgaged, then he was not prepared to follow the decision; and in Moore v. Moore, which was a case similar to Rowson v. Harrison, the same lords justices,† following their decision in Eno v. Tatham, overruled the decision of the Master of the Rolls, which was similar to that in Rowson v. Harrison. In Maxwell v. Hyslop,‡ Vice Chancellor Malins, who approved of Lord Campbell's judgment in Woolstencroft v. Woolstencroft, and who says that if the Appeal Court had not decided the other way he should have gladly followed it, lays down the rule, as settled by the decisions, to be,—that whenever a testator has mortgaged his estates and, by his will provides a fund, either his residuary personal estate, or an estate devised for the purpose, or the general personal estate, and other property mixed up with it, or, in other words, when he provides a fund of any description whatever for the payment of his debts, that is an indication of an intention that the land is not to be the primary fund, but that the personal estate, or the particular fund provided, is to exonerate it from the mortgage debt.

By an Act passed by the Imperial Parliament on the 25th July, 1867, 30th and 31st Vic., ch. 69, which was passed to explain the operation of 17th and 18th Vic., ch. 13, it was enacted that in the construction of the will of any person who might die after the 31st day of December, one thousand eight hundred and sixty-seven, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to, or other than, the rule established by the said Act, unless such contrary or other intention should be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate. In Brownson v. Lawrence,* which came before the Master of the Rolls in 1868, after the passing of the above Act, but in which the question arose upon the will of a testator who had died in 1860, the Master of the Rolls, after reviewing Woolstencroft v. Woolstencroft, Pembroke v. Friend and Eno v. Tatham, was of opinion that in construing the wills of testators who have died between the 31st of December, 1854, and the 1st of January, 1868, he must follow Woolsten-

* 9 Jur. N.S., 481. † 1 D. J. & S. 602. ‡ L. R. 4 Eq. 407. ‖ L. R. 6 Eq. 1

croft v. Woolstencroft or Eno v. Tatham, according as the words of the will in each particular case came within the exact authority of one or other of those decisions; holding the rule to be that where a testator directs his debts to be paid out of some particular fund or property, or description of property, out of which, according to the rule established by the statute, they would not be primarily liable, he must be taken to signify an intention to exclude the statutory rule, but where he merely directs his debts to be paid or to be paid out of his estate generally, he does not signify an intention to exclude that rule.

In Coote v. Lowndes,* the testator had excluded any such conclusion as an intention that the mortgage debt should be paid out of the personalty, by the disposition in his will whereby he had expressly directed that the devisees in trust of his real estates should, during the minorities of the cestui que trust, receive the rents and profits, and by and out of the same keep down any annuity which might be charged on the premises, and the interest of any sum which might be charged by way of mortgage on the same premises. The alteration made in the English law upon the subject by the Imperial Statute, 30th and 31st Vic. ch. 69 makes decisions under that Act inapplicable to the present case, but, if the true construction of article 889 be, as for the purpose of the present discussion I have assumed it to be, then, as such a construction is at variance with the provisions of the Code Napoleon in like cases, and with the law of other countries where the civil law prevails and corresponds with the provisions of the Imperial statute, 17th and 18th Vic. ch. 113, we may have recourse to the decisions under this Act to assist us in the determination of the present question.

Now, the principle to be derived from the above English cases is that, if from any provision, express or by necessary implication, in the testator's will, we find his intention to have been that his debts generally, without any specific directions as to his mortgage debts, should be paid out of any particular fund, or part of his estate other than the mortgaged estates, such intention must prevail, and the will must be construed as imposing a primary obligation upon such particular fund, or part of his estate, for the payment of his mortgage debts as well as his other debts in relief of the mortgaged estates particularly devised; and for the purpose of arriving at the testator's intention upon the point, no particular form of words is necessary, but, as in all other questions arising under the will, the testator's intention is to be gathered from a perusal of the whole will.

Now the testator, in his will, declares his intention to be:

That all my just debts, funeral, and testamentary expenses be paid by my executors hereinafter named, as soon as possible after my decease.

In connection with this clause, and as incorporated with it, we must turn to the clause appointing the executors here referred to, which is as follows:

I appoint my well tried and trusty friends Edwin Atwater and Norton B. Corse, both of the said city of Montreal, Esquires, into whose hands I hereby divest of myself of all my property, real or personal, and hereby expressly continuing their powers as such, beyond the year and day limited by law, and with full power to my said executors, or the survivor

*L. R. 10 Eq., 380.

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of them, to sell and dispose of all real estate to me belonging, and not hereby bequeathed, for such prices and on such terms and conditions as he or they may deem most advantageous, and to signiall conveyances and deeds of sale thereof, and to administer generally my said estate as if the same belonged to them personally.

Now these clauses, taken together, express the clear intention of the testator to be to devise the whole of his personal estate to his named executors, and to give them complete power of disposition over all of his real estate not bequeathed by the will, to enable his executors, with such particular portion of his estate, to administer his estate generally, and in the course of such administration to pay all his debts as soon as possible after his decease. The bequeathed real estate is specially excepted from the real estate over which, in such administration of the testator's estate, his executors should have any control, and the clause operates as a charge of all testator's debts upon the whole of his personalty and that portion of his realty not specifically bequeathed, thus displaying a manifest intention of the testator that his bequeathed realty, of which the tenement and dwelling house in question is a part, should be exempt. The usufructuary life-estate devised to the testator's wife can plainly operate only upon the real estate, excepted from the estate, over which, for the purposes of administration, control is given to the executors, and such personal estate, if any, and such real estate, over which the executors were given control, as should remain after the complete administration of the testator's estate, and consequently after the payment of all his debts.

The devise to the wife is as follows:

I give, devise and bequeath to my dearly beloved wife, Dame Tamer Murray, the use, usufruct and enjoyment during her natural life of all my property, whether real or personal, moveable or immovable, moneys, stocks, funds, securities for money, and, in fine, everything that I may die possessed of, without any exception, or reserve and without being obliged to render an account thereof to any person whomsoever, hereby constituting my said wife my universal usufructuary legatee and devisee.

Then, after the death of the wife, the particular realty in question, of which the testator's intention was that his widow should enjoy during her life the complete usufructuary enjoyment, without being obliged to render an account to any person whomsoever, is devised in fee simple to one of his daughters. The fact that the testator's widow died in his life time, and that he thereupon made a codicil to his will, providing that the devisees in fee in remainder should immediately upon testator's death enter into possession of the estates by the will devised to them after the death of the testator's wife, can make no difference in the determination of the question before us. Then, by the codicil made after the death of testator's daughter Laura, to whom the fee simple estate in remainder after the death of the testator's wife, in the tenement and dwelling house in question, was by the will devised, the use, usufruct and enjoyment of that tenement and dwelling house was devised to William Harrington, husband of testator's daughter Laura, for the term of his natural life, and after his death the same was devised *en pleine propriété* to the four children issue of his marriage with testator's daughter Laura and to the survivors of them, in equal proportions. And by this codicil William Harrington had as full use, usufruct and enjoyment of the property in question for the term of his natural life as the testator's

widow, if she had survived him, would have had. In view of the whole will, whereby it is apparent that the testator was making provision for his wife and his children, and their issue, equally out of his estate, after the whole of his debts being first paid out of the personalty and so much of his realty as was not specially bequeathed, I am of opinion that the testator has, by his will, expressed a manifest intention that his mortgage debts as well as his other debts should be paid out of his personal estate devised to his executors, and out of the fund created by the sale of such testator's real estate over which special power, for the purpose of administration, was given to his executors, which power could only be exercised if the personalty should prove to be insufficient, and that the mortgaged estate should not be primarily liable for the debts charged upon them. A contrary decision would, in my opinion, defeat the plain intention of the testator, as appearing in his will. The appeal, therefore, should be allowed with costs, and the judgment rendered by the Superior Court of the Province of Quebec should be reversed with costs.

Wm. Harrington et al. and N. B. Corse, es-qualité.

Doutre & Joseph, solicitors for appellants. Appeal allowed with costs.
Robertson & Fleet, solicitors for respondents.

COUR DU BANC DE LA REINE, 1881.

(En Appel.)

MONTREAL, 29 NOVEMBRE 1881.

Présents: Sir A. A. DORION, J. C., et les Honorables Juges RAMSAY, TESSIER, CROSS et BABY.

ALFRED BACHAND ET AL.,

APPELLANTS;

vs.

JOSEPH BACHAND,

INTIMÉ.

Poursuite pour pension alimentaire—Offre des défendeurs de recevoir le demandeur à leur domicile, Art. 171 *C. C.—Lorsque la pension est demandée par ou pour le mari seul la cour ne peut refuser aux enfants le privilége discrétionnaire de recevoir chez eux leur père parceque ce dernier est marié en secondes noces.*

L'Intimé, Joseph Bachand, poursuit les deux appelants (l'un son fils et l'autre son gendre) pour une pension alimentaire de $14.00 par mois. Voici les conclusions de l'action: "Pourquoi le demandeur conclut à ce que les défendeurs soient condamnés à lui payer une pension alimentaire de $14.00 par mois, aussi longtemps qu'il en aura besoin, avec dépens, etc."

Il n'y a aucune allégation dans la déclaration que le demandeur est marié en secondes noces. La pension n'est pas demandée pour Joseph Bachand et son épouse, mais seulement pour Joseph Bachand personnellement.

A cette action, les défendeurs, deux petits cultivateurs de la campagne, ont répondu qu'il étaient incapables de payer une pension au demandeur. Ils offrent de le recevoir dans leur famille, le nourrir et le vêtir.

A. Bachand et al. vs. J. Bachand.

A ce plaidoyer le demandeur a répondu qu'il était marié en secondes noces; qu'il était obligé de pourvoir à la subsistance de son épouse; que les défendeurs n'ont jamais offert de recevoir le demandeur et son épouse chez eux.

Les défendeurs ont répliqué, en substance, que l'offre des défendeurs s'adressait tout autant à la femme qu'au mari; qu'ils n'objectaient pas à les recevoir tous les deux, si la Cour enjoignait aux défendeurs de ce faire.

Le jugement de la Cour Supérieure a été rendu par son honneur le juge Mackay, le 9 octobre 1880; celui de la Cour de Révision, présidée par les honorables juges Torrance, Rainville et Laframboise, le 15 décembre 1880.

Voici comment se lit le jugement de la Cour Supérieure:

"Considérant la condition des dites parties et leur pauvreté relative tel qu'il ressort de la preuve, et leur offre de loger, nourrir et entretenir le demandeur en leur demeure; maintient l'exception plaidée par les défendeurs et déclare les dites offres bonnes et valables et légales; en conséquence ordonne et enjoint aux dits défendeurs de loger, vêtir, nourrir et entretenir le dit demandeur, en leur demeure, la vie durant de ce dernier, et condamne le dit demandeur aux dépens, distraits, etc."

Le demandeur appela de ce jugement à la Cour de Révision qui rendit le jugement suivant:

"Considérant qu'il est établi que le demandeur est sans moyens et incapable de gagner sa subsistance.

"Considérant qu'il est établi par la preuve que le demandeur est marié en secondes noces.

"Considérant qu'il est prouvé que l'un des défendeurs, savoir le nommé Surprenant, est propriétaire de deux immeubles et d'un roulant valant $6,000.00, et que ses dettes payées, il serait encore assez à l'aise.

"Considérant que dans les circonstances de la cause, l'offre faite par les défendeurs de recevoir le dit demandeur chez eux, entraînerait des difficultés à raison de son second mariage, et que les tribunaux doivent autant que possible ne pas obliger les pères à aller prendre leur pension chez leurs enfants, ce qui est souvent la source de difficultés et de désagrément; et considérant que le jugement qui a ordonné que le demandeur prit sa pension chez les défendeurs est erronné

"Infirme et annule le dit jugement et procédant à rendre celui qu'aurait dû rendre la dite Cour en cette instance et fixant le montant de la pension qui devra être payée au demandeur à $6.00 par mois, condamne les défendeurs conjointement et solidairement à payer au demandeur la somme de $48.00 pour arrérages de la dite pension alimentaire depuis l'institution de l'action jusqu'à ce jour, et à payer à l'avenir comme telle pension, au dit demandeur la dite somme de $6.00 par mois payable d'avance, le premier jour de chaque mois, et le premier paiement devant se faire le 1er de Janvier prochain, avec dépens dans la dite Cour Supérieure contre les dits défendeurs en faveur du dit demandeur, et avec les dépens de cette Cour de Révision contre les dits défendeurs en faveur du dit demandeur, et distraction des dépens est accordée, etc."

Les défendeurs interjetèrent appel de cette décision. Voici en résumé ce qu'ils disent dans leur factum:

A. Bachand, et al. vs. J. Bachand.

Il faut prendre l'action telle qu'elle est, car il n'est pas permis de refaire une action avec une réponse à une exception. Le demandeur devait alléguer que la pension était réclamée pour lui et sa femme. Or, il ne fait pas cela. Il poursuit personnellement, pour lui seul. L'offre que les défendeurs ont faite, dans leur réplique, de recevoir en leur demeure l'épouse du demandeur est nullement nécessaire au soutien de leur exception. En effet, il n'était pas nécessaire d'offrir ce qui n'était pas demandé, puisque d'après l'action il ne s'agissait que du mari. Mais les défendeurs ont fait cette offre afin de prouver leur bonne foi, leur esprit d'entente. Par conséquent, l'intimé ne peut dire, comme il l'a fait en Révision, que le jugement de la Cour Supérieure accorde moins qu'il n'est offert par la défense. Mais, disent les savants Juges de la Cour de Révision : "Bachand est marié en secondes noces, comment pouvez-vous séparer le mari de la femme ; la chose est impossible ;" et on a invoqué à l'appui de cela des droits de cohabitation, de domicile, de tutelle maritale, etc., etc. (Art. 175). Aucune de ces analogies n'est applicable, aucun des inconvénients qu'on invoque peut utilement se présenter.

Le jugement de Son Honneur le juge MacKay est parfaitement logique. Le demandeur seul se met en cause ; il n'invoque pas la personnalité de son épouse pour l'obtention de la pension ; il n'est donc pas étonnant que le savant juge ait ignoré la personnalité de l'épouse lorsqu'il a adjugé sur le mérite de la demande et de l'exception. Aucun autre jugement ne pouvait être rendu ; car, la défense aurait pu invoquer utilement *l'ultra petita* si la Cour avait dépassé les conclusions de l'action.

C'est sur ces motifs que la Cour de Révision a infirmé le jugement de la Cour Supérieure. Sur la question de fait, la preuve est des plus fortes. Les défendeurs sont si peu capables de payer une pension à leur père, qu'ils seront contraints, si la Cour les y oblige, à s'expatrier aux Etats-Unis. C'est l'opinion des témoins.

La question à décider est donc la suivante :

Lorsque la pension est demandée par et pour le mari seul, la Cour peut-elle refuser aux enfants le privilége discrétionnaire de recevoir chez eux le demandeur parce que ce dernier est marié en secondes noces.

Voici l'opinion de Pothier qui nous paraît claire et raisonnable (Contrat de Mariage, No. 391).

"Lorsque les enfants n'ont pas le moyen de payer une pension et sont seulement en état de recevoir leur père ou mère dans leur maison et à leur table ; si c'est le père seul ou la mère seule qui demande des aliments, les enfants doivent être condamnés à recevoir chez eux, chacun à leur tour, leur père ou leur mère, pendant une certaine partie de l'année, à commencer par l'aîné des enfants ; par exemple, s'ils sont quatre enfants, on les condamne à les recevoir, tour à tour, chacun pendant trois mois de l'année.

"Lorsque le père et la mère demandent l'un et l'autre des aliments, comme la charge des deux en même temps pourrait être trop considérable, on peut la partager entre les enfants, en chargeant les uns du père et les autres de la mère."

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Ainsi donc, le père et la mère peuvent demander l'un et l'autre des aliments. Le père le peut faire pour son propre compte; la mère aussi. Dans l'espèce on peut d'autant plus raisonnablement le supposer que la femme du demandeur a ses propres enfants qui peuvent l'assister. On voit aussi que d'après Pothier les circonstances peuvent obliger le mari et la femme à habiter chacun dans un domicile différent, "les uns se chargeant du père et les autres de la mère." Pothier ne voit donc pas en cela des dangers graves, ni l'étrangeté d'une situation fausse ou illégale.

"La femme est sans doute obligée d'habiter avec le mari, et le mari obligé de la recevoir; mais cela s'entend qu'autant qu'il se trouve capable de le faire. Il est bien obligé de même de lui fournir des aliments "selon ses facultés et son état." Mais lorsqu'il en manque pour lui, il va de soi qu'il en manque pour elle.

D'ailleurs les droits de l'épouse ne sont pas périmés; elle peut en tout temps (son mari pour elle), par une autre action réclamer une pension.

Nous croyons donc que le motif déterminant de la Cour de Révision pour infirmer le jugement de la Cour Supérieure n'est pas fondé.

1o. Parce que dans la présente action le mari seul réclame une pension; on doit donc supposer que la femme n'en a pas besoin.

2o. Parce qu'il n'est pas allégué dans l'action que le demandeur est marié en secondes noces et qu'on ne peut par une réponse refaire son action. En conséquence on ne saurait ici évoquer la personnalité de l'épouse ou seconde femme, pour combattre la proposition des défendeurs de recevoir le mari chez eux.

3o. Parce que le fait d'obliger le mari à demeurer chez ses enfants, sans sa femme, ne porte en soi aucune atteinte aux lois du mariage et n'a rien d'illégal, surtout lorsque la femme ne se joint pas au mari pour demander la pension, comme dans l'espèce.

Nous allons maintenant examiner si les défendeurs sont trop pauvres pour payer une pension en argent au demandeur. Le plaidoyer de la défense se base sur l'article 171 du C. C., qui se lit comme suit: "Si la personne qui doit fournir les aliments, justifie qu'elle ne peut payer la pension alimentaire, le tribunal peut ordonner qu'elle recevra dans sa demeure, qu'elle nourrira et entretiendra celui auquel elle doit des aliments."

Toute la question est de savoir si les défendeurs "ont justifié qu'ils ne pouvaient pas payer une pension" au demandeur, au désir de l'article 171. Si la Cour en arrive à cette conclusion, nous pensons qu'elle ne pourra pas faire autrement qu'infirmer le jugement de la Cour de Révision; autrement ce serait méconnaître une disposition de la loi que les législateurs et les jurisconsultes ont reconnue être sage. "Je trouve très bien, dit Demolombe (Mariage vol. 2. p. 64) qu'en général celui qui est dans le besoin ne soit pas soumis à la nécessité souvent humiliante d'aller se mettre en pension chez celui qui doit le secourir, et que celui-ci ne soit pas forcé de le recevoir chez lui. Mais d'autre part, à l'impossible nul n'est tenu; et on conçoit qu'il peut être moins dispendieux pour le débiteur des aliments, d'avoir dans son ménage une personne de plus à loger

et à entretenir, que de prélever sur ses ressources le montant d'une pension en argent, suffisant pour faire vivre cette personne à part et au dehors.... Quand il y en a pour deux, il y en a pour trois."

Les défendeurs entrent dans l'exception prévue par la loi ; c'est la nature exceptionnelle de la défense que la Cour Inférieure a méconnue.

L'intimé fait valoir, dans son factum, les raisons suivantes :

L'on voit par le jugement de la Cour de première instance que l'intimé *seulement* doit être reçu, nourri et entretenu par les appelants. Son épouse ira où elle pourra. Néanmoins les appelants, par leur réplique, se sont déclarés prêts à recevoir l'intimé et son épouse. Ce jugement accordait à l'intimé, non seulement moins que sa demande, mais il lui accordait même moins que ce que les appelants lui offraient. L'intimé se trouvait avoir un jugement qui rendait nulles, vis-à-vis de lui et de sa femme, les obligations qu'imposent aux époux l'articles 175 du Code Civil et qui se lit comme suit.

"La femme est obligée d'habiter avec son mari et de le suivre partout où il "juge à propos de rester ; le mari est obligé de la recevoir et de lui fournir tout "ce qui lui est nécessaire pour les besoins de la vie, selon ses facultés et son "état."

Mais, comme les appelants, par le jugement de première instance, ne sont obligés de recevoir chez eux que l'intimé et non son épouse, il arrivera que la femme de l'intimé ne sera pas obligée d'habiter avec lui et de le suivre partout où il jugera à propos de rester et il résulte aussi que le mari ne sera pas obligé de recevoir son épouse et de lui fournir tout ce qui est nécessaire pour sa subsistance, parce qu'étant incapable de gagner sa vie par lui-même, il ne pourrait, pour ce premier motif, lui fournir tout ce qui lui est nécessaire pour ses besoins de la vie, et, parce qu'il ne pourrait non plus le lui fournir, à cause de l'obligation dont ses enfants sont tenus envers lui, à savoir : l'obligation de recevoir, vêtir, nourrir et entretenir leur père *seulement* et non son épouse.

Les enfants de l'intimé sont-ils dans une position qui leur permette de s'exonérer de l'obligation de payer une pension alimentaire à leur père, et la preuve faite dans la cause justifie-t-elle le tribunal d'avoir ordonné à l'intimé d'aller vivre chez ses parents ?

Les Cours de justice doivent-elles ordonner aux parents d'aller vivre avec leur enfants, lorsqu'il y a lieu de croire que les parents n'auront pas de leurs enfants tout le respect auquel ils ont droit ? L'intimé soumet humblement que non et que, pour cette seule raison, le jugement de la Cour de première instance ne devrait pas être maintenu.

Maintenant les appelants sont-ils dans des conditions à pouvoir se dégager de l'obligation de payer une pension alimentaire à leurs parents à cause de leur pauvreté ?

L'article 171 du Code Civil contient notre loi à ce sujet : "Si la personne qui "doit fournir des aliments, justifie qu'elle ne peut payer la pension alimentaire, "le tribunal peut ordonner qu'elle recevra dans sa demeure et qu'elle nourrira "et entretiendra celui auquel elle doit des aliments."

Que l'on remarque l'expression de notre article : "Si la personne qui doit "fournir des aliments ; *justifie qu'elle ne peut payer une pension alimentaire.*"

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La loi ne dit pas, comme le jugement, lorsque des défendeurs sont relativement pauvres, ils ne seront pas condamnés à payer une pension alimentaire, mais elle dit que s'ils justifient qu'ils ne peuvent pas *payer une pension alimentaire*, ils en seront exemptés.

Ne pouvoir faire une chose, cela veut dire, être dans l'impossibilité de la faire ; être physiquement incapable de l'accomplir et non pas, *ne pouvoir la faire qu'en se gênant*, pour emprunter l'expression des témoins de la défense.

Mourlon, dans ses commentaires sur l'article 210 du Code Napoléon, qui est le même que notre article 171, à la page 283 et 284 du premier volume de ses répétitions, paragraphe 750, s'exprime ainsi sur la question de l'obligation, pour les père et mère, d'aller demeurer chez leurs enfants, et sur la question de savoir, quand les enfants peuvent être exemptés de payer en argent la pension alimentaire.

§ 750 IV. *Comment on acquitte la dette alimentaire.*— " En principe, la " dette d'aliments s'acquitte au moyen *d'une pension en argent* ; car celui qui la " doit *n'est point tenu* de recevoir chez lui, à son foyer et à sa table, celui qui a " le droit de l'exiger.

" L'offre est-elle faite, soit par un enfant à son père ou à sa mère, soit par un " gendre ou une bru à son beau-père ou à sa belle-mère, le créancier n'est tenu " de l'accepter qu'*autant que celui qui la fait justifie qu'il lui est impossible de* " *payer une pension en argent.*

" L'offre est-elle faite par un *père* ou une *mère* à son enfant, elle *doit* être ac- " ceptée *dans tous les cas.*

" Cette distinction est fort sage. Il n'est pas naturel qu'un père ou une mère " soit obligé de rester dans la maison de son enfant, sous son autorité, *et dans* " *un état de dépendance propre à blesser sa dignité ;* l'impossibilité de faire autre- " ment peut seule justifier et légitimer cette humiliation. L'enfant reçu dans la " maison de son père est, au contraire, à sa place. Il n'a donc, du moins en prin- " cipe, aucun motif légitime pour refuser d'aller chez lui. Toutefois, si par ex- " ception la séparation était utile, nécessaire même, les juges pourraient, en l'au- " torisant, permettre à l'enfant de réclamer une pension en argent."

Demolombe, vol 2, No. 48, page 55.

Demolombe, au même volume, sous le No. 59, à la page 65, parlant des cas où un fils ne pourrait être forcé de recevoir la pension alimentaire, dans la maison de son père, dit: " C'est ainsi que la présence d'une *belle-mère* devra " être prise aussi en considération, (Pothier, 25 Nov. 1824, D. 1825, 1196.) "

La même chose ne peut-elle pas se dire du cas où les enfants offriraient de recevoir chez eux, leur *belle-mère* ?

Pour deux raisons, le jugement de la Cour de Révision doit être maintenu:

1o. Parce que ses enfants, si l'intimé est forcé d'aller vivre chez eux n'auraient pas pour lui le respect auquel a droit la paternité ;

2o. Parce que ses enfants n'ont pas justifié qu'ils ne pouvaient pas lui payer la pension alimentaire réclamée.

L'intimé doit mentionner en terminant qu'il s'est désisté, quant à la solidarité seulement, de cette partie du jugement de la Cour de Révision, qui con-

damne les appelants à lui payer *conjointement et solidairement*, la somme de $48.00 pour arrérages de pension. Ce désistement a eu lieu avant que le dossier de cette cause fût devant cette Cour. A. Bachand et al. vs. J. Bachand.

Voici comment se lit le jugement de la Cour d'Appel :

"Considérant, la condition des parties en cette cause, et leur pauvreté relative, tel qu'il ressort de la preuve, et l'offre des défendeurs appelants de loger, nourrir et entretenir le demandeur intimé en leur demeure, que la Cour de première instance savoir, la Cour Supérieure, siégeant à Montréal, le neuvième jour d'Octobre, 1880, en maintenant, par son jugement rendu, en la dite cause, le dit jour, l'exception plaidée par les dits défendeurs appelants et déclarant leur dites offres bonnes et valables et légales, et ordonnant, en conséquence aux dits défendeurs appelants de loger, vêtir, nourrir et entretenir le dit demandeur intimé, en leur demeure, la vie durant de ce dernier, a bien jugé, et que la Cour de Révision en infirmant le dit jugement en première instance, a mal jugé, renverse et annule le jugement rendu par la dite Cour de Révision en cette cause, le 15me jour de décembre 1880.

"Et procédant à rendre le jugement que la dite Cour de Révision aurait dû rendre confirme le dit jugement du 9 octobre 1880, maintient l'exception plaidée par les intimés, déclaré leurs offres bonnes et valables ; en conséquence, ordonne et enjoint aux dits intimés de loger, vêtir, nourrir et entretenir l'appelant, en leur demeure, la vie durant de ce dernier, chacun des intimés devant le recevoir alternativement six mois de chaque année à commencer par les dits Thomas Surprenant et Philomène Bachand, chaque partie payant ses frais tant en Cour Supérieure que sur l'Appel."

Jugement renversé.

MM. Lareau et Lebeuf, pour les appelants.
M. J. E. Robidoux, pour l'intimé.

SUPERIOR COURT, 1884.

MONTREAL, 19th JANUARY, 1884.

Coram PAPINEAU, *J.*

Eusèbe Pauzé, es-qualité, vs. Louis A. Senécal.

OBLIGATION—ACCEPTANCE—INSOLVENCY.

PER CURIAM :—The plaintiff, who is curator to the vacant succession of the late John Henry Pangman, deceased the 11th of November, 1880, instituted an action against the defendant to revendicate 54 bonds of $500 each of the Laurentides Railway Company, pledged on the 31st of January, 1880, with the defendant, as security for the payment of two promissory notes of $1,000 each of that date, payable one at ten months and the other in a year after date.

The plaintiff alleges that on the 6th of April, 1882, he tendered to the defendant the sum of $2,150, being the amount of the two notes, with the interest accrued on them since their maturity, calling upon him, at the same time, to return the said promissory notes and the said bonds, which he, the defendant, refused to do.

E. Pauzé, es-qualité vs. L. A. Senécal.

The plaintiff, in his declaration, values these bonds at $13,500. With the return of the actions he deposited in Court the amount tendered, prayed to be declared the proprietor of the 54 bonds and that the defendant be condemned to return them to him within such delay as the Court should fix, and in default that he be condemned to pay the value thereof, to wit, the sum of $13,500.

The writ authorized the seizure of the bonds or debentures represented, but they were not seized as the defendant Senecal refused to deliver them to the bailiff charged with the writ.

The defendant appeared and contested the action. By a first exception he alleged that the two promissory notes in question had been returned by him to Pangman in exchange for the $27,000 in bonds which are claimed, which were then left with the defendant as his own property. That the defendant while returning these promissory notes to Pangman neglected to get back his receipt for them.

By a second exception the defendant pretends that these bonds were given to Pangman in payment of his salary as president of the Lauzon Railway Company, which he had been owed on the dollar, and that on the 13th of September, 1878, [illegible] promised and agreed with N. H. Greene to transfer and sell back to them for $24,000 of these bonds on payment of $1,400, that this arrangement was duly accepted by Greene; that on the 10th of April, 1882, Greene transferred to the defendant his rights under this arrangement; that the defendant has a right to keep these bonds on paying the plaintiff *es qualité* the sum of $1,400. That the plaintiff owes the defendant *fourteen thousand dollars* (*sic*) for money lent to Pangman about the month of July, 1880; $800 for money lent about the month of October, 1880; $500, the amount of a promissory note made by Pangman to the order of and endorsed by Senecal, payable two months from date, and transferred to him for value received, and, lastly, another sum of $300, the amount of a bon given by Pangman to the defendant on the 6th of May, 1880, which sums were duly demanded. All these sums form united $3,000. That the defendant is the cessionary of the St. Lin Brewery Company's right against Pangman, who was a shareholder in that Company and owed $4,000 and upwards on his shares. The defendant offered to deduct from his claim a sum of $1,400, and he made this offer in order to purchase the bonds to the amount of $24,000, and he offers the balance coming to him in compensation for the $3,000 of bonds claimed above the $24,000, and consents, in case of the acceptance of his offers, to pay the costs. He also alleges that the bonds are not in his possession. In another exception he alleges that the bonds are not in his possession, that they are not worth $5,000, and then offers, in compensation, all the claims enumerated in the preceding plea and prays that the debt be declared extinguished and the action dismissed. By his answers the plaintiff specially denies the allegations of defendant's first exception. He demurs to the second exception because the defendant does not deny that plaintiff is the legal depositary of the said bonds and entitled to their possession and does not allege any right of retention; [illegible], because the defendant not claiming to be proprietor, cannot oppose [illegible] which the plain-

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tiff revendicates the ownership and possession. He also denies that the bonds were given to Pangman for salary, or that Pangman agreed to transfer them to Greene. He further alleges that at the date of Pangman's decease he was notoriously insolvent; that Greene did not accept the alleged arrangement of the 13th September, 1878; that Greene only accepted it about the month of March, 1882, when it was too late to withdraw them from the Pangman succession.

That, besides, this arrangement was only made for the purpose of placing with one person all the bonds of the Company in order to negotiate more easily a loan, which was not carried out, so that the arrangement was forgotten from the fact that the signers of this arrangement were unable to attain the object had in view in making it. That Greene not having performed his part of the obligation entered into by this agreement did not acquire any right, and could not therefore transfer any to the defendant. That besides Green's pretensions or rights under this are unalienable in law, and even if the defendant had acquired these rights he could not set up the ownership of the bonds, not having fulfilled the condition of the other arrangements.

That the promissory note for $500 was only transferred to the defendant after the death of Pangman, and the bond for $300 only became exigible on the death of Pangman, and therefore defendant could only claim pro rata with the other creditors of the succession.

Motions were made by both parties to amend, so as to make their pleadings conform with the evidence; these motions are granted without admitting that the legal proof corresponds in reality with their procedure thus amended.

The plaintiff's title is not contested, but the defendant pleads that he has a title to the bonds revendicated. His first plea as to the exchange is not supported by any proof.

In the second, of compensation, there was no attempt to prove that Pangman was indebted to the St. Lin Brewing Company, or that Senecal acquired any claim from it against Pangman.

As to the money advanced there is a bond of $300 and a promissory note for $500, dated 21st June, 1880, at five months, to Pangman's own order, and endorsed by him, which is in the defendant's possession. The defendant has not proved that he advanced $1,400 to Pangman about the month of July, 1880, nor the $800 about the month of October, 1880, but in Pangman's journal are entries of monies borrowed from Senecal amounting to $330. There are also entries of other sums amounting to $2,000, but these are not mentioned in his pleas and in all probability they are [illegible] $2,400 for which the two promissory notes were given.

According to the rules governing compensation the claims of the defendant for money lent are not of the same nature as that of the plaintiff, which is one for the return of a pledge and one cannot compensate the others.

It now remains to dispose of the question of Greene's acquisition of Pangman's debentures for $24,000, and that of Senecal from Greene of the same.

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The agreement alleged to be dated 13th September is not an actual transfer of the $34,000 debentures by Pangman to Greene; the defendant only says that Pangman agreed to transfer to Greene $24,000 of these debentures on payment of $1,400. He adds that this arrangement was duly accepted by Greene, taking care not to allege when this acceptance took place. Greene, on being examined, swears that he cannot say when he wrote his acceptance on the bottom of the deed. He says that it was more than six months previous to the date of his examination, which took place on the 29th of January, 1883; he cannot remember how many more than six, but it must have been after the death of Pangman, for, on being asked if he did not say to Murphy in April or March, 1882, that he had not accepted, he replied he did not remember, but on being pressed he finished by saying that he might have told Murphy that he had not accepted.

Acts sous seing privé not having any certain date of themselves until fixed en justice or by some circumstance which determines it, and the deposit of this Act with Notary Dumouchel only having been made on the 11th April, 1882, there is no proof that this acceptance took place before that date. Pangman died on the 11th of November, 1880; there is no proof then that the acceptance took place before the death of him who was bound to deliver the $24,000 of debentures. Greene not having accepted before Pangman's death could not do it afterwards. Sec. 15, Laurent, No. 478 and 479, pages 549 and following, 24 Laurent, p. 11 and 12, Nos. 7, 8 and 9; 24 Demolombe Nos. 67, 68 and 69. Nor could he do it to the prejudice of Pangman's creditors after the latter's insolvency. Now, Pangman's insolvency was notorious before his death, and Senecal himself admits that public rumor declared Pangman insolvent. Senecal could not therefore legally acquire the right of ownership in these debentures. In his first plea he says he acquired Greene's right to acquire them, but he has failed to prove either statement. He has not proved that he acquired them from either one or the other or from the Pangman succession. The pleas are therefore unfounded, and are dismissed, and the defendant is ordered to restore the debentures to the defendant within 15 days from the date of the judgment, and in default to pay the plaintiff the nominal value of the debentures, to wit, the sum of $27,000, with interest from the 8th of April, 1882, and costs, deduction to be made, however, of the $2,152, the amount of the two promissory notes, with interest up to the day of tender, leaving the sum of $24,848, with interest, to be paid by the defendant in default of the restoration of the debentures.

Messrs. De Bellefeuille & Co., for plaintiffs.

Messrs. Lacoste & Co., for defendants.

COUR DE REVISION, 1883.

MONTREAL, 23 AVRIL 1883.

Coram SICOTTE, J., TORRANCE, J., et DOHERTY, J.

HUGH BRADY, ès-qualité, et al.,

DEMANDEURS;

vs.

ARSÈNE COURVILLE,

et

DÉFENDEUR,

PAUL BOUDRIAS,

Mis en Cause.

JUGÉ:—Le 31 mai 1881 Rainville, J., que le gardien qui aurait laissé les effets saisis, en la possession du défendeur, sera tenu de les représenter ou d'en payer la valeur ou la créance du demandeur, même si les effets ont été vendus en justice, dans une poursuite contre une personne autre que le défendeur, mais résidant avec lui.

Le 27 octobre 1881, Jetté, J., que le défendeur, qui, après la saisie, est demeuré en possession des effets saisis, sera tenu de les représenter au gardien volontaire qu'il a nommé ou d'en payer la valeur, ou payer la créance du demandeur, sous peine d'être déclaré en mépris de cour.

Le 9 février 1883, Loranger, J., que le gardien, qui représente les effets saisis, sera déchargé de la garde, même, si par sa faute les effets ont éprouvé une détérioration; mais que, dans ce cas, il sera réservé au demandeur son recours, pour dommages contre le gardien.

Le 30 avril 1883, Cour Supérieure, en Révision, Sicotte, J., Torrance, J., et Doherty, J., que le gardien, qui, par sa faute, a laissé détériorer les effets saisis ne sera pas déchargé de la garde, sans avoir payé au demandeur la valeur de cette dépréciation.

Le 22 janvier 1878, le défendeur fut, par jugement de la Cour Supérieure à Montréal, condamné à payer aux demandeurs $270, avec intérêt sur $300, du 26 octobre 1874, au 1 octobre 1875, et sur $260 du 1 octobre 1875, et sur $100 du 16 avril 1875, à 6 par cent, et sur $10 à 6 par cent, du 18 mai, 1877, et dépens.

Le 12 février 1878, un bref d'exécution émana de la Cour Supérieure, à Montréal, contre les biens meubles du défendeur. L'huissier chargé de l'exécution de ce bref, saisit certains effets en la possession du défendeur et les mit sous la garde de Paul Boudrias gardien volontaire qui accepta cette garde. Le beau-père du défendeur, Cornelius O'Neil, produisit une opposition à cette saisie par laquelle il réclamait la propriété des effets saisis. Cette opposition fut renvoyée le 12 mars 1880. Un bref de *venditioni exponas*, émana le 3 avril 1880. Avis fut donné au gardien, le 15 mai 1880, de produire les effets saisis le 25 mai 1880, pour qu'ils soient vendus conformément au dit bref de *venditioni exponas*. Le gardien ne produisit pas les effets, mais signifia à l'huissier un avis qu'il ne pouvait les produire, vû qu'ils avaient été antérieurement vendus, pendant que cette cause était pendante, dans une poursuite où James Foley était demandeur, contre Cornelius O'Neil, défendeur. Il paraît que, quelques mois après la saisie, le défendeur et l'opposant O'Neil, qui demeuraient ensemble, sont allés, l'un et l'autre, habiter la même maison, dans le Village de Ste. Cuné-

Hugh Brady, ès-qualité et al. vs. A. Courville et P. Boudrias.

gonde, et ont apporté avec eux les effets saisis dont le défendeur n'avait pas été dépossédé. Le mis en cause, gardien des effets, les aida à déménager. La maison, à Ste. Cu[illegible] louée par l'opposant. Le 7 janvier 1880, l'opposant, ni le [illegible]ant le loyer, James Foley, le propriétaire de la maison où étaient [illegible], les fit saisir, pour son loyer, et les fit vendre, hors la connaissance du mis en cause. » Le 2 février 1881, le demandeur obtint une règle ordonnant au gardien de produire les effets saisis ou de payer la dette sous peine d'emprisonnement. Le gardien contesta la règle pour les raisons suivantes.

1 Parce que les effets avaient été vendus en justice, dans la cause de Foley *vs.* O'Neil.

2 Parce qu'il s'était écoulé plus de deux mois, après le jugement sur l'opposition, ayant que le demandeur ne procédât à la vente de ces effets, et notifiât le gardien qu'il entendait procéder à la vente de ces effets, (ordonnance de 1667, Tit. xix., art. 20.

3 Parce que l'huissier ne s'était pas présenté au jour fixé pour la vente pour réclamer les dits effets.

Le demandeur a répondu au premier moyen que si le gardien n'avait pas permis à O'Neil de prendre possession des dits effets, et de les transporter ailleurs, ils n'auraient pas été vendus et qu'il avait agi de collusion avec O'Neil, en ne notifiant pas le demandeur de ces procédés. Le 31 mai 1881, la règle fut déclarée absolue, Rainville, J., et le gardien fut condamné, à être "emprisonné dans la prison commune du District de Montréal [illegible] qu'à ce qu'il ait représenté les effets saisis, dont il s'était chargé ou ait payé le montant, dû au saisissant, en capital, interêt et frais, ou la valeur des effets non représentés; ce jugement fut unanimement confirmé par la Cour de Révision à Montréal, le 30 septembre 1881, Sicotte, J., Jetté, J., et Buchanan, J.

Le 27 octobre 1881, la Cour Supérieure à Montréal, Jetté, J., a déclaré absolue une règle, émanée contre le défendeur Arsène Courville, lui ordonnant de produire et livrer au mis en cause Boudrias des effets qui avaient été ainsi saisis et que les demandeurs n'avaient pas pu vendre, vû qu'ils avaient été vendus dans la poursuite [illegible] Foley et O'Neil. Le défendeur ne comparût pas et le jugement lui ordonna de livrer les effets au mis en cause Boudrias, qui avait été nommé gardien d'iceux, à moins que le dit Arsène Courville n'obtienne légalement, pour le mis en cause une décharge de la garde des dits effets, et ne paye aux demandeurs la valeur des dits effets, ou le montant de la dette et les frais sur le jugement principal, et des frais de la règle, dans tous les cas, sous peine de mépris de cette cour.

Le 9 novembre 1881, par jugement de la Cour Supérieure à Montréal, Jetté J., il fut donné acte au mis en cause du dépôt par lui fait au greffe de cette cour de la somme de $104.34, pour satisfaire aux frais de révision, et comme étant la valeur des effets confiés à sa garde, et non représentés par lui, le tout en exécution volontaire du jugement rendu par la Cour de Révision, le 30 septembre 1881, et ce sans préjudice aux droits des demandeurs de contester la suffisance de ce dépôt. Le 11 mars 1882, la Cour Supérieure, Papineau, J., a déclaré ce dépôt insuffisant, et a fixé à la somme de $122.54, la valeur totale

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des effets saisis, et non représentés, et a ordonné au mis en cause de compléter son dépôt, jusqu'à ce montant; ce jugement a été confirmé unanimement par la Cour Supérieure en Révision, le 31 mai 1882, Mackay, J., Jetté, J., et Taschereau, J. Par jugement du 6 février 1882, Mackay, J., une règle émanée contre le défendeur a été déclarée absolue et le défendeur a été déclaré en mépris de cour, vû que, depuis la signification du jugement du 27 octobre 1881, qui lui avait été faite le 5 novembre 1881, il avait refusé de remettre les effets au mis en cause, et il a été adjugé et ordonné que le dit défendeur, Arsène Courville, fût contraint par corps et incarcéré dans la prison commune du District du Montréal, jusqu'à ce qu'il ait représenté les effets et meubles, ou ait obtenu pour le mis en cause, une décharge de la garde des effets, ou ait payé au demandeur, l'acquit du dit mis en cause, la valeur des dits effets, ou le montant de la dette et des frais sur le jugement principal en cette cause, et les frais de la dite règle, ainsi que ceux encourus sur le jugement du 27 octobre 1881, dans tous les cas. Le 29 avril 1882, la Cour Supérieure à Montréal, Rainville J., a, sur motion du mis en cause, permis à ce dernier de produire une partie des meubles et effets saisis, sous quinze jours de la date du dit jugement, au lieu à être indiqué par l'huissier, chargé du bref de *venditioni exponas*, dans les limites de la Cité de Montréal, sur avis donné au dit huissier, pour être disposé des dits meubles et effets suivant la loi, ce, après avis donné par le mis en cause à qui de droit, restreignant et limitant aux seuls effets non produits et non offerts, par le mis en cause, et à la question des frais la contestation engagée, sur la valeur des dits meubles et effets saisis et non produits lors de la dite contestation, avec dépens contre le mis en cause. Le 5 mai 1882, une copie du jugement du 29 avril 1882, fût signifiée à Michael Hynes, huissier chargé du bref de *venditioni exponas*, dans la dite cause, avec un avis, d'avoir à se conformer au dit jugement, en indiquant le lieu où le mis en cause devrait livrer les effets saisis, et qu'il leur était permis de représenter, et l'heure et le jour auquels les dits effets devraient être livrés. L'huissier ne se conforma pas à cette requisition, et le le 7 juillet 1882, la Cour Supérieure à Montréal, Rainville J., a, sur motion du mis en cause Boudrias, fixé elle-même le temps et le lieu de la livraison, et a ordonné que les effets saisis soient remis et livrés aux mains des demandeurs par le dit Paul Boudrias, le 21 juillet 1882, à dix heures de l'avant midi, au No. 9 de la rue St Dominique, en la Cité de Montréal, et a declaré, qu'à partir de cette date, le dits effets seraient aux risques et périls des demandeurs. Il fût constaté par le retour de Joseph Thibault, huissier, en date du 21 juillet 1882, que le même jour, il avait offert de livrer aux demandeurs les dits effets, sauf ceux que le mis en cause Boudrias ne pouvait livrer, et que les demandeurs avaient refusé d'accepter et de recevoir les dits biens meubles et effets ainsi offerts. Le 6 septembre 1882, le mis en cause *Boudrias*, fit motion pour être déchargé de la garde des dits effets. Le 9 février 1883, la Cour Supérieure à Montréal, Loranger, J., a accordé cette motion, en par le mis en cause Boudrias payant aux demandeurs la valeur des dits effets offerts telle que reconnue par le jugement du 11 mars 1882, savoir $8.45, et a déchargé le mis en cause Boudrias de la garde des dits effets, les laissant pour l'avenir aux risques et

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périls des demandeurs à la disposition desquels ils se trouvaient alors, pour en être disposés en justice, ou suivant qu'ils le jugeront convenables, sauf leur recours contre le mis en cause, pour les dommages résultant de la dépréciation de la valeur des dits effets survenue par le fait qu'ils ont été en la possession du défendeur, sans le consentement des demandeurs, le tout, en, par le mis en cause, payant aux demandeurs, la susdite somme de $8.45, valeur des effets saisis, non offert comme susdit, avec dépens contre le mis en cause; ce dernier n'ayant pas offert, aux demandeurs, ni consigné en cour, avec sa motion, la dite somme de $8.45. Il y a, dans ce jugement, un considérant déclarant que les demandeurs ont un recours contre le mis en cause, en raison de la dépréciation, dans la valeur des dits biens meubles et effets, depuis la saisie qui en a été faite, tenant compte toutefois de la durée de la garde qu'en aurait eu le mis en cause, et de la diminution qui s'en serait suivie dans leur valeur, même s'ils étaient restés en sa possession. Ce jugement fût porté en Révision, et la Cour Supérieure à Montréal, Sicotte, J.; Torrance, J., Doherty, J., a, le 30 avril 1883, rendu le jugement suivant:

"Considérant que, dans l'état de la cause, le demandeur était bien fondé à procéder, pour obtenir, contre le gardien, la livraison et remise, ès-mains de la justice des effets saisis sur le défendeur et placés sous la garde du dit *Boudrias*, et à défaut de ce faire, à requérir la contrainte par corps;

"Considérant, en fait, que le gardien, mis en demeure de faire telle livraison, n'a fait livraison que de partie des choses saisies. Considérant que les effets et choses ainsi saisis, et mis sous la garde du dit *Boudrias*, que ce dernier à représentés, étaient dans un état de dilapidation et de détérioration, qui en avait grandement diminué la valeur;

"Considérant que le gardien est responsable de cette détérioration et dépréciation de valeur, par le fait qu'il en a laissé l'usage au saisi, qui les a placés dans une taverne et lieu public, et sans en prendre le soin requis;*

"Considérant que la valeur des effets ainsi saisis a été fixée, après enquête contradictoire, par jugement rendu le 11 mars, 1882, et que cette valeur doit servir de base, pour constater la différence qu'il y a entre celle des effets représentés, et fixer la somme que doit payer le gardien, à raison de la dépréciation et détérioration causée par sa négligence dans les devoirs de sa garde;

"Considérant en fait, que le jugement dont la révision est demandée, quoi qu'il admette la faute et la négligence du gardien et sa responsabilité, quant à cette détérioration, l'a déchargé de la contrainte par corps, réservant purement au saisissant son recours ultérieur, par action contre le gardien, quant à la somme due pour la détérioration;

"Considérant qu'il y a erreur, dans le dit jugement, par la décharge accordée de la contrainte demandée par le saisissant aux termes de la loi, et des jugements

* "L'Article 9 du titre 33 de l'ordonnance défend aux gardiens de se servir des choses saisies, pour leur usage particulier, ni de les bailler à louage; et en cas de contravention, veut qu'ils soient privés du paiement des frais de garde et de nourriture, et condamnés aux dommages, intérêts des parties; ils sont en outre tenus de toutes les obligations des dépositaires." (Pigeau, Edition de 1787, p. 640.)

qu'ils avaient octroyés pour ses recours; et en ne statuant pas de suite sur la question de détérioration; infirme le dit jugement, du 9 février 1883, et procédant à rendre le jugement qui aurait dû être rendu, et déclarant que la demande pour contrainte par corps entre le gardien procédait valablement, rejette les moyens invoqués par ce dernier: adjuge, qu'avant de faire droit, en la dite Cour Supérieure, sur la demande pour contrainte, par le saisissant, il soit ordonné que preuve soit faite de la moins value des effets répresentés à raison de la détérioration, depuis la saisie par la faute du dit gardien, en prenant pour base la valeur à la date de la saisie, les évaluations faites et réglées par le dit jugement du 11 mars 1882, tant pour les articles et effets qui n'ont pas été représentés, que pour ceux qui l'ont été, pour ensuite être la dite contrainte prononcée contre le gardien, avec l'alternative de se libérer en payant au créancier saisissant la valeur ainsi prouvée, avec dépens, contre le dit gardien, tant de la Cour Supérieure que de la Cour de Revision, distraits à T. P. Butler, avocat des demandeurs."

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T. P., Butler, pour les demandeurs.

Jugement reversé.

Trudel, Charbonneau et Lamothe, pour le défendeur et mis en cause.

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MONTREAL, JANUARY 23, 1884.

DORION, C.J., RAMSAY, TESSIER, BABY, JJ.

PRENTICE

(*Defendant in the Court below*),

APPELLANT;

AND

MACDOUGALL

(*Plaintiff in the Court below*),

RESPONDENT.

Partnership—Partition—Warranty.

Art. 1507 C.C. does not apply to partition between co-partners. Where two partners made a partition of shares forming a portion of the partnership property, and one was evicted from his share, the other partner was held not liable for more than the value of the share at the time of the partition, i. e., his obligation was merely to equalize the value of the portions, without a new partition.

RAMSAY, J. This is an action to account brought by one of the members of a partnership against his co-partner after the dissolution of the partnership by mutual consent. At first there appears to have been a number of questions at issue between the parties, but the only one submitted for our consideration is as to the disposal of 160 shares of the Silver Islet Company. Apart from the Silver Islet transaction, the respondent admitted his account was overdrawn by the amount of $7,296.01.

Before proceeding to examine into the only question with which we have to deal, it is necessary to say that by the articles of partnership the appellant was

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to have two-thirds of the profits of the general brokerage business, and three-fourths of the profits resulting from the sale of mines and mineral rights, and from the formation of companies in Canada, the United States and Europe. After some preliminary details, which are wholly unimportant as regards the issue before us, the appellant and respondent, as co-partners, obtained on the 18th April, 1870, the right to purchase the whole property of the Montreal Mining Company (really the Silver Islet property) for $225,000, this right to purchase being open till the 1st of June, 1870. As the right to purchase for so short a time was insufficient to allow of the negotiations contemplated by Prentice in England, the firm of Prentice & Macdougall on the 6th May obtained from The Montreal Mining Company the right to an extension of time till the 1st September following, by their paying the company $2,000, or giving an approved note for $2,000, to be forfeited to the company in case Prentice & Macdougall should fail to accept and pay for the property according to agreement. In order to procure the $2,000 necessary for this deposit Prentice turned to a friend in London, Mr. McEwan, and obtained the necessary funds from him on the promise that he should share equally with Prentice & Macdougall in the profits of the transaction. The deposit was duly made, and on the 25th May the Montreal Mining Company made a bond in favor of Prentice alone. When it became necessary to pay up the balance of the first instalment ($48,000) under the bond on the 1st of September, 1870, Prentice & Macdougall were unable to provide the money, which was furnished by one Sibley, of New York. In exchange for this Prentice conveyed to him "all and singular the within written bond," that is, the bond from the Montreal Mining Company to Prentice, by a memorandum of sale written on a copy of the notarial bond by the Montreal Mining Company to Prentice. This memorandum was extended and made more fully by a deed called an indenture, purporting to be made on the same day between Prentice and Sibley. By this deed it appears that Sibley was to hold nine-tenths of the property in trust for his friends, and one-tenth or 160 shares for Prentice. By another bond of indenture we learn that the persons for whom Sibley was acting when he treated with Prentice, besides himself, were E. B. Ward, Edward Learned, Peleg Hall and C. A. Trowbridge. We also learn that Prentice was to have his one-tenth, that is 160 shares. These shares were transferred to Prentice's name, and he got certificates for them. This last indenture was executed on the 2nd November, 1870. In December of that year, Mr. Learned wished to acquire 80 shares of the 160 shares held by Prentice, and Prentice sold them to him for $9,000. In all these transactions it seems the promises to McEwan were overlooked by Prentice and Macdougall, and he was getting restive under this neglect. Prentice and Macdougall then agreed that Macdougall's share should be 40 shares, and in order to put the remaining 40 shares out of the reach of Mr. McEwan's litigation, the whole 80 shares were, on the 3rd March, 1871, assigned to Macdougall, on the understanding that 40 shares should be passed over into the name of Mr. Ashbel Ward in trust for Miss Aubijo, Prentice's sister-in-law, but really to be held for Prentice. In 1871 Mr. McEwan brought his action in the United States

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against Prentice and Macdougall, and attached the whole 80 shares which had been left standing in Prentice's name notwithstanding the transfer. In this suit of McEwan, Prentice & Macdougall succumbed, and the whole 80 shares were lost save eight which McEwan abandoned to avoid the risk of an appeal. Now Prentice's pretension is that he owes Macdougall an account of the whole 160 shares, because although they stood in Prentice's name, they were undoubtedly the property of the firm, that is three-fourths were Prentice's and one-fourth Macdougall's, that by the transactions of the firm the whole of these shares were lost save the price of the 80 sold to Learned for $9,000, and the eight shares given back by McEwan, and that Macdougall has, therefore, only a right to be credited for one-fourth of $9,000 and two shares of the eight or their value; that one-fourth of $9,000 is $2,250, and the value of the two shares *nil*, so that plaintiff's *débat* is unfounded, and, moreover, he is entitled to nothing, for his account is greatly overdrawn, and that the *reliquat* is due by Macdougall and not to him.

There is really little difference between the parties as to the main facts, and to avoid length, I shall advert to the evidence where it is conflicting in setting out Mr. Macdougall's pretensions, which are perfectly clear. He contends that he was no party to the arrangement in London, by which Prentice promised one-half of the profits to McEwan; that in reality, he had, by special arrangement with Prentice, a right to half of the profits of this particular transaction; that for certain reasons of convenience the whole 160 shares got in to Prentice's name; that Prentice sold 80 shares, his own half, for an inadequate price, namely for $9,000; that subsequently Macdougall agreed to take 40 shares to terminate a suit between him and Prentice; that Prentice agreed to take the 80 shares he had sold to his own account, and that he had given Macdougall, by a deed of sale *implying warranty*, for his share, a certain forty shares, of which Macdougall had been deprived by the fault of Prentice. Consequently he concludes that Prentice is his *garant* for those forty shares, and that he should, therefore give him over the eight shares returned by McEwan and pay him for thirty-two, or [illegible] him for the whole forty shares. The Court below adopted respondent's view, and decided that appellant owed respondent forty shares or the value, fixed at $80,000, less the *reliquat de compte*, which, apart from this matter, is in favor of the defendant to the amount of $16,188.51, leaving a balance due by the appellant to respondent of $63,811.49, to which he is condemned unless he gives the respondent forty shares within fifteen days.

It is manifest that whatever view may be taken of this case the judgment is exaggerated. If appellant is *garant* of respondent for the forty shares transferred to him by Prentice, the least we can say is that Macdougall is *garant* in the measure of his interest of the other forty shares sold by Prentice to Macdougall for the account of Miss Auldjo. But in truth the deed of the 3rd March is not a warranty deed in the sense of the respondent's pretensions, or a deed of sale.

It is an assignment of all Prentice's rights in the forty shares, and it is made with special reference to McEwan's claim for which Macdougall undertakes to

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guarantee Prentice proportionally. This will appear by a letter of guarantee from Macdougall to Prentice, of the same date, which is in these words:—

"63 Wall Street, New York, 3rd March, 1871, Edward A. Prentice, Esquire.

"Dear Sir,—In consideration of your assignment to me this day of your remaining interest in the property formerly belonging to the Montreal Mining Co., and now held by Alex. H. Sibley and other trustees, I hereby agree that any interest therein to the extent of one-half of that conveyed by the said assignment or one-fortieth of the whole interest originally held by you, shall be liable in said proportion for any damages which may result to you by reason of any suit which Mr. Alex. McEwan, of London, England, may institute against you for failure to secure *his interest*, or any expenses which have been already incurred in the negotiation of the sale of the property by you.

"Yours truly,

"(Signed), H. T. Macdougall."

It is strange, after reciting this letter textually, to find respondent saying in his factum, "This letter was given without consideration; at a time when plaintiff knew nothing whatever of McEwan's claim." Mr. Macdougall may not have known the full extent of the firm's liability to McEwan, but it is evident by this very letter that he knew there was something, and it is difficult to believe from his correspondence with Prentice in 1870 that he did not know from the beginning that Prentice was getting financial assistance in the matter, which had to be paid somehow. Again, if taken with the articles of partnership it would seem that the assignment was simply a mode of giving Macdougall his proportion of the 160 shares. As the learned council for the respondent has pointedly referred to Art. 1507, I shall endeavor to put the argument technically. *Partage* is not *vente*. It is determinate of the right of property and not translative. "Pareillement, lorsque plusieurs personnes ont été conjointement légataires d'un héritage, ou lorsqu'elles l'ont acheté en commun, et que par la suite elles le partagent, chacun est censé avoir été seule légataire ou seul acheteur de ce qui est tombé dans son lot, et n'avoir été légataire ni acheteur de rien de ce qui est tombé dans les autres lots." "Cela a lieu quoique le partage ait été fait avec retour en deniers ou en rente. * * * "Il est évident, suivant ces principes que le partage est un acte qui n'a aucun rapport avec le contrat d'échange, et encore moins avec le contrat de vente, soit qu'il soit fait sans retour, soit avec retour en deniers; car, suivant ces principes, le partage n'est point un titre d'acquisition; je n'acquiers proprement rien par le partage que je fais avec mes cohéritiers ou autres copropriétaires; et tout l'effet du partage se réduit à rendre déterminé à de certaines choses le droit que j'avais, qui était auparavant indéterminé." Pothier, vente, No. 630. Laurent tries to show that this opinion of Pothier is erroneous, and that it is not in accordance with Roman law. He has for him the great name of Dumoulin, but I think he is unsuccessful. He goes back to the feudal law and contends that it was declared by the lawyers, who were hostile to mutation fines, that *partage* was not *équipollent à vente*, in order to avoid the payment of fines. (X. No. 396.)

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This is not a very satisfactory mode of reasoning, and he admits the C. N. has adopted Pothier's view (Art. 833), but he says that by the use of the word "*censé*" the article indicates a fiction. So it does, but the fiction is not that *partage* is not *sale*. Evidently it cannot be confounded with either. It would be a fiction to say it was either a sale or exchange.

But leaving these theoretical discussions, let us look at the reason of the thing as applied to the case before us. The tacit warranty of our law is the warranty by the vendor *de ses faites et promesses*. This warranty never exceeds the nature of the thing, a doctrine decided formally by this Court in the case of *Dupuy & Ducondu*, recently confirmed in the Privy Council,* and not, I believe, questioned in the Supreme Court. Now what were the *faits et promesses* of Prentice? He was making over to Macdougall his share of co-partnership property, which stood in Prentice's name for the benefit of the partners. Prentice was, therefore, acting as the agent of the partnership, the thing was lost by a partnership obligation, and, therefore, Macdougall was his own *garant*. "L'obligation de garantie est indivisible." (24 Laurent, 213.) But even if it were to be treated as a sale, it must be remembered that there is an exception to garantie even in sale, viz., where the purchaser knew the danger of eviction. Macdougall is presumed to have known his danger, for he was evicted for a partnership debt. He is therefore only entitled to what he paid for thet hing—24 Laurent, p. 259, and Pothier, Vente No. 187. Now what did Macdougall pay for his 40 shares? Evidently his interest in the 160 shares. One-half of that is swept away by a partnership liability, so that his share was really 20 out of the 80 remaining. But here respondent raises another difficulty. He claims that he is entitled to stock, and that if that cannot be given to him he is entitled to its equivalent as damages, which are to be valued at the time of the eviction, and he cites Troplong, Vente No. 506. This authority does not apply to the case of a purchaser who knows the cause of his eviction. "Si l'acheteur, qui a acheté avec cette connaissance souffre de cette éviction quelque chose au delà du prix qu'il a payé, il doit se l'imputer, puisque c'est une éviction à laquelle il devait s'attendre; ce n'est pas le vendeur qui l'a induit en erreur," Pothier, vente, 187. Here is how Laurent states the principle of Pothier: "Des que l'acheteur connaissait lors du contrat, la cause pour laquelle il a été évincé, il renonce au droit de réclamer la réparation d'un dommage qu'il doit s'imputer à lui-même. Sur ce point tout le monde est d'accord."—(24, 261.) And he cites Aubry et Réau and Dalloz.

It is, however, the principles of *partage* and not of sale we have to examine. In the old law it was for a time held that where in a *partage* the party taking the share knew of the cause of eviction, he had no claim at all. The principle seems to be this, that the contract is so far *aléatoire*. This doctrine appears to have been abandoned on the ground of equity. Pothier, Vente, No. 188. But to what is the *co-partageant* obliged? There has been a greatly contested question as to whether the eviction, at all events of a great portion of the share of

* 7 L. N. 46.

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one of the *co-partageants*, was a cause of recision of the partage. Dumoulin first thought it was, but later he abandoned this opinion on the ground of convenience, and the better opinion seems to be that the obligation is to equalize the shares without a new *partage*. Therefore Prentice has only to account for the value of what he got at the *partage*. That was unquestionably $9,000. It is therefore a fourth of $9,000 he has to return.

But how are we to deal with the eight shares? This is the only part of the case which has given us any real difficulty as to the principles involved, and although a matter of small importance pecuniarily, it is not easily disposed of. As we have seen, as a rule of convenience rather than of strict right, the *partage*, once carried out, is not set aside for eviction, even of the whole of the share of a *co-portageant*. All the latter's rights consist in a demand to oblige his *co-partageant* to equalize the shares—that is, to a money indemnity. The eight shares abandoned by McEwen formed part of those assigned to Macdougall, one-half for his own benefit and one-half for the benefit of Prentice; therefore, four should go to Prentice and four to Macdougall, then their value should be taken, and three-fourths of it should go to Prentice and one-fourth to Macdougall, precisely as we divide the $9000. But it is very difficult to fix the value of these shares, which have been sequestrated during all these years, without doing injustice to one or other of the parties; we therefore say this, the rule which has been adopted from convenience does not apply here. These eight shares have never really been mixed up with the property of either party; but, by the operation of the sequestration, they have remained to be dealt with in the same condition as at the time of the *partage*, and therefore they should be divided in the same manner as they ought to have been divided by the *partage*, that is, six should go to the appellant and two to the respondent.

The judgment, therefore, will be reversed, with costs, for respondent's *débat de compte* is unfounded, and it appears he has overdrawn his account to a much greater amount than anything coming to him from the $9000.

The following is the judgment of the Court:—*

"The Court, etc,

"Considering that by an *Acte* passed before Griffin, notary public, on the 19th of March, 1869, the appellant and respondent declared to have formed a partnership as brokers, beginning from the 24th of February, 1869, including the negotiation of loans and other monied transactions, as well as the purchase and sale of mines, and the formation of companies; the profits in the ordinary transactions, as brokers, to be divided in the proportion of two-thirds for the respondent and one-third for the appellant, and those resulting from the sale of mines or mineral interests and from the formation of companies, to be divided in the proportion of three-fourths for the appellant and one-fourth for the respondent, which co-partnership was dissolved on the 2nd of November, 1871;

"And considering that during the existence of the said co-partnership, the appellant, with the aid of one Alexander McEwan, obtained in his own name, but for the benefit of the co-partnership, a promise of sale of the franchise and mining rights of "The Montreal Mining Company," it being understood that

* This judgment was confirmed by the Privy Council.

the said Alexander McEwan should have one-half of the profits to be derived from said transaction;

"And considering that on or about the 2nd day of September, 1870, the appellant transferred his rights in the said 'The Montreal Mining Company' to Alexander H. Sibley, acting for himself as well as for others his associates;

"And considering that the profits realized by the said sale consisted in 160 parts of 1600 parts or shares in the Association termed 'The Canada Lands Purchase Trust;'

"And considering that in or about the month of December, 1870, the appellant sold 80 of the 160 parts or shares by him obtained in the said 'Canada Lands Purchase Trust' for the sum of $9,000, and that on 21st day of February, 1871, the respondent instituted an action against the appellant, in the Supreme Court, New York, by which he alleged that appellant had realized $22,500 of profits by the said negotiation and sale of mining lands, and claimed that the appellant be condemned to pay him the sum of $11,250 as his share of said profits;

"And considering that with a view to settle their difficulties with regard to said transaction and suit, the said appellant, on the 3rd day of March, 1871, agreed to transfer and did transfer unto the respondent the 80 parts or shares remaining out of the 160 parts or shares in the 'Canada Lands Purchase Trust,' which he had obtained by the transfer of said mining lands and rights, 40 parts or shares out of the 80 the said respondent agreed to transfer unto Miss Auldjo, the remaining 40 parts being in full for his proportion of the profits derived from said transaction;

"And considering that at the time of the said transfer of the said 80 parts in the 'Canada Lands Purchase Trust' by the appellant to the respondent, the said respondent agreed, by a letter dated the 3rd day of March, 1871, that the said 40 parts or shares, so transferred to him for his share of profits in said transaction, should be liable in the same proportion to the whole of the parts or shares originally held by the appellant in the said company for any damage which might result to the appellant by reason of any suit which the said Alexander McEwan might institute against him for failure to secure his interest, or any expenses incurred in the negotiations of the sale of the property;

"And considering that the said transfer of the 3rd of March, 1871, was not only made to secure to the respondent his share of the profits arising out of the said mining transactions, but also to meet the contingent event of the claim of the said Alexander McEwan to the ownership of the said 80 shares, and that in consequence of the judgment hereinafter mentioned, declaring the said Alexander McEwan owner of the said 80 shares, the said transfer became inoperative;

"And considering that before the said transfer was duly completed and registered in the books of the Trust, the said Alexander McEwan claimed before the New York Supreme Court, as his share in the profits in the said transaction, the 80 shares or parts in the said 'Canada Lands Purchase Trust' so transferred by the appellant to the respondent, which 80 shares, by a decree of the said

Prentice and Macdougall.

Supreme Court of the 9th of December, 1871, were adjudged to be the property of the said Alexander McEwan;

"And considering that subsequently the said Alexander McEwan, by compromise, agreed to transfer and did re-convey eight of the said 80 parts in the said Trust, to Walter Shanly and James D. Crawford, trustees appointed by the appellant and the respondent, to hold the said eight shares on their behalf until an adjustment of their claims had taken place, the said Trust being now represented by 288 shares of the nominal value of $100 each in the Silver Mining Company of Silver Islet and eight shares of The Ontario Mineral Lands Company;

"And considering that through the adjustment in the present case of the accounts of the affairs of the said co-partnership, exclusive of the rights which the said parties may have against each other with regard to the said mining rights, there is now due to the appellant by the respondent a sum of $16,185.51, as mentioned in the judgment rendered by the Court below;

"And considering that through the claim of the said Alexander McEwan the said respondent has been deprived of the whole of the 40 shares allotted and transferred to him as his share of the profits in the said transaction;

"And considering that he is entitled to claim his proportion of one-fourth of the sum of $9,000, for which the said respondent has sold 80 of the said 160 shares or parts in the said 'Canada Lands Purchase Trust' or $2,250 currency, with interest on the said sum from the 30th December, 1870, date of the sale by the respondent of the said mining rights, and also his one-fourth part of the said eight shares or parts in the said company now represented by the 288 shares of the nominal value of $100 each in the Silver Mining Company of Silver Islet and eight shares of The Ontario Mineral Lands Company;

"And considering that the said sum of $2,250, and interest as aforesaid, are more than compensated by the sum of $16,188.51, which is due and owing by the respondent to the appellant according to the adjustment of accounts as made in and by the judgment appealed from, to wit, the judgment rendered on the 31st day of March, 1881, by the Superior Court sitting at Montreal, and that there is error in the said judgment of the 31st March, 1881;

"This Court doth reverse the said judgment of the 31st March, 1881; and proceeding to render the judgment which the said Superior Court should have rendered, doth adjudge and order that the said eight shares in the said 'Canada Lands Purchase Trust,' in the hands and possession of the said Walter Shanly and Jas. D. Crawford, in trust, which shares are now represented by 288 shares of the nominal value of $100 each in the Silver Mining Company of Silver Islet and eight shares in The Ontario Mineral Lands Company, so that six of the said eight shares of the 'Canada Lands Purchase Trust' or 216 shares in the Silver Mining Company of Silver Islet, and six of the eight shares in the Ontario Mineral Lands Company, shall belong to the said appellant, and two of the said 8 shares of the said 'Canada Lands Purchase Trust,' or 72 of the said 288 shares in the Silver Mining Company of Silver Islet, and two of the eight shares of the Ontario Mineral Lands Company shall belong to the said respon-

dent, as their respective shares in the said partnership property, and the said parties are hereby ordered to make to each other within one month from the date of this judgment a regular transfer of their respective shares in the said mining stock, and to grant the necessary discharge for the same to the said trustees, and in default of doing so within the said delay, this judgment shall be held to be in lieu and place of a regular transfer by the parties to each other of the said shares in the said respective proportions, and to be held as a good and valid discharge to the said trustees for the said shares; it being ordered that any profits derived from the said shares now due, or which may have been received by the said trustees, shall be accounted for and paid to the said parties in the above proportions;

"And the Court doth dismiss the other conclusions of the action of the respondent, each party paying his own costs in the Court below, and doth condemn the respondent to pay the costs on the present appeal: reserving to the appellant his recourse for any balance which may be due him by the respondent."

Judgment reversed.

R. A. Ramsay, for appellant.
S. Bethune, Q.C., counsel.
Dunlop & Lyman, for respondent.
R. Laflamme, Q.C., counsel.

COUR SUPÉRIEURE, 1884.

MONTREAL, 10 MAI, 1884.

Coram LORANGER, J.

Desjardins vs. *Girard.*

Acte des licences de 1878. (41 Viet. ch. 3)—*Vente de liqueurs aux ivrognes d'habitude—Conclusion aux dommages.*

PER CURIAM. Le mari de la demanderesse est un ivrogne d'habitude. Le défendeur est un hôtelier de cette ville. Aux termes des sections 95 et suivantes de l'acte des licences de 1878 (41 Vic. ch. 3) le mari, la femme, le père, la mère, le frère, la sœur, le curateur ou le patron de toute personne qui a l'habitude de boire avec excès des liqueurs enivantes, peut donner avis par écrit signé de son nom à toute personne licenciée pour la vente des liqueurs enivrantes *ou qui en vend habituellement*, de ne pas en vendre ou en livrer à la personne qui a cette habitude. Si, dans le cours d'une année de cet avis la personne ainsi notifiée soit par elle même, soit par son commis, serviteur ou agent, vend ou livre autrement que sur demande spéciale, pour des fins médicales; signée par un médecin pratiquant, telles liqueurs à la personne ayant telle habitude, celui qui a donné l'avis peut, par une action en dommages, recouvrer de la personne notifiée la somme de 10 piastres au moins et de 500 piastres au plus à titre de dommages et intérêts; et en cas de décès de l'une ou l'autre des parties, ce droit d'action subsiste contre ou en faveur de leurs représentants légaux. Toute femme mariée peut intenter cette action en son nom sans l'autorisation de son mari, et les dommages recouvrés sont dans ce cas pour son seul usage.

Desjardins vs. Girard.

Le 12 septembre dernier, la demanderesse a donné au défendeur l'avis en question, et par son action elle se plaint que nonobstant cet avis, le dit défendeur aurait dès le lendemain, vendu et livré à son mari la quantité de trois bouteilles de *gin;* puis elle réclame comme dommages-intérêts la somme de deux cents piastres.

Le défendeur a plaidé d'abord par une défense en droit ; c'est cette défense que la cour est appelée à juger. Il se plaint de l'insuffisance de la déclaration, en autant que la déclaration ne fait pas voir. :

1o Que lors de la vente en question, le défendeur était une personne licenciée pour la vente des liqueurs enivrantes ou qui en vendait alors habituellement.

2o Que l'identité du mari de la demanderesse était connue du défendeur, lorsqu'il lui a vendu telles liqueurs enivrantes;

3o Parce que la loi des licences ayant fixé la pénalité ou dommages à la somme de pas moins de dix piastres et pas plus de 100 piastres, à être déterminée par la cour ou un jury, les conclusions de la déclaration doivent être dans les termes mêmes de la loi, afin de laisser au défendeur l'option de l'un ou l'autre tribunal.

A l'argument, le défendeur a prétendu à l'appui de sa première proposition savoir, que le défendeur était insuffisamment désigné dans la déclaration, que l'action en question est une action pénale et doit être formulée dans les termes et avec la précision d'une plainte en matière criminelle. Je ne puis adopter ces vues qui sont à la fois contre la lettre et l'esprit de la loi, puisque le statut déclare formellement que l'indemnité est payée au poursuivant à titre de dommages et intérêts, et qu'en cas de décès, le droit d'action subsiste en faveur ou contre les représentants de l'une ou l'autre des parties. Sur ce point de même que sur plusieurs autres que le défendeur oppose, la déclaration me paraît suffisamment libellée ; mais il y a une omission fatale dont le défendeur a pris avantage et sur laquelle il doit réussir. Le défendeur ne peut être condamné s'il ignorait au moment de la vente que la personne à laquelle il a vendu fut la personne désignée dans l'avis qu'il a reçu.

Cette preuve doit être faite ; or la demanderesse n'a pas allégué ce fait essentiel et, partant, ne peut pas le prouver.

La défense en droit sur ce point seulement était bien fondée. La demanderesse a, depuis l'audition de la cause, demandé à amender de manière à suppléer à cette insuffisance dans les allégués de sa déclaration, et sa demande a été accordée. En conséquence, la défense en droit sera maintenue pour les frais seulement.

Voici le jugement de la Cour :

Considérant que le défendeur est désigné dans le bref de sommation comme hôtelier, et qu'aux termes du paragraphe 4 de la première section de l'acte des licences de 1878, il est réputé tenir une maison d'entretien publié où l'on vend des liqueurs enivrantes;

Considérant de plus qu'aux termes de la section 95 du même acte, les dispositions du dit acte qui règlent la matière en litige, s'appliquent non seulement aux personnes licenciées pour la vente des liqueurs enivrantes, mais aussi à celles qui en vendent habituellement, même sans licence ;

Considérant que l'action autorisée par les sections 96, 97 et 98 dudit acte, est une action en indemnité d'un caractère purement civil, et est soumise aux règles de procédure ordinaires;

Desjardins vs. Girard.

Considérant que par la section 96 dudit acte, le montant de l'indemnité est fixé à pas moins de $10, et pas plus de $500, et qu'il appartient à la cour ou à un jury d'en déterminer le *quantum*: que cette indemnité est accordée à titre de dommages et intérêts, et conséquemment qu'il est loisible à la partie qui les réclame, d'en fixer le montant par action: que cette action peut être indistinctement soumise à la cour ou à un jury, au choix des parties, mais que cette option n'a lieu que pour les cas où la somme réclamée est d'un montant suffisant pour avoir un procès par jury;

Considérant que dans l'espèce la demanderesse a limité sa demande à la somme de $200, et qu'aux termes de l'article de 349 C. P. C., cette action n'est pas de la compétence du jury;

Considérant que le défendeur ne peut être condamné à payer tels dommages et intérêts que dans le cas où il est prouvé que l'indentité de la personne à qui la liqueur a été vendue était connue par lui au moment de cette vente;

Considérant que la demanderesse n'a pas allégué que le défendeur connaissait son mari, le nommé Desjardins, au moment de la vente en question, ou qu'il savait que la personne à laquelle cette vente a été faite était la personne indiquée dans l'avis que lui a donné la dite demanderesse, le douze septembre dernier, et que cette omission sur un fait essentiel donnait ouverture à la défense en droit du défendeur;

Considérant que la demanderesse a, depuis l'audition sur la présente défense en droit, obtenu la permission d'amender sa déclaration de manière à couvrir l'insuffisance de ses allégués en ce qui concerne l'omission ci-dessus mentionnée;

La Cour, tout en déclarant la défense en droit mal fondée sur tous les points soulevés, sauf celui en dernier lieu mentionné, et vû l'amendement susdit, maintient la dite défense en droit pour les frais seulement.

MM. Jodoin et Pelletier, avocats de la demanderesse.

MM. Mercier, Beausoleil et Martineau, avocats du défendeur.

COUR DU BANC DE LA REINE, 1884.

MONTREAL, 14 JANVIER 1884

Présents: L'Hon. Juge-en-chef DORION, Les Hon. Juges MONK, TESSIER, CROSS ET BABY.

THE MUTUAL FIRE INSURANCE COMPANY OF JOLIETTE, APPELANTE

vs.

E. N. DUPUIS. INTIMÉ.

Assurance Mutuelle—Obligation des assurés—S.S. 6, 20, 21, ch. 68 S. R. B. C.—Le montant des pertes doit être allégué et prouvé—La nature des dettes doit être établie afin de voir si elles sont de celles dont les assurés sont responsables.

Voici les considérants du jugement:

"Considérant que les seules dettes que les membres [illegible] compagnie d'assu-

The Mutual Fire Insurance Company of Joliette vs. E. N. Dupuis.

rance mutuelle sont tenus de payer sont les pertes résultant des risques assurés par la compagnie, les dépenses d'administration pendant l'exi[illegible]ce des polices d'assurance de chaque membre, et les intérêts sur les empru[illegible]e les directeurs sont autorisés à faire pour rencontrer ces pertes et dépenses incidentes. Sects. 6, 20 et 21 du ch. 68 des (Statuts Refondus du Bas Canada,)

"Et considérant que les répartitions que les Directeurs sont autorisés à faire des sommes que les membres doivent payer doivent toujours être en proportion du montant des billets de dépôt de chaque membre. Sect. 20 du même chap.

" Et considérant que l'appelante n'a pas allégué ni prouvé quel était le montant des pertes qu'elle avait subies, ni l'époque à laquelle elle avait subi ces pertes, ni quel était le montant des dépenses incidentes et quand elles avaient été encourues, de manière à établir le montant que chaque membre devrait payer sur les billets par lui donnés.

"Et considérant qu'il appert par la preuve faite en cette cause que le 9 novembre 1880 les dettes de la Compagnie ne s'élevaient qu'à $21,023.53 suivant l'état B 15, y compris $4,400 pour réclamations en suspens, ce qui ne laissait réellement que $16,623.53. et que ces dettes se montaient le 5 avril 1881, lorsque la première répartition en a été faite sur les membres de la Compagnie à une somme de $22,189,50 et que pour payer cette somme les directeurs ont fait une première répartition au montant de $25,084.74.

"Et considérant que le 9 décembre 1881 les directeurs ont fait une seconde répartition par laquelle ils ont demandé aux membres de la Société le paiement entier [illegible] balance des billets par eux déposés, ce qui formerait une autre somm[illegible]delà de $29,600 ; ces deux répartitions s'élevant à un chiffre au-delà de [illegible]74 pour payer la somme de $22,189.50, ou près de 150 pour cent [illegible]que le montant à payer.

" Et considérant que ni la preuve ni les états produits ne donnent aucun détail sur la nature ni l'époque à laquelle ces dettes ont été encourues en sorte qu'il est impossible de dire si l'intimé est tenu de ces dettes ou d'aucunes d'elles — et que l'appelante n'a pas prouvé sa créance.—

" Cette Cour est d'opinion qu'il n'y a pas d'erreur dans le jugement rendu par la Cour de première Instance le neuvième jour de janvier 1883, et pour les raisons ci-dessus confirme le dit jugement avec dépens, tant ceux encourus en Cour de première Instance que sur cet appel."

Jugement confirmé.

McLaren, Leet et Smith, pour l'appelante.
Lacoste, Globensky, Bisaillon et Brosseau, pour l'intimé.

SUPREME COURT OF CANADA, 1883.

OTTAWA, NOVEMBER, 1883.

Present:—Sir W. J. RITCHIE, C.J., and STRONG, FOURNIER, HENRY, and GWYNNE, JJ.

DAME ELLEN TREACEY *et vir.*

(P[illegible])

AND

THOMAS LIGGETT *et al.*

(P[illegible])

Articles 803, 1034 *C. C. P. Q.—Donation in marriage co[illegible] Proof of insolvency of donor at date of donation necessary to set aside.*

On 28th June, 1876, L. *et al.* sold to M. T. a property for $12,250, of which price $3,789 were paid in cash. On 16th June, 1879, E. T., daughter of M. T., married J. K., and in their contract of marriage M. T. made a donation to his daughter, E. T., of certain property of considerable value, and remained with no other property than that sold to him by L. *et al.* In July, 1881, L. *et al.* brought an action to set aside the gift in question, claiming that the property sold having become so depreciated in value as to be insufficient to cover their claim for the balance remaining due to them and secured only by the property so sold, the gift in this marriage contract had reduced M. T. to a state of insolvency, and had been made in fraud of L. *et al* and that at the time the gift was made M. T. was notoriously insolvent. M. T., pleaded, *inter alia*, denying averments of insolvency, fraud, or wrong-doing. The only evidence of the value of the property still held by M. T. at the date of the donation, 16th June, 1879, was the evidence of an auctioneer, who merely spoke of the value of the property in November, 1881, and that of a real estate agent, who did not know in what condition the property was two years before, but stated that it was not worth more than $6,000 in November, 1881, adding that he considered property a little better now than it was two years before, although very little changed in price.

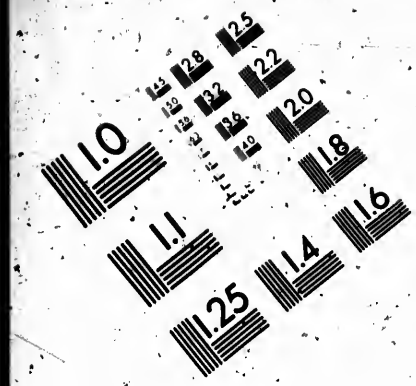
HELD (reversing the judgment of the Court below), That in order to obtain the revocation of the gift in question, it was incumbent on the plaintiffs to prove the insolvency or *déconfiture* of the donor at the time of the donation, and that there was no proof in this case sufficient to show that the property remaining to the donor at the date of his donation was inadequate to pay the hypothecary claims with which it was charged.

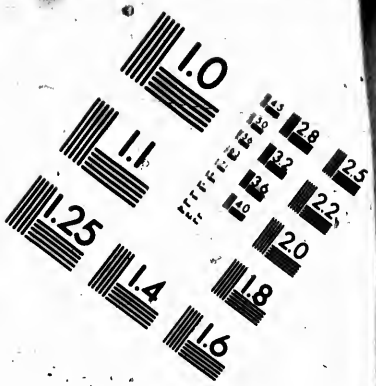
Appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) *affirming the judgment of the Superior Court.

This was an action brought to set aside a gift made by Martin Treacey to his daughter Ellen Treacey and to her husband John Killoran, contained in their marriage contract executed 16th June, 1879, to which Martin Treacey was a party, for the purpose among other things of conveying to them, in consideration of their marriage, property of considerable value.

The wrong which Liggett *et al.* complained of was, that having sold Martin Treacey a property on the 28th June, 1876, which had only been partly paid

* 3 Dorion's Q. B. R. 247.





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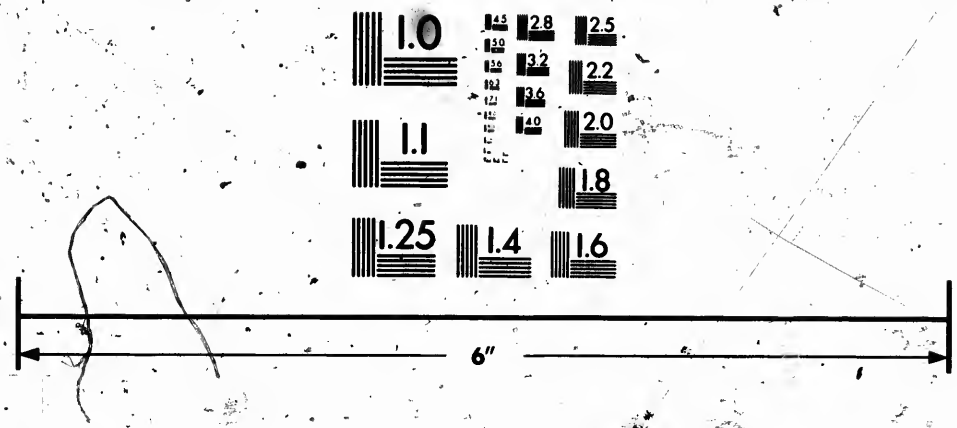

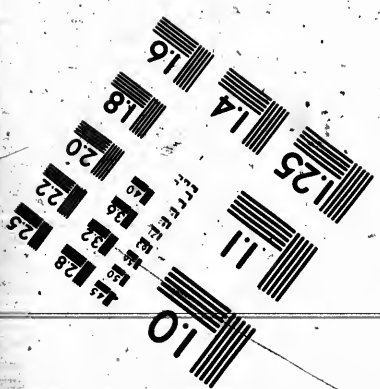

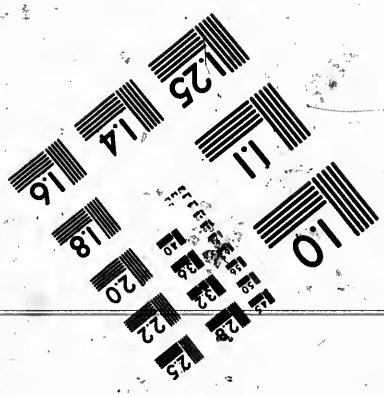

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Dame Ellen Treacey et vir. and T. Liggett et al.

for, a balance remained due to them thereon secured only by the property so sold, which having become depreciated in value was insufficient to cover their claim, that the gift in this marriage contract had reduced Martin Treacey to a state of insolvency, and had been made in fraud of Liggett *et al.*, whose claim remained unsatisfied; they further alleged that at the time the gift in question was made, Martin Treacey was notoriously insolvent, that he had remained in possession of the property so given, the same as before the date of the gift, and that a year had not elapsed since they, Liggett *et al.*, had become aware of the existence of the donation; they therefore claimed that the donation in question should be set aside and annulled.

The defendants each pleaded separately, but to the same effect, by a special categorical denial of each of the averments in the declaration, especially the averments of insolvency, fraud, or wrong-doing.

The facts shown in evidence were that by deed dated the 28th June, 1876, Liggett *et al.* had sold Martin Treacey a property for $12,250, whereof $3,787 were paid in cash, and the balance was made payable to the acquittal of Liggett *et al.*, viz., $403 to A. M. Foster, 1st November, 1876, and the balance to the Liverpool, London & Globe Insurance Co., as follows, viz.: $4,030 on the 1st July, 1878, and $4,030 on the 1st July, 1883.

That the contract of marriage complained of was made 10th June, 1876, and contained a large amount of valuable property which Martin Treacey thereby transferred to his daughter and son-in-law, and was duly registered.

That besides the property he gave to his daughter and her husband, Mr. Treacey held no other than that sold to him by Liggett *et al.*; also that they had taken judgment against him for the first instalment due under his deed of purchase, and seized and sold his moveables; further that since his daughter's marriage, she and her husband had lived on the property he had given her.

There was no proof of fraud or collusion on the part of the daughter or of her husband.

As to proof of the value of the property still held by Martin Treacey at the date of the donation, 16th June, 1879, two witnesses were examined on the 12th November, 1881.

William J. Shaw, auctioneer, stated that on that day, 12th November, 1881, sub-division No. 40, No. 1206 St. Ann's ward, he considered worth about $6,000.

Oliver W. Stanton, real estate agent, being examined, stated that he considered about $6,000 a very fair value of No. 1206 sub-division 40, St. Ann's ward. The houses, he said, were in bad order and the building also.

He was asked: "Is it worth to-day as much as it was two years ago? A. I did not see it two years ago."

Q. Supposing the property to be in the same state, was it more valuable two years ago than to-day? A. No; I consider property a little better now than it was two years ago, although there is very little change in price."

The Superior Court rescinded the donation made by contract of marriage to the female appellant by her father, Martin Treacey, and that judgment was affirmed by the Court of Queen's Bench for Lower Canada (Appeal side).

From these judgments the appellants, Dame Ellen Treacey *et vir*, as well for themselves personally as beneficiary heirs to the estate of the late Martin Treacey, appealed to the Supreme Court of Canada.

The question which arose on this appeal was, whether the respondents had proved their averment in their declaration, that Martin Treacey was at the date of the said donation, and before, notoriously insolvent, *en déconfiture*, and unable to pay his debts, and were entitled under art. 803 C. C. to obtain the revocation of the gift. Other points were argued by counsel, but the Court did not think it necessary to express any opinion on them.

Mr. Doutre, Q.C., and Mr. Joseph, for appellants, and Mr. Branchaud, for respondents.

RITCHIE, C.J.:—

The whole question turns on whether Martin Treacey was solvent at the time he made this conveyance, or whether making the conveyance which he did rendered him insolvent. For the reasons given by Mr. Justice Cross, and with which I entirely agree, and to which I have nothing to add, I think this appeal should be allowed. That is to say, I am of opinion that the insolvency of the party was not established.

STRONG, J.:—For reasons substantially the same as those given by Mr. Justice Cross, I am of opinion that we ought to allow this appeal. Without entering upon a consideration of the important point of law which is dealt with in the opinion of the learned Chief Justice of the Court of Queen's Bench, but assuming, for the present purpose, that the law is as he states it, that a donation of immovable property by a father to his daughter, on the occasion of her marriage is to be considered a gratuitous alienation, I am still of opinion that the proof in the present case is inadequate to invalidate the gift made by Martin Treacey to his daughter. Article 803 of the Civil Code provides that:

> If at the time of the gift, and deduction being made of the things given, the donor were insolvent, the previous creditors, whether their claims are hypothecary or not, may obtain the revocation of the gift, even though the donee were ignorant of the insolvency.

Fraud must be proved, and is not to be presumed. Therefore, it was incumbent on the respondents to show that the property remaining to Martin Treacey, after he had made this donation to his daughter, was inadequate in value to pay the hypothecary claims of the respondents with which it was charged.

This property had been sold by the respondents to Martin Treacey, on the 28th June, 1876, for $12,250, of which price $3,787 had been paid in cash. There is a presumption, therefore, that on the day of donation by Martin Treacey to his daughter, the 10th of June, 1879, the property still remained of more than sufficient value for the residue of the unpaid purchase money.

The question we have to decide is, therefore, reduced to this: is it sufficiently proved that the property on the 10th June, 1879, was so reduced in value as to be worth less than the portion of the sum remaining unpaid, in other words, is the *primâ facie* presumption destroyed by the counter testimony of witnesses?

Only two witnesses were examined on the point of value.

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William J. Shaw's evidence is not material, since he merely speaks of the value at the date of his examination, which was the 12th November, 1881.

Stanton, a real estate agent, says that $6,000 was the fair value at the date at which he speaks—in November, 1881. He says, he did not know the property two years ago. He then adds, he considers property a little better (when he speaks) than it was two years ago.

It appears to me that this evidence of a single witness is much too vague and general to repel the fair inference arising from the circumstance of the sale in 1876, especially considering the well-known fluctuations in the value of land in cities and towns in this country. It is true that the only way of fixing a valuation in questions of this kind is by the estimation of persons having dealings in real estate, or otherwise experienced in its value, like the witness; but, certainly, it would be most unsafe to act on evidence like this, when it must have been easily within the power of the respondents, upon whom the burden of proof lay, to establish the value at the date of the marriage settlement by the evidence of witnesses who knew the property at that time. I doubt, indeed, if such evidence as this ought to be acted on, even in a case where there was no such criterion of the value afforded as there is here by the price agreed to be paid under the previous sale, to which the creditors were parties, but under the circumstances of the present case it seems clear to me that there is not such distinct and clear proof of insolvency as is required to warrant the revocation of the donation.

I think the appeal should be allowed, and the action dismissed with costs in this Court and the Court below.

FOURNIER, J.:—Le 28 juin 1876, les intimés vendirent à Martin Treacey, un des appelants, un lot de terre avec bâtisses, pour la somme de $12,250, à compte de laquelle ils reçurent au moment de la passation de l'acte de vente $3,787. La balance était payable avec intérêt à 7 p. c. comme suit: $4030.00 à A. M. Foster avec intérêt au 1er novembre 1876 $4,030.00, le 1er juillet 1878, et $4,030, le 1er juillet 1883.

Le 19 juin 1879, Martin Treacey intervint au contrat de mariage de sa fille, Ellen Treacey, avec John Killoran, et lui fit donation de toutes ses propriétés à l'exception de celle qu'il avait achetée des intimés. Ceux-ci ont, par leur action en cette cause, demandé la révocation de cette donation, comme faite en fraude de leur droit, et parce qu'à l'époque de cette donation, le donateur Martin Treacey était notamment insolvable et en déconfiture. Cette dernière allégation étant la base principale de l'action, il est important de la donner textuellement, afin de faire voir clairement la position prise par les intimés :

That the said Martin Treacey was at the date of the said donation and before notoriously insolvent, *en déconfiture*, and unable to pay his debts, and has ever since remained so, to the full knowledge of the said Ellen Treacey and husband, who acted with the said Martin Treacey in fraud and collusion, to impair the interests of the said plaintiffs.

That by the said deed of donation, which was gratuitous and made by the said donor and accepted by the said donee fraudulently and with intent to defraud the said plaintiffs in particular, the said donor divested himself in favor of the said donee of a property which was the common pledge of his creditors.

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Ils ont de plus allégué que l'existence de cette donation n'était parvenue à leur connaissance que depuis moins d'un an.

Les intimés ont par des défenses séparées nié spécialement toutes les allégations de la déclaration et plus particulièrement celles concernant la fraude et l'insolvabilité. Ils ont aussi invoqué la prescription introduite par l'art. 1040 C. C.

Le jugement de la Cour Supérieure, confirmé par celui de la Cour du Banc de la Reine, a maintenu l'action et annulé la donation tout en ordonnant la discussion des autres biens de Martin Treacey.

La question très controversée de savoir si la donation contenue dans un contrat de mariage doit être considérée faite à titre gratuit ou onéreux, a été discutée par plusieurs des honorables juges appelés à décider cette cause.

Cette question qui pourrait être de la plus haute importance en certains cas à cause de la différence de la preuve que la loi exige suivant le caractère de l'acte, n'en a aucune dans la présente cause; car la preuve est tout à fait insuffisante pour établir les allégations de fraude, d'insolvabilité notoire et déconfiture qui sont les éléments essentiels de l'action révocatoire. Si la preuve en eût été faite, il est indubitable que le jugement rendu en cette cause aurait bien jugé, mais il est évident que cette preuve fait défaut.

D'abord quant à la preuve de fraude et de collusion de la part d'Ellen Treacey et de son mari, il n'y a pas eu la moindre tentative de la faire. Quant à la preuve de l'insolvabilité, *à la date de la donation*, il n'y en a aucune preuve non plus, si ce n'est celle que les intimés prétendent tirer de l'admission de faits des appelants, que Martin Treacey n'avait pas à cette époque d'autre propriété que celle achetée des intimés ("*no other property but the one purchased from plaintiffs in this cause.*")

Cette admission qui ne fait pas mention des propriétés mobilières, ne fait pas preuve d'insolvabilité et encore moins de déconfiture. Pour suppléer à cette insuffisance et dans le but d'arriver, faute de preuve directe, à prouver l'insolvabilité, les intimés ont fait entendre deux témoins au sujet de la valeur de la propriété en question. M. J. Shaw, l'un d'eux qui a été entendu, le 12 octobre 1881, estime la propriété en question à $6,000. L'autre, Olivier W. Stanton, l'estime aussi à $6,000. Il dit que les bâtisses étaient en mauvais ordre. A la question qu'on lui a faite pour savoir si cette propriété valait autant il y a deux ans, il répond qu'il ne l'a pas vue à cette époque. Elle pouvait alors valoir beaucoup plus, si elle était en bon ordre, mais le témoin n'en sait rien. Ainsi ces deux témoins ne font mention de la valeur de la propriété en question qu'à l'époque de leur examen, le 12 novembre 1881. Ce qu'elle pouvait valoir plus de deux ans auparavant, à l'époque de la donation du 15 janvier 1879, ils n'en savent rien. Devons-nous présumer que cette propriété vendue $12,253 le 28 janvier 1876, n'en valait plus que $6,000 le 16 janvier 1879, 3 ans après? Non car lorsqu'il s'agit de prouver l'insolvabilité, c'est par des preuves directes qu'il faut le faire. Aucune tentative n'a été faite de la part des intimés pour prouver la valeur de cette propriété à l'époque de la donation. D'après la manière qu'ils ont fait leur preuve ils semblent avoir complètement perdu de vue que le

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fait essentiel à prouver était la valeur à l'époque de la donation, afin de démontrer que déduction faite des propriétés données il ne restait plus assez de biens à Martin Treacey pour payer ses dettes. Ils semblent aussi avoir été sous l'impression que dans un cas comme celui-ci, de simples présomptions seraient suffisantes pour faire la preuve requise, mais ils ont oublié qu'il s'agit dans cette cause de faire annuler un acte solennel entre non commerçants, et qu'ici les présomptions ordinaires, suffisantes lorsqu'il s'agit de l'annulation d'actes de commerçants en fraude de leurs créanciers, ne peuvent recevoir aucune application.

Il faut encore remarquer que quant à la preuve de l'insolvabilité, il n'en est pas de même que pour celle de la fraude; si celle-ci, faute de preuve directe, peut être prouvée par des preuves indirectes, il faut au contraire, pour établir l'insolvabilité ou la déconfiture, des preuves directes et positives.

Pardessus dit: *

La déconfiture est la position du non-commerçant qui se trouve par l'accumulation de condamnations ou de poursuites dirigées contre lui, hors d'état de payer ce qu'il doit.

.....Qu'un simple particulier laisse prononcer contre lui des condamnations, ne paie personne, quoiqu'il ait des meubles ou des immeubles, il ne sera pas en déconfiture, car ses créanciers peuvent le saisir, l'exproprier. Il n'y a de déconfiture que là seulement où la discussion de tous les biens ne produit pas l'acquittement de toutes les dettes.

Si telle eût été la position de Martin Treacey le 16 juin 1879, il eût été facile d'en faire la preuve par la production de condamnations et de poursuites dirigées contre lui, et en constatant d'une manière précise la valeur, à cette époque, de la propriété qui lui restait, après la donation,—la valeur de ses biens meubles et le montant exact de ses dettes; on pouvait aisément par ce procédé arriver à faire la preuve nécessaire d'insolvabilité. Cette preuve les intimés s'étaient engagés à la faire par les allégations de leur déclaration. En basant, comme ils l'ont fait, leur action sur l'art 1034. ils devaient prouver l'insolvabilité de Martin Treacey à la date de l'acte de donation dont ils se plaignent. Un autre article non moins positif sur ce point, rendait encore cette preuve obligatoire. L'article 1034 C. C. dit:

Si, au temps de la donation et distraction faite des choses données, la donateur n'était pas solvable, les créanciers antérieurs, hypothécaires ou non, peuvent la faire révoquer quand même l'insolvabilité n'aurait pas été connue du donataire.

La preuve faite ne justifie nullement le principal considérant du jugement déclarant "qu'il a été prouvé "que le défendeur Martin Treacey s'est rendu "insolvable par la donation dont il est question en cette cause, et qu'il était "insolvable *lors de l'institution de la présente action*, et que les immeubles qui "lui restaient n'étaient pas suffisants pour assurer le paiement de ses dettes et "nommément de la créance des demandeurs." *

Quant à la dernière partie de ce considérant déclarant Martin Treacey insolvable lors de l'institution de l'action qui a été signifiée plus de deux ans après la date de la donation, il est évident qu'elle doit être sans effet sur le sort de cette cause, car elle est en contradiction manifeste avec les articles 1034 et

* Vol. 4, No. 1,322, pp. 579, 580.

803, exigeant la preuve de l'insolvabilité à la date de l'acte attaqué. Mais elle fait voir que les honorables juges qui ont rendu ce jugement n'ont pas trouvé de preuve au dossier les autorisant à déclarer que l'insolvabilité existait au temps de la donation. Dans la première partie du considérant, quoiqu'il soit déclaré que Martin Treacey s'est rendu insolvable par la donation en question—il n'est pas dit quand cet effet s'est produit. Est-ce au moment de la donation?—si c'est là l'interprétation qu'il faut donner au jugement, il est clair qu'il n'y a aucune preuve pour justifier cette conclusion. Pour en arriver là, il faudrait, comme il a été dit plus haut, avoir un état exact de la position de Martin Treacey au temps de la donation. Il faudrait être en état de dire si, après déduction faite des propriétés données il ne lui restait pas assez de biens pour payer ses dettes. Il n'y a dans le dossier aucune preuve quelconque sur laquelle on puisse baser cette opération. Pourtant, d'après l'article 803, c'est la manière de constater l'insolvabilité. Cette première partie du considérant n'est pas plus justifiée par la preuve que la seconde.

De l'existence reconnue par la Cour, de l'insolvabilité de Martin Treacey, lors de la signification de l'action a-t-on voulu en induire qu'il en résultait une présomption de fraude comme celle dont Ricard fait mention dans son Traité des Donations? *

Il y a peu d'analogie entre les deux cas. Dans celui dont parle Ricard il s'agissait de savoir si la donation était sujette à l'insinuation. Il est vrai qu'il dit que "le sort de la contestation fut sur ce qu'il y avait une *présomption violente* que le père avait fait à son fils, par son contrat de mariage, la donation dont il s'agissait, en fraude de ses créanciers, en conséquence de ce qu'elle contenait tous les immeubles qu'il possédait et qu'il avait fait banqueroute un an après." Il y a cette différence importante dans le cas présent, que la donation n'est pas de tous les immeubles—et que l'insolvabilité n'est survenue que plus de deux ans après la donation dont il s'agit,—tandis que dans le cas cité par Ricard la banqueroute avait lieu un an après, et que la donation était de tous les immeubles. L'insolvabilité survenue à une époque rapprochée des actes allégués pourrait bien former une présomption de fraude,—prouver l'intention de fraude, *consilium fraudis*,—mais cela seul ne suffirait pas pour faire prononcer la nullité, il faudrait encore pour se conformer à une autre condition essentielle de l'action révocatoire, prouver que cette insolvabilité est la conséquence de ces actes afin d'établir le préjudice causé, *eventus damni*, sans lequel l'action ne peut exister.

Aubry et Rau † disent à ce sujet:

L'exercice de l'action Paulienne suppose avant tout un préjudice causé aux créanciers qui l'intentent, et ce préjudice ne se comprend que moyennant le concours des trois conditions suivantes:

Il faut, en premier lieu, que les biens du débiteur soient insuffisants pour le paiement de ses dettes. Si son insolvabilité ne se trouvait encore, ni établie par sa déconfiture, ni légalement présumée à raison de sa faillite, le créancier demandeur devrait pour la justification de son action, discuter au préalable les biens du débiteur à l'exception cependant de ceux dont la discussion présenterait trop de difficultés.

* Vol. 1, p. 250, no. 1113. † Vol. 4, p. 132, § 313.

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Il faut, en second lieu, que le préjudice soit résulté pour le créancier de l'acte contre lequel son action est dirigée, en d'autres termes, que le débiteur ait été au-dessous de ses affaires dès avant la passation de l'acte attaqué, ou que du moins son insolvabilité en ait été la cause reconnue.

Chardon dit :*

De même que le dessein de tromper, sans un préjudice effectif n'autorise pas l'action révocatoire, le préjudice éprouvé ne permet de l'accueillir qu'autant qu'il a été la conséquence d'une intention hostile ; *Consilium fraudis, et eventus damni.* L'article 1167 du Code Civil offre le même sens, puisqu'il n'autorise les créanciers à critiquer que les actes faits par leurs débiteurs en fraude de leurs droits.

..... Les créanciers doivent donc prouver, et le dommage qui leur est fait, et l'intention qu'a eue leur débiteur de le leur faire. Il est essentiel de faire cette preuve.

Bédurrido dit : †

La seconde condition imposée au créancier suivant l'action révocatoire, est de prouver l'insolvabilité du débiteur. Cette action est essentiellement subsidiaire. Elle ne peut être exercée que pour amener le paiement que les biens restants sont, par leur insuffisance, dans l'impossibilité d'effectuer. Il faut donc préalablement établir cette insuffisance.

Cette condition se justifie avec autorité par cet autre principe que, pour intenter une action, il ne suffit pas d'avoir qualité, qu'il faut surtout y avoir intérêt.

Chardon dit encore : ‡

Pour établir la fraude du donateur, il suffit de prouver son infortune au moment de la donation, parce qu'en effet si alors ses dettes surpassaient son avoir, il ne pouvait en rien donner qu'au préjudice des créanciers. C'est donc ce préjudice que doit prouver celui qui se plaint.....

Demolombe dit : ||

Le préjudice éprouvé par les créanciers, c'est-à-dire l'insolvabilité du débiteur résultant de l'acte qu'ils attaquent, telle est donc la première condition, sous laquelle l'action Paulienne est recevable.

Aussi, le premier moyen du tiers défendeur est-il, en effet, lui-même tiré de l'absence de préjudice et de la solvabilité du débiteur. Le tiers défendeur peut, en conséquence, à moins que le débiteur ne se trouve déjà en état de faillite ou de déconfiture ouverte, demander qu'il soit préalablement discuté dans ses biens.

C'est en ce sens que l'on a dit, avec raison, que l'action Paulienne est seulement *subsidiaire* ; en ce sens qu'elle ne peut être exercée qu'à défaut ou en cas d'insuffisance des autres biens du débiteur..... *bonis ejus excussis.*

Comme on le voit par ces autorités qu'il serait facile de multiplier, la condition première, comme le dit Demolombe, sous laquelle l'action des intimés était recevable était le préjudice lui résultant de l'acte de donation attaqué. Ils ne pouvaient exercer leur action qu'en cas d'insuffisance des autres biens de Martin Treacey, constatée par une discussion préalable de ses biens. Cette condition est exigée par les autorités ci-dessus citées,—à moins que le débiteur ne soit déjà en faillite ou en déconfiture ouverte. Non-seulement les biens de Martin Treacey n'ont pas été discutés avant l'émanation de l'action révocatoire, mais la preuve de son insolvabilité au temps de la donation, condition essentielle du succès de leur action, n'a pas été faite.

Quant à la question de savoir si les intimés devraient discuter les biens de

* De la Fraude, 2 Vol., No. 203, p. 369. † Traité du Dol et de la Fraude, 3 Vol., p. 205, No. 1425.

§ De la Fraude, 2 Vol., No. 237. p. 432. ‖ Vol. Code Napoléon p. 172, No. 179.

Martin Treacey avant de porter leur action, je ne crois pas que les circonstances de cette cause m'obligent à la décider. Cependant, je ne puis m'empêcher de reconnaître que les autorités citées plus haut, qui comptent parmi les plus considérées, sont en faveur de la discussion et la considèrent obligatoire, à moins que le débiteur ne soit en faillite ou en déconfiture ouverte. Mais comme d'après la preuve en cette cause, on pouvait considérer Martin Treacey comme insolvable à l'époque de l'émanation de l'action, cette circonstance rendait, suivant l'opinion de Demolombe, l'action recevable. Mais pour réussir à faire annuler la donation attaquée, il aurait fallu établir par des preuves directes et positives, que cette insolvabilité remontait à la date de la donation attaquée, ou que la donation elle-même était la cause de l'insolvabilité.

En outre des observations que j'ai faites sur la nature de la preuve de l'insolvabilité, je dois déclarer que je concours dans celles qui ont été faites sur le même sujet par l'honorable juge Cross.

Pour tous ces motifs, je suis d'opinion que l'appel doit être reçu.

HENRY, J. :—I am entirely of the same opinion. I think the party was bound to prove that at the time of the transfer from Treacey to his daughter and her husband he was insolvent. I may say that no such evidence has been given. We are asked to presume that because one man put a valuation of $6,000 on the property two years and a-half afterwards, therefore it was not worth $8,000 at the time of the conveyance. It is a principle that not only must fraud be alleged, but it must be also proved. He undertakes to assert that that was a fraudulent and illegal transaction, and that the party became insolvent by the mere fact of making that transfer. Now, have we any reason to assume fraud? On the contrary, I think we are bound to assume the reverse on this occasion. At the time of the transfer he paid nearly one-third of the whole amount, leaving $8,000 due. At the time of the donation we could hardly assume that the property had fallen so much in value as to be worth no more than $6,000, that is, depreciated in value to the extent of one-half. I think if property went down by degrees, and had two years to go down after the transfer of this property, we may assume that at the time this donation was made it had not got down to the depth of $6,000. I see no reason for imputing fraud in this case. He, the father of Mrs. Killoran, was growing old, he had no wife and but one daughter. He was making provision for his daughter, and probably for his own support in his old days. I cannot, under the circumstances, imagine, without express proof of fraud, that we are justified in assuming it. I think the appeal ought to be allowed with costs.

GWYNNE, J. :—I concur in the opinion that the plaintiffs have wholly failed to prove the case stated in their declaration.

The object of the action is to have a donation of realty, made by one Martin Treacey to his daughter Ellen on the occasion of her marriage, declared to be fraudulent and void and set aside, to enable the plaintiffs to recover thereout a balance due by the father upon a purchase of other property made by him from the plaintiffs three years previously to the daughter's marriage, and for securing which balance, amounting to two-thirds of the purchase money, the plaintiffs at

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the time of the sale to Martin Treacey had taken back from him a mortgage upon the property sold by them to him.

There are three paragraphs in the declaration upon which the plaintiffs rest their right to obtain the relief sought by the action, upon their establishing any one of which they would be entitled to recover. The first is:

That the said Martin Treacey made the said donation to the said Ellen Treacey, his daughter, with a view to defraud the said plaintiffs in depriving them of the means of securing the payment of the said balance of the said price of sale herein above recited, the said defendants knowing well at the time that the property sold under the deed of sale was and is, insufficient to secure the payment.

The second paragraph is:

That the said Martin Treacey was at the date of the said donation and before, notoriously insolvent, *en déconfiture*; that is to say, hopelessly insolvent and unable to pay his debts, and has ever since remained so to the full knowledge of the said Ellen Treacey and husband, who acted with the said Martin Treacey in fraud and collusion to impair the interests of the said plaintiffs.

The third paragraph is:

That by the said deed of donation, which was gratuitous and made by the said donee fraudulently and with intent to defraud the said plaintiffs in particular, the said donor divested himself in favor of said donee of a property which was the common pledge of his creditors.

It will be observed that in none of these paragraphs do the plaintiffs seek to avoid the contract in virtue of the provisions of the 1084th article of the Civil Code, namely, that the donation was gratuitous, and that the donor was insolvent at the time of making it, although that is really the sole ground upon which the respondents rest their contention, that the judgment of the Court below should be supported. The ground relied upon in the first of the above paragraphs states nothing affecting the solvency of Martin Treacey. It charges that the donation was made with intent to defraud the plaintiffs who were his creditors by mortgage. Unless made with intent to defraud, it could not be avoided at the suit of a creditor of the donor, but the paragraph proceeds to specify the particular mode whereby this intent to defraud was to be carried out, namely that by this donation the plaintiffs would be deprived of the means of securing the balance due to them on their said mortgage security, the defendants well knowing at the time of making the donation that the property held by the plaintiffs in mortgage was insufficient to secure payment of the money secured by the mortgage. The gist of this paragraph plainly is that the intent to defraud charged in it is manifested by the knowledge imputed to Martin Treacey, that at the time of making the donation he well knew the property held by the plaintiffs in mortgage was insufficient to secure payment of the mortgage debt. Now, not to rest upon the absence from this paragraph, and indeed from the declaration, of an averment (to bring the case as stated in this paragraph within the 1038th section of the Civil Code, namely, that besides having been made with intent to defraud, the donation would have the effect of injuring the creditor,) to the effect that the donor had no property out of which the alleged deficiency of the mortgaged property to pay the mortgage debt could be supplied other than the property donated, it is sufficient to say in answer to

the case as alleged in this paragraph, that there has been no evidence offered of a character sufficient to establish that Martin Treacey had any such knowledge as is imputed to him, or that he entertained any intent to defraud the plaintiffs when he made the donation, or that he made it with that intent. Indeed there is no sufficient evidence that, as a matter of fact, at the time of the donation in June, 1879, the property purchased by Treacey from the plaintiff in 1876 was not worth the two-thirds of the purchase money for which he purchased the property.

The charge, as alleged in the second of the above paragraphs, is—not only that prior to and at the date of the donation Martin Treacey was notoriously and hopelessly insolvent and unable to pay his debts, but that such his insolvency was well known to the donee and her husband, who acted together with Martin Treacey in fraud and collusion in accepting the donation from him with intent to injure the plaintiffs. Of this knowledge in Ellen Treacey and her husband and of the constructive fraud and collusion charged, there is not any evidence whatever offered, nor, indeed, is there sufficient evidence of the alleged insolvency of Martin, assuming such insolvency alone to be sufficient to avoid the donation. Martin Treacey appears to have had no debt but that to the plaintiff, and which was secured by a mortgage. It is difficult to understand how a person owing no debts whatever, except one amounting only to two-thirds of the purchase money of a piece of property purchased by him, and which two-thirds was secured by mortgage upon the whole of the property, the purchase of which constituted the debt, can be said to have been notoriously and hopelessly insolvent.

There is no evidence whatever in my opinion sufficient to establish the averment that Martin Treacey was insolvent when he made the donation to his daughter, nor of any fraudulent intent whatever in the daughter accepting the donation. The plaintiffs therefore failed to establish any one of the grounds upon which their claim to the relief they have prayed is based, and it is unnecessary to determine the point upon which there appears to be a conflict of opinion, whether the law of the Province of Quebec in regard to donations by a parent by way of provision for a daughter upon her marriage and for her husband and their children, is different from the law of France and that of England, in which marriage is deemed to constitute valuable consideration.

The appeal, in my opinion, should be allowed with costs.

Appeal allowed with costs.

Doutre & Joseph, solicitors for appellants.

Judah & Branchaud, solicitors for respondents.

COURT OF QUEEN'S BENCH, 1884.

MONTREAL, MAY 27, 1884.

Before DORION, C.J., RAMSAY, TESSIER, CROSS and BABY, JJ.

PRATT

(*Plaintiff in the Court below*),

APPELLANT;

AND

BERGER

(*Defendant in the Court below*),

RESPONDENT.

Evidence—Aveu—Commencement de preuve.

To an action *pro socio*, alleging a partnership and asking for an account of the profits, the defendant pleaded that the plaintiff was only an employee, but at the same time he admitted that there was an understanding that he was to have half the profits as salary, and the defendant repeated this when examined as a witness. Then T., a witness, was asked whether he had had any transaction with the parties and whether they acted therein individually or as partners.

HELD, that the *aveu* of the defendant was indivisible, and did not constitute a *commencement de preuve par écrit*: and therefore verbal evidence of the partnership was inadmissible.

The plaintiff moved for leave to appeal from the following interlocutory judgment rendered by the Superior Court, Mathieu, J., April 9, 1884, in which the case is fully stated:—

"La Cour, parties ouïes sur la motion du défendeur produite le 3 mars dernier, demandant que la décision rendue par son honneur le juge Doherty, présidant la cour d'enquête, renvoyant l'objection du défendeur à la preuve testimoniale tentée par le demandeur, soit révisée par cette cour, et à ce que la dite objection soit maintenue avec dépens, avoir examiné la procédure et délibéré;

"Attendu que le dit demandeur allègue dans sa déclaration que, dans le cours du mois de décembre 1878, le gouvernement de la Province de Québec ayant demandé des soumissions pour le contrat de l'ameublement de l'école normale à Montréal, le demandeur fit des démarches pour l'obtenir et proposa au défendeur de se joindre à lui; qu'ils se mirent en société pour les fins du contrat, le demandeur devant faire l'ouvrage et le défendeur devant fournir les fonds nécessaires pour l'achat des matériaux et les gages des ouvriers, les associés, l'ouvrage terminé, devant se partager les profits nets; que le défendeur a retiré du gouvernement $18,895.59 sur laquelle il a perçu un profit net d'au moins $12,000, dont il n'a pas rendu compte au demandeur; et conclut à ce que le défendeur soit condamné à lui rendre un compte à l'amiable si faire se peut, si non en justice, de la société qui a existé entre eux pour ce contrat, si non et faute par le défendeur de ce faire, qu'il soit condamné à payer au demandeur $6,000 pour tenir lieu du reliquat du dit compte, et qu'en cas de reddition de compte le défendeur soit condamné à payer au demandeur le reliquat qui se trouvera fixé définitivement;

"Attendu que le dit défendeur a plaidé qu'il était faux qu'il ait jamais formé la société alléguée dans la déclaration du demandeur; que le contrat a

été pris au nom du défendeur seul et que les travaux y mentionnés furent exécutés par le demandeur sous sa conduite et d'après ses ordres, et que le demandeur n'était que son employé; que sur les représentations du premier ministre de la Province de Québec d'alors, que le défendeur n'était pas un homme de l'art, le défendeur connaissant les aptitudes du demandeur s'assura les services de ce dernier pour l'exécution et la surveillance des ouvrages se rapportant plus particulièrement à l'ébénisterie; que le dit défendeur demanda alors au dit demandeur de vouloir bien lui prêter son concours dans l'exécution du contrat en question et que sur les profits réalisés, si profit il y avait après avoir payé au dit demandeur ce qui serait convenable pour l'indemniser du temps qu'il y mettrait et l'aider à supporter sa famille, et ce à titre de salaire, il donnerait crédit au dit demandeur de la moitié des dits profits sur les différents montants que le dit demandeur devait au dit défendeur; qu'il ne fut aucunement convenu que le demandeur serait responsable des dettes ou des pertes résultant de ce contrat; que le demandeur accepta la proposition qui lui fut faite par le défendeur et consentit à prêter son concours et son travail au défendeur aux conditions susdites;

"Que durant la confection des ouvrages le défendeur a payé au demandeur une somme de $400 à titre de salaire, ou plutôt comme avance faite par le défendeur, sans tenir compte des profits ou des pertes qui pourraient résulter; que depuis l'exécution finale du contrat le défendeur a rendu compte au demandeur du coût de ce contrat, et que la balance revenant au demandeur n'était pas suffisante pour payer le défendeur de ce que le demandeur lui devait;

"Attendu que le dit défendeur examiné comme témoin, a d'abord déclaré dans une première séance qu'il n'avait jamais promis au demandeur une part dans les profits du contrat, mais qu'il s'était seulement engagé à le payer généreusement pour son travail en tenant compte des montants que le demandeur lui devait, et que la rémunération qu'il devait accorder au demandeur était laissée complètement à sa discrétion et qu'il n'avait jamais été question entre eux de part dans les profits; qu'il admet ensuite que le demandeur devait avoir une part dans les profits comme salaire en sa qualité d'employé du défendeur, mais que dans une autre séance le défendeur a déclaré que lorsqu'il a demandé au demandeur de l'aider dans ses ouvrages le demandeur se trouvait en faillite, et que le défendeur n'a jamais dit à personne ce qu'il entendait lui donner de crainte d'être troublé par les créanciers du demandeur, mais, que son intention était de lui donner la moitié des profits; que c'était entendu qu'il n'y avait pas de prix d'établi vû qu'il était en faillite, et que le défendeur ne voulait pas être troublé par les créanciers du demandeur, et que cela a été une des raisons pour lesquelles le défendeur n'a pas établi de prix avec le demandeur; qu'il c'était arrangé de telle sorte que si une saisie-arrêt avait été prise entre les mains du défendeur il aurait juré que le demandeur n'avait aucune part, vû que le défendeur ne savait pas le montant de profit qu'il ferait sur ce contrat, et que le demandeur lui devait une somme aussi élevée pour que dans aucun temps le défendeur eût pu faire serment qu'il ne lui devait rien;

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"Attendu que la question suivante a été posée par le demandeur au témoin J. Rosaire Thibaudeau :—'Avez-vous eu quelque transaction avec les parties en cette cause, savoir le défendeur et le demandeur relativement au contrat entre le gouvernement et le défendeur pour l'ameublement de l'école normale, et les deux parties en cette cause ont-elles fait cette transaction individuellement ou comme associés?'

"Attendu que le dit défendeur a objecté à cette question comme illégale et comme tendant à prouver par témoin des faits qui ne sont pas susceptibles de preuve testimoniale;

"Attendu que par jugement rendu par l'hon. juge Doherty à l'enquête le 25 février dernier, la dite question a été permise sous réserve de l'objection;

"Attendu que le dit défendeur a fait motion pour faire reviser la décision de son honneur le juge Doherty, et demandant que l'objection soit maintenue;

"Considérant que le dit demandeur réclame du défendeur un compte de la moitié des profits faits pour l'exécution du contrat susdit et le paiement de cette moitié des dits profits, et allègue, comme cause de l'obligation du défendeur, une société qu'il prétend avoir existé entre eux;

"Considérant que le dit demandeur dans son plaidoyer et dans sa disposition, admet son obligation de rendre compte au demandeur de la moitié des dits profits, et lui fournit même un compte que cette cour n'a pas maintenant à apprécier, mais soutient dans son paidoyer et dans sa déposition que la cause de son obligation n'est pas celle qui est mentionnée dans la déclaration du demandeur, mais qu'elle résulte d'une convention par laquelle le défendeur aurait contracté cette obligation comme salaire du travail que devait fournir le demandeur dans l'exécution de ce contrat;

"Considérant que par l'article 1243 du Code Civil l'aveu ne peut être divisé contre celui qui le fait, et que l'aveu du défendeur fait en cette cause ne peut être divisé contre lui;

"Considérant que le demandeur n'ayant pas de commencement de preuve par écrit pour établir qu'il existait une société entre le défendeur et le demandeur, ni les plaidoyers du défendeur ni sa disposition n'étant suffisants pour constituer tel commencement de preuve par écrit, ne peut prouver par témoins qu'il existait une société entre lui, le dit demandeur et le défendeur;

"Considérant que sous ces circonstances la question posée au témoin Thibaudeau est illégale;

"A revisé et revise la décision rendue par son honneur le Juge Doherty, présidant la cour d'enquête le 25me jour de février dernier, permettant la question sous réserve de la dite objection, et a mainteu et maintient l'objection du dit défendeur à la dite question avec dépens distraits," etc.

RAMSAY, J. (*diss.*) This case comes up on a motion for leave to appeal from an interlocutory judgment setting aside a ruling at *enquête* by which ruling certain evidence appears to have been admitted under reserve. The effect of the judgment appealed from is to exclude parol testimony, and therefore it is clearly one of those cases in which leave to appeal should be granted, if appellant's

pretensions are sustainable on the merits, for the judgment orders the doing of what cannot be remedied (at least fully and conveniently) by the final judgment. We must therefore examine the merits of the question as to the right of the moving party to make parol proof.

The action is *pro socio* and to account for half of the profits of an enterprise.

By the defence the "*contrat auquel il est fait référence dans la dite déclaration*" is recognized, and the defendant goes on to admit he had transactions with plaintiff with respect thereto—that he had advanced him money, and that he had promised to give "*crédit au dit demandeur de la moitié des dits profits sur les différents montants que le dit demandeur devait au dit défendeur* POUR LES CONSIDÉRATIONS CI-DESSUS MENTIONNÉES ;" but defendant specially denies that there was a partnership.

The precise question was this; "*Avez-vous eu quelque transaction avec les parties en cette cause, savoir, le demandeur et le défendeur, relativement au contrat entre le gouvernement et le défendeur pour l'ameublement de l'école normale, et les deux parties en cette cause ont-elles fait cette transaction individuellement ou comme associés.*" The Court, reversing the decision of the judge at *enquête*, held that there was no *commencement de preuve par écrit*, owing to article 1243 C. C., and that this question could not be put. It is conceivable that if the witness had answered it was as "*associé*," on the merits, it might be held not to be proof of a partnership; but how the alternative could be excluded as a logical operation, I cannot understand.

But there is more in the matter before us than a defective form of question, for if this were all the plaintiff might perhaps renew the question, leaving out the words "*ou comme associé*," and so an appeal might be avoided. But it seems to me that the reason of the judgment is wholly bad, and that therefore it should be questioned at once. It evidently takes for granted that the article 1243 creates an artificial or purely arbitrary restriction of evidence. It does nothing of the kind. It simply states somewhat inartistically a manifestly wise rule for the appreciation of evidence, and one which has always existed under the French law. To that law it has neither taken away nor added a tittle *. It expresses a truth for the guidance of courts and judges, and its interpretation is to be determined by the limits of that truth. It warns the judge not to concoct a confession, but it is not intended that everything that a party may choose to say must be taken together and be equally believed. So far as I know, the pretension I combat has never been held theoretically by the writers under our law or practised by the courts.

The commonest illustration of divisibility, so-called, is in pleading, where a contract is alleged, and admitted with a plea in avoidance or exception. In that case the burthen of proof is transferred invariably to the defendant.

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* Toullier (10,336) has remarked that the Code Napoléon had copied Pothier exactly. He says :—L'indivisibilité de l'aveu était regardée comme une règle soumise à des exceptions livrées à la prudence des juges. Pothier, No. 799, énonça simplement la règle sans parler des exceptions. Le code l'énonça de la même manière dans l'article 1356. The article has to be interpreted. Ib. 338, 2 Carré & Chauveau, 682.

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What the Code means by "aveu" and "admission" is confession.* If A on interrogatories answers he borrowed from B, but paid him, the confession must be taken as a whole, because judgment could not pass against A on his confession—"*nam inanis inutilisque confessio est nisi sit certi confessio.*" *l. certum ff. de confess. quod est in controversia.* But if he pleads payment he must prove it, otherwise we should get into a violation of the rule that he who alleges must prove—*ei incumbit probatio, qui dicit, non qui negat.*† It will be found that what is uppermost in the thoughts of all the writers who treat of the indivisibility of the confession, is the indivisibility of the judicial confession, and principally on interrogatories. Again, there are cases of its divisibility which are left to the prudence of the judge, and to a doctrine which is too well known to require me to do more than allude to it.‡ By entering into it I should add nothing new, and I should fail to convert those who think they have all the law and the prophets when they can exclaim, "I have the article of the Code on my side," meaning thereby, that they have got the most superficial doctrine that does not violate grammatical construction.§

There has, however, been a question as to whether the rule *in civilibus non scinditur confessio* is applicable to the *commencement de preuve par écrit*. It seems to me that the reasoning which leads to the conclusion that it is not is irresistible; and had it not been for an allusion by Serpillon (323 C. C.) to the indivisibility of the admission tending to admit proof, I should not have thought it possible to see any common principle. As I have already explained, the doctrine of the indivisibility of a confession is based on a principle of justice, which forbids one's taking the *testimony* of a man as one's whole evidence and then rejecting a part. The statutory rule that verbal evidence shall not be received without a *commencement de preuve par écrit* is simply to prevent false witnesses fabricating a story.¶ All that was necessary either under the French Ordinances or under the Statute of Frauds was something to give reality to the evidence. Here is how Pothier puts it, the evidence is to be "*non à la vérité du fait total qu'on a avancé, mais de quelque chose qui y conduit ou en fait partie.*" If this be the law, it will be hard to justify the judgment in this case. However, I find everywhere the same doctrine: "*Les contraditions et demi-aveux, résultant d'un interrogatoire ou de la défense d'une partie, sont aussi un commencement de preuve par écrit.*" 1 Pigeau, 268. And Serpillon, C.C. 321, says: *Un commencement de preuve par écrit, c'est lorsque l'on a un titre par écrit, non de la vérité totale du fait, mais de quelque fait qui y conduit, ou qui en fait partie.*" "*On entend par un commence-*

* "L'aveu de la partie, que l'on appelle aussi en droit confession," 10 Toullier, 260.

† Cujas decides the special point: "*Si reus ollegat solutionem probare debet,*" 7, c.874, C.

‡ 10 Toullier, 336, where the whole question, its history and authorities are fully stated.

§ It is not uninteresting to compare the operation of doctrine on the text of the French ordinances and of the English statute. Lately a school of philosophers has sprung up, both in England and France, who regret the abandonment of the most simple exposition, of their statutory evangel. The English innovator is embarrassed by precedent, his French parallel has no such superstitious terror before his eyes.

¶ It was not intended to exclude verbal testimony, but to check its abuses.

ment de preuve par écrit un écrit qui prouve seulement, ou un fait préparatif à la convention ou une partie de la convention sans prouver l'autre, ou quelque suite de la convention." Prévost de la Jannes, Pr. de la Juris. 2, p. 407. Under the C. N. art. 1347, there can be no doubt, for it distinctly tells us what a *commencement de preuve* is: "*On appelle aussi tout acte par écrit qui est émané de celui contre lequel la demande est formée ou de celui qu'il représente, et qui rend vraisemblable le fait allégué.*" This is not even a new way of stating the old law.*

Pratt and Berger.

Mr. Justice Loranger made this very clear in the case of Cox & Patton and then, curiously enough, dissented. (18 L.C.J. 320). Now the case of Cox & Patton amounts to this—Patton talked of buying Cox's horse. He was told the price, and went to see it, and offered a cheque for the price demanded. He then took the horse away, drove it to Lachine, brought it back to his own stable, and returned it lame the next day. His story was that he took it on trial and that he gave the cheque as security. The majority of the Court held that these answers to interrogatories rendered a sale *vraisemblable*, and allowed the introduction of parol testimony. On the evidence, if admissible, there was no doubt of the sale, and there was no attempt to avoid it.

There is another view of this case, which was scarcely touched upon at the argument, but which appears to me conclusive, apart from the question of evidence under the French law, as to the mover's right to have leave to appeal. The matter is commercial, and under the English laws of evidence there could be no doubt the plaintiff could prove his claim (1206 C. C.)

DORION, C. J., remarked that there were two questions which were not to be confounded—the divisibility of the *aveu* and the *commencement de preuve par écrit.* The article of the Code (1243) says the admission cannot be divided whether extra judicial or judicial. That had nothing to do with the question, of *commencement de preuve.* A *commencement de preuve* is incomplete evidence which you may complete by verbal testimony. In the case of an *aveu* the indivisibility exists whether it would make complete proof, or whether it would make a beginning only. The point came up clearly in the case of Fulton & McNamee † which went to the Supreme Court, and was there confirmed. The answer is divisible when the facts are not connected, when the answer is contradictory of the pleas, or when there are contradictions in the answer. These exceptions do not apply in this case, and we say the evidence was properly excluded.

Motion for leave to appeal rejected.

Laflamme, Huntington, Laflamme & Richard, for appellant.

Geoffrion, Rinfret & Dorion, for respondent.

* Prevost de la Jannes, Pr. de Juris. 2 p. 407. N. Denisart, *vbo.* commencement de preuve.

† 2 S. C. R. 470.

COUR DU BANC DE LA REINE.

(En Appel).

MONTREAL, 9 JUIN 1868.

Coram :—Les Hons. Juges Duval, Caron, Drummond et Badgley.

EDOUARD LEMIRE,

Appelant;

vs

GABRIEL COURCHÈNE,

Intimé.

Code Municipal—Procès-verbal d'inspecteur.

Jugé :—Que les dispositions d'un procès-verbal dûment homologué et confirmé doivent être exécutées et observées aussi longtemps qu'il n'a pas été dûment remplacé ou annulé ; et que les intéressés ne peuvent réclamer un état de chose autre que celui qui découle des dispositions du dit procès-verbal.

Les considérants du jugement de la Cour d'Appel font voir les faits principaux de la cause :

"Considérant que lors des voies de fait dont se plaint l'appelant et longtemps avant, savoir dès le cinq août mil huit cent soixante et sept, l'égoût de la portion des terres des parties qui a donné lieu au présent litige était et avait été réglé par un procès-verbal de cette date fait par les nommés Colbert Côté et Hyacinthe Lemire, inspecteurs des clôtures et fossés pour la localité où sont situées les dites terres, le dit procès-verbal dûment homologué a confirmé nonobstant les oppositions réitérées de l'intimé; considérant que par ce procès-verbal il est ordonné que la dite portion des terres sera égoûtée dans le cour d'eau traversant les dites terres et non au moyen du fossé de ligne que réclame l'intimé, vû que ce fossé de ligne serait inutile, dispendieux et dommageable à l'appelant; considérant qui c'est en violation de ce procès-verbal et non exécution d'icelui ainsi que l'a erronnément prétendu l'intimé, qu'il a commencé à creuser ce fossé de ligne qui lui avait été refusé par les dits inspecteurs, et qu'à cet effet il a abattu les clôtures communes entre les parties et fait et commis les actes et voies de fait dont se plaint l'appelant;

"Considérant que ces procédés de la part de l'intimé ne sont nullement justifiés par l'ordre verbal par lui invoqué qui aurait été donné par le nommé Lampson Lacharité, lequel sous les circonstances, n'avait aucun droit de donner tel ordre quand même il aurait été inspecteur de fossés et clôtures pour la localité, qualité qui lui a été donnée et qui n'est pas suffisamment prouvée—considérant que le procès-verbal des dits Coté et Lemire ne pouvait être mis de côté que par un autre procès-verbal fait avec les formalités voulues, et qu'il est faux que les dits prétendus travaux de l'intimé aient été faits en exécution du dit procès-verbal, mais qu'au contraire, ils ont été en violation directe du dit procès-verbal, sans droit ni autorité quelconque, sont en réalité une empiétation sur la propriété de l'appelant.

"Considérant que pour ces raisons dans le jugement dont est appel, savoir dans le jugement de la Cour Supérieure, siégeant en la ville de Sorel en date

de vingt-cinq janvier mil huit cent soixante et huit, qui renvoie l'action de l'appelant, il y a erreur, casse et annule le dit jugement et procédant à juger comme aurait dû le faire la cour de première instance, maintient la dite action, fait défense à l'intimé de continuer les travaux qu'il a commencés, lui ordonne de remettre les lieux dans l'état où ils étaient auparavant, éc sous quinze jours de la signification du présent jugement, si non permis à l'appelant de le faire faire aux frais de l'intimé; déclare que le procès-verbal de Coté et Lemire sera suivi et exécuté, jusqu'à révocation légale, dans sa forme et teneur, que l'égoût des terres des parties se fera à l'avenir en la manière réglée au dit procès-verbal, et pour les voies de fait commises comme susdit, la cour condamne l'intimé à payer à l'appelant par forme de dommage la somme de douze piastres avec dépens tant en Cour Supérieure que sur le présent appel."

Jugement renversé.

A. Germain, avocat de l'appelant.
P. R. Lafrenaye, avocat de l'intimé.

COUR DE REVISION.

MONTREAL, 31 OCTOBRE 1879.

Présents: MACKAY, RAINVILLE, ET JETTE, J. J.

CHARLES CADIEUX,

DEMANDEUR;

vs.

THE CANADIAN MONTREAL FIRE INSURANCE COMPANY,

DEFENDERESSE;

ET

C. D. MORIN,

TIERS-SAISI.

JUGÉ:—Que le certificat du secrétaire de la société défenderesse attestant que le tiers-saisi était endetté envers elle en la somme y mentionnée, doit être considéré comme une preuve légale et suffisante, en autant qu'il est conforme aux dispositions du statut d'Ontario 36 Vict. ch. 44, s. 48, et que ce certificat suffit pour établir d'une manière légale la répartition ou cotisation invoquée par le demandeur contre le tiers-saisi.

JETTÉ, J.:—Le demandeur a obtenu jugement contre la défenderesse pour une somme de $600.

En exécution de ce jugement il a pris une saisie-arrêt entre les mains d'un grand nombre de personnes assurées par la compagnie défenderesse qu'il dit être endettées à cette compagnie.

Le tiers-saisi Morin a déclaré qu'il ne devait rien à la compagnie défenderesse, ajoutant: "*qu'il avait pris une assurance en la dite défenderesse* QU'IL CONSIDÈRE NULLE *par ce qu'elle a été annulée par la dite défenderesse.*"

Le demandeur a contesté cette déclaration alléguant:

Que le tiers-saisi a été assuré par la compagnie défenderesse en vertu d'une *Police* en date du 30 mars 1876, portant No. 2012.

Qu'il est ainsi devenu membre de la dite compagnie à qui il a alors donné son billet de prime au montant de $49, en garantie du paiement des sommes qu'il aurait à payer sur répartition future pour les pertes à couvrir par la compagnie.

C. Cadieux vs. The Canadian Montreal Fire Insurance Company et C. D. Morin.

Enfin qu'une telle répartition a été faite le 30 octobre 1877 ; et que le montant dû par le tiers-saisi en vertu de cette répartition s'élève à $5.00.

Il demande donc condamnation contre le tiers-saisi pour cette somme.

La réponse du tiers-saisi est générale.

Le jugement de la cour de première instance renvoie la contestation de la déclaration du tiers-saisi pour deux raisons.

1o. Parce que l'existence de la police d'assurance n'a pas été prouvée légalement.

2o. Parce qu'il n'y a pas de preuve légale de la *répartition* ou cotisation invoquée par le demandeur, contre le tiers-saisi.

Quant au premier motif, il ne me paraît pas soutenable. Le demandeur ne pouvait pas être forcé de produire la police elle-même, qui se trouvait entre les mains du tiers-saisi, pour en prouver l'existence, et d'ailleurs l'admission formelle que le tiers-saisi en donne dans sa déclaration, suffisait pour les fins du litige.

Le second motif du jugement, au contraire, donne naissance à des questions d'une importance hors de proportion avec la somme qui détermine l'intérêt des parties en cause, mais dont la solution est néanmoins nécessaire.

La compagnie défenderesse existe en vertu de la loi d'Ontario, au sujet des compagnies d'assurance mutuelles. Elle fait affaires dans la Province de Québec.

Par la statut d'Ontario 36 Victoria, ch. 44, il est pourvu à ce qu'une compagnie telle que la défenderesse, peut accepter en paiement des primes d'assurance à elle dues, un billet de l'assuré, sur lequel la compagnie répartit ensuite une certaine cotisation pour les pertes à couvrir par la compagnie, pendant le terme de durée de la police de celui qui a ainsi donné son billet de prime.

L'art 48 de cette loi dit ensuite que lorsque telle répartition aura été ainsi faite, un certificat sous la signature du secrétaire de la compagnie, constatant telle répartition et la somme due par l'assuré, sera reçu comme faisant preuve *prima facie*, dans toute cour de la province, c'est-a-dire de la province d'Ontario.

Le certificat du secrétaire constatant le montant dû par le tiers-saisi en vertu de la répartition du 13 octobre 1876 a été produit ici, et on a fait par témoins la preuve de la *signature* et de la *qualité* de l'officier qui émane ce certificat.

Le tiers-saisi soutient que cette preuve est tout à fait insuffisante et ne peut être acceptée par les tribunaux de cette province ; que la loi d'Ontario ne peut avoir aucune autorité au-delà du territoire soumis à la juridiction législative du parlement qui l'a édictée ; et que ce certificat auquel cette loi donne la force probante dans son territoire, ne peut conserver cette autorité ici qu'au moyen de la légalisation requise pour les actes qui émanent d'une autorité publique étrangère quelconque, la *province d'Ontario* étant pour nous un *pays étranger*.

Il serait inutile de discuter ici la question de savoir si la province d'Ontario est pour nous un pays étranger. Soumises à une union législative jusqu'en 1867, les deux anciennes provinces qui formaient le Canada n'ont pas pu devenir étrangères l'une à l'autre lorsque restant unies pour les matières d'intérêt général, elles n'ont modifié leur régime politique, qu'en admettant d'autre

provinces dans leur nouvelle organisation et en laissant à la juridiction provincial l'autorité législative et administrative sur les manières d'intérêt plus restreint. Il suffit de se rendre compte de notre régime politique actuel pour arriver à cette conclusion.

Si donc cette nouvelle organisation politique que nous avons adoptée n'a pas fait des deux provinces de Québec et d'Ontario deux états étrangers, il est évident que les lois d'un caractère sinon international du moins interprovincial adoptées avant la confédération, n'ont pas pu être affectées par ce changement de régime et qu'elles restent en force tant qu'elle ne sont pas abrogées. La sect 129 de l'Acte de l'Amérique Britannique du Nord de 1867, le déclare d'ailleurs formellement.

Or quel était l'état de notre droit avant 1867 quant à la force probante attribuée aux écrits de la nature de celui que l'on invoque ici.

L'art 1207 de notre code, résumant les lois antérieures, dit :

" Les écrits suivants, faits ou attestés avec les formalités requises par un " officier public ayant pouvoir de les faire ou attester dans le lieu où il agit, " sont *authentiques* et font preuve de leur contenu, sans qu'il soit nécessaire " d'en prouver la *signature*, non plus que le sceau qui y est attaché, ni le *caractère* " *de l'officier*, savoir :

" 7o. Les livres, registres, règlement, archives et autres documents et papiers " des corporations municipales, *et autres copies ayant un caractère public* en cette province."

Si je réfère maintenant au statut d'où cet article de notre code est tiré, savoir : 13 et 14 Victoria ch. 19 (1850), j'y trouve ce qui suit :

" Sec. 4. Et qu'il soit statué qu'une copie de tout document officiel ou public " en cette province, qui paraîtra avoir été certifié par la signature de l'officier " ou de la personne sous la garde de laquelle le dit document officiel ou public " sera et pourra être placé, ou une copie de tout document, statut, règle, " règlement ou délibération, ou copie d'une entrée dans tout registre ou autre " livre *d'une corporation créée ou qui sera créée* par une *charte* ou un *statut*, " en cette province, et qui paraîtra avoir été certifiée sous le sceau de la dite " corporation, et par la signature du président ou du *secrétaire* de cette " corporation, *sera recevable en preuve* de toute particularité, *dans toute cour* " *de justice* ou *devant tout tribunal légal*.....ou *dans toute procédure* " *judiciaire, sans aucune preuve* de l'authenticité du sceau de la dite corpora- " tion, ou de la *signature* ou du *caractere officiel* de la personne ou des per- " sonnes qui paraîtront y avoir apposé leurs signatures, *et sans aucune autre* " *preuve d'iceux et dans chaque cas où l'original aurait pû être reçu en* " *preuve.*"

En supposant même qu'on pourrait considérer la province d'Ontario comme un pays étranger, le tiers-saisi aurait encore tort. Lorsqu'on exerce un droit né d'une convention passée à l'étranger il y a deux choses à considérer : le fonds qui reste soumis à la loi du lieu où l'acte est passé,—et la forme qui est régie par la loi du lieu où l'action s'exerce. En d'autres termes l'instruction où la procédure dans la cause dépend de la loi du pays où l'action s'exerce, mais ce qui regarde le *principe de décision* dépend de la loi du lieu de la convention.

C. Cadieux vs. The Canadien Montreal Fire Insurance Company et C. D. Morin.

Ainsi dans une telle action il faut distinguer les *formalités ordinaires* qui n'ont pour objet que la procédure et les *formalités décisoires* qui déterminent le fondement et les effets de l'action.—Massé p. 33.

Maintenant exiger la législation serait assimiler erronément ce certificat à un acte authentique car c'est un simple contrat entre particuliers, entre un individu et une société commerciale, ou une compagnie d'assurance agissant par son secrétaire ou agent. Mais dans le même cas où ce certificat devrait être considéré comme un acte authentique, il faudrait distinguer entre les actes authentiques qui n'intéressent que les parties et ceux qui intéressent l'ordre public. Si la législation est requise pour les derniers elle ne l'est pas pour les premiers. Mais puisqu'il s'agit ici simplement d'un contrat entre particuliers, la question de légalisation ne pourrait être soulevée même si la province d'Ontario pouvait être considérée comme un pays étranger. Enfin, comme nous avons établi que la province d'Ontario n'est pas pour nous un pays étranger, que ses statuts, d'après l'article 1207 de notre Code, doivent être considérés comme des documents authentiques, le tiers-saisi en cette cause est régi, en sa qualité de membre de la société défenderesse, par les lois concernant les compagnies d'assurance renfermées dans ces statuts et en particulier par la clause de cette loi relative au certificat du secrétaire-trésorier, et le demandeur a fait, par conséquent, la preuve de ses allégations, et il doit obtenir jugement pour le montant réclamé dans ses conclusions.

Jugement renversé.

MM. Longpré et David, pour l'appelant.
MM. Pagnuelo et St. Jean, pour l'intimé.

PRIVY COUNCIL.

LONDON, NOVEMBER 24, 1883.

Before LORD WATSON, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH and SIR ARTHUR HOBHOUSE.

FRECHETTE,

Appellant;

AND

LA COMPAGNIE MANUFACTURIERE DE ST. HYACINTHE,

Respondent.

Servitude—Water-course.—Art. 501 C. C.

Where a person complains that the flow of water in a stream passing through his land has been obstructed by the act of the owner of the lower land, and the issue is raised that the plaintiff by his own works has altered the natural course of the stream, it is for him to prove, in order to make out a case entitling him to relief, that the servitude, as it existed previous to the changes made by himself, *i. e.*, the natural or the established flow, has been interfered with by the lower proprietor.

The appeal was from a judgment of the Queen's Bench, Montreal, the 23rd Sept., 1881.

PER CURIAM. The parties to this suit are owners of contiguous lands on the left bank of the River Yamaska; the plaintiffs, who are the respondents, being the owners of the upper lands, and the defendants, one of whom is the

appellant, of the lower. The complaint is that the defendants have lately erected a barrier which prevents the water flowing in due course from off the land of the plaintiffs.

To understand the position of affairs it is convenient to refer to a plan put in by the defendants. Prior to the year 1878 matters stood as follows:—The whole river was traversed by a dyke marked A, which conducted the water to a mill (No. 4) belonging to the plaintiffs. After working that mill the water escaped into the natural channel of the river, and was not diverted again by the plaintiffs until nearly 100 yards below mill No. 4, where it reached the head of another dyke (Dyke No. 1), which was built near and nearly parallel to the left bank, and which caught a portion of the stream and carried it to another mill (Mill No. 1) belonging to the plaintiffs. The rest of the stream was caught by a dyke (Dyke No. 3), the head of which was in mid-channel opposite Mill No. 4, and which conducted the water to the defendant's Mill No. 3. The water escaping through the tail-race of Mill No. 1 also descended to Mill No. 3, but how it was used there, if used at all, does not clearly appear. Early in the year 1878 the plaintiffs carried Dyke No. 1 up the river to a point above the head of Dyke No. 3, and there connected it with a reef of shingle which extends to the right bank of the river. By this work the whole stream has been intercepted below Mill No. 4, and conducted to Mill No. 1, except when there is water enough to overflow the reef of shingle, and except so much as may leak through the dyke or through the reef. The defendant says that water has thus been taken away from the water-course formed by Dyke No. 3; and in the month of June, 1878, for the purpose, as he alleges, of recouping himself, he erected a barrier so as to prevent the escape of water from the tail-race of Mill No. 1, and to form a head of water for a new mill which he built just below No. 3. The plaintiffs have also built a new mill (Mill No. 2) just below No. 1, and have excavated the bed of the river to receive their new wheels.

There has been considerable controversy whether the defendants' operations have impeded the working of Mill No. 1 or only that of Mill No. 2, but in their Lordships's opinion, the controversy is not now material. The important fact is that the defendants' barrier has been found to bay back the water to a maximum depth of 22 inches at point A, which is the dividing line of the two properties. And the important question is, whether the plaintiffs are entitled to have the barriers so lowered that the water shall not be bayed back to any extent at all at Point A.

By the Civil Code of Quebec all rights to flowing water are classed under the head of servitudes; and by sect. 500 real servitudes are divided into three classes, according as they arise from the natural position of the property, from the law, or from the act of man. Servitudes arising from the law have nothing to do with the present question.

Sect. 501, which deals with servitudes of the first class, is as follows:—
"Lands on a lower level are subject towards those on a higher level to receive "such waters as flow from the latter naturally and without the agency of man. "The proprietor of the lower land cannot raise any dam to prevent this flow. "The proprietor of the higher land can do nothing to aggravate the servitude of "he lower land."

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Sect. 503 applies specially to rivers. It says: He whose land borders on a "running stream may make use of it as it passes for the utility of his land but "in such manner as not to prevent the exercise of the same right by those to "whom it belongs, saving the provisions contained in Cap. 51 of the Consoli- "dated Statutes for Lower Canada, or other special enactments." "The same right" their Lordships take to mean the right to make use of the running stream as it passes the bordering land.

Unless, then, the provisions of the Code are limited by some special enactment, the plaintiffs have a right to say that the flow of water from their land shall not be impeded so far as it is a natural flow, and independent of the agency of man. In this case the natural flow of the river has been altered by the agency of man for a long time, but an artificial flow may acquire as ample a right to protection as a natural flow.

The 3rd cap. of the 4th title of the Code treats of servitudes established by the act of man. Sect. 545 recognizes the right of every proprietor to subject his property to such servitudes as he may think proper consistently with public order. Sects. 549 and 550 are as follows:—

"No servitude can be established without a title; possession even immemorial is insufficient for that purpose."

"The want of a title creating the servitude can only be supplied by an act of recognition proceeding from the proprietor of the land subject thereto."

"Title," which answers to "titre" means a written or express grant.

Now as regards the flow of water which existed prior to 1878, and which it may be convenient to call the established flow, it is not now disputed but that the plaintiffs became and were, just before the execution of their new works, rightfully possessed (whether by title or by some act of recognition does not clearly appear), of what, according to the Code, is a servitude over the defendants' property. Their Lordships consider that the plaintiffs then had, at least as between them and the defendants, the same right to protection for the established flow as if it were the natural flow. The defendants might not raise any dam to obstruct the established flow.

The appellant's counsel contended strongly at the bar that the working of the plaintiffs' mill has not been impeded or only impeded to a slight extent, and that the defendants have been materially injured by the abstraction of water, But their Lordships did not not think it necessary to hear the respondent's counsel on those points. For the right to resist interference with a natural flow of water, or a flow legally established, is independent of the actual user of the water. Neither would the plaintiffs' right to have the established flow protected be barred by the mere fact that the defendants may have been injured by deprivation of water owing to the extension of Dyke No. 1. That might give the defendants a right to sue for damages, or to remove the dyke; but it does not follow that they can interfere with the established flow from the plaintiffs' land.

The appellant's counsel also insisted strongly that the action is wrong in form. but their Lordships see no reason to differ from the two Quebec Courts on this point.

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The question whether Chapter 51 of the Consolidated Statutes does not confine the plaintiffs to a single remedy, viz., that of pecuniary damages, is a more substantial one. There is certainly great difficulty in so construing the Code and the Statute as to produce a clear and harmonious result for the whole. There is nothing on the face of the Statute itself to limit the generality of the powers it appears to confer on riparian owners. It was stated at the Bar that there had been a course of decision in Canada which had the effect of placing a limit on the general terms of the Statute. But the only case cited, that which is stated in the respondent's factum, filed 11th May, 1881, appears only to refer to the mode of ascertaining damages. And the Judges in the Lower Courts do not refer to any course of decision, while they entertain a great diversity of view as to the limits within which the Statute is to be construed. The Superior Court appears to think that the Statute is no answer to actions founded on common right and on actual injury. Mr. Justice Ramsay, while impugning both the motives and the capacity of its framers, thinks it means nothing more than that if and when damages are sued for they shall be ascertained by referees. The rest of the Court in one passage express an opinion that the Statute was not intended to operate against those who had turned running waters to use, and in another, that it was intended to operate only against land-owners and not against millowners. It is difficult to find the foundation for any of these limitations. At the same time, their Lordships find it difficult to suppose that, by the saving of the Statute contained in Sect. 503, the Code intended to give no remedy whatever beyond pecuniary compensation for any violation of its rules. The question was very ably argued at the Bar, but in the result their Lordships do not find it necessary to pronounce any opinion on it.

The substantial difficulty in the way of the plaintiffs is this: that they are seeking to establish a new and different servitude by the act of man without either grant or recognition; that they have not alleged or proved what was the precise servitude which existed prior to 1878; and that the decree which they have obtained proceeds on the assumption that the existing state of things is the natural state, or at least that there is identity between the state of things before and after the plaintiffs' operations of 1878. This is the difficulty to which the attention of their counsel was specially called, and to see how it stands it is necessary to examine the proceedings with some particularity.

In the declaration filed by the plaintiffs, they set forth their documents of title, and allege that they have had for upwards of 62 years the rights, privileges and water powers actually used by them They pray for a declaration of those rights for a declaration that the defendants have illegally disturbed the enjoyment of them, and for demolition of the defendants' barrier. It is clear, then that, so far, the plaintiffs make no distinction between the existing flow of water and the established flow.

The defendants on their part rely on the alterations of 1878. They say in substance that the mischief is caused by the plaintiffs' own works executed below Mill No. 1; in the preceding spring and summer; that the extension of Dyke No. 1 has caught all the water and carried it down to Mill No. 1; that by collecting so large a quantity of water into the narrow space on the left bank,

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the plaintiffs have themselves to blame if at that point the water is more abundant than they like; and that they have no grant (*titre*) giving them a right so to use the river.

In replying to these defences the plaintiffs do not fall back on their right to the natural or the established flow of the water. As regards their works below Mill No. 1, they say that the defendants' allegations are false in fact. And as to all their recent operations, they say that their only object has been to preserve the water and conduct it from one of their mills to another, *as they have always done.*

At the wish of both parties experts were appointed by the Court to report upon instructions given to them by the Court. They were to state:—

1. The conditions of the localities and of the erections described in the writings of the parties, both before and after the said erections.

2. The works of the defendants.

3. The nature of those works, and whether they are calculated to injure the working of the water-power used by the plaintiffs before they were completed.

4. What should be done so that each party may use the water without injury to the other.

5. What amount of damages, if any, should be paid by the defendants to the plaintiffs.

These instructions are not pointed to the effect of the plaintiffs' operations, but rather indicate that the only question is whether the flow existing at the time of the defendants' operations has been impeded.

In answer to the first and second questions the experts show the construction of the old and new mills to the effect therein before stated, but they say nothing about the extension of Dyke No. 1, nor do they show what was the former flow of the water, or the bed of the river, or in any other respect what was the state of the localities prior to the execution of the recent works of the plaintiffs. In answer to the third question they find that the defendants' new barrier bays back the water to the depth of about two feet at the boundary line, Point A. In answer to the fourth question they find the defendants ought to lower their barrier 22 inches, so as not to bay back the water at all over Point A. And they award $100 for damage.

The parties then went into evidence, and the cause came on for hearing before Mr. Justice Sicotte, Judge of the Superior Court. That learned Judge gave the plaintiffs a decree in precise accordance with the opinion of the experts. The decree is founded on recitals showing that the plaintiffs [illegible] possession of a real right for a year and a day, using the upper water [illegible] them escape over the land of the defendants. Then it states that the barrier raised by the defendants has obstructed the waters in *their natural course such as it was formerly.*

It is clear then that the Superior Court paid no attention to the alteration [illegible] the plaintiffs' works in 1878. The recital of possession for a year [illegible] of the prior state of things, but is not true of the existing state [illegible] Nor is the present course of water its natural course nor such as it was formerly.

On appeal to the Queen's Bench, there was a difference of opinion among the Judges. Mr. Justice Ramsay states very clearly the point of the defence which

is now under discussion. He says, "The defendants answer that they have not "stopped the natural flow of the water, but that the plaintiff has, by increas- "ing his own works above, directed the waters of the river out of their natural "course, and so created an artificial accumulation of water which can only es- "cape through the tail race." He thinks this would be a good defence if it were not for the acquiescence or recognition of the defendants. But there is no evidence of such acquiescence in the plaintiffs' works of 1878. The evidence referred to by Mr. Justice Ramsay consists of two acts. First, the construction by the defendants of Dyke No. 3, which was long prior to the extension of Dyke No. 1. Secondly, the construction of the works now complained of. But in the first place, though it is true that by their new works the defendants sought to take advantage of the new flow of water, they did so because their former flow was partially cut off. And in the second place an act can hardly be treated as acquiescence in favor of a person who has ever since been contending against it, and striving to destroy it. It is at the utmost acquiescence on condition of enjoying the thing acquiesced in, and if that condition is taken away, so is the acquiescence.

Having thus disposed of the defence founded on the extension of Dyke No. 1, Mr. Justice Ramsay addresses himself to the question of damage. He thinks that there is no sufficient evidence of damage, and would either dismiss the action or remit it for further report by experts.

The opinion of the rest of the Court was delivered by Mr. Justice Tessier, that learned Judge states the defendants' plea that the plaintiffs themselves have caused the mischief complained of, but he thinks it is completely answered by the report of the experts in answer to the 3rd question. Now that question and answer relate only to the existing flow of water, and have absolutely no bearing on the prior question whether the plaintiffs are entitled to have that flow protected. Mr. Justice Tessier then quotes Art 501 of the Code, and says that the Company have not added anything to the volume of the water by the hand of man, because they have not introduced any foreign water into the Yamaska. On these grounds the Court decides for the plaintiffs, and dismisses the appeal.

It is true, indeed, that the plaintiffs have not increased the whole volume of the Yamaska, but they may have accumulated the waters of that river into a small space, and so have increased their depth at the point where they complain of it, and have augmented the servitude they desire to enforce. This is the very thing which the Court of Queen's Bench appears to think would be material if only it had been done by introducing fresh water into the Yamaska, instead of being done by a readjustment of the waters of the Yamaska itself. That it must have been done to some extent seems evident from the plan, and the respondents, counsel so admitted. It results also from the evidence given by Bertrand and by Delisle, showing how the water which used to flow to the right of Dyke No. 1 now flows to the left. The plaintiffs have left the point untouched by evidence. Whether the difference is much or little has not been ascertained. By Sect. 501 of the Code, the proprietor of the higher land can do nothing to aggravate the servitude of the lower land. The plaintiffs have certainly accumulated the volume of the water, and have probably increased its depth in the narrow channel

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up to the dividing line. To that extent they are aggravating the servitude of the lower land, and to that extent at least they have no right to demand, as they do demand, a free course for the water sent down by them. That the matter is left in this uncertainty is the fault of the plaintiffs who are bound to allege and prove a case entitling them to relief. They come into Court insisting on their right to keep unobstructed the flow of water which they say has existed as it now is for more than 90 years. The issue is distinctly raised that the existing flow is not the ancient one; but they continue to insist that it is, and refuse to shape their case so as try the question whether or no they are really entitled to some relief on the ground that the established flow had been interfered with, and to get that amount of relief. It is unsatisfactory to dispose of a case on such grounds, but their Lordships cannot see by what right the defendants are to be compelled to keep their dam so low that the whole volume of water, as accumulated and increased by the plaintiffs, shall run away unobstructed.

It is not easy to find decisions precisely applicable to such peculiar circumstances; but their Lordships have not been referred and are not aware of any case in which the plaintiff has obtained relief in respect of any servitude except that to which he has clearly alleged and proved his right.

In *Saunders* v. *Newman*, 1 B. & A., 258, the plaintiff had acquired a prescriptive right to an artificial flow of water.

All he had done within recent times was to alter the construction of the wheel turned by the water. It was held that the defendant, a lower proprietor, had no right to obstruct the ancient flow; but it seems clear from the observations of the Judges that the decision would have been otherwise if the plaintiff's operations had substantially altered the flow of the water. Abbott, J., says, "when a mill has been erected upon a stream for a long period of time, "it gives to the owner a right that the water shall continue to flow to and from "the mill in the manner in which it has been accustomed to flow during all "that time. The owner is not bound to use the water in the same precise "manner, or to apply it to the same mill. If he was, that would stop all "improvements in machinery. If indeed the alterations made from time to time "prejudice the right of the lower mill, the case would be different; but here "the alteration is by no means injurious, for the old wheel drew more water than "the new one."

Tapling v. *Jones*, 11 H. L. 290, was cited as an authority for the plaintiffs; but, so far as it bears upon the point under discussion, it favors the argument for the defendants. For the plaintiff in *Tapling* v. *Jones* succeeded in getting protection for nothing but his ancient light; those very rays of light to which he had acquired an indefeasible right. Lord Westbury says:—"In the pre-"sent case an ancient window in the plaintiff's house has been preserved, and "remained unaltered during all the alterations of the holding. . . . The "appellant's wall, so far as it obstructed the access of light to the respondent's "ancient unaltered window was an illegal obstruction." And Lord Chelmsford "in answering the argument that the alteration of windows had changed the char-"acter of the right so as to destroy it, says: But it is not easy to comprehend "how this effect can be produced by acts wholly unconnected with an ancient "window the owner has carefully retained in its original state."

It may be inferred from these judgments that, if the plaintiff in *Tapling* v. *Jones* had so mixed up his old lights with his new ones that they could not be distinguished, he would have failed. It is true that in that case the protection given to the ancient light carried with it incidentally protection to the new lights. But the only reason why it did so was that the new lights could not be obstructed without obstruction to the ancient light. New lights are encroachment, nor did the plaintiff's decree aggravate the defendant's servitude, for he was only prevented from building so as to obstruct the ancient lights. In the case of an augmented flow of water the servitude of the lower proprietor is aggravated. Fréchette and La Compagnie Manufacturière de St Hyacinthe

The result is that the plaintiffs have insisted on an enjoyment to which they have shown no legal title, and have not proved, or even alleged any case for relief in respect of that enjoyment to which they may have had a title. Their lordships have anxiously considered whether it is possible usefully to remit the case to be tried on the true issues. They are, however, convinced that an attempt to do so will not save time or money, and that the litigation must follow the strict course. They will humbly advise Her Majesty to reverse the decrees below and to dismiss the action with costs. The costs of this appeal will follow the result.

Judgment reversed.

Henry Matthews, Q.C., and MacLeod Fullerton, counsel for the appellant.

Bompas, Q.C., and *Kenelm E. Digby*, counsel for the respondents.

PRIVY COUNCIL.

LONDON, JULY 12, 1884.

The Queen vs. *Doutre.*

Action for Professional Services—Locus contractus—Status of advocate—Action against the Crown.

An advocate of the Province of Quebec, being by law and the custom of his profession entitled to recover payment for his professional work, those who engage his services must, in the absence of any stipulation to the contrary, expressed or implied, be held to have employed him upon the usual terms according to which such services are rendered.

The contract is not dependent upon the law of the place where the services are to be given but upon the status of the person employed.

A Quebec advocate has the same right to fees against the Crown as in other cases.

PER CURIAM. On the 1st of October, 1875, the Government of Canada addressed and sent to the respondent, Mr. Joseph Doutre, a letter, signed by Mr. Bernard, the Deputy Minister of Justice, in the following terms:—

"Sir,—The Minister of Justice desires me to state that the Government being desirous to retain counsel to act for them upon the proceedings in connection with the Fishery Commission to sit at Halifax under the Treaty of Washington, he will be glad to avail himself of your services as one of such counsel, in conjunction with Messrs. Samuel R. Thomson, Q.C., of St. John, New Brunswick, and Robert L. Weatherbee, barrister, of Halifax. The Minister will be glad to know whether you are willing to act in that capacity, and in that case to place you in communication with the Department of Marine and Fisheries upon the subject."

Upon receipt of this letter the respondent wrote in reply that he would act as

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requested. The respondent is a member of the Montreal section of a body of legal practitioners incorporated by cap. 72 of the Consolidated Statutes of Lower Canada, under the title of "the Bar of Lower Canada." By the terms of the Statute each member of the Bar is admitted to practise as "advocate, barrister, attorney, solicitor and proctor at law," and no person except a member of the Bar duly admitted, is entitled to conduct business in any of these capacities before the Courts of Lower Canada. Every member of the Bar must be registered in the district where he intends to practise, and he becomes answerable for his conduct to the council of that district, being liable, in case of his offending against professional rule or etiquette, to censure or to suspension from office for any period not exceeding a twelve month. It is not matter of dispute that, according to the law of Quebec, a member of the Bar is entitled, in the absence of special stipulation, to sue for and recover a *quantum meruit* in respect of professional services rendered by him, and that he may lawfully contract for any rate of remuneration which is not *contra bonos mores*, or in violation of the rules of the Bar. But it is asserted for the appellant that by the law of Ontario, the Province in which Ottawa, the seat of Government, is situated, a counsel cannot sue for his fees, and that he is under the same disability according to the law of Nova Scotia, where, according to Article 23 of the treaty, the Commission was to meet.

In support of that contention, counsel for the appellant referred to the opinion of Chief Justice Harrison in *Macdougall* v. *Campbell* (41 U. C. Q. B., 332) as correctly expressing the law of Ontario, but they mainly relied upon the proposition that in those provinces of the Dominion where the common law of England prevails, members of the Canadian Bar can neither have action for their fees nor make a valid agreement as to their remuneration, unless that right has been conferred upon them by statute.

In these circumstances it was maintained that the right of the respondent to sue for his fees must depend either upon the law of Ottawa, the *locus contractus* or upon the law of Nova Scotia, the *locus solutionis*, and that in neither case was any suit competent to him. Were it necessary to decide all the points thus taken by the appellant, questions of much nicety would arise. It is by no means clear either that Ottawa was the *locus contractus*, or that Nova Scotia was, in the strict sense, the *locus solutionis*. It is at least a plausible view of the case that the contract was completed in Quebec at the moment of time when the respondent posted his letter accepting the employment offered him by the Minister of Justice. On the other hand, although the Commission was to sit at Halifax it is perfectly plain that the work expected of the respondent and actually performed by him was by no means confined to advocacy of the Dominion claims during the sitting of the Commission. His employment was not limited to what would in his country be considered the proper duties of a counsel, but embraced the work of an agent or solicitor. In point of fact, he is employed to prepare the case of the Dominion Government as well as to plead in their behalf. That such was the understanding of both parties may be inferred from the known professional *status* of the respondent, as well as from the fact that, in pursuance of the so called retainer of the 1st of October, 1875, the respondent had papers sent him and was engaged at Quebec during eighteen months, with occasional visits to

Ottawa, in collecting and putting in shape materials for framing and supporting the claim which was to be urged before the commission. Then, as regards the other questions of law raised by the appellant, there is much difficulty. Their lordships are willing to assume that the law of England, so far as it concerns the right of the Bar of England to sue or make agreement for payment of their fees was rightly applied in the case *Kennedy* v. *Brown* (13 C. B. N. S., 677), but they are not prepared to accept all reasons which were assigned for that decision in the judgment of Chief Justice Erle. It appears to them that the decision may be supported by usage and the peculiar constitution of the English Bar, without attempting to rest it upon general considerations of public policy. Even if these considerations were admitted, their lordships entertain serious doubts whether, in English colony where the common law of England is in force, they could have any application to the case of a lawyer who is not a mere advocate or pleader, and who combines in his own person the various functions which are exercised by legal practitioners of every class in England, all of whom, the Bar alone excepted, can recover their fees by an action at law. But it is unnecessary, in the view which their lordships take of this case, to decide any of these questions which were raised by the argument for the appellant. The right of the respondent to sue for remuneration does not appear to them to depend either upon the law of the place where the employment was given, or upon the law of the locality within which it was performed. When any advocate or other skilled practitioner is by law and the custom of his profession entitled to claim and recover payment for his professional work those who engage his services must, in the absence of any stipulation to the contrary expressed or implied, be held to have employed upon the usual terms according to which such services are rendered. That is the implied condition of every contract of employment which is silent as to remuneration, and it is dependent upon the *status* and rights of the person employed and not upon the law of the place where his services are to be given so long as he is employed in his professional capacity. A member of the Bar in England, in accordance with the law of that country and the rules of the profession to which he belongs, renders and professes to render, services on a purely honorary character. If in his professional capacity as an English barrister he accepted a retainer to appear and plead before commissioners or arbitrators in a foreign country by whose law counsel practising in its regular courts were permitted to have suits for their fees, that would not give him a right of action for his *honorarium*. His client would have a conclusive defence to such an action, on the ground that he was employed as a member of the English Bar, and, by necessary implication, upon the same terms as to remuneration upon which members of that Bar are understood to practice. The responedn is a member of the Quebec section of the Bar of Lower Canada, and it was in tha capacity that he was retained by the Government as one of their counsel before the Fisheries Commission. The respondent has the rank of Queen's Counsel conferred upon him by patent, but that circumstance does not appear to their lordships to effect the present case. It gave him a certain precedence in a question with other members of the Bar, but it made no change upon the duties and obligations incumbent on him as a practising member of the Bar, or upon his privileges as such, including the right to sue for his fees. The retaining letter of

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the 1st of October, 1875, makes no mention of fees, and their lordships are accordingly of opinion that it must be held to have been an implied condition of the employment thereby offered that the respondent was to be remunerated for his services upon the same terms on which these services were rendered to clients in Quebec. The respondent was engaged and undertook to go to Halifax as a Quebec counsel, subject to the same rule of his Bar, by which his conduct as a lawyer was regulated in Quebec, and it would be a strange result if, retaining his *status* and performing his work as a member of the Quebec Bar, he was nevertheless to be stripped of the privileges attaching to that *status* as soon as he entered the Province of Nova Scotia. A few weeks after his acceptance of the letter of the 1st of October, 1875, the respondent received a retaining fee of $1,000, and thereafter the subject of counsel's remuneration does not appear to have been considered until May, 1877, when it was discussed at Ottawa, in the course of one or two personal interviews between Sir A. Smith, Minister of Marine and Fisheries in the Government of Canada, and the respondent.

The parties are widely at variance in regard to what actually passed on the occasion of these interviews. The allegation made by the respondent in his petition is:—"That on the eve of his leaving his home for Halifax in May, 1887, your petitioner made with the Department of Marine and Fisheries a temporary and provisional arrangement, under which your petitioner should be paid $1,000 month for current expenses while in Halifax, leaving the final settlement of fees and expenses to be arranged after the closing of the Commission." On the other hand, it is alleged, in the defence filed for the appellant:— "That the arrangement made with the suppliant referred to in his petition, under which he was to be paid $1,000 a month while in Halifax, was not a temporary and provisional arrangement, as alleged, but that the $1,000 a month was with other moneys previously paid to the suppliant, to be accepted by him in full for his services and expenses." The Commission met at Halifax on the 16th of June, and brought its labors to a close on the 23d of November, 1877, having sat, with occasional adjournments, for a period of five months and seven days. In addition to the retaining fee already mentioned, the respondent received a "refresher" of $1,000, and also six monthly payments of $1,000 each during the sitting of the Commission, making a sum total of $8,000. According to the respondent, these sums were paid to him to account of his remuneration, the precise amount of his fees and expenses being left for adjustment subsequently. According to the appellant, they were paid to and received by the respondent as in full of his whole claim for fees and expenses. Both parties are agreed that in May, 1877, it was arranged that those sums (to the extent of $7,000) should be paid to the respondent, but they differ as to the footing upon which they were to be paid. Being of opinion that by the terms of his employment, in 1875, the respondent was entitled to a *quantum meruit* in respect of the services which might be required of him, their lordships think that it lies with the appellant to make out that the respondent's original right to remuneration was varied by subsequent agreement, and they have also come to the conclusion that the appellant has failed to establish the existence of such an agreement. The evidence upon this point, which need not be referred to in detail, is very unsatisfactory. It is

abundantly plain that the impression honestly derived by Sir A. Smith from his interviews with the respondent in May, 1877, was that the respondent had agreed to accept a refresher of $1,000, and a payment of the same amount monthly during the sittings of the Commission, as in full of all claims for remuneration. But in order to alter the then existing rights of the respondent, it is not enough for the appellant to show that such was the impression created in the mind of Sir A. Smith: he must also prove that the terms of the arrangement, as understood by Sir A. Smith, were understood in the same sense and were assented to by the respondent. But the respondent swears distinctly that he understood and believed the arrangement to be provisional merely; that its object was to fix the sums which were to be paid him to account, leaving the balance payable to him for after-adjustment, and there are circumstances proved in the case which seem to establish beyond question that the respondent at the time sincerely entertained that belief. Then the evidence of Mr. Whitcher, the Commissioner of Fisheries for Canada, and the only third party present at these interviews, is not only very inconclusive, but what he does state, as to the language actually used by the principal parties to the arrangement then made tends to support the respondent's understanding of its terms. In that state of the evidence, their lordships are unable to hold that the appellant has satisfied the *onus* incumbent on him of proving the new arrangement alleged in his defence. In the Courts below, while the learned judges were equally divided as otthe result of the case there was a remarkable diversity of judicial opinion in regard to the law applicable to its decision.

The cause was tried before Mr. Justice Fournier, who, on the 12th of January, 1881, gave judgment in favor of the respondent, and fixed the amount of fees and expenses still remaining due to him in remuneration of his services at $3,000, and it is not maintained that the amount awarded by the learned judge is excessive, if the respondent has a right of action, and that right is not barred by the alleged arrangement of May, 1877. The cause was then taken by appeal before the Supreme Court of Canada, who gave their judgment on the 13th of May, 1882. Chief Justice Ritchie and Justices Strong and Gwynne were in favor of allowing the appeal, but Mr. Justice Fournier, who was a member of the Full Court, adhered to the view which he had taken as judge of first instance, and Justices Henry and Taschereau, in substance, agreed with him. In consequence of this equal division of opinion in the Supreme Court, the order appealed from was confirmed, and the appeal dismissed, with costs. Their Lordships do not consider it necessary to notice the great variety of reasons assigned by the learned judges of the Supreme Court in support of the views which were severally adopted by them, with the exception of one point raised in the judgment of Mr. Justice Gwynne. That point is deserving of notice for this reason—that if the opinion of the learned Judge, which is based on the provisions of the Petition of Right Act of Canada, be well founded, the respondent, though he might have suit for recovery of his fees from any subject, could not recover them, by petition, from the Crown. By a pardonable error, Mr. Justice Gwynne refers to the Act of 1875, instead of the Petition of Right Canada Act, 1876 (39 Vic. c. 27), which repealed the Statute of the previous year

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Section 19, which is identical, in expression, with the similar circumstances of a repealed Act, provides "that nothing contained in this Act shall give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy in England, under similar circumstances by the laws in force there prior to the passing of the Imperial Statute 23 and 24 Vict., c. 34." The learned Judge seems to hold that these provisions place a Quebec lawyer on perfectly the same footing as an English barrister, so far as regards his right to proceed against the Crown for recovery of his fees. But it appears to their Lordships that the process of reasoning by which the learned Judge arrives at that conclusion confounds two things which are essentially different—"right" and "remedy." The Statute does not say that a Quebec lawyer shall, in all cases, have only the same right against the Crown as a member of the English Bar. What it does enact is that no subject in Canada shall be entitled to the "remedy" provided, unless he has a legal claim, such as could have been enforced by petition of right in England prior to the Imperial Act of the 23rd and 24th Victoria. It is impossible to hold that a member of the Quebec Bar who by law and practice is permitted to sue for his fees, when he seeks his remedy against the Crown under the Canadian Act of 1876, has no such legal claim and that he sues under circumstances similar to those in which an English barrister is placed who, neither by the usage of his profession nor the law of his domicile, can maintain any action for his fees. Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment of the Courts below, and to dismiss the appeal with costs.

Judgment affirmed.

The *Solicitor General* and Mr. *Jeune*, for the Crown.
Mr. *McLeod Fullarton*, for the respondent.

COURT OF QUEEN'S BENCH.

(APPEAL SIDE.)

MONTREAL, 27TH MAY, 1881.

Present:—DORION, C. J., MONK, RAMSAY, CROSS, BABY, J.J.

ALEXANDER MOFFATT es qual.,

(*Defendant in the Court below*),

APPELLANT;

AND

GEORGE B. BURLAND,

(*Plaintiff in the Court below*),

RESPONDENT

Powers of assignees of insolvent.—Concealed sales, Art. 19 C. C. P.

The action in this cause was commenced by the plaintiff, respondent, by a writ of seizure in revendication of certain machinery, mentioned in the proceedings, which it is not here necessary to describe, as the difference between the parties has no relation to the character or amount of the object in question. The respondent claimed to be the proprietor of the machinery in question, in

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virtue of a deed of sale thereof executed by a certain firm of J. G. Gebhardt & Co. to the Canada Paper Company, before Beaufield, notary public, on the 27th day of April, 1880, and of another deed executed by the Canada Paper Company to respondent on the twelfth day of May, 1881, before Marler, notary. Concurrently with the sale from Gebhardt & Co. to the Canada Paper Company the latter executed a lease of the object of sale to the former, on certain terms which will be found in said lease, which is of record, and Gebhardt & Co. were not then deprived of the physical possession of the goods. After the date of this sale Gebhardt & Co. continued their business, and used the machinery in question for about a year, when they became financially embarrassed, and made a voluntary assignment of all their estate and effects to appellant, Alexander Moffatt, before Isaacson, notary; and in virtue of that deed Moffatt took possession of Gebhardt & Co.'s place of business and its contents, and among other property the machinery now in question. Moffatt had advertised the estate, including this machinery, for sale, when he was stopped by the present action. The action was directed against the firm of Gebhardt & Co., as being legal possessors of the effects claimed, and also against appellant as being in physical possession thereof, and detaining them against respondent's will. Gebhardt & Co. did not plead, but Moffatt appeared and pleaded the assignment of the said effects to him, as above set forth: that the deed from Gebhardt & Co. to the Canada Paper Company was fraudulent and simulated; that Gebhardt & Co. were at the time insolvent; and concluded that said deed should be declared null, and he maintained in his possession. To this plea respondent answered that Moffatt had no legal status to oppose such objections to this action; that Moffatt was not a creditor, and had no interest; that he could not plead defences that competed only to creditors, and that he had no authority to represent the creditors by pleading in his own name; and respondent also denied the allegations of the plea. Upon these issues the parties went to proof, when the following facts in substance were proved:

1o. The deed from Gebhardt & Co. to the Canada Paper Co., dated 27th April, 1880.

2o. The deed from the Canada Paper Co. to respondent, dated 12th May, 1881.

3o. Assignment from Gebhardt & Co. to Moffatt, dated 13th June, 1881.

4o. That the goods had never been removed from Gebhardt & Co.'s store, but remained there in virtue of the lease dated.

5o. That at the time when the sale from Gebhardt & Co. to the Canada Paper Co. was effected, the former owed the latter a balance of account exceeding ten thousand dollars; that previous to the sale, Gebhardt & Co. called on the Canada Paper Co., and represented that they were commencing a new branch of manufacture (viz., playing cards, which was certain of yielding large returns, but that their capital was not large enough to carry on this new branch, with the best results, and asked the Canada Paper Co. to extend their line of credit. This the Canada Paper Co. refused to do, but promised that if Gebhardt & Co. should pay $5000, they would supply goods to the amount of $10,000. Gebhardt & Co., finding themselves unable to pay $5000 in cash, offered as a

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substitute for the cash to sell the Canada Paper Co. a portion of their machinery to a like value, the price to be imputed as payment *pro tanto*. This offer the Canada Paper Co. after consulting counsel, accepted, and the transaction was concluded, as appears by the deeds. The Canada Paper Co. did sell Gebhardt & Co. goods to the amount of $10,000, and the latter continued their business, meeting every business obligation for nearly a year.

The following is the opinion of Monk, J., dissenting:

I find myself unable to concur in the judgments about to be rendered by this Court.

Gebhardt & Co., an insolvent firm, by deed before Mr. Isaacson, dated 13th June, 1881, made a transfer of their whole estate to appellant, in trust, for the benefit of certain persons, styled creditors of said insolvent firm, and subject to the obligation of retroceding to Gebhardt & Co. any surplus which might remain after payment of such creditors. In virtue of said assignment appellant took possession of the insolvent's premises and the contents thereof. Among the things so taken possession of by appellant were the effects seized in this cause as described in the procès-verbal of seizure. These effects had been sold by the insolvents to "The Canada Paper Co." by deed, before Beaufield, N.P., of date the 27th April, 1880, and the Canada Paper Co. had sold the same to the respondent by deed, before Marler, N. P., dated the 12th May, 1881, but the said effects, not having been removed from the insolvents' premises, came into the possession of appellant.

Respondent thereupon took his proceedings in revendication directed against Gebhardt & Co., as possessors *de jure*, and against the appellant as actual *détenteur* of the effects in question. Gebhardt & Co. did not plead. Appellant pleaded that he was assignee of the insolvents' estate for the benefit of their creditors; that the deeds set up by respondent were simulated and fraudulent, and were injurious to the interests of said creditors, and he asked to have said deeds set aside. Appellant was not himself a creditor. Respondent answered, among other things, denying the right of appellant to plead such a defence against the respondent's action. Taking, as I do, the view that the respondent's position in this respect is well founded, it becomes unnecessary to discuss, or even to state, any of the other points in the case.

What, then, could justify appellant in pleading as he does? No person can bring a suit at law unless he has an interest therein.—Art. 13 C.C.P.L.C. Appellant has no personal interest in this case, he does not pretend to have any; he specifically claims to be fighting for the creditors, that is, it is the interest of the creditors and not his own that he is attempting to advance. His success is no gain, neither is his failure any loss, to him. Then we have article 19 of the same Code, which says: "No person can use the name of another to plead." But it is said that appellant "does not use the name of another to plead, but pleads in his own name, under the deed of conveyance to him of the rights of all the parties." Of course appellant does not use the name of another to plead, that is a mere truism; but does he really plead at all? is it not rather certain creditors who are using his name to plead, whose alleged rights are being protected by him? The deed of assignment from Gebhardt & Co. to appellant

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contains the names of a certain number of Gebhardt & Co.'s creditors, but they conveyed nothing to appellant; they took no part whatever in the deed; the utmost that the deed could accomplish, so far as they were concerned, was to express their consent that the appellant should act as the agent of Gebhardt & Co. in winding up their estate. If there could be any reasonable doubt about the correctness of the position now taken, arising out of the interpretation of the articles of the Code of Procedure above cited, that doubt is set at rest by the decision in re Brown *vs.* Pinsonneault, 3 Sup. Court Rep. p. 102, where it is expressly decided that the granting of a trust deed does not vest in the trustee the right to sue in a Court of Justice in the interest of those for whom he is trustee.

Then, on the other hand, it is said that appellant is a syndic under some sort of common law bankrupt system, and has the right to represent the creditors and *ester en justice*, in consequence, and we have numerous ancient French authors cited to sustain this position. The answer to these authorities is threefold: 1o. They arise under the *Ordonnance de Commerce* of 1673, which never was registered in Canada, and in consequence never was law here. 2o. Even if the *Ordonnance de Commerce* was in force here the appellant has not put himself in a position to be recognized as a *syndic* under the Ordonnance or under any other French system. Under the *Ordonnance de Commerce* the creditors, or at least three-fourths of them, could pass *contrat d'union*, whereupon the insolvent debtor could make an assignment to the creditors united. This contract had to be submitted to a judge, and might be homologated if it appeared that it had been executed by at least three-fourths of the creditors, but homologation could not be had until the creditors had fyled their claims under oath. Subsequently the French Code of Procedure perpetuated the same system with modifications. Appellant is evidently not in a position to *ester en justice* on behalf of the creditors under any French system.

It has never been held that any such bankrupt system prevails in this Province. See remarks of Aylwin, J., in McFarlane et al., *vs.* McKenzie et al., 5 L. C. J. p. 110; also Cumming *vs.* Smith, 10 L. C. R., p. 122; also Withall *vs.* Young et al., and Michon et al., intervening, 10 L. C. R., p. 149. If appellant was a *Syndic* in virtue of any such system he could hold and administer the insolvents' estate, even against the wishes of a minority less than one-fourth of the creditors, but against this position the whole of our jurisprudence is constant. If, on the contrary, he derived his authority from the consent of the creditors we must look at the deed to discover the extent of such authority. It is needless to say that in the present instance appellant's title does not, even by remote inference, give him the shadow of a right to act as he does in this cause. A judgment has recently been given in an analogous case in the Province of Ontario. See Lumsden *vs.* Scott, Ont. Rep. Vol. IV., p. 323. The holding in that case was as follows: "A creditor's assignee, not himself a creditor, can-"not sustain an action to set aside a fraudulent conveyance or transfer made by "the debtor prior to the assignment under which he claims to be such as-"signee."

The respondent has, without doubt, made a *prima facie* case for the relief

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which he demands, and which has been accorded to him by the judgment appealed from, and the answer to that case, even if sufficient, has been put forward by the appellant without sufficient grounds in law or fact, and is, in consequence, to be treated as a nullity. The judgment appealed from should, therefore, in my opinion, be confirmed.

DORION, C.J.:—On the 27th day of April, 1880, Geo. J. Gebhardt & Co. sold to the Canada Paper Co., for the sum of $5000, which they acknowledged to have received, the machinery enumerated in a schedule annexed to the deed of sale. On the same day The Canada Paper Co. leased said machinery to Gebhardt & Co. for one thousand dollars for one year. The Canada Paper Co. subsequently sold the same machinery to the respondent, who has instituted this action to revendicate the said machinery, which he alleges by his declaration are in the possession of appellant and of Gebhardt & Co.

Moffat has pleaded to this demand that, by deed of the 13th June, 1881, Gebhardt & Co., with the consent of their creditors, had made an assignment to him of the whole of their estate, including the machinery seized in this cause, for their benefit; and that the sale from Gebhardt & Co. to the Canada Paper Co. was a simulated and fraudulent transaction, made at a time when Gebhardt & Co. were in very embarrassed circumstances, and to secure the payment of advances already made, and to be made, by the Canada Paper Co. which had never paid the price stipulated in the deed of sale, and never had any delivery or possession of the machinery in question.

The respondent by his answers contested the right of the appellant to raise the question as to the validity of his title, inasmuch as he, the appellant, had no interest, he being a mere agent or attorney.

Two questions are raised by this issue: 1st. Does the deed of the 27th April, 1880, by Gebhardt & Co. to the Canada Paper Co. contain a real *bona fide* sale of the machinery therein mentioned, or is it a simulated deed to pledge the said machinery for an existing debt and further advances, under the guise of an absolute sale, and is such pledge unavailable for want of actual possession and delivery.

2nd. Was the appellant as *cessionnaire* of Gebhardt & Co., for the benefit of the creditors, entitled to resist in his own name the claim of the respondent to the property of said machinery.

It appears by the evidence that the machinery sold by the deed of sale of the 27th of April, 1880, for $5,000, was worth from $17,000 to $19,000; this sum of $5,000 was never paid to Gebhardt & Co. It was agreed, or at least understood, that on payment of the sums due by Gebhardt & Co. to the Canada Paper Co., the latter would reconvey the property to Gebhardt & Co., and finally the transaction was never entered in the books of either Company, until a long time after the occurrence, and on the eve of Gebhardt & Co.'s insolvency. The rent stipulated in the lease was never claimed, and neither the Canada Paper Co. nor the respondent, ever obtained under the said sale of the 20th of April, 1880, any possession of the machinery sold.

It is evident that such a transaction between a debtor and his creditor cannot

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be considered as a real and valid sale of the property mentioned in the deed, but must be held to have been entered into for the purpose of creating, without actual delivery and possession, a lien or pledge on the machinery described in favor of the Canada Paper Co., to secure advances then due or that might thereafter become due, to said Company.

Troplong, contrat de nantissement, No. 39 says:—"Quelquefois le nantissement affiche les formes extérieures d'un contrat de vente. Pour donner plus "d'efficacité au nantissement, les parties lui donnent l'apparence d'une vente de "la chose. C'est au juge à examiner les faits et à voir si sous cette écorce extérieure, ce n'est pas une garantie qui est donnée à un créancier et non une vente "qui est passée à un acheteur."

Duvergier, de la Vente T. 2, No. 11, p 17, says:—"Il est rare, il faut en "convenir, que le pacte à réméré ne serve pas à cacher un prêt garanti par un "gage..... .....

"Dans tous les cas, lorsque sous la forme d'une vente c'est un prêt qui est "intervenu et que la chose vendue en apparence, n'a été effectivement que donnée en gage, les jurisconsultes restituent à l'acte son caractère et sa véritable "qualification, le nomment contrat pignoratif et déterminent les effets d'après les "principes qui régissent les contrats de prêt et de nantissement."

At page 19 the same writer also says: "Les signes auxquels on reconnaît "ordinairement le contrat pignoratif, sont la vilité du prix et la relocation faite "par l'acquéreur apparent au prétendu vendeur. Le prix vil indique que les "parties n'ont eu nulle intention sérieuse de vendre, la relocation prouve que "le véritable propriétaire n'a pas même voulu cesser d'être possesseur. D'autres "circonstances peuvent fournir d'autres éléments à la conviction des juges; la "preuve testimoniale même est admissible, ainsi que les présomptions graves, "précises et concordantes au termes de l'article 1353."

We find in the sale by Gebhardt & Co. to the Canada Paper Co. all the circumstances which, according to Duvergier, indicate that a transaction in the form of a sale is nothing else than a pledge.

It is proved that Gebhardt & Co. sold for $5,000 the greatest portion of the implements which they required to carry on their business, and which, by their inventory, they valued at from $18,000 to $19,000. This sale was certainly made *à vil prix*.

The Canada Paper Co. did not require those articles which they immediately leased to the pretended vendors Gebhardt & Co. at a price quite out of proportion with the price of sale. These articles never left the possession of Gebhardt & Co., and it was perfectly understood that they should retain these articles, on their paying the advances which the Canada Paper Co. had made or would make to them in the course of their business.

Duvergier, loc., cit., p. 20, says: "Si donc au lieu d'une vente on trouve un "gage ou une antithèse; ce sont les dispositions sur l'antithèse et le gage qui "doivent être consultées et suivies,"..... et plus loin le même auteur dit encore; "également le privilége ne subsisterait pas sur le gage mobilier, si ce "gage contrairement à la disposition de l'article 2076 était resté en la possession "du débiteur."

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It is moreover an undoubted rule of the civil law that creditors may proceed against the goods in the possession of their debtor, as if they really belonged to him, when by the collusion or gross negligence of the owner such possessor is permitted to hold himself out to the world as being the proprietor of these goods and thereby to raise his credit. (Bell's Commentaries, pp. 249, 250).

At p. 252, No. 5, Bell says: "It is not a sufficient justification of a continuance of possession of moveables that the conveyance was only in security; for by the law of Scotland there is no effectual conveyance of moveables in security without possession—delivery must take place fairly in such conveyance, etc..... .....The same doctrine prevails in England, etc..... .....and it is no answer, that as where property is let on hire, the possession and property are justifiably separate, so the possession may be continued to the debtor on the footing of location."

The transaction which has intervened between the parties is nothing else but a *cession de biens*, made by insolvent debtors for the benefit of their creditors. Such a *cession de biens* is either voluntary or judicial.

The authors of the Pandectes Françaises, vol. 10, p. 297, says:—"La cession "de biens volontaire, c'est ce que nous connaissons sous le terme d'abandon, "d'abandonnement."

Guyot, Vo. Cession, p. 26, 1st Column, says:—"Ou la cession de biens "judiciaire dont nous venons de parler, les débiteurs font souvent usage d'une "autre espèce de cession, connue plus particulièrement sous le nom d'aban- "donnement."

The authors of the Nouveau Denisart, Vo. cession de biens, say:—"Il y a "deux espèces de cession de biens l'une, volontaire et l'autre forcée."

"No. 3, la volontaire est celle que les créanciers acceptent sans procédure; "celle-ci n'est sujette qu'aux formalités nécessaires aux abandonnements et aux "attermoyements, elle laisse le débiteur en l'état où il était auparavant, et "*c'est le contrat passé entre lui et ses créanciers qui leur fait la loi.*"

Denisart, Vo. Abandonnement, says:—"On nomme contrat d'abandonne- "ment un acte par lequel un débiteur se dépouille de ses biens, et les cède à "ses créanciers en tout ou en partie, pour qu'ils les vendent et en distribuent le "prix entre eux, conformément aux droits de chacun en particulier."

No. 5, "La propriété des biens abandonnés par un débiteur à ses créanciers "en corps avec pouvoir de les vendre, réside néanmoins toujours dans la personne "du débiteur, &c."

Demolombe, Vol. 28, Nos. 186, 191, 193, 195, and 199; Larombière, Vol. 3, under Art. 1266 and 1267, of the C. N., Nos. 3, 5 and 12, and Aubry & Rau, Vol. 8, § 781, pp. 494 and 495, all say that the *cession volontaire* is an ordinary contract requiring no special formality, and that its effects are regulated by the stipulations of the parties.

The deed of abandonnement usually contains a clause appointing a trustee or syndic and directors, who are authorised to adopt all necessary proceedings for recovery of the assets conveyed by the debtor, and also a *Séquestre* for the safe keeping of the monies collected until they are distributed. This *Séquestre* is generally one of the notaries before whom the deed is passed, and not a creditor. (1 Pigeau, p. 453 and 454).

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At p. 452, this Author says:—"Lorsqu'il n'y a que des recouvrements à "faire, et que l'Union n'aura aucune suite d'affaires on ne nomme aucuns "directeurs, ni syndic, mais seulement *un séquestre qui poursuivra ces recou-* "*vrements*, les distribuera aux créanciers quand il aura une certaine somme, sur "leur simple quittance, sauf à la fin à lui donner une quittance générale devant "notaire, le tout pour éviter à frais."

This is important as showing that in these voluntary arrangements between a debtor and his creditors, it is not necessary that directors and an assignee be chosen, and that a mere *Séquestre* may be appointed and clothed with the powers of suing for the collection of the assets of the estate, and that it is not necessary that this *Séquestre* be chosen from among the creditors, since such *Séquestre*, in France, was usually one of the Notaries passing the deed, and who could not pass such a deed, if he were himself a creditor. In the cases of Masson and others, to which I have alluded, B. H. Lemoine, one of the assignees, was not a creditor, yet he was allowed to sue as one of the assignees, and recovered judgment.

But it is contended that in France these had no effect until they were homologated by the Court according to the provisions of the ordinance of 1673, which was never in force here, and that as these deeds cannot be homologated here the trustees named under them have no right to sue.

There is in all this reasoning a grave misapprehension of the whole subject. The ordinance of 1673, styled "*l'Ordonance du Commerce*," had special reference to merchants and traders, and to commercial transactions. It contained dispositions by which it was in the power of an insolvent trader, who had obtained the consent of three-fourths in value of his creditors to a contract of abandonment or *cession de biens* to compel the remaining créditors, who refused to become parties to it, to submit to its provisions, and this was done by a judgment homologating the deed. This homologation was only required to force a minority of creditors to abide by the decision of a majority, when such majority represented at least three-fourths of the value of all the ordinary claims against the insolvent. Nouveau Denisart, Vo. Abandonnement, § 3.

Even in the case of the assignment by a trader for the benefit of his creditors, it was not necessary that the deed of assignment be homologated, when all the creditors had joined in it. In non-commercial cases, for an assignment could be made by a non-trader as well as by a trader (1 Pigeau, p. 475), the homologation of the deed of assignment was never required, for the reason that the majority of the creditors could not bind the minority, and that the assignment only bound those who signed it. (28 Demolombe, No. 191.)

Dallos, Rec. Alp. Vo. Obligation, Vol. 10, p. 396, cites an arrêt of the 20th of February, 1820, between the creditors of Schnée vs. Gayl and Bohmer, which contains among others the following *considérant*: "Qu'un pareil contrat "qui étant signé de tous les créanciers n'avait pas besoin d'être homologué en "justice, &c."

And why should such deed require any homologation when all the parties interested have adhered to it. This case is the more remarkable inasmuch as it was a deed of assignment made by a trader to his creditors.

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It is also an error to suppose that in the case of an assignment by a trader to a majority of his creditors, the trustees could only institute proceedings after homologation had taken place.

In the very forms of a deed of assignment given by Guyot, and by Pigeau, is included a clause authorising the Assignee and Directors to sue in their own name the homologation of the deed of assignment, in order to compel the creditors refusing to sign it, to become bound by its provisions.

The authority of the assignees and directors to sue is therefore derived from the deed of assignment and not from its homologation of it, even when such homologation is required, (1 Pigeau, p. 458, form of deed, 3 Larombière, Lot. Cit. No. 12).

By the deed of the 13th of June, 1881, Gebhardt & Co., bargain, sell, assign, transfer, deliver and set over to the appellant, all their goods and chattels, stock-in-trade, &c., as and for his proper goods, monies and estate upon trust, to sell and dispose of the said estate and also to collect with all convenient speed, the outstanding debts and accounts. On his part the appellant accepted this trust, and promised to pay to the creditors present and accepting the proceeds to the amount of their claim, and any balance which might remain to Gebhardt & Co.

This is not an ordinary Power of Attorney, it is a deed conveying to the appellant a title or at least an apparent title to the property therein mentioned, which gave him a right to claim this property as his own from all other parties except Gebhardt & Co. and their creditors, to whom they were bound by the trust created by the deed, but to no others.

At most this was but an irrevocable mandat, resulting from a contract between parties having adverse interests.

Troplong, du Mandat, Nos. 718 and 737, speaking of a *mandat irrevocable*, the author says:

"Il en est de même dans tous les cas où le mandat est la condition d'un con-
"trat ou le mode d'exécution d'une obligation contractée;

"Par exemple, quand un failli fait cession de biens à ses créanciers." (3 Larombière, p. 494, No. 5. Denisart, Vo. Abonnement, No. 4).

It would be a contradiction to say that the mandate is irrevocable, and yet that those who gave it must sue to recover the assets which form the subject of it, and thereby indirectly remove from the control of their agent, those assets, while they cannot revoke his powers to deal with them. In the present case by whom should the suits be brought; is it by Gebhardt & Co., but the deed was passed for the very purpose of removing their estate from their control; is it the creditors, but no transfer has been made to them of the estate. They have been satisfied with accepting the delegation by which the appellant agreed to realise the estate conveyed to him, and pay them the proceeds to the extent of their respective claims.

The writer at p. 253, No. 8, entering into the circumstances under which possession of goods acquired by a debtor, says: "In all cases of possession in "temporary contracts, it is important to observe whether the thing in the "bankrupt's possession is of a kind that is usually let out or held separately "from ownership," etc..... On this principle it is difficult to adm t

"a justification of the retained possession of furniture, of stocks or implements "of trade and such possession strongly implies a continued ownership, and the "mere fact of possession a power of disposal of property."

Every word of this passage is applicable to the present case, and this sound doctrine so clearly enunciated applies not only to Scotland, but also to this Province and to every country where the rules of the civil law prevail.

It is in conformity with these rules and principles that the Lords of the Privy Council in the case of Cushing and Dupuy, 24 L. C. Jurist, 151; the Supreme Court in the case of Rickaby and Bell, 1 Supreme Court, Rep. 560, and more recently this Court in Thibaudeau and Mailley, 25th of January, 1883, held that sales of property of which the original owners had remained in possession were null and void as regards the creditors of the vendor.

There cannot therefore be any difficulty that the pretended sale by Gebhardt & Co. to the Canada Paper Co. cannot be considered as a real sale, but that it must be held to have been intended by the parties as a mere pledge of chattel property to secure advances already made and to be made thereafter, and that from the absence of actual delivery and possession of the articles so pledged, neither the Canada Paper Co. nor the respondent, who is their representative, have acquired any privilege, preference or right whatsoever on said goods to the prejudice of the *bona fide* creditors of Gebhardt & Co., and that on this first ground the judgment of the Court below is wrong.

But it is contended that the appellant, as the assignee of Gebhardt & Co., being a mere agent or attorney, has no quality and no interest as such, to appear in a Court of Justice to urge any objection against the title of the respondent.

By the deed of the 13th of June, 1881, Gebhardt & Co. have with the consent of their creditors and for their benefit, the present respondent being one of them, sold the whole of their stock in trade and assets, among which were the machinery claimed by respondent, and the appellant is thereby specially authorised to dispose of the said property and to sue for and to defend in his own name any action which may be brought in reference to this said estate.

Now is this a transaction to which the old rule that *personne ne plaide par procureur*, embodied in article 19 of the Code of Civil Procedure, does apply—we have no hesitation in saying that it is not.

As far as we can refer back for precedents in the Courts of Lower Canada, we find that assignees or trustees vested by voluntary agreements with the estate of insolvent debtors, for the benefit of their creditors, have invariably, with one or two exceptional cases, to which we shall presently refer, been admitted to urge before Courts of Justice the claims and rights of the estates which they represented as such assignees or trustees.

The first case I find any mention of is that of Watts *et al.*, assignees to the Newman estate against Hall, in which judgment was rendered in favor of the plaintiffs by the Court of King's Bench, at Montreal, on the 15th of February, 1811. The next case is that of Blackwood *et al.*, trustees to the estates of Cuvillier and Harkness, and Cuvillier and Aylwin, opposants in a case of Lawrence against the said trustees; this was also in 1811, although the date of the judgment is not given.

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Then came the cases of Blackwood *et al.* and McLaren *et al.*, judgment 20th April, 1811, of Blackwood *et al.* and Labelle, which was a petitory action, judgment 20th April, 1812, that of McNider *vs.* Stevenson, McGill *et al.*, assignees to estate James Porteous, judgment 19th February, 1812; Smith *et al. vs.* McGill *et al.*, judgment 18th October, 1828. In all these cases which are mentioned in the notes of the late Chief Justice Reid, now in the library of the Bar of Montreal, the question as to the rights of assignees to sue and be sued was never enquired into, but the Court in all these cases acted upon the assumption that such right existed. But the question was formally raised in the case of McNider and others, assignees of the bankrupt firm of Alexander and Lawrence Glass *vs.* Gardiner, and after due deliberation the action was maintained by the Court of King's Bench, on the 19th of October, 1826. Again the question was raised in the case of Gates *et al.*, plaintiffs, as assignees and trustees of the estate, debts and effects of Maitland, Gardner and Auldjo, in trust for the benefit of their creditors against Millar *et al.*, and the action maintained by judgment of the 20th October, 1828. We here append the notes of Chief Justice Reid who presided in the Court of King's Bench, then composed of three judges.

No. 346—20th October, 1828, Gates *et al. vs.* Millar *et al.*

The plaintiffs as assignees and trustees of the estate, debts and effects of Messieurs Maitland, Gardner and Auldjo, in trust for the benefit of the creditors of the latter, have brought this action to recover from the defendants a large sum of money as due by them to that insolvent firm, and as one of the debts so assigned to the plaintiffs in their capacity of trustees.

To this action a *défense au fonds en droit*, and three pleas of exception have been put in by the defendants, similar in every respect to those submitted in the case of McNider and others, assignees of the Bankrupt firm of Alexander and Lawrence Glass vs. Gardiner, and upon which, after due consideration, judgment was rendered in this Court, on the 9th of October, 1826. It is upon the sufficiency of the above pleas that the parties in this cause have been heard, and the Court is thus a second time called upon to adjudge thereon. Under the exceptions and the *défense au fonds en droit*, it has been principally urged, that the assignment to and the appointment of the plaintiffs as trustees was illegal and null, the formalities required by law not having been thereon observed, such as due notification to, and the consent of a majority of the creditors, and the homologation to, and the consent of a majority of the creditors, and the homologation in a Court of justice of the deed of assignment to and appointment of the plaintiffs as trustees, and that the plaintiffs could not in their assumed quality maintain this action; that at most they could be considered only in the light of agents, and could not therefore sue in their own names, but in those of the insolvent firm, their constituents, who are the only true proprietors of the debt claimed; and, lastly, that the assignment had not been notified to the defendants.

Upon reconsideration we are not disposed to think that the opinion we held on the former case should in any respect be departed from, and we shall therefore in this, as in all similar cases, adhere to the principles whereon the decision

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in the case of McNider and others, assignees, against Gardiner, was given (19th October, 1826). We should think it enough to say on the present occasion, if we did not find that assignments of the nature of the present frequently come before us, and appear to have been adopted in this country in the absence of any positive or express bankrupt law, and as it appears to have been resorted to as well for the security of the creditors as for the relief of the unfortunate and insolvent debtors, we deem it right to remove all doubts in respect of such assignments again to express our decided opinion, that the same are, in respect to the persons whose debts are thereby assigned, perfectly legal and do not require any of the formalities insisted upon by the defendant to render them valid, —they are made for beneficial and good purposes, and, like other assignments, (*transport*) vest the debt thereby transferred in the assignee who may thereon bring the action either in his own name or in that of the assignor. Lacombe Vo. Transport No. 5. Of an assignment so made, none but the creditors of the insolvent debtors could complain, for, if made in fraud or to the injury of any one or more, there can be no doubt but that in their complaint an act so infected, would be, like any other fraudulent transaction, rescinded and set aside, but he whose debt has been so transferred cannot object to the assignment, he can have but one legitimate object, that of obtaining a valid acquittance on payment of what he owes, and this no doubt could be given him by the assignees, the plaintiffs in this cause, to whom the debt might have been assigned purely and simply, without express mention of its being assigned for the benefit of the creditors of the assignors, of which transfer it would not be competent for the debtor to complain, whatever the creditors of the assignor might have to urge against it, they taking the legal steps for that purpose.—*Quo ad*, therefore the person whose debt is transferred, the assignment is valid, and, whatever objections the creditors not parties to the act might have, the debtor could not *excepter du droit d'autrui*, particularly of those who it may be presumed are alive to their interests, and who, by their silence, evince that they have no ground of complaint, but rather acquiesce to an assignment made for the general benefit of themselves and of all the other creditors of the bankrupt, and even with regard to the creditors, Denizart observes: "Si par les circonstances particulières du fait, la cession "dont se plaignent les créanciers ne leur causait aucun préjudice, elle cesserait "par le même d'être faite en fraude de leurs droits, d'être frauduleuse, faute "d'intérêt ils seraient non-recevables à en demander la révocation." Vo. *Fraude retivement aux créanciers*, No. 9, § 2. As Chief Justice Reid presided over the Court of Queen's Bench, until he resigned in 1838, it is not likely, and there is no evidence that those deliberate decisions were overruled while he remained on the Bench.

In the District of Quebec, the same principles were acted upon in the case of Bruce vs. Anderson, and Randall and other Opposants (Stuart's Rep. 127, 20th October, 1818), in which it was held by the Court of Queen's Bench, Chief Justice Sewell presiding, "that an English commission of bankruptcy "operated in Canada as a voluntary assignment by the bankrupt, and that "therefore the assignees may sue for debts due to the bankrupt, or for his pro-

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"perty, and may take the proceeds of the bankrupt's estate which belong to "the English creditors, but such proceedings of the assignees cannot deprive "the provincial creditors of any acquired rights or privileges as to the property "of the bankrupt or the proceeds thereof, to which they, by the law of Canada, "may be entitled, nor can such rights or privileges be affected by the commis- "sion or by the assignment." The judgment was accordingly rendered in favor of the opposants.

But it will be said that these opposants had a regular official capacity recognised by the English Statute. This is not what was decided by the judgment, on the contrary the Court held that the opposants had no official capacity in this country, but that under a voluntary assignment for the benefit of the creditors of the bankrupt, they might come in our Courts and claim the estate of the bankrupt.

It is difficult to follow the jurisprudence of that period when there were no judicial reports, but from personal recollection I can affirm that from the year 1840 to 1843 or 1844, the Hon. Joseph Masson and two others, as assignees of the estate of the late Joseph Toussaint Drolet, under a deed of voluntary assignment recovered some twenty or thirty judgments, and that in one of these cases the question was distinctly raised that the plaintiffs had no right to sue since they were only acting as agents and *mandataires*, and this objection was overruled by the Court, and judgment given in favor of the plaintiffs as assignees to the insolvent estate.

In 1848 the Court of Queen's Bench decided in the case of Mills *vs.* Philbia *et al.*, 3 Revue de Législation 355, that although the plaintiff had admitted on *faits et articles*, that he had no interest in the note sued upon, that he only held it for the purpose of collection, and that the money when collected would go to one Malo, still he was entitled to recover judgment.

Similar decisions had already been given by the Court of Appeals, the first on the 20th of July, 1821, in the case of Armour and Main, and the second on the 20th of January, 1838, in the case of Adam Ferrie and Alexander Thompson, 2 Revue de Législation 303.

These rulings were in accordance with the well-known rule of law that he who has an apparent title can enforce such title in the Courts of Justice as against every one except the real owner of the thing claimed, or as Troplong puts it in his *Traité du Mandat*, No. 43. "Ce dernier, le prêtenom, est revêtu d'un titre "apparent, qui lui donne dans ses rapports avec les tiers, tous les droits du pro- "priétaire. Il est, à leur égard, non pas un agent intermédiaire qui se meut "sous l'influence de la volunté d'autrui, mais un maître qui dispose de sa chose. "Sans doute entre les parties, celui dont le rôle a été réduit par une contre- "lettre à la simple-qualité de prête nom n'est pas autre chose qu'un mandataire."

We shall see shortly how important it is to keep this distinction in view, with reference to the present controversy.

We now come to the case of Chevalt and Dechantal and Thomas *et al.*, assignees, opposants, and Chevalt contesting the opposition, in which Mr. Justice Monk, in rejecting the opposition of the assignees, did so on the express ground that they were only *mandataires* and as such could not plead in their own name.

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This judgment was rendered on the 31st of May, 1861, when the Court was composed of a single Judge, and is reported in the 8 L. C. Jurist, page 85.

In the case of Starke *et al.*, and Henderson, which was an action by the Plaintiffs as assignees to an insolvent to revendicate a quantity of tobacco in the possession of the defendant, the latter expressly raised by demurrer the right of the plaintiffs to sue in their capacity of assignees, the Court, on the 4th of March 1863, over-ruled the demurrer and gave judgment in favor of the plaintiffs.

This judgment was confirmed in Appeal on the 9th of March, 1865, the Judges composing the Court being Chief Justice Duval, and JJ. Meredith, Mondelet and Badgley. Mr. Justice Badgley seems to have based his judgment on the fact that Henderson, the defendant, was a party to the deed of assignment, 9 L. C. Jurist, 238. If that reason was a good one in that case it must be equally valid in this present one, the respondent Burland being one of the creditors who signed the deed of assignment made to the appellant.

An attempt has been made to distinguish this last case from that of Chevalt and Dechantal and Thomas et al., on the supposed ground that in this last case the assignees were not creditors of the insolvent, while in the other case the assignment had been made to creditors. I am unable to apprehend the force of such a distinction. But were it well founded in law, in point of fact, the assignees were in both cases the creditors of the estate conveyed to them, but this fact did not appear by the pleadings in either case. The assignees proceeded in both cases in their capacity of assignees without any reference to their being creditors. If, therefore, the assignees had no capacity to institute proceedings except as creditors, it should have been expressly alleged in their declaration that they were such creditors, otherwise the demurrer should have been maintained instead of being dismissed.

There is another case in which the judgment emanating from the Court of Queen's Bench, in appeal, created some dismay among the members of the profession, and has since given rise to a good deal of confusion, I mean the case of Prevost et al., and Drolet—reported in the 18 L. C. Jurist., p. 300.

In this case the plaintiffs, alleging that they represented their late father, who as assignee and sequestre to the estate of the husband of the defendant, had sold to her the estate so assigned, sought to recover from the defendant the price of such sale. The defendant by demurrer maintained that the plaintiffs had no right of action, and by a plea to the merits she alleged that the whole price of sale had been paid.

Mr. Justice Beaudry, rejected the demurrer as unfounded in law, and holding that the plea of payment had been established he dismissed the action.

The case was taken to appeal and Mr. Justice Loranger, acting as assistant Judge, in rendering the judgment asserted broadly, as a proposition irrefutable, that a creditor who had been appointed assignee or *mandataire* of the other creditors, and who receives an assignment of his debtor's estate to distribute the proceeds in payment of his debtor's debts, has no *personal action*, to realise such property, and that the demurrer had been wrongly dismissed by the Court below. Whether the learned Judge meant that such assignee had personally no action, or merely that he had no action which he could transmit to his

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representatives, which is a totally different question (the action here was by the representatives of the assignee), does not clearly appear by the report of the case, if the former meaning is to be attached to his observations, the authorities which he has cited do not bear out his proposition, and they only very indirectly apply to the other question.

The views of the learned judge, whatever they may have been, were not concurred in by Mr. Justice Taschereau, Mr. Justice Ramsay and Mr. Justice Sanborn, who composed the majority of the Court, for the judgment in appeal merely confirms the judgment of the Court below, which, by rejecting the demurrer, had held the action to have been rightly brought, but dismissed it on the plea of payment, thus adding another judgment to that long list of precedents already cited, by which the right of assignees under a voluntary assignment of an insolvent estate to proceed in Courts of Justice for the recovery of the assets of the insolvent has been upheld.

I may here add that the report of this case is so imperfect that it has been generally assumed that the Court of Appeals had reversed the judgment, the original judgment, and decided unanimously that the assignee had no action against the debtors of the estate he represented, even upon a contract, to which he had been a party, but such is not the case, as I have had occasion to verify by referring to the register of this Court.

Under this unbroken chain of precedents going back as far as 1811, and interrupted by the single case of Chevalt and Deehantal and Thomas *et al.* (I am not unmindful of the decision in the Supreme Court in the case of Brown *et al.* and Pinsonnault to which I shall presently refer), it would seem unnecessary to inquire into the principles of law by which the Courts have been guided in arriving at such concurrent decisions during a period extending over nearly three-quarters of a century, for the jurisprudence of a country on any given case, when certain, is not only the best, but the sole authentic exposition of what the law is on the question.

But as this is an important case, and as the judgment of the Court below coupled with the strong dissent in this case, may add another disturbing element, and contribute to unsettle the views of the members of the profession on a most important question, it is well to state the rules of law which the majority of the Court has adopted as the basis of their judgment.

The rule that *the Sovereign alone can sue by Attorney* is not, in France, and was not here prior to the code, a rule of law, but a mere question of procedure founded upon usage. (Merlin, Rep. Verbo, Plaider par Procureur et Vo. Cit., Nos. 2, 3 et 4.) It is not a rule of public policy, and the nullity resulting from its violation must be invoked by the parties, and their omission to do so cannot be supplied by the Court. As a consequence, this nullity must be proposed in the Court of original jurisdiction. (Merlin, Vo. Cit., No. 4; Sirey, 1831,—1,—172. 1841,—1,—579. 1856,—1,—348. 1876,—1,—166.

In practice the rule was of a much more limited application than is generally supposed. It did not apply to Tutors, Curators, Executors, Administrators, Trustees, or *Fidéi commissaires*, to Assignees of an insolvent estate, to liquidators of a commercial co-partnership, nor to Factors, Commission Merchants (*Com-*

missionnaires), Consignees, Shipmasters, Guardians, Depositaries, Sequestrators, and other like agents acquiring an interest in the property intrusted to their care, to the extent of their responsibility to their principals, nor was it applicable to a party who, without fraud, acquired an apparent title to the rights which they sought to inforce, (*prête nom*). (Aubry and Rau, Vol. 8, § 768, pp. 133, 134, 135. Troplong, du mandat, Nos. 519, 520, 521, 523, etc. Idem, du dépot, Nos. 122, 123. Carré and Chauveau, Quest. 187, 188, 189 and 190 and notes. Mallette and Whyte, et al., 12 L. C. J. 239. Moisan and Roche, 4 Quebec Law Rep. 47. Gilbert and Coindet, 1 Legal News 42. Ferrie and Thompson, and Mills and Philbin, already cited. C. C. Art. 964.)

It has even been held that a mere agent could sue in his own name provided he did so as the duly authorised attorney of a named principal, (Carré and Chauveau, Quest. 189 and 190 and notes). Perrault, in his extracts des Registres de la Prévosté de Quebec, p. 59, cites a case which Henry Campeau was sued as fondé de pouvoir de Louis Campeau, son frère.

The rule is thereby reduced almost to a simple question of form.

In point of fact it was only applied to a mere agent, *nudus minister* (Troplong du Mandat, No. 545), suing in his own name without disclosing his principal.

By Art. 19 of the Code of Civil Procedure, it is declared that: "No person "can use the name of another to plead, except the Crown through its recognised "officers."

This is in a more cumbrous form than the old rule, "*Nul ne plaide par procureur si ce n'est le Roi.*" It is not given as new law, and the commissioners have informed us in their report, p. 10, that all the articles of the Chapter, in which this article is found, except Art. 2, are taken from the existing law, and they have indicated Loisel's Institute as the source of Art. 19. This article must therefore be interpreted as the old rule was. We have pointed out a number of cases to which that old rule did not apply.

Is the deed of transfer made to the appellant by Gebhardt & Co. of the whole of their estate, with the consent and for the benefit of their creditors, one of those cases?

Such a transaction gives them no right to claim the management of the estate, nor any authority to bring, in their own name, actions having reference to the assets and property of the estate.

On the other hand, the property claimed by the respondent has been sold and transferred to the appellant (these are the terms used in the deed), subject, it is true, to the conditions and trusts therein mentioned; but it cannot be said that these conditions affect the title of the respondent any more than if the sale had been absolute and the conditions inserted in a separate deed or *contre lettre* in which case the appellant would undoubtedly have the right to sue or be sued under such deed (Troplong du Mandat, No. 43. Aubry and Rau, vol. 8, §748, p. 134 and No. 11, Mills and Philbin already cited.)

In the second place, if the appellant is to be considered as the agent of either Gebhardt & Co., or of their creditors, or of both, his powers are irrevocable. He is not subject to the control or interference of those in whose interest he is acting, and as long as he fulfils his obligations he has the entire disposition and

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management of the property entrusted to him ; and, finally, by accepting the trust which is the object of the deed of the 13th of June, 1881, the appellant has assumed the obligation to account to Gebhardt & Co. and to their creditors for the proceeds of the property placed in his possession. In order to save his responsibility he has the greatest interest in protecting this property, as well against the attacks of trespassers as of third parties who may assert any claim to it in a Court of justice.

It is upon these grounds that voluntary assignments by insolvent debtors, for the benefit of their creditors, have always been considered, both in France and in this country, as conferring to the assignee's (cessionaires) the right to sue and be sued with reference to the assets and property assigned.

These voluntary agreements between debtors and creditors are expressly sanctioned by the Code of Civil Procedure, Art. 799 ; they are to be encouraged especially in the absence of any bankrupt law, and it is impossible to conceive how they could be carried out, except by giving to the assignees the fullest control over the property entrusted to them.

I now come to the case of Brown et al., and Pinsonneault (3 Supreme Court, Rep. 102). In this case Brown and others, as trustees for the creditors of one Steele, sued Pinsonneault, for an account of monies received for them. The defendant did not question the right of the plaintiffs to bring the action in their capacity of trustees, and by his plea, which is reproduced in the factum of Pinsonneault in appeal, he admitted they had a right to a portion of their claim, but contended that their demand as to that portion was premature, and that, as to the remainder, the contract on which it was founded had been dissolved. The judgment in the Court below was in favor of the plaintiffs. In appeal Pinsonneault by his factum raised the objection that the plaintiffs had no right to bring their action as trustees. This Court without taking any notice of this objection, which had not been raised in the Court below, reversed the judgment on the ground that the contract on which the action was brought had been dissolved by *force majeure*. The Supreme Court confirmed the judgment rendered in appeal for the reason therein assigned, and added, as another reason, that the appellants had no right to bring the action.

If the circumstances in the two cases were exactly the same, I think it would be our duty to apply to this case the rule laid down in the case of Brown et al., and Pisonneault, but I think there is a distinction to be made between the two cases, and I do not think that the Supreme Court by that judgment intended to extend the rule contained in Art. 19 of the C. of C. P., to any cases to which it did not apply before the Code.

If we are mistaken as to the effect of the ruling of the Supreme Court, there is still another ground on which the present action should have been dismissed, and it is this, that if the appellant had no right to urge the defects in the title of the respondent, then the action was wrongly brought, and the very moment the appellant disclosed how he had become in possession of the property sought to be recovered, it was the duty of the respondent to summon the creditors having an interest to urge their rights.

Merlin, Rep. Vo. Revendication, says:—"Si la chose n'appartient pas au "possesseur vous devez faire assigner son bailleur."

A. Moffatt es qual, and G. B. Burland

The parties more particularly interested in this case are the creditors of Gebhardt & Co.; and if the appellant has no capacity to plead to the action, the creditors should have been made parties to the suit. In order to call them in, the respondent whose name is the first in the list of creditors who signed the deed of assignment, would have had to sue himself to have it declared that the appellant, as his agent, unduly held possession of the property seized by him. This difficulty is avoided by considering the appellant as a party representing all the rights of Gebhardt & Co.

As the majority of the Court are of opinion that the decision in Brown et al. and Pinsonneault, ought not to be applied to this case, and that the deed of the 27th of April, 1880, was not intended as a real bona fide sale, but as a mere pledge or *gage*, which required actual possession to be available to the pledgee, who never obtained such possession, and as we are moreover of opinion that the appellant is entitled to urge these objections, we have come to the conclusion that the judgment of the Court below must be reversed.

Judgment reversed. (1)

Monk J., *dissentient*

Dunlop & Lyman, for appelant.

S. Bethune, Q.C., and *J Doutre, Q.C.*, Counsel.

Archibald & McCormick, for respondent.

CIRCUIT COURT, 1882.

WATERLOO, 13TH JUNE, 1882.

Coram BUCHANAN, J.

JOSEPH AUCLAIRE,

PETITIONER;

AND

HERMENEGILDE POIRIER,

RESPONDENT.

HELD:—1o. That the collection roll will be accepted as sufficient proof of the imposition and non-payment of taxes when no issue is raised by a specific plea as to the validity of the imposition of such taxes.

2o. That a scholar tax is a school tax within the meaning of art. 291 of the Municipal Code.

3o. That the payment of taxes due by an elector for the purpose of enabling him to vote on behalf of a candidate is a corrupt act.

4o. That under art. 361 of the Municipal Code a new election will be ordered when such corrupt acts are proved.

The petitioner sought to annul the election of respondent as Municipal Councillor of the Township of Roxton, to which office he had been declared elected by a majority of eight votes at the election held 7th January, 1882, on the ground that some 40 persons named in the petition, at trial voted for respondent without having paid their school or municipal taxes, and consequently were disqualified by art. 291 of the Municipal Code, whereby petitioner asked that said 40 names should be struck off and he be given the seat.

(1) This case was appealed to the Supreme Court and the judgment of the Court of Appeal reversed. Vide *Legal News*, Vol. viii. p. 147.

Jos. Auclaire and H. Poirier.

Respondent answered that the 40 voters attacked were legally qualified; that 23 persons, named in answer, had voted for petitioner without having the qualification required by art. 291 of the Municipal Code and should be struck off; that petitioner by himself and his agents had corruptly paid money and other considerations to voters to corruptly induce them to vote for him, and asked that petitioner be not declared elected.

At the enquête a motion was made to amend petition by adding new particulars disclosed by the evidence, but the motion was rejected without costs.

The petitioner established that 32 of the votes given in favor of respondent were null by reason of the non-payment of taxes by them which left him in a majority of 24 over respondent, and on the part of respondent it was proven that 11 persons had voted for petitioner whose taxes had been paid by friends of his to enable such votes to be given in his favor.

At the argument it was claimed by petitioner that the advancing of money to rate-payers to enable them to pay their taxes was not a corrupt act, inasmuch as it was shown that such advances were to be repaid, but that if those eleven votes were invalidated petitioner had still a legal majority of 13 votes, after the striking off of the 32 illegal votes given to respondent.

On behalf of respondent it was urged that the 32 votes could not be struck off, because it was not proven that the taxes had been legally imposed; that the collection roll was not sufficient proof of such imposition; that a scholar tax was not a school tax within the meaning of art. 291 of the Municipal Code, and, therefore, that respondent had a right to the office.

The material *moyens* of the judgment are as follows: considering that under the pleadings fyled herein by the respondent no issue was thereby raised by him as to the validity of the imposition of the scholar tax or monthly school fees, as to the non-payment thereof, the petitioner sought to invalidate the votes of 18 voters named in the petition as having voted illegally for the respondent, and such issue not having been raised in a specific and legal manner by the pleadings, the Court cannot here enquire into the same and cannot under the pleadings go behind the collection roll whereby the said scholar tax (being a school tax within the meaning of the class of taxes, the prepayment whereof is required by said article 192 to qualify a voter) appears to have been charged to and was unpaid by the said 18 voters when they so voted, by reason whereby the votes of these 18 persons cannot avail to the respondent, and must be annulled and set aside;

Considering that it results from the evidence herein that of the votes impugned by the petitioner 32 are null, to wit (names omitted) by reason of the non-payment by such voters of the municipal and school taxes then due by them and are set aside, and the number of votes cast for the respondent must therefore be reduced *pro tanto*, and that even if the eleven votes for petitioner attacked by the respondent (the objections to the others beyond these votes having been abandoned) were allowed to the respondent, yet the majority would still be in favor of the petitioner, to the extent of 13 votes, and, consequently, the respondent was in an absolute minority at said poll, and should not have been declared elected;

Considering by reason of the premises that respondent was not legally elected as such Councillor, and his election as such was and is null, doth annul and set aside the same, and seeing that it is proved that the petitioner by his agents was guilty of corruption thereat, in that such agents, with the knowledge and consent of petitioner, corruptly paid the municipal and school taxes of divers voters, to the end that they might be enabled to vote and did vote for the petitioner, doth, in annulling said election as aforesaid, declare the petitioner, for the reasons aforesaid, not entitled to be declared elected, and doth reject and refuse that portion of the conclusions of his petition, to that effect; and seeing the provisions of Art. 361 of the Municipal Code which apply to the present case, doth order a new election of Councillor, etc.

Jos. Auclaire and H. Poirier.

J. P. Noyes, for petitioner.

A. O. T. Beauchemin, for respondent.

COUR DE RÉVISION, 1879.

MONTRÉAL, 29 NOVEMBRE 1879.

Présents: Les Honorables Juges SICOTTE, JOHNSON et LAFRAMBOISE.

HERLINE KARCH,

DEMANDERESSE;

vs.

PIERRE LEMAIRE DIT ST. GERMAIN,

DÉFENDEUR.

Jugé:—Qu'une personne entrée chez une autre sous la promesse d'être considérée comme de la famille et d'être indemnisée, et non comme domestique, à raison d'un salaire fixe et payable périodiquement n'est pas soumise à la courte prescription des articles 2261 ou 2262 C. C.;

Que la prescription portée dans ces articles n'est établie que contre les créances existantes et déterminées, et qu'elle ne court à l'égard d'une créance qui dépend d'une condition que lorsque la condition arrive (art. 2236 C. C.)

Le jugement de la Cour Supérieure (Jetté, J.) explique suffisamment les faits de la cause. Il se lit comme suit:

La Cour, etc.

Considérant que vers le 1 décembre 1873, la demanderesse est entrée au service du défendeur en qualité de gouvernante, pour tenir la maison du dit défendeur âgé, veuf et n'ayant personne pour prendre soin de lui et de son petit-fils, enfant de trois ans resté à sa charge;

Considérant que vu les rapports de parenté existant entre le défendeur et la demanderesse, celle-ci étant sa nièce, il n'a pas été fait alors entre ces parties aucune stipulation ou convention d'un salaire quelconque pour les services de la dite demanderesse, et que le défendeur lui a simplement promis de la garder toujours avec lui et de lui assurer une partie de ses biens;

Considérant que la demanderesse est ensuite restée chez le dit défendeur jusque vers la fin d'octobre 1878, c'est-à-dire pendant quatre ans et dix mois, et que la demanderesse a pendant tout ce temp fidèlement rempli les devoirs qui lui incombaient, et ce à la satisfaction du défendeur lui-même;

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Considérant que pendant cette période le défendeur a rempli une partie de ses obligations envers la demanderesse en lui donnant sa nourriture, son entretien et même de l'argent, les parties n'ont cependant pu s'entendre sur la manière d'assurer à la demanderesse la revendication principale sur laquelle elle était en droit de compter, savoir la transmission a la dite demanderesse d'une partie des biens du dit demandeur, et que vu ce désaccord les dites parties ont mis fin à l'entente existant entre elles, et la demanderesse a laissé le service du défendeur ;

Considérant que la demanderesse, vu les faits ci-dessus, réclame maintenant du défendeur la valeur des services qu'elle lui a rendus pendant les quatre ans et dix mois sus-mentionnés, lesquels services elle estime a dix dollars par mois, formant une somme totale de $580, à compte de laquelle elle reconnait avoir reçu $250 laissant une balance de $330 seulement pour laquelle est portée la présente action ;

Considérant que le défendeur entre autres défenses oppose a cette action une défense en droit et une seconde exception fondée sur la prescription d'un an et celle de deux ans établie par les articles 2262 et 2261 du C. C., contre les réclamations pour gages et salaires des domestiques et des personnes non réputées domestiques ;

Considérant que les dites prescription ne sont établies que contre les créances existantes et déterminées, et que dans l'espèce la demanderesse tant qu'elle est restée chez le défendeur n'avait aucune telle créance, mais uniquement la simple espérance d'un droit futur, ou tout au plus conditionnel dans les biens du défendeur, et que par suite, aux termes de l'article 2236 du C. C., la prescription invoquée n'a pu commencer à courir qu'à compter du mois d'octobre dernier, époque où par le fait des parties, l'obligation du défendeur s'est transformée en faveur de la demanderesse en une réclamation pour valeur de ses services ;

Considérant en conséquence que l'action de la demanderesse a été intentée en temps utile et avant toute prescription ;

Renvoie la défense en droit et la seconde exception du défendeur à l'action de la demanderesse en cette cause ;

Et procédant à adjuger sur le mérite de la demande tel que constaté par la première exception et la défense en fait du défendeur ;

Considérant que la demanderesse a prouvé que la valeur des services par elle rendus au défendeur pendant la période sus-mentionnée, est, vu la condition du dit défendeur, d'une somme de $7 par mois seulement, ce qui pour les quatre ans et dix mois formme une somme totale de $406, à compte de laquelle la demanderesse a reçu celle de $250, laissant une balance de $156 que la demanderesse a le droit de réclamer ;

Renvoie la dite première exception et la défense en fait du dit défendeur, et condamne ce dernier a payer à la demanderesse la dite somme de $156, avec intérêt a compter du 2 novembre 1878, date de l'assignation et les dépens distrait a Messieurs Lareau & Lebeuf, avocats de la demanderesse.

Le défendeur appela de ce jugement à la Cour de Révision.

Voici les remarques de son Honneur le Juge Sicotte :

Il s'agit ici d'une question de salaire et de prescription. Les rapports entre les parties sont admis et présentés de la même manière par chacune d'elles.

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D'après les défenses, la demanderesse aurait été accueillie chez le défendeur comme l'enfant de la maison et traitée comme tel. Ainsi qu'allégué dans l'action, le défendeur dans sa déposition constate que la demanderesse, sa nièce, est venue chez lui, à sa demande, pour prendre l'administration intérieure de sa maison et le soin de son enfant âgé de deux ans, et qu'il lui promit une indemnité convenable ; il admet qu'il lui a parlé à différentes reprises de son intention de lui faire des avantages de succession et des dons entre-vifs, pour l'indemniser amplement de ses services.

Le défendeur avoue dans son témoignage, que la demanderesse lui a donné parfaite satisfaction. Cette déclaration est tout à fait contradictoire des accusation injurieuses et acrimonieuses qu'on fit dans les défenses.

Il est donc constaté que la demanderesse n'est pas entrée chez le défendeur comme domestique, ni à raison d'un salaire fixe et payable périodiquement, au mois ou à l'année, ni pour un temps déterminé ; mais sous la promesse d'être considérée comme de la famille, et d'être amplement indemnisée. Le fait qu'elle est restée chez le défendeur quatre ans et dix mois, sans qu'il fût question de salaire, de mois ou d'années, constate explicitement que les choses sont bien telles qu'il est expliqué dans l'action.

Aucune des courtes prescriptions de notre Code n'est applicable aux faits et circonstances de la demande.

La défense est incertaine, quant à la prescription qui est applicable, et probablement à raison de ce doute, la prescription n'a pas été réellement plaidée. Tout ce que la défense allègue, c'est que si la demanderesse a droit à un salaire, tel salaire serait prescriptible par un an comme domestique, ou par deux ans comme employé non domestique ; partant que la somme de $250 que la demanderesse reconnait avoir reçue, est plus que suffisante pour couvrir cette année ou ces deux années de salaire. Toutefois cela ne préjudicierait pas à la défense, si l'action est déniée soit par l'article 2261, soit par l'article 2262.

Il y avait dans l'arrangement entre les parties deux conditions : 1o. Promesse définie d'accorder une indemnité convenable pour les devoirs et la responsabilité assumés par la demanderesse ; 2o. Promesse d'avantages de succession sans date certaine pour les réaliser. Il découlait de ces promesses que l'indemnité comme date fixe et déterminée, ne devenait exigible que lorsqu'il y aurait refus de l'obligé, d'exécuter la convention. Le droit de réclamer toute l'indemnité était subordonné à cette condition suspensive.

Si le défendeur eut opposé à l'action sa disposition à exécuter sa promesse, en rapportant donation au profit de la demanderesse des avantages de succession ou dons entre-vifs promis, il eut obtenu le débouté de la demande, si ces avantages étaient déclarés suffisants.

La somme allouée par le jugement est justifiée par les faits de la cause et de la preuve.

D'après l'exposé des faits qu'on lit dans la défense, la prescription qu'elle pouvait invoquer serait celle de deux ans.

La prescription commence après l'échéance de chaque terme de paiement, et, s'il n'y a pas de preuve du contraire, les paiements sont présumés avoir été faits

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à l'échéance convenue. Le défendeur est mal fondé dans le calcul qu'il fait, comme dans l'application du cours de la prescription. Il n'y a rien à changer au jugement.

Jugement confirmé.

Lareau & Lebeuf, avocats de la demanderesse.
Doutre, Doutre & Branchaud, avocats du défendeur.

COURT OF QUEEN'S BENCH.

MONTREAL, 21st FEBRUARY, 1884.

Present:—DORION, C. J., MONK, TESSIER, CROSS, BABY, J. J.

ELIJAH ADAM MORSE,
(*Plaintiff in the Court below*),
APPELLANT;

AND

CHARLES MARTIN,
(*Defendant in the Court below*),
RESPONDENT;

AND

DAME BERTHA HERK,
Respondent par Reprise d'Instance.

Trade-Mark—Registration—Infringement.

The plaintiff, a citizen of the United States, had, since the year 1865, under the firm name of "Morse Bros.," been manufacturing and selling stove polish, and in order to secure a trade-mark by which the said goods might be known, the said stove polish was put up in small, oblong, cubical blocks, enclosed in a wrapper of red paper, on which was printed a vignette or picture of an orb rising above a body of water, and across the picture the printed words, "The Rising Sun Stove Polish." The plaintiff registered the above trade-mark in Canada on the 20th December, 1879, in accordance with the requirement of the "Trade Mark and Design Act of 1879."

The plaintiff claimed that the defendant had fraudulently imitated and infringed the said trade-mark and he prayed for damages of $5,000 and an injunction against further infringement. It appeared that the defendant had been manufacturing and selling in Canada stove polish containing the picture of an orb, with the words "Sunbeam Stove Polish" in place of "The Rising Sun Stove Polish" in the plaintiff's trade mark. The defendant also used yellow wrappers in place of the defendant's red ones, and the shape of the defendant's packages was various, in place of the plaintiff's oblong cubical blocks.

The defendant demurred to the action, principally on the ground that there was no allegation of infringement, subsequent to the registration of plaintiff's trade-mark in 1879. Defendant also pleaded that the marks used by him were not similar to plaintiff's trade-mark, and were not of a nature to deceive the public, and that, moreover, he, defendant, had enregistered the marks used by him as his trade-mark in October, 1876, nearly three years before the enregistration

of plaintiff's trade-mark, but the trade-mark so enregistered did not include any device resembling sunbeams or rays, as did the plaintiff's; but in 1877 the defendant put an indication of sunbeams upon his labels and upon his boxes containing packages of stove polish.

Appellant contended:

That respondent wilfully put a device, knowing it was part of appellant's trade-mark.

He admitted that the size and general appearance of the packages containing the appellant's and respondent's stove polish are different, but what the appellant complained of was the adoption by the respondent of a part of his trade-mark, and the appellant submitted that it was sufficient to maintain the present action that the respondent should wilfully have used a part of the trade-mark of the appellant, that part so used by the user of it, calculated to enable the respondent's goods to be passed of for the goods of the appellant.

The following are appellant's authorities:

Lord J. James, in Orr & Ewing *et al. vs.* Johnston *et al.*, p. 8 of special report.

Bagallay, L. J., p. 10.

Cotton, L. J., p. 17.

Henderson *vs.* Torss Seton, 4th ed., 236, Sebastian Dig. Trade Marks, No. 198.

Moses *vs.* Surgood *et al.*, Sebastian Dig. Trade Marks, No. 636.

Tilley *vs.* Fassett, Cox, 530.

Morse *vs.* Mewall, 9 Am. R., 318.

Amoskeag Mfg. Co. *vs.* Spear, R. Cox, 87.

When a trade-mark has been used by one person for a number of years, and another begins to use the same trade mark, or a part of it, that can only be with a fraudulent intent.

Wood, V. C. The Collins Co. *vs.* Brown, 30 L. T. 62.

Taylor *vs.* Taylor, 22 L. T. 271.

The *onus* of proving that the taking of a substantial part of appellant's trade-mark did not deceive purchasers was thrown, by the taking itself, upon the defendant.

Orr, Ewing *et al. vs.* Johnston, 27 W. R. pp. 580–1, per Fry, J.

It is proved in this case that, previous to the institution of the suit, the appellant wrote to the respondent, drawing his attention to the fact that this device of the Rising Sun upon the packages was an infringement of his, the appellant's rights, and therefore the respondent wrote in answer, offering to cease using the said device upon receiving $5,000, and that he still continued to use the same after such correspondence. This continuance in use, after complaint, constitutes strong evidence of fraud, in fact, is sufficient evidence thereof.

Orr, Ewing *et al. vs.* Johnston, special report, p. 9.

The point raised upon the defendant's demurrer, although not decided in the judgment in appeal, formed the basis of the judgment in the Superior Court. It was founded upon the operation of 42 Vic cap 22 sec. 4, and was stated and argued by plaintiff as follows:

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That non-registration of a trade-mark within the delay limited (between the 15th May, and the 1st July, 1879) has the effect of depriving the original owner of the trade mark from ever proceeding against a person who after the 1st July, and before the owner registers his trade-mark, makes use of such trade-mark; that by such infringement such third person acquires such a right in the trade-mark as will deprive the original owner, even after registration, of ever proceeding against such person infringing.

The wording of the section of the statute is as follows: "From and after the 1st July, 1879, no person shall be entitled to institute any proceedings to prevent the infringement of any trade-mark, until and unless such trade-mark is registered in pursuance of this Act—provided always that actions may be instituted as heretofore against persons fraudulently marking merchandise in accordance with the Act 35 Vict. cap. 32 intituled "an Act to amend the law relating to the fraudulent marking of merchandise, even in the absence of registration."

It is thus evident that without any registration under 42 Vict. cap. 22 § 4, all the remedies possessed by parties previous to the passing of that statute under 35 Vict. c. 32, insure to their benefit without registration under the first mentioned Act.

By the 1o. section of 35 Vict. c. 32 the Act was made applicable to all persons, whether aliens or subjects, etd., etc., and to all trade-marks, whether registered or unregistered, thus recognizing the common law rule, that aliens' marks are protected in English Courts in precisely the same manner as if they belonged to British subjects.

Sebastian on Trade-Marks, pp. 11 and 48, and cases cited (1o. Ed.)

Under the 35 Vict., c. 32, ss. 2-10, make offences of the different acts by which an infringement of a trade-mark may be committed, and it is submitted that every variety of infringement has been therein provided for.

But by making the doing of an act an offence—the act is thereby declared to be illegal, and as a general rule no right of property can be thereby acquired by the wrong-doer as against the proprietor, in the thing with respect to which the wrong-doing has been committed.

Thus a thief does not acquire any right of property in the thing stolen as against the proprietor from whom he stole it.

Wilberforce on Stat., pp. 69, 70, 71.

The jurisdiction given to the Court in trade-marks rests upon property—and the violation of a trade-mark is as much a violation of a right of property as the violation of any other kind of property.

Per Lord Westbury, Leather Cloth Co.'s Case, 33 L. J. ch. 199.

Sebastian on Trade-Marks 1st Ed. pp. 104, 105, 106.

Johnston & Ewing L. R. 7, App. Cas. p 222.

By 35 Vict. c. 32, s. 11, it is provided that the provisions of the Act as to criminal remedies shall not effect the civil remedies of the party injured, and S. 22 expressly gives a right of action for damages and perpetual injunction to the party injured.

Under these circumstances it would appear to be clear that the intention of

Parliament as expressed in the 42 Vict. c. 22, s. 4, was not to legalize the piracy of a trade-mark even when not registered, and thereby to grant a right of property to any one using the same in the interval between the 1st July 1879, and the date of registration, sufficient to defeat the remedies of the proprietor against the wrong-doer forever, and giving such wrong-doer the same right of use of the trade-mark as that possessed by the true owner.

Upon this point the judgment of JOHNSON, J., in the Superior Court was as follows:

"Considering, that it sufficiently appears from the allegations of the parties, and from the proof of record, that the plaintiff only registered his trade-mark in this country on the twentieth day of December, eighteen hundred and seventy-nine, and that the defendant registered his trade-mark in October, eighteen hundred and seventy-six;

"Considering, that by law, to wit, the Statute 42nd Vic. cap. 22, it is enacted in the fourth section, that from and after the first of July, eighteen hundred and seventy-nine: "No person shall be entitled to institute any proceeding to prevent the infringement of any trade-mark until and unless such "trade-mark is registered in pursuance of this Act;"

"Considering, therefore, that although under the law, as it stood prior to the passing of the [illegible]42 Vic., cap. 22, the plaintiff might have had a right of action against [illegible]efendant for the unlawful and fraudulent use of his trade-mark, he, the plaintiff, then being an alien, and not having registered his trade-mark in this country, yet since the passing of the said Statute, such right has ceased, and the plaintiff can only now sue according to the requirements of the said Act;

"Considering, that the present action and the rights claimed thereby are subordinated to the said Statute 42 Vic., cap. 22, and that the plaintiff does not show that his trade-mark has been infringed since the twentieth day of December, eighteen hundred and seventy-nine, but, on the contrary, it is evident from the proof of record that the defendant registered the trade-mark complained of in October, eighteen hundred and seventy-six, and had therefore a right to use it.

The judgment in appeal went upon the ground that the facts above set forth did not constitute infringement, inasmuch as it was not shown that the respondent Martin had used the plaintiff's trade-mark or any fraudulent imitation thereof.

Kerr & Carter, attorneys for plaintiff.

Robertson, Ritchie & Fleet, attorneys for respondent.

PRIVY COUNCIL, 1884.

LONDON, APRIL 7, 1884.

Before LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT COLLIER, SIR RICHARD COUCH, SIR ARTHUR HOBHOUSE.

CALDWELL,

APPELLANT;

AND

McLAREN,

RESPONDENT.

Stream floatable in part—C. S. U. C., cap. 48—Right of using improvements.

The intention of the legislature in enacting C. S. U. C., cap. 48, sec. 15 (12 Vict. cap. 87, sec. 8), was to give to owners of higher lands the right of floating timber down all streams which were naturally floatable for some portions of their course, though at certain points obstructions existed which were only overcome by improvements effected by the owner of the land on either side at his own cost.

Judgment of Supreme Court of Canada (5 L. N. 393) reversed.

PER CURIAM.—In this case the now respondent, as plaintiff, filed in the Court of Chancery, Ontario, on the 4th May, 1880, a bill of complaint, and appellants, as defendants, filed an answer on the 11th August, 1880. Issues of fact were raised, and evidence was heard at great length before Vice-Chancellor Proudfoot, who, on the 16th December, 1880, pronounced this judgment:

"1. This Court doth declare that those portions of the three streams referred to in the plaintiff's bill of complaint, where they pass through the lands of the plaintiff, described in the said bill, when in a state of nature were not navigable or floatable for saw-logs and other timber rafts and crafts, down the same, and doth order and decree the same accordingly;

"2. And this Court doth further declare that the plaintiff is entitled to the user of those portions of the said streams where they pass and flow through the lands of the plaintiff in the said bill of complaint described, and to the improvements thereon, freed from the interruption, molestation, or interference of the defendants or either of them, or their or either of their servants, workmen, or agents, and doth further declare that the defendants have no right to the user of such parts of the said streams for the purpose of driving timber and saw-logs, and doth order and decree the same accordingly;

"3. And this Court doth further order and decree that a writ of injunction be awarded to the plaintiff, perpetually restraining the defendants, their servants, workmen and agents from interfering with the plaintiff's user of the said streams where they pass through the lands of the plaintiff, described in the said bill, and of the improvements erected on the said streams, and restraining the defendants from using such parts of the said streams and the said improvements for the purpose of driving their timber and saw-logs."

This decree was brought by appeal before the Court of Appeal of Ontario, and, on the 8th July, 1881,—

"It was ordered and adjudged by the said Court that the said appeal should

be, and the same was allowed without costs; and that the bill of complaint of the said Peter McLaren, in the Court below, be, and the same is hereby dismissed without costs except in so far as the costs of the appellants (the defendants in the Court below) have been increased by reason of the motion for an interlocutory injunction, and except their costs of appeal to this Court from the order granting such interlocutory injunction and as to such excess and costs of appeal, the same are to be paid by the respondent to the appellants forthwith, after taxation thereof."

This order was brought by appeal before the Supreme Court of Canada, and, on the 28th November, 1882, it was ordered by that Court,—

"That the said appeal should be, and the same was allowed, that the said order of the Court of Appeal for Ontario should be and the same was reversed, and that the decree of the Court of Chancery of Ontario, dated the 16th day of December, 1880, should be and the same was affirmed.

"And this Court did further order and adjudge that the said respondents should pay to the said appellant the costs incurred by the said appellant, as well in the said Court of Appeal for Ontario as in this Court."

It is from this last order that the present appeal is brought.

There are some things not now in controversy, which it is better to state before examining the allegations in the bill and answer.

The waters which drain from a considerable tract in Upper Canada collect so as to form a river called the Mississippi, which flows down to and into the River Ottawa. There is no controversy as to the Mississippi below a point in the township of Dalhousie called High Falls.

The lie of the country above that point is shown by a map (Exhibit G) prepared by the plaintiff below (now respondent), and adopted and used on the argument here by the appellants (defendants below).

The waters which flow over High Falls have their origin in a district of considerable dimensions, now divided into several townships. The upper part of this district does not appear to be very steep, though on some of the creeks in it there appear to be rapids. The creeks, at places widening into lakes, finally converge into Cross Lake, in the township of Palmerston. Thence the waters flow in what must be a considerable body of water down a steep and rocky country; and this continues to be the character of the country for some miles. The body of water flowing down this passes over a succession of rapids and waterfalls. The waterfall which is lowest down is High Falls; below that there is no controversy that the Mississippi is floatable.

All this country was till within the last forty or fifty years in a state of nature, and belonged to the Crown. It was covered with timber, and the waters flowed as the force of gravity directed them.

And now it is convenient to examine the allegations in the bill and answer.

The bill of complaint of the plaintiff was filed on the 4th May, 1880, in the Court of Chancery, Ontario. It states that the plaintiff is a timber dealer, having his principal saw-mill at Carleton Place, a village on the Mississippi, a considerable distance down below High Falls. The defendants also are timber dealers, having their principal saw-mill also at Carleton Place.

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Both the plaintiff and the defendant have taken from the Crown growing timber on the lands which form the upper townships, the waters from which flow over High Falls.

The bill states that the plaintiff is owner in fee simple of several lots of land. He derives his title from grants by the Crown, some to himself and some to persons from whom he claims by mesne conveyances.

The dates of those grants are all given in the bill; the earliest grant in point of date is one of the 3rd of August, 1853, to one Skead, of lands at High Falls, and the latest in date is one of 18th September, 1879, to the plaintiff himself, of lands on one of the creeks above Cross Lake. It is not unimportant to remark that all the grants under which the plaintiff claims are subsequent in date to the Act of 1849.

The bill then contains these statements:—

"8. The plaintiff is also the owner of large tracts of timber land in the aforesaid townships and along the banks and in the vicinity of the said streams, and he has for many years past been using, and is now using, and expects for many years to come and until the timber on the said land so owned by the plaintiff has become exhausted, to continue to use the said streams for the purpose of driving or floating down his timber and logs to his mill at Carleton Place aforesaid.

"9. The said streams were not navigable streams nor floatable for logs and timber during the time the said lands were vested in the Crown, not until after the time when the improvements hereinafter referred to were made on the said streams, and when they were in their natural and unimproved state the said streams would not, even during the freshets, permit of saw logs or timber being floated down the same, but, on the contrary, were quite useless for that purpose.

"10. The plaintiff is entitled, both as riparian proprietor and as owner in fee simple of the bed of the said streams, where they pass and flow through the said lots, respectively, to the absolute, exclusive, and uninterrupted user of the said streams for all purposes not forbidden by law, and amongst other purposes to the absolute and exclusive right to the user of the same for the purposes of floating or driving saw logs and timber down the same.

"11. The plaintiff has for many years been engaged in the business of lumbering in the said county of Lanark, and at other places throughout this Province, and more particularly in the timber region along the banks and in the vicinity of the said streams; and in order to get to his mill at Carleton Place aforesaid, and to market the timber and saw logs cut in that region, the plaintiff and various other persons and firms, the whole of whose rights and interests therein and thereto have been acquired by purchase by the plaintiff, have expended a large amount of money, to wit, not less than one hundred and fifty thousand dollars, not only where the said streams run and flow through the lots above described, but at various other parts thereof, over a length of about fifteen miles on the said 'Buckshot Creek,' and a length of about fifty miles on the said 'Louse Creek,' and main branch of the Mississippi, in improving the said streams, by deepening the same by clearing out therefrom stumps, trees, and

débris of all kinds, by erecting dams, slides, and other erections and improvements wherever necessary on the said streams, and occasioned by the existence of rapids, falls, and shallows in the course thereof; and by reason of such expenditure the said streams have become navigable for saw logs and timber which, with the aid of such dams, slides, and other erections, may now be floated down the said streams during the time of freshets, which occur chiefly in the spring of the year.

"12. On the various parts of the said streams which run and flow through the said lands hereinbefore described, the plaintiff and those through whom he claims the said lands have expended a large amount of money in making certain specific and very valuable improvements, that is to say:"

(The description of the improvement at High Falls may serve as a sample):—

"On the said parcel of land, being the front half of lot number fourteen in the first concession of the township of Sherbrooke North, the plaintiff, and those through whom he claims the said parcel of land at a place called 'High Falls', a portion of the said Mississippi River, which runs through the said lot, having erected a dam across the said Mississippi, where there is a fall of about seventy feet from an island in the centre of the said stream to the south shore thereof, and also a dam between the said island and the north shore thereof, and the said plaintiff, or those through whom he claims, that is to say, the said Skead and Gilmour, or one of them, has formed an artificial stream, consisting of a cutting through rock and earth, and a slide connecting the lake or pond above the said High Falls, on an extension of the said Mississippi River, with the lake or pond below the said falls, which said cutting also passes through the afore-mentioned lot in the township of Dalhousie, the effect of the building of the said dams at the entrance of the 'High Falls' being to raise the level of the waters in the said pond or lake above the same, and to form a stream in the said cutting or artificial stream as aforesaid made through the said lot fourteen and the said lot in Dalhousie, and thus rendering the same capable of floating saw logs and timber down the same.

"31. The defendants being engaged in their business as herein before alleged, have recently got out of the woods in the said township of Abinger a large quantity of saw logs, to wit, about 9,000 saw logs, the whole of which is now lying in or being driven by the defendants down the said Buckshot Creek, and they commenced to enter the said improvements on Buckshot Creek on the twenty-seventh day of April, one thousand eight hundred and eighty, and they have taken them over the improvements hereinbefore particularly referred to, and made as aforesaid on lot one in the third concession of Abinger aforesaid, and they are now driving them down the said Buckshot Creek with the intention of taking, and they threaten and intend to take them over the other herein-before described improvements made as aforesaid on the said Buckshot Creek, and down through the main branch of the said Mississippi, and will do so unless restrained by the order and injunction of this Honorable Court.

"32. The defendants are also taking a quantity of saw logs, about ten thousand in number, down the said Louse Creek, and through the said lands belonging to the plaintiff in the township of Denbigh, and thence down the said

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stream, and to do this the defendants threaten and intend to avail themselves, and unless restrained by this Honorable Court they will avail themselves, of the said improvements made by the plaintiff and those under whom he claims, and, in so floating and running the said timber and saw logs down the three said streams, the defendants are interfering with and obstructing the plaintiff and his employees in floating and running down the plaintiff's timber and saw logs, to the great damage and injury of the plaintiff, and to the damage and injury of the said improvements.

"33. The defendants, in so floating and running their timber and saw logs down the said streams, are wrongfully and forcibly, and without right or color of right, making use of the improvements made by the plaintiff and those under whom he claims, and to which, for the reason aforesaid, the plaintiff is entitled to the exclusive and uninterrupted user.

"37. The plaintiff further shows that the defendants have made use of the said streams and the improvements thereon without any authority or license from the plaintiff, and well knowing, as the facts are, that the plaintiff was owner of such improvements, and that owing to the said improvements, all of which have been made by the said plaintiff or those through whom he claims, the said streams have become useful for the purpose of floating down saw logs and timber, and that before the said improvements were made, and when the streams were in a state of nature, they would not permit of timber and saw logs being floated down the same even during freshets, yet the defendants have never paid to the plaintiff any compensation for the user of the said streams and improvements, and the plaintiff submits that the defendants are liable to pay him compensation therefor, and that this Honorable Court should direct an account to be taken of the amount of compensation which the defendants should pay, and that the defendants should be ordered to pay the same to plaintiff when so ascertained."

The following are the more material parts of defendants' answer:—

"We are the owners of certain timber limits situated in the townships of Abinger and Denbigh, in the county of Addington, for the purchase of which we paid a very large sum of money.

"The said limits were originally the property of the Crown, and were sold by the Crown Lands Departments to one Skead, and we claim title thereto, through the said purchaser, from the Department.

"Our object in purchasing the said limits was to obtain a supply of timber and saw logs for our mills at Carleton Place, and we would not have purchased and paid the price we did for them for any other purpose or object.

"Timber and saw-logs cut and manufactured upon the said limits can only be brought to our saw-mills by means of the Mississippi River, and Buckshot and Louse Creeks, mentioned in the plaintiff's bill, form the only outlets by which the said timber and saw logs from our said limits can be carried to the said Mississippi River.

"We deny the allegations contained in the 9th and 10th paragraphs of the said bill, and, on the contrary, we say that we are informed and believe, and charge the fact to be, that the said Mississippi River and Buckshot and Louse

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Creeks are all streams which are navigable or floatable for timber and saw logs within the meaning of the statutes in that behalf, and we claim the benefit of the said statutes.

"We deny that the alleged improvements upon the same streams, claimed by the plaintiff, confer upon him the rights he claims against us by his said bill, but we have nevertheless been always ready and willing, and before the commencement of the suit we offered the plaintiff, to pay him any proper sum for the use of any of said improvements, or any loss or damage that he might fairly claim to be put to by reason of the passage of our said timber and logs over the said improvements, and we offered to submit the question of the amount we should pay to arbitration, but the plaintiff would not accede to any of our offers."

STRONG, J., began his judgment by saying:

"The finding of the learned Judge before whom this case was tried, that those parts of the River Missippi and of Louse and Buckshot Creeks, at which the appellant has constructed his improvements, were not originally and in their natural state capable of being used, even in times of freshets, for the transportation of saw logs or timber, was not on the argument of this appeal demonstrated to be erroneous, and a careful perusal of the evidence has led me to the conclusion that an attempt to impugn that finding would have been hopeless, even if we could have entirely disregarded the rule so often laid down in this Court, that the finding of the Judge before whom the witnesses were examined is, in the case of contradictory evidence, entitled to the strongest possible presumption in its favor. We must, therefore, assume the facts to be as they are stated in the first declaration with which the decree under appeal is prefaced, namely,—

"That those portions of the three streams referred to in the plaintiff's bill of complaint, where they pass through the lands of the plaintiff, when in a state of nature were not navigable or floatable for saw logs and other timber rafts and crafts down the same.

"The appellant's title to the lands upon which he has made the improvements in question, including the beds of the respective streams, was not seriously disputed, and has been established by the production of his title deeds. The question for this Court to determine is, therefore, purely one of law."

To this their Lordships agree. The respondent cannot now contend that timber could not be practically floated down those portions of the streams whilst in a state of nature, though not so well or so profitable as after the improvements were made; but the Vice-Chancellor cannot be understood to find that it was impossible to float any timber at all, over High Falls for instance. In an affidavit used by the plaintiff for the purpose of obtaining an interim injunction, Mr. T. Skead says:—

"I purchased High Falls, in their thirteenth paragraph in the bill referred to, from the plaintiff's father, and built the dam and slides there; and about the year of our Lord 1849, I took John Allan Snow, a surveyor, with me and surveyed the whole line of the river from High Falls to Cross Lake, and he and I then drew a plan of the improvements which we thought necessary to make the

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river navigable and floatable for timber and saw logs, which said improvement was substantially carried out by Messrs. Gilmour & Co.; who purchased from me the lands and limits bordering on this portion of the said Mississippi.

"Before the improvements at High Falls, a Mr. Playfair, during the highest freshets, used to run a few hundred logs over the falls, but they were so injured and damaged in their transit thereover, that he told me he would have to give it up. I had not made the slide hereinbefore referred to."

The finding of the Vice-Chancellor must be understood as meaning only that in a commercial sense it could not be done; the timber being so difficult to guide over the falls and so liable to be injured that no one can profitably do it, and consequently no one would do it. And it must be taken, as admitted, that at many places above High Falls, and for considerable distances, timber could be floated along the streams. Obviously this must have been the case wherever the streams expanded into lakes.

So understanding the finding, the question, which through raised as to many places may most conveniently be dealt with as if it related to one only, seems to be this.

The waters have formed a stream or river, which for many miles is capable of floating logs and timber, at least during freshets, down towards a market, but at a part of it where the soil on both sides of the stream belongs to the plaintiff, there is a natural obstacle such as a rapid and waterfall which renders it impracticable in any commercial sense to float timber down the stream at that part.

The plaintiff, or those through whom he claims, have made improvements, consisting substantially of dams above the waterfall to keep the water back, so as to make the rapid deeper and slower, and made slides over the top of the dam and down to below the falls, so that timber can by means of these slides be carried safely over the waterfall. The defendant proposes to bring the timber from the part of the stream above the obstacle by means of these improvements. He does not claim to do this by any common law right, but by virtue of certain statutes of Upper Canada. And it cannot be disputed that the Legislature had full power to confer such a right; whether they have done so or not must depend on the construction of the statutes.

The defendant has always been ready and willing to pay for the use of the improvements; that is obviously fair and just, but it is not pretended that the statutes provide in terms that if he uses such improvements he shall pay for them. Had either of them done so, the intention of the Legislature to authorize him to pass over the obstacle by means of the improvement would have been quite clear. The absence of any such provision is strongly relied on as showing that the Legislature did not so intend.

The plaintiff relies on his common law right, as owner of the soil, to prevent any one from using his soil in any way which he does not choose to allow, unless, by statute, that right is abridged, as it may be.

There has been a considerable diversity of opinion amongst the Judges in the Courts below. Their Lordships have pursued their opinions with much advantage, and have with great care considered the reasons of those from whom

they differ. In the result they come to the conclusion that the judgment of the Court of Appeal for Ontario is right and should be restored.

They think that there can be no doubt that by the law of England the owner of the soil on both sides of a running stream, whether it be navigable or not, is *prima facie* at least, owner of the soil which forms the bed of the stream, and as owner of this land covered by water, has all the rights of a land owner. But this is subject to all rights of the owners above him to have the water flow away from their land, and to all rights of the owners below him to have the flow come down to them as it was wont. It is also subject to any rights which the public have over it.

One of the practically most important rights of the owner of a portion of the soil of the river is the right to use the water for a mill, and in order to do so, or indeed for any other lawful purpose, to erect a dam on it. The public may have rights to navigate the stream, and whenever such a right exists the right of the mill-owner and the right of the public come into conflict. They may co-exist, but when they do, one or other must be modified.

The rights of the public to navigate a stream may be created either by prescription or by dedication by the owner of the land within time of legal memory. And in an old settled country like England it could seldom be material to enquire further than as to those modes of creating such a right. But when the law of England was taken out to a new, unsettled country, where prescription could not exist, and dedication could rarely exist till after the country was to some extent settled, it became important to enquire whether the principles of the common law did not give such a right independent of any user, wherever the stream was, in its nature, capable of being navigated. No question arises in the present case as to this right of navigation; and, at all events, up to a period later than 1849, it was a question of great doubt what the law of Upper Canada was on this subject. The right now claimed to use streams, not navigable for general purposes, to float down timber, was one, which in England, if it existed at all, from the nature of the country, could not be important; it never came into question in any case of which we are aware. It was one which, in a new wild country overgrown with timber, might be very important, and it must be a question of doubt what was the right.

The owner of the land covered with water, over which a stream flows, has the unquestioned right to erect a mill on it, if he does not thereby infringe on any right of the proprietors above or below him, or on the public rights. The doubts as to what was the extent of the public right over such streams cast a doubt on the extent to which it was lawful to erect mill dams.

It is obvious that it was very desirable that, for the purpose of encouraging the development of the country, these doubts should, as soon as possible, be solved. And as the Legislature of Upper Canada had full power to enact what should be the law in that country, the real question is, what did they enact?

The statutes of Upper Canada have been consolidated and afterwards revised; but the Acts under which this is done are merely consolidation and revision Acts, and do not alter the effect of those statutes which bear on this question. The first statute which it is necessary to notice is the Act of 25th March, 1828.

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After a preamble that it is found expedient and necessary to afford facility to the inhabitants of the Province engaged in the timber trade in conveying their rafts to market (as well as to the ascent of fish) in various streams now obstructed by mill dams, it enacts that every occupier of "any mill dam, which is or *may* be legally erected," where timber "is usually brought down the stream on which such dam is erected," shall, under a penalty, "construct and erect a good and sufficient apron to his dam." The 2nd section describes the kind of apron:—"Such apron shall not be less than eighteen feet wide, by an inclined plane of twenty-four feet eight inches to a perpendicular of six feet, and so in proportion to the height. Where the width of the stream will admit of it, where such stream or dam is less than fifteen feet wide, the whole dam shall be aproned in like manner, with the same inclined plane."

Without encumbering the case by considering any question relating to the fish, the intention of the Legislature seems obvious. They contemplated that there might be mill dams then or thereafter legally erected on streams down which lumber was usually brought. And without inquiring what were the conditions necessary to make such an erection legal, the Legislature, for the purpose of affording facility to those engaged in the lumber trade in conveying their rafts to market, impose a duty on the mill-owner to add to his mill an apron so as to let the rafts pass over it. This did to some extent impose on the owner of the dam, by supposition legally erected, the burthen, without any compensation, of building an apron; but it is clear that the Legislature did intend for the good of trade to impose that burthen on them. Probably it was not supposed to be very heavy. The Act, however, is in terms confined to those streams down which lumber was "usually" brought.

Several statutes were referred to on the arguments, which their Lordships think do not much affect the question.

Then comes the Act of 30th May, 1849.

The preamble is, "Whereas it is necessary to declare that aprons to mill-dams which are now required by law to be built and maintained by the owners and occupiers thereof in Upper Canada" (obviously referring to the Act of 1828 already cited), "should be so constructed as to allow a sufficient draft of water to pass over such aprons as shall be adequate in the ordinary flow of the stream to permit saw logs and other timber to pass over the same without obstruction." This clearly indicates an intention to throw upon those who have dams "legally erected" upon streams a further burthen. The first section with the object contemplated by the preamble cast upon them without any compensation the duty to erect and maintain waste gates, brackets, and slush boards, so as to keep the depth sufficient to allow the passage of "such saw-logs, lumber, and timber as are usually floated down such streams," with a proviso that "no person shall be required to build aprons or slides on small streams unless required for the purposes of floating down lumber."

The fifth section of this Act goes beyond the object mentioned in the preamble; it is, however, perfectly settled that though the preamble aids in the construction of an Act, effect is to be given to the intention of the Legislature if it sufficiently appears though it goes beyond the object of the preamble.

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It is upon the construction of this fifth section that their Lordships think this case depends. In the Consolidated Statutes for Upper Canada, cap. 48, it is divided into two sections—sections 15 and 16—and the meaning is made rather clearer by transposing the position of the two provisos at the end of the section which are made into section 16, but there is no alteration in the substance.

The fifth section is in the following terms:—

"That it shall be lawful for all persons to float saw logs and other timber rafts and crafts down all streams in Upper Canada during the spring, summer and autumn freshets, and that no person shall by felling trees or placing any other obstruction in or across such stream, prevent the passage thereof; provided always, that no person using such stream in manner and for the purposes aforesaid shall alter, injure, or destroy any dam or other useful erection in or upon the bed of or across any such stream, or do any unnecessary damage thereto or on the banks of said stream, provided the owner of any convenient apron, slides, gate, lock, or opening in any such dam or other structure made for the passage of all saw logs and other timber rafts, and crafts authorized to be floated down such stream as aforesaid."

This enactment, it is to be observed, became law in 1849, and has not been altered since. In 1863, the case of *Boale* vs. *Dickson* was decided in the Court of Common Pleas of Upper Canada. The question there was as to a claim for the use and occupation of a slide on the Indian River. The Court of Common Pleas thought that if the slide was on a stream within the meaning of the enactment their Lordships are now considering, the plaintiff must fail; whether, if the statute applies, this consequence would follow, their Lordships need not stop to inquire. So thinking the Court of Common Pleas put a construction on the Act.

The Vice-Chancellor, in the present case, after the evidence was heard, said, addressing the defendant's counsel:—

"I think, Mr. Bethune, you stated that if I considered myself bound by the authority of *Boale* v. *Dickson*, there was little use in arguing the case. It seems to me that I am bound by that case in this respect, that I ought to be bound by and respect the ruling of a Court of co-ordinate jurisdiction, though not in the same sense as I would be bound to follow a judgment of the Court of Appeal. If the interpretation placed upon it in *Boale* v. *Dickson* be the construction this statute is to bear in regard to improvements upon rivers and their floatability, I understand that case to determine that if any improvements are necessary to render streams floatable, the statute does not apply, that it does not alter the character of the private streams, and that the owner of the land over which the stream flows has the right to prevent intrusion upon it. It therefore comes to be a question of evidence as to whether the streams mentioned here can be considered floatable without artificial aids."

The Judges of the Court of Appeal for Ontario all agreed that Vice-Chancellor Proudfoot had correctly apprehended the construction put upon the statute by the Court in *Boale* v. *Dickson*, and that he could not properly disregard the decision of a Court of co-ordinate jurisdiction, but all four thought

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that construction wrong; Burton, J., though dissenting from his brothers, expressly saying:—

"I quite agree with them in their view of the doctrine laid down in *Boale* v. *Dickson*, and think there is nothing to warrant the qualified construction placed upon Sect. 15 of the 12th Vict., c. 87, by the learned judge who delivered the judgment in that case; but I am unable to bring myself to the conclusion that the mere permission or the recognition of the right to float all streams during freshets makes the entire streams *publici juris*, although, in point of fact, many portions of it may be quite impassable, even in times of freshets, for the smallest description of timber or other article of merchandize.

The Judges in the Supreme Court thought that the construction put upon the statute in *Boale* v. *Dickson* was right, and the Chief Justice Sir W. Ritchie thought, that even if wrong, it ought to be maintained on the ground taken by Lord Ellenborough in *Doe* and *Otley* v. *Manning*, 9 East 71, that in questions of conveyancing it was important to adhere to decided cases even if convinced they were originally wrong. This doctrine has often been recognized. The maxim "*Communis error facit jus*" is peculiarly applicable to conveyancing questions. But this is not a question of conveyancing, and their Lordships do not think that there is any ground for saying that *Boale* v. *Dickson*, if wrong, should be followed.

And their Lordships agree with the Judges in the Court of Appeal for Ontario in thinking that there is nothing to justify any Court in construing the words "all streams" as meaning such streams only as are at all places floatable. They do not think that every little rill, not capable of floating even a bulrush, is a stream within the meaning of the Act. But when once it is shown that there is a sufficient body of water above and below the spot where the natural impediment renders the stream at that spot practically unfloatable, it does not make it cease to be a part of the stream in the ordinary sense of the words.

It has been argued that though this might have been the natural meaning of the words, if the enactment had been "that it should be lawful to float saw timber rafts and craft down all streams in Upper Canada at all seasons," that the legislature here confined the enactment to making it lawful "during the spring, summer and autumn freshets." And that, it is argued, shows an intention to cut down the large words "all streams." Their Lordships do not assent to this argument. Probably the Legislature confined the enactment to the seasons during which lumberers ordinarily ply their trade, thinking it better to leave the rights of all parties at all other seasons untouched. Whatever was their motive, it seems clear, on the construction of the enactment, that if a lumberer claims a right at any other period than during the freshets to float timber along a portion of a stream, he must rest his claim on something else than this enactment. It is not, however, an objection to his right under this enactment to float during freshets, that he may, on the same part of the stream, be entitled on other grounds to float at all times.

Their Lordships do not think that the limitation of the right in the stream to one period of the year prevents that from being a part of the stream which would otherwise, in the ordinary sense of language, be a part of the stream,

even if the existence of an impediment there makes it not practically available for the purposes of the lumberer even in freshets. This respondent's construction of the enactment seems to them to require the introduction by implication of some such words as these, "except on such parts of the streams as are, owing to the presence of an impediment such as a waterfall, not practically available for the purpose of floating timber, until some improvements are made."

There does not seem to their Lordships to be any sufficient reason for implying this or any similar qualification.

It is quite true that it is not to be presumed that the Legislature interferes with any man's private property without compensation. But if the whole stream is floatable during the freshets it cannot be doubted that the Legislature did mean, with the object of affording facility to lumberers, to carry their timber to market, to say that they should have the right to float down the stream at these seasons without obstruction by the owners of the bed of the river—without paying them anything. If, as seems to be the opinion of Burton, J., the principles of the common law could be worked out so as to give this right, at any rate the Legislature in 1849 did not know this, or mean to declare it. Without declaring what the law then was, they enacted that "from this time, 1849, forward the law shall be as we now enact."

It is, however, quite true that no power is given by the statute to make practically floatable spots which are not so in their natural state, and that the Legislature, who must be taken to know that such streams as this Upper Mississippi were likely to exist in the unimproved parts of the country, must have contemplated that, before the right they gave became practically useful, something must be done which would be a trespass if done without the authority of the owner of the soil.

There does not seem to be any great difficulty in holding that, if all that was done was to remove some existing obstruction, as by blowing up a rock which impeded the passage, and thus putting the bed of the stream into the state in which it would have been if the rock had never existed, a right to float timber down that spot might be exercised, even though the blowing up of the rock could not be justified against the owner of it. There is more difficulty in dealing with the case of a dam maintained by or with the assent of the owner of the soil for the purpose of making the part of the stream practically floatable, which was not so in its natural state. There is certainly no obligation on the person who makes and maintains such a dam to continue to maintain it; if he ceases to do so it becomes useless, and can only, if at all, be made useful by forming a joint stock company for the purpose of doing so; and if the Court of Common Pleas in *Boale* v. *Dickson* were right in thinking that, if the statute applies, a promise to pay slidage for the use and occupation of such works, in consideration that the plaintiff would allow the defendant to use them, should not be enforced, the Legislature have improvidently reduced the inducement to make the stream at such a part practically floatable. But, though this may be so, the question remains whether the words of the Legislature do not express an intention that, when the part of the stream could be used, it should be lawful for all persons to use it.

Caldwell and McLaren.

It does not seem to their Lordships that the private right, which the owner of this spot claims, to monopolize all passage there, is one which the Legislature were likely to regard with favor, and in the earlier legislation they had, without scruple, cast on the owners of "dams legally erected" the obligation, at their own expense, to make such dams passable for lumber; if the law was (contrary to what is laid down in *Boale* v. *Dickson*), that reasonable compensation should be payable for the use and occupation of works maintained for the purpose of rendering the portion of the stream practically useful for floating purposes, there would be no hardship at all; if the Legislature had inserted a provision that such should be the law, there could have been no doubt of their intention. They have not inserted such a provision; but, though that makes the case somewhat difficult, their Lordships do not think it enough to justify what seems to them a somewhat violent departure from the plain meaning of the words.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the Supreme Court should be reversed and that of the Court of Appeal restored. They do not think there is any reason for departing from the general rule that the costs of the appeal should be borne by the unsuccessful party, the respondent.

Judgment of Supreme Court reversed.

Bethune, Q.C. (of the Ontario Bar), and *Jeune*, for the appellants.

The Solicitor-General McCarthy, Q.C. (of the Ontario Bar), and *Crump*, for the respondent.

SUPERIOR COURT, 1883.

MONTREAL, 14TH MARCH, 1883.

MR. JUSTICE LORANGER.

JAMES STEWART HUNTER, *Plaintiff; and* GEORGE RENNIE, *Defendant.*

SEMBLE:—That when a plaintiff is domiciled in Quebec when he institutes his action, but afterwards, during the pendency of the suit, removes into another country, the defendant must make his motion for security of costs within four days from the time he obtains certain knowledge of the departure.

On the 18th of August, 1882, the plaintiff absconded. It was published in the newspapers of the 19th August that his effects would be sold on the 23rd September following. On the 13th October the defendant moved for security of costs, and on the sixteenth he produced an affidavit; alleging that plaintiff had absconded several months previously, but that his knowledge of that fact was not such as to justify him to make an affidavit; that he had become possessed of such positive knowledge only on the said sixteenth day of October, day on which his affidavit was made.

The granting of the motion for security was opposed, on the ground that it was a matter of public notoriety that plaintiff had absconded.

The following judgment was rendered, granting the motion for security of costs upon the following considerant:

Vû l'affidavit produit au soutien de la dite motion par lequel il appert que le defendeur n'a acquis d'une manière certaine, que le jour même où le dit affidavit a été donné, la connaissance que le dit demandeur avait quitté la Province de Québec, etc.

John L. Morris, attorney for plaintiff.

Messrs. Geoffrion, Rinfret & Dorion, attorneys for defendants.

COUR SUPÉRIEURE, 1872.

MONTRÉAL, 26 AVRIL 1872.

Coram BEAUDRY, J.

Verroneau vs. Perry et Clément.

JUGÉ.—Qu'une action pour bois coupé sur la limite d'héritages contigus ne peut être maintenue s'il n'y a pas eu bornage pour fixer la ligne entre ces deux héritages.

Per Curiam.—Jean Sauvé avait reçu en concession de la Couronne la moitié N. E. du lot no. 4 dans le canton de Newton. Le 8 septembre 1858, il vend au nommé Gilbert Laniel, 5 arpents de front sur 7 arpents précis de profondeur de ce terrain à prendre du chemin et le 4 juillet 1860, il vendait aux demandeurs leur terrain.

Léon Clément paraît plus tard en possession des cinq arpents et la preuve constate qu'il y a environ 4 ou 5 ans, il a fait une couple d'arpents de clôture pour séparer son terrain de celui de M. Laniel, se contentant de marquer le reste de la ligne, sans que les demandeurs aient songé à faire leur part de clôture. En 1868 Laniel vend au défendeur principal la coupe de bois de ces cinq arpents à prendre dans le cours de deux ans sur les 5 arpents sur 7 arpents plus ou moins. Pendant que le défendeur était à faire couper son bois, les demandeurs s'éveillent enfin, et croyant qu'il coupait au-delà de ses bornes, ils lui font défense de couper sur plus que 7 arpents et avec une perche mesurée par les demandeurs sans l'aide d'un arpenteur, ils veulent établir que le défendeur a coupé sur leur terrain. Un des témoins des demandeurs dit qu'ils ont compris le chemin dans le terrain mesuré, et qu'ils n'ont mesuré que du mieux qu'ils ont pu, attendu que des embarras les empêchaient de suivre toujours la ligne droite. Le défendeur avait dit aux demandeurs de faire mesurer par un arpenteur, qu'il paierait la moitié des frais. Le demandeur n'en a rien fait. Et il vient aujourd'hui réclamer le prix des arbres qu'il dit avoir coupés sur son terrain. La preuve faite établit qu'il n'a été coupé de bois que sur le terrain compris en dedans de la clôture de Clément et de la ligne marquée en suivant la direction de cette clôture, et sur le terrain dont Clément était en possession depuis plus d'un an, d'après les témoins des demandeurs. Le bornage n'était pas possible avec le défendeur principal qui n'avait aucun droit quelconque dans le fonds, et c'est une question si même le défendeur pouvait être poursuivi dans les circonstances de cette cause. Sans ce bornage ou du moins un mesurage, il est impossible de constater le nombre d'arbres coupés. Et quant à la quantité et valeur prouvées elle me paraissent bien exagérées. Les demandeurs ne pourraient avoir que la valeur vénale du bois qui, à mon avis, ne pourrait guère excéder $20; quant au prix d'affection, ils n'en peuvent exiger du défendeur parce qu'ils sont en faute, de n'avoir pas provoqué le bornage. Je ne puis ici qu'appliquer la règle suivie dans la cause de Fournier et Lavoie, jugée en juin 1871, et faute de bornage, je dois renvoyer l'action.

Bondy, pour le demandeur principal.

Doutre, Doutre & Doutre, pour le défendeur.

COUR DE CIRCUIT, 1872.

MONTREAL, 30 MARS 1872.

Coram BEAUDRY, J.

Léandre Labelle vs. Félix Villeneuve et al.

Juoé—Que le nu propriétaire peut vendre et céder la nue propriété d'un immeuble avant la mort de l'usufruitier.

Que ce cessionnaire a, comme son cédant, droit aux fruits et revenus de la propriété cédée du moment de la mort de l'usufruitier, par laquelle l'usufruit est consolidé au fonds.

Qu'un bail passé avec l'usufruitier d'immeuble dont il a l'usufruit, est résolu par sa mort, mais que le locataire, qui continue à occuper les lieux loués, en est tenu au loyer par un bail tacite.

Que ce loyer se divise de plein droit entre les différents co-propriétaires du fonds du moment de la mort de l'usufruitier.

Qu'ils peuvent poursuivre pour leur part et portion de ce loyer, même avant partage.

Qu'il suffit au co-propriétaire en ce cas de justifier de la légitimité et de la qualité de son droit.

Que cette justification peut se faire par exposition d'actes et offre de les laisser visiter, sans qu'il soit nécessaire d'en fournir copie.

Que le co-propriétaire n'a cependant pas recours contre les locateurs pour les sommes payées de bonne foi au procureur de l'usufruitier avant cette mise en demeure.

Que la connaissance personelle qu'ils auraient de la mort de l'usufruitier ne peut les constituer en mauvaise foi d'avoir agi ainsi; mais il est nécessaire qu'il y ait un protêt de la part du co-propriétaire lui faisant connaitre ce décès, la cessation de l'usufruit et son titre aux loyers.

Joseph Octave Alfred Turgeon, Ecr., avocat, avait, par un arrangement de famille, cédé la propriété indivise d'une maison située à Montréal, à ses cinq enfants, et s'en était gardé l'usufruit. L'un de ses enfants avait vendu sa part au demandeur. M. Turgeon mourut le 17 septembre 1871. Dans le mois d'octobre, le demandeur fit protester les locataires de la dite maison de ne pas payer à d'autres qu'à lui, sa part, qu'il déterminait, par acte contenant la relation des différents titres du demandeur, et ce, par le ministère de M. Archambault, N. P., qui exhiba les différents titres, offrit aux locataires d'en prendre communication, et leur assigna un lieu où ils pourraient en prendre communication; il leur fesait en même temps connaître la somme à laquelle il avait droit depuis le décès du dit Turgeon.

Les actions relatent ces faits. Les défendeurs ont plaidé, entr'autres par une défense en droit, par laquelle ils prétendent que la demande ne peut pas se maintenir: Parce qu'il appert par la dite déclaration que le demandeur a plusieurs co-héritiers ou co-ayant droit, lesquels ne sont pas en cause.

Parce que le demandeur était tenu de s'unir avec les autres représentants et ayant droit du locateur pour intenter la présente action, ou tout au moins de les mettre en cause pour faire constater contradictoirement ses droits.

Parce que le demandeur n'allègue pas qu'il y a eu partage entre lui et ses co-héritiers ou co-ayant droits, tous représentants du locateur et quels droits

respectifs des co-héritiers ou co-ayant droit ont été réglés et reconnus entre eux.

Parce que, ainsi qu'il appert par la déclaration, il y a plusieurs et divers immeubles dans la succession dont un des héritiers a cédé et vendu ses droits au demandeur ; et qu'il peut se faire que par le partage, l'un des ou tous les immeubles décrits tombent au lot d'un autre héritier ou ayant droit que le demandeur.

Parce qu'il n'y a que les héritiers du bailleur qui peuvent réclamer le prix du bail allégué en la déclaration et que le demandeur ne prend aucunement cette qualité ; mais qu'au contraire, il a poursuivi en vertu de droits antérieurs au dit bail.

Parce que la présente action est de sa nature pétitoire et ne peut être dirigée que contre celui ou les représentants ou ayant droit de celui de qui le défendeur tient la propriété à titre précaire.

Parce que le défendeur n'a contracté qu'une seule obligation et qu'il ne peut être soumis à l'obligation plus lourde de fractionner le paiement de ses loyers et d'être ainsi exposé à plusieurs actions.

Parce que la signification des droits et prétentions des demandeurs sur le défendeur n'est pas suffisante en droit.

Parce que le locataire n'est pas tenu de constater et vérifier les droits d'une partie autre que son locataire réclamant des droits dans la propriété à lui louée.

Parce que le demandeur avant d'intenter la présente action, aurait dû faire constater ses droits, au préalable, sur le locateur ou les représentants et ayant droit de ce dernier.

A l'audition le demandeur, par ses avocats, dit : Nul doute que le demandeur avait, avant même la mort de l'usufruitier, M. Turgeon, acquis la nue propriété

La loi loin de le défendre y pourvoit en disant, art. 483, C C. : "Que la vente de la nue propriété ne dérange pas l'usufruitier."

Il était propriétaire même du moment où il a succédé aux droits de son cédant, qui, lui, était propriétaire du moment où un arrangement de famille lui donnait la propriété de cette maison.

La mort de l'usufruitier met fin à l'usufruit (Art. 479) mais ne donne pas naissance au droit de propriété.

"A la mort de l'usufruit, dit Proudhon, Vol 5, no. 2572, le maître du fonds ne fait que rentrer dans la jouissance du fait ; quant à la possession proprement dite, il n'y a aucune mutation.."

Le demandeur était donc propriétaire de l'immeuble du moment de son acquisition : mais à la mort de l'usufruitier il devenait propriétaire des fruits ou loyers qui sont des fruits civils et qui, d'après l'art. 451, s'acquièrent jour par jour.

"Enfin, dit Prouhon, idem no. 2583, § 2, si le fonds et bâtiments qui étaient grevés d'usufruit ont été donnés à ferme par l'usufruitier, le propriétaire, rentrant en jouissance, se trouve seulement subrogé dans le droit d'exiger le prorata du fermage à dater du jour de l'expiration de l'usufruit.

Or ces loyers sont divisibles et se divisent de plein droit entre les causes du créancier qui peuvent réclamer leur part. Art. 1121 et 1122, C.C)

Il n'était pas nécessaire de mettre en cause les co-propriétaires qui pouvaient intervenir si bon leur semblait. Le demandeur n'avait qu'a constater ses droits

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par une exposition d'actes au débiteur qui n'était pas censé ignorer le droit du moment qu'il n'ignorait pas les faits et qui doit payer le luxe de vouloir le faire constater en justice.

Le défendeur n'est pas obligé à plus qu'il s'était obligé quand il contractait, autrement les créances se seraient jamais divisées, et à part l'acte écrit, le droit est constaté d'une manière non douteuse. " Si le créancier vient à mourir dit Toullier vol. 6, No. 752, laissant plusieurs héritiers, le droit du créancier se divise de plein droit entre les héritiers, et chacun des héritiers ne peut demander que sa part. "

"Quoiqu'il en soit, dit Larombière, oblig. sur l'art. 1220, No. 7, la divisibilité a été surtout introduite pour le commun avantage de ceux entre lesquels elle s'opère pour la meilleure et plus prompte expédition des affaires." Mais, si on veut autrement, il avait provoquer un partage. Pourquoi ? Les droits du demandeur sont déjà liquides : il ne demande pas sa part indivise, et c'est en quoi son action diffère de celle ordinaire, mais bien une part, dans une somme d'argent dont il connaît la part. Cette part n'est contestée. Toullier, No. 759 dit que le créancier peut intenter son action avant partage et il doit s'imputer de n'avoir pas agi avant le partage.

C'est ce qui a été jugé le 6 août 1828 par le Tribunal de Bourges, conformément à l'art. 883 C. N. qui est le même que notre art. 749, Sirey, vieille collection p. 74, 2 partie 1830, et 1831, 2 p. p. 176.

La loi a prévu qu'il y aurait de graves inconvénients à attendre un partage avant que chaque co-héritier put réclamer sa part, et il suffisait qu'un des co-héritiers voulut retarder le partage pour que les droits des autres fussent compromis.

" Il résulte, dit Larombière, Oblig. art. 1220, No. 4, de la théorie de la division que les héritiers solvables ne sont pas tenus pour les insolvables, " et No. 7, " Du côté des créanciers la divisibilité fait que, sans attendre un partage judiciaire et à la charge seulement de justifier de la légitimité et de la qualité de son droit, chacun des héritiers peut exiger sa part, donner quittance, si elle est liquide, ou la faire liquider pour sa part, plaider à concurrence de sa portion, sans qu'il soit tenu jamais du fait de son co-héritier. "

Le défendeur développe les différentes raisons de sa défense en droit et se fonde principalement sur la nécessité où était le demandeur de provoquer un partage avant de poursuivre pour sa part.

Il cite un jugement rendu dans la cause de Woolrich vs Connolly, où l'Hon. Juge Beaudry aurait jugé en faveur de cette prétention.

L'on. Juge observe que les circonstances dans cette cause n'était pas les mêmes. On y demandait une part indivise de fonds de [illegible] qui n'était nullement constatés d'avance, et les co-héritiers avaient intérêt [illegible] qu'un titre de propriété ne fut pas accordé à un co-héritier, sans qu'ils fussent mis en cause.

Le 30 mars 1872, [illegible] a maintenu l'action du [illegible]

" Considérant que [illegible] du 19 juillet 1867, devant [illegible] Provost, notaire, Joseph Octave Alfred Turgeon a cédé et abandonné à [illegible] enfants dont le demandeur est un, des immeubles dont celui loué [illegible] deur fait par-

tie, s'en réservant seulement l'usufruit sa vie durant; et considérant que dès l'époque de cet acte, les dits enfants sont devenus propriétaires du dit immeuble chacun pour un cinquième, sujet au dit usufruit; considérant que le dit Joseph Octave Alfred Turgeon est décédé le 17 de septembre 1874 et que dès lors le dit usufruit s'est trouvé consolidé au fonds; considérant que le dit Joseph Octave Alfred Turgeon avait loué au dit défendeur partie des immeubles et nommément la partie désignée en la déclaration en cette cause pour deux années à compter du 1er mai 1871, à raison de neuf cents piastres par an payables par paiements mensuels de ..... et de par bail reçu devant Garand, notaire, le 27 janvier 1871, et que le loyer a été payé de bonne foi au dit Joseph Octave Alfred Turgeon ou ses représentants jusqu'au 30 de septembre inclusivement; et considérant que le demandeur a suffisamment fait connaître son titre à un cinquième de la dite propriété au défendeur par avis protêt en date du 31 d'octobre 1871, fait par le ministère de M. Archambault, notaire, mais n'a pas justifié de son titre à un autre quarantième du chef de sa sœur; considérant que le bail fait par le dit Joseph Octave Alfred Turgeon à été résolu par sa mort, qui a fait cesser son droit ainsi que celui du défendeur; et que ce dernier n'a depuis occupé les lieux que par bail tacite, et que l'action du demandeur est bien fondée

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Déboute les défenses et exceptions du dit défendeur, déclare ses offres insuffisantes et le condamne à payer au dit demandeur la somme de ..... pour deux mois de loyer et occupation des dits lieux, avec intérêt du 23 de décembre 1871, et les dépens dont distraction est accordée à MM. Trudel et de Montigny, procureurs du demandeur, sauf au dit demandeur à se pourvoir ainsi que de droit, s'il y a lieu pour le quarantième qu'il allègue tenir de sa sœur.

Trudel et DeMontigny, pour le demandeur.

Bourgoin et Lacoste, pour le défendeur Villeneuve.

De Bellefeuille et Turgeon, pour les autres défendeurs.

COUR SUPÉRIEURE, 1877.

MONTREAL, 18 NOVEMBRE 1877.

Coram JOHNSON, J.

Dupuis vs. Gagnon.

JUGE:—Qu'une obligation donnée pour un montant payé par billets n'opère pas novation de ces billets, et que l'on peut réclamer ces billets en les déduisant du montant de l'obligation.

Faits de la cause, tels qu'énoncés par l'avocat du demandeur.

Le demandeur réclame $220, montant d'un billet, daté, Montréal 27 décembre 1875, pour value reçue et signé par le défendeur lui-même.

Défense: 1re admission du billet susdit, selon sa forme et teneur, mais qu'il n'y avait pas de *valeur reçue* pour ce dit billet.

Que c'est un billet d'accommodation seulement.

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2e. défense: Le défendeur à St. Norbert, le 27 décembre 1875, se serait reconnu endetté envers le demandeur pour $1100, en vertu d'une obligation produite au soutien de la défense.

Que le billet a été donné pour avance à venir;

Que la dite obligation était pour toute la dette alors due au demandeur.

Que le demandeur n'a pas avancé depuis au défendeur.

3e. défense: Que le défendeur a droit de faire déduire de la dite obligation le présent billet, au moins.

Que si ce billet est payé, le demandeur ne peut réclamer tout le montant de l'obligation, ni conserver sur icelle tous ses priviléges.

Que le demandeur aurait dû offrir, par son action, de déduire sur la dite obligation, le montant du dit billet.

Qu'ainsi, la dite action est mal fondée.

Réponses et répliques du demandeur.

1er. Que le billet est pour valeur reçue, par marchandises, etc., vendues.

2e. Que la dite obligation n'est acceptée que comme garantie collatérale du dit billet et autres; qu'elle n'opère pas *novation*, mais qu'elle est la garantie du compte courant tant dû qu'à devenir dû plus tard. Le demandeur ayant toujours été prêt à faire de nouvelles avances au défendeur, quand il le voudra.

Que la dite obligation n'est que celle de payer un solde éventuel, dont le montant est subordonné à l'existence et à la qualité du solde ou des billets, et que le présent billet payé, un montant égal se trouve déduit de la dite obligation.

Que le défendeur, si la présente action n'existe pas, aurait dû l'attaquer par une fin *de non recevoir formelle*, ou exception péremptoire en droit.

3e. L'obligation n'a rien à faire ici, n'étant qu'une garantie.

Qu'il n'est pas nécessaire, dans la présente action, d'offrir de déduire le dit billet de la dite obligation, lequel se trouve, une fois payé, naturellement déduit du montant de la dite obligation.

Notes et autorités du demandeur:

La dite obligation n'étant pas enregistrée ne vaut pas mieux qu'une créance chirographaire ordinaire, du reste—et elle est éteinte, faute d'objet.

D'ailleurs, il est expressément stipulé que le demandeur doit donner des marchandises à crédit au défendeur et ses billets pour avances futures, durant le compte courant, "*lesquels billets n'opéreront en façon quelconque aucune novation à la présente obligation*" etc.

L'obligation à été faite pour subsister toujours tant que le défendeur devra une balance quelconque au demandeur, mais n'espère pas novation du présent billet, car la *novation est expresse; elle ne se présume pas, il faut que la volonté de l'opérer résulte clairement de l'acte.* Art. 1273 C. N.

"Sirey, sous l'art. 1273, C. N. Note 29, dit:

"Une dette originairement *commerciale*, ne perd pas ce caractère, par cela "seul qu'elle est ensuite reconnue par un acte *notarié*, et garantie par une "hypothèque."

Une telle reconnaissance *n'opère pas novation.*

Rogron, com., vol. 1, p. 1428 sous l'art. 1273.

" Il ne faudra pas voir la novation dans un acte par lequel le débiteur et le " créancier, modifieraient la 1ère dette sans l'éteindre, en convenant d'une " hypothèque ou d'une caution, par exemple.

Sirey, Note 27, art. 1273 maintient :

" Que l'hypothèque consentie pour sûreté d'un crédit ouvert, s'applique à une " créance garantie par des billets bien que ces billets aient été acceptés en échange " d'autres billets échus (alors) et souscrit antérieurement à l'ouverture du crédit. "

Art. 2344 C. C. B. C. " Un billet promissoire est une promesse, par écrit, pour le paiement d'une somme d'argent à *tout événement* et sans *condition.*

L'obligation susdite n'est qu'une sûreté, un gage, un nantissement ; or, art 1980, C.C., B.C. dit :

Quiconque est obligé personnellement est tenu de remplir son engagement sur tous ses biens mobiliers et immobiliers ; P. Pont, priviléges pp. 23, ch. 2092, ajoute :

Par conséquent l'obligation non enregistrée susdite, ne donne pas plus de priviléges au demandeur qu'il n'en a sur les biens du défendeur par son billet.— Pont. No. 95, p. 103, Ed. 1844, dit :

Cette obligation n'est qu'une garantie et l'obligation primitive (le billet) n'existant plus, la garantie cesse de plein droit.

Le demandeur ne peut pas ici imputer la présente réclamation, ni le montant " d'icelle sur la dite obligation, car comme le dit Noblet, No. 71. " Comment " concevoir une imputation sur une dette qui non-seulement n'est pas exigible, " mais qui pourra même ne pas exister au jour *de l'exgibilité ?* si elle est éteinte " au moyen du paiement des billets, dont elle n'est que la garantie. "

Le défendeur pour se libérer des frais de la présente poursuite, aurait dû offrir la somme et la consigner en *Cour* en paiement du dit billet et la faire réduire sur la dite obligation.

D'ailleurs, le créancier a droit de choisir la créance pour en demander le paiement, quand il en a plusieurs pour la même dette, et il peut imputer les paiements reçus sur la créance qu'il préfère.

Story on Contracts, No. 878. On the propriation of payment.

La grande faveur qui doit entourer le commerce doit être ici favorable au demandeur, car son but n'est pas de faire payer deux fois la même créance, mais seulement de tâcher d'avoir quelque chose, de temps à autre de son débiteur malhonnête, qui a reçu pour $1,100.50 de marchandises, sans payer un sou au demandeur.

Aussi, Story *on Bills* No. 266, prétend que les règles du commerce doivent être relachées en sa faveur. " *In case of bills and other negotiable instruments* " *the rule for the convenience of commerce is greatly relaxed and modified.* "

Du reste, l'obligation susdite, non enregistrée, déclare formellement qu'elle

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n'opérera pas *novation*. Or, " la volonté de faire novation doit être déclarée " dit *Pothier*. Oblig. [redacted] 559, 560. Il ajoute :

" La raison est [redacted] doit facilement être présumée abdiquer les " droits qui lui appartiennent. "

Toullier, T. 7, No. 277. Si créancier et débiteur font changement à une première obligation, en y ajoutant une hypothèque, ou une caution ou une sûreté, etc, tous ces changements ne font que déroger à l'ancienne obligation, *en ce qui est exprimé dans le dernier acte*, sans faire [redacted]tion qui s'étendra aux objets dont il ne fait pas mention. "

(Ici la dite obligation ne peut s'étendre au présent billet, car elle n'en parle point.)

Il est d'usage dans le commerce de prendre de semblables obligations pour garantir une vente éventuel; *Noblet* du compte courant, No. 211, ajoute :

" Cette obligation de payer un solde éventuel peut être garantie par hypothèque. Il y a même raison de décider qu'au sujet d'hypothèque constituée pour sureté d'un *crédit ouvert* et qu'une *jurisprudence unanime* reconnaît prendre, date du jour même de sa constitution, ou de *l'inscription*, et non du jour de la *réalisation du crédit*. "

Noblet, *Loco citato*, No. 257 : S'il a été stipulé une garantie hypothécaire pour sûreté du paiement du solde, cette garantie s'applique, non-seulement au solde qui peut résulter de la balance du compte au moment de la clôture, mais encore au solde tel qu'il sera, en définitive par suite du non-paiement des effets de commerce, non encore *échus*. (Douai, 7 mai 1840.)

C. L. 3,246. L'hypothèque est une espèce de gage, la chose hypothéquée étant obligée au paiement de la dette.

C. L. 3,259. Quand l'obligation principale est nulle, l'hypothèque l'est pareillement.

C. L. 3,259. On peut donner un hypothèque pour une obligation qui n'existe point encore, et, pour sûreté d'endossement, " et ouverture de crédit, etc. "

Ici l'hypothèque n'existe même pas ; l'obligation qui la crée n'étant pas enregistrée.

Du reste, *Chitty* Ed. 1809. p. 62, maintient la doctrine soutenue par Eyre C. J. : " No evidence of want of consideration, or other ground to impeach the " apparent *value received*, was ever admitted, etc. "

Chs. Thibault, avocat du demandeur.

Prévost et Préfontaine, avocats du défendeur.

COURT OF QUEEN'S BENCH, 1884.

(APPEAL SIDE.)

MONTREAL, 27TH SEPTEMBER, 1884.

Present:—DORION, C. J., MONK, RAMSAY, CROSS, and BABY, J.J.

REGINA

vs.

JOHN ROSS, *for Perjury.*

HELD:—1. That where the alleged perjury was committed in an issue in the Circuit Court in which it was proved a plea had been fyled, but the record produced and proved in the Criminal Court did not contain such plea, no ground for new trial.

2. That it is not necessary to allege in the indictment or show in evidence that the subject matter of the perjury was material to the issue in which the perjury was committed.

3. Where from all the circumstances it appears that the defendant may have been under a misapprehension as to the nature of the questions put to him or the jury may have been misled, the Court will, in its discretion, grant a new trial.

Reserved case upon a conviction for perjury stated by Hon. Sir A. A. Dorion, trial Judge.

On the 13th day of June inst., in the Court of Queen's Bench (Crown Side), the defendant, John Ross, was found guilty on a charge of perjury contained in the following indictment:

"The jurors for our Lady the Queen upon their oath, present, that heretofore, to wit, at the term of the Circuit Court holden for the District of Montreal, in the City and District of Montreal, on the 5th day of May, 1884, before the Honorable Francis G. Johnson, one of the Judges of Her Majesty's Superior Court for Lower Canada, a certain issue in which one Samuel Edwards, of the City and District of Montreal, laborer, was plaintiff and the Canada Pacific Railway Company, a body politic and corporate, was defendant, in a certain action of damages for breach of contract, bearing the number 8694 of the record of the said Circuit Court, was tried, upon which trial, one John Ross appeared as a witness for and on behalf of the said Samuel Edwards, the said plaintiff, and was then and there duly sworn before the Honorable Francis G. Johnson, one of the Judges of Her Majesty's Superior Court for Lower Canada, as aforesaid, in the said Circuit Court, and did then and there upon his oath aforesaid, falsely, wilfully and corruptly depose and swear in substance and to the effect following, that he (the said John Ross) did not hire any men to work on the Steamship *Alberta* and did not hire Edwards (the said Samuel Edwards, the said plaintiff) to work on board the Steamship *Alberta* (to wit, a certain vessel so named that lay in the Port of Montreal last fall, and of which he (the said John Ross) was supposed to be captain. Whereas in truth the said John Ross did hire several men to work on board the said Steamship *Alberta* in the month of November last, and did hire Edwards (the said Samuel Edwards, the said plaintiff) to work on board the said Steamship *Alberta*, on the 8th day of November, 1883, and the said John Ross did thereby commit wilful and corrupt

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perjury, against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen, Her Crown and Dignity."

Treffié Lamontagne, Deputy Clerk of the Circuit Court, was the first witness examined for the prosecution, and produced the record in the case of Edwards *vs.* The Canadian Pacific Railway Company, in which the defendant was charged with having committed the perjury for which he was tried. After the writ and declaration had been proved and read to the jury the counsel for the defence asked that the plea be also read to the jury, when the witness stated that the plea was not in the record and could not be found, although it appeared that a plea had been fyled in the cause.

The defendant, by his counsel, immediately took exception to the production of an incomplete record, owing to the absence of the plea, which was neither produced nor proved. I, however, directed that the trial should be proceeded with

At the close of the case for the prosecution the defendant submitted that, there was no case to go to the jury: 1. Because the whole record in the cause in which the perjury charged was alleged to have been committed had not been proved.

2. Because it did not appear that the matter sworn to was material to the issue in the cause.

I ruled against the defendant, who entered upon his defence, and the jury returned a verdict of guilty.

The defendant then moved that the verdict be set aside, and a new trial ordered on the following grounds. Motion on the part of the defendant, John Ross, that the verdict in this case rendered by the jury impanelled be set aside and a new trial ordered, for the following amongst other reasons:

1. Because the said verdict was rendered contrary to the evidence given on the trial.

2. Because at the trial the record of the case of Edwards *vs.* The Canadian Pacific Railway Company was not produced and proved in a complete state, the said case being the case set out in the indictment as the case wherein issue had been joined, wherein the alleged perjury was committed, the plea fyled by the defendant not having been in the said record, and not having been proved on the said trial.

3. Because the facts set out in the assignment of perjury in the said indictment in this Court were not facts, matters or things required or authorized by any Act or law, now or at any time in force in the Dominion of Canada, or in the Province of Quebec, to be verified or otherwise assured or ascertained by or upon oath, affirmation, declaration or affidavit of some or any person, in the said case of Edwards *vs.* The Canadian Pacific Railway Company, set out in the said indictment, wherein the perjury charged is alleged to have been committed by the said defendant.

4. Because the facts, matters and things contained in the assignment of perjury set out in the said indictment were not facts, matters or things required or authorized by any law or Act now or at any time in force in the Dominion of Canada, or in the said Province of Quebec, to be verified or otherwise assured or

ascertained, by or upon the oath, affirmation, declaration or affidavit of some or any person in the said suit in the Circuit Court of Edwards *vs.* The Canadian Pacific Railway Company.

5. Because the plea in the case of Edwards *vs.* The Canadian Pacific Railway Company not having been produced and proved, it was impossible to decide what facts, matters or things were required or authorized to be verified or otherwise assured or ascertained by or upon the oath of the said defendant.

6. Because by the evidence of the Hon. Mr. Justice Johnson, the Judge of the Superior Court holding the Circuit Court on the fifth day of May last past, when the said case of Edwards *vs.* The Canadian Pacific Railway Company came on for trial, and before whom the said defendant was sworn and examined, it was proved that the said facts, matters and things set out in the assignment of perjury in the said indictment contained were not facts, matters or things, required or authorized to be verified or otherwise ascertained or assured, by the oath, affirmation, declaration or affidavit of some or any person, or of the defendant, in the said suit of Edwards *vs.* The Canadian Pacific Railway Company under or in virtue of any Act or law then in force in the Dominion of Canada or in the Province of Quebec.

7. Because the said verdict is contrary to justice, and a new trial will further the interests of justice.

8. Because it was clearly proved that no such evidence was ever given by the defendant as that contained in the assignment of perjury in the said indictment.

I refused to grant this motion, but, at the request of the defendant, I reserved for the consideration of the Court sitting in Appeal the following questions:

1. Was it necessary for the prosecution to produce and to prove at the trial the plea which has been fyled in the case of Edward *vs.* The Canadian Pacific Railway Company, in which cause the perjury charged was alleged to have been committed?

2. Was it necessary to prove that the facts sworn to by the defendant as alleged in the indictment wer material to the issue in the cause in which the defendant was examined?

On the hearing of the cause and at the request of the defendant the reserved case was amended as follows:—By adding the evidence taken at the trial except such as had reference to the Record in the Circuit Court, and to the good character of the defendant.

3. If, considering the evidence and the whole circumstances of the case, a new trial should be granted to the defendant?

If the Court is of opinion that either of the above questions should be decided in the affirmative then the verdict should be set aside and a new trial ordered as prayed for; otherwise the verdict should remain in force.

The defendant was admitted to bail to appear at the sitting of the Court of Queen's Bench to be held at Montreal in the month of November next.

MONTREAL, 17th June, 1884.

(Signed), A. A. DORION, C. J.

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The judgment of the Court of Queen's Bench, Appeal Side, upon the reserved case above stated was as follows:

"After hearing counsel, as well for the Crown as for the defendant, on the case reserved by the Court of Queen's Bench, sitting on the Crown Side at Montreal, and mature deliberation had thereon;

Considering that there was no error in the rulings of the Judge presiding at the trial against the defendant on the first and second questions reserved in the reserved case;

But considering that from the whole circumstances of the case there appears to have been some misapprehension as to the nature of the questions put to the defendant, and as to his answers thereto, and that, owing to such misapprehension the defendant may have been taken by surprise and the jury misled and that it is proper that a new trial be granted to the defendant;—

This Court doth set aside the verdict against the defendant, and doth order that a new trial do take place in due course, at the next or at any subsequent term, of the Court of Queen's Bench sitting on the Criminal Side at Montreal."

D. Barry, Esq., attorney for private prosecutor.

Wm. H. Kerr, Q.C., attorney for defendant.

COURT OF QUEEN'S BENCH.

(APPEAL SIDE.)

MONTREAL, 24TH SEPTEMBER, 1884.

Present:—DORION, C. J., MONK, RAMSAY, CROSS, and BABY, J.J.

REGINA

vs.

JOHN SCOTT.

HELD:—1. That in a prosecution under the 32 and 33 Vic. cap. 20, sec. 25, it is not necessary to allege in the indictment that by the refusal and neglect of the defendant to supply the necessary goods, etc., to his wife, her life had been endangered or her health permanently injured.

2. That it is not necessary to prove upon the trial that the life of defendant's wife had been endangered or her health permanently injured by his neglect to provide her with necessary food, etc., in the absence of any allegation to that effect in the indictment.

The clause of the Statute upon which the case proceeded was as follows:—"Whosoever being legally liable, either as a husband, parent, guardian or committee, master or mistress, nurse or otherwise, to provide for any person as wife, child, ward, lunatic or idiot, apprentice or servant, infant or otherwise, necessary food, clothing or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, or unlawfully or maliciously does or causes to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant is endangered, or the health of such apprentice or servant has been, or is likely to be, permanently injured, is guilty of a misdemeanor, and shall be liable to be imprisoned in the penitentiary for any term not exceed-

ing three years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years with or without hard labor.

The following is the case as reserved by the Hon. Chief Justice Dorion:

"The defendant, John Scott, was tried before me on the 10th of June inst. (1884), on a charge, under the 32 and 33 Vic. cap. 20, sec. 25, of having refused and neglected to provide necessary food, clothing and lodging for his wife, Elizabeth McDougall, on an indictment in the following terms:

That John Scott, on the 19th day of April, in the year of Our Lord one thousand eight hundred and eighty-three, at the city of Montreal, in the District of Montreal, then being the husband of Elizabeth McDougall, and then being legally liable as her husband to provide for the said Elizabeth McDougall, his wife, necessary food, clothing and lodging, unlawfully, wilfully, and without lawful excuse, did refuse and neglect to provide the same.

After the case for the prosecution had been closed the counsel for the defendant submitted to the Court that there was no case to go to the jury, inasmuch as it was not alleged in the indictment, and it had not been proved that, by the neglect of the defendant to provide food for his wife, the said Elizabeth McDougall, her life had been endangered or her health was likely to be permanently injured.

I ruled that putting the life in danger or causing a permanent injury to health, as mentioned in sec. 25 of the above-cited Act, merely applied to the offence contemplated in the second part of the section, namely, that of causing or doing some bodily harm to an apprentice or servant, and not to the offence mentioned in the first part of the section, that of a husband neglecting to provide the necessary food, etc., for his wife.

The defendant thereupon entered upon his defence, and the jury returned a verdict of guilty.

At the request of the defendant I have reserved the case for the opinion of the Court of Queen's Bench on the following questions:

1. Was it necessary to allege in the indictment that by the refusal and neglect of the defendant to supply the necessary food, etc., to his wife, her life had been endangered or her health permanently injured?

2. Was it necessary to prove that the life of the defendant's wife had been endangered or her health permanently injured by his neglect to provide her with necessary food, etc., in the absence of any allegation to that effect in the indictment?

In the event of an affirmative answer to either of the above questions, the verdict of guilty should be set aside, otherwise it should stand.

The defendant was admitted to bail, to appear at the next term of The Court of Queen's Bench holding criminal jurisdiction, and no sentence was pronounced.

MONTREAL, 17th June, 1884.

(Signed), A. A. DORION."

The judgment upon the above case was as follows:—"After hearing counsel as well for the Crown as on behalf of the defendant, and due deliberation had on the case transmitted from the Court of Queen's Bench sitting on the Crown Side at Montreal,—

Regina vs. John Scott.

It is considered and adjudged and finally determined by the Court now here, pursuant to the Statute in that behalf, that an entry be made in the record to the effect that, in the opinion of the Court, the proceedings had and taken in the said Court at Montreal are regular; that the ruling of the judge presiding in the said Court of Queen's Bench is correct, and that no reason hath been assigned by and on behalf of the said John Scott sufficient to set aside the conviction on the indictment in this cause.

It is therefore ordered that the said conviction be and the same is hereby affirmed and that it do stand in full force and value."

RAMSAY, J., dissentiente.

H. C. St. Pierre, attorney for defendant.

C. P. Davidson, Q.C., attorney for the Crown.

COUR SUPÉRIEURE, 1878.

MONTRÉAL, 1 MARS 1878.

Présent: L'Hon. Juge RAINVILLE.

LOUIS SAUNDERS, DEMANDEUR,

vs.

DAME CÉLINA VOISARD, DÉFENDERESSE;

ET

FRANÇOIS DERAGON DIT LAFRANCE ET AL., TIERS-SAISIS,

ET

LOUIS SAUNDERS, CONTESTANT.

JUGÉ:—Que la clause d'insaisissabilité et incessibilité d'un immeuble insérée dans un testament ne s'applique pas aux obligations que le légataire peut encourir à raison de la dite propriété, même pour l'administration d'icelle.

Le demandeur avait pris une action contre la défenderesse, laquelle fut déboutée en appel avec dépens. La défenderesse prit une saisie-arrêt après jugement pour les frais, et fit saisir le loyer de la maison à propos de laquelle l'action (une saisie-gagerie) avait été prise.

Le demandeur contesta cette saisie et invoquant la clause d'insaisissabilité comme suit:

"Que la dite Dame Hypolite Corpiette ordonna par le dit testament que les fruits et revenus des biens légués ci-dessus au dit demandeur et à la dite Marguerite Harnois seraient à toute fin que de droit considérés comme leur tenant lieu d'aliment et comme autant par elle laissés pour être employés à leur nourriture, entretien et éducation des enfants du dit demandeur et qu'en conséquence ils ne seraient saisibles ou saisissables par leurs créanciers pour quelque cause que ce soit et sous aucun prétexte que ce puisse être; que le dit testament a été dument enregistré.

"Que la saisie a été pratiquée sur les locataires de l'immeuble ainsi légué, etc. Pourquoi, etc.

Voici le jugement de la Cour :

La Cour, etc.

L. Saunders vs. Dame Voisard, et F. Déragon dit Lafrance et al. et L. Saunders.

" Considérant que les frais pour le recouvrement desquels la saisie-arrêt a été émanée en cette cause ont été encourus par le demandeur dans une action pour le recouvrement du loyer de partie de la propriété à lui léguée, en vertu du testament de feue Dame Hypolite Corpiette dit Fleur de Rouge, en date du 19 février 1871 ;

" Considérant que la clause d'insaisissabilité et incessabilité de la dite propriété insérée dans le dit testament ne peut pas s'appliquer aux obligations que le dit légataire peut encourir à raison de la dite propriété, même pour l'administration d'icelle.

" Considérant que les choses saisies-arrêtées en cette cause sont les revenus de la dite propriété, déboute la dite contestation du demandeur avec dépens."

Doutre, Doutre et Robidoux, avocats du demandeur contestant.

Roy et Bouthillier, avocats de la défenderesse.

COUR SUPERIEURE, 1872.

MONTREAL, 29 FEVRIER 1872.

MACKAY, J.

Benoit vs. Foster, John Rodgers et Anna Rodgers.

JUGÉ :—Que pour faire maintenir une action contre les héritiers d'un défunt, il n'est pas nécessaire d'alléguer si c'est en vertu d'un testament ou par succession légitime que ces héritiers sont devenus aux droits du défunt, mais qu'il suffit d'alléguer qu'ils y sont.

Qu'il n'est pas non plus nécessaire d'alléguer de quelle manière les héritiers ont accepté la dite succession ; mais qu'il suffit d'alléguer qu'ils l'ont acceptée.

Qu'il suffit que les allégations d'une déclaration donnent ouverture au droit d'action, sans dire comment elles le donnent ; c'est-à-dire qu'il suffit de poser la majeure et de tirer les conclusions, sans être obligé de relater la mineure.

Qu'il suffit d'alléguer que des ouvrages ou des matériaux ont été fournis à une construction appartenant à un défendeur, à sa demande et requisition, sans être obligé d'alléguer que les ouvrages ou matériaux ont été délivrés ou acceptés par lui.

Le demandeur allègue :

Que comme entrepreneur il a fait pour le défendeur Foster et son épouse décédée, communs en biens, à leur requisition, différentes constructions et fourni des matériaux au montant de $289.73.

Que l'épouse du défendeur Foster est décédée, laissant pour seuls et uniques héritiers les deux autres défendeurs, John Rodgers et Anna Rodgers, issus de son premier mariage avec Peter Rodgers, lesquels ont accepté la succession de leur mère et pris possession des biens dont ils jouissaient.

Que le demandeur est bien fondé à se pourvoir pour le recouvrement de $289.73, contre le défendeur Charles Foster pour la totalité de cette dite dette crée par lui et sa dite épouse pendant leur mariage et leur communauté, et pour un quart de cette dite dette contre chacun des deux autres défendeurs, comme héritiers de leur dite mère décédée,

Benoit vs. Foster, JohnRodgers et AnnaRodgers.

Pourquoi il conclut à ce que les défendeurs soient conjointement condamnés à lui payer la dite somme de $289.73, savoir: le dit Charles Foster pour la totalité de cette dite somme, et les deux autres défendeurs John Rodgers et Anna Rodgers, pour chacun un quart de cette dite somme, savoir pour $72.04.

Les défendeurs ont plaidé que cette action ne pouvait être maintenue en droit.

Parce que le demandeur n'allègue pas que l'épouse du défendeur Foster soit décédée *intestat* ou sans testament.

Parce qu'il n'allègue pas de quelle manière les défendeurs John Rodgers et Anna Rodgers ont accepté la succession;

Parce que le demandeur conclut à la condamnation conjointement des défendeurs, tandis que dans le libellé, il allègue seulement le droit de recouvrer le quart de la somme réclamée contre John Rodgers et Anna Rodgers;

Parce qu'il allègue avoir un droit pour le tout contre le défendeur Foster sans dire comment il en a le droit en loi;

Parce que le demandeur n'allègue pas que les ouvrages faits et les matériaux fournis au défendeur Foster et à son épouse aient été délivrés à eux, ou reçus ou acceptés par eux.

Parce que les conclusions ne découlent pas des prémisses.

La Cour a, le 29 février 1872, débouté la défense en droit.

Bondy, pour le demandeur.

Monk & Butler, pour les défendeurs.

SUPERIOR COURT, 1881.

In Review.

MONTREAL, 30TH NOVEMBER, 1881.

Present: Mackay, Papineau, Buchanan, J.J.

FINLAY A. McRAE, PLAINTIFF;

vs.

CHARLES MILLER, DEFENDANT.

HELD:—1. Where capias is founded upon belief of plaintiff that defendant is about to abscond, and states that his reasons for so believing are that he has been so informed by A B and C D that affidavit is not insufficient."

2. That under the circumstances of the case proof that the defendant was not immediately about to abscond, where it appeared that he had himself declared that, under certain not improbable conditions, he would go to Chicago, and where intention to defraud was evident, was not sufficient to disprove plaintiff's affidavit.

This was a review of a judgment pronounced on the 1st day of October, 1881, dismissing a petition to quash the capias issued against the defendant. The facts as set forth in the affidavit were as follows:—

1. The ordinary allegations of personal indebtedness in the sum of one hundred and ten dollars for rent.

2. "That the deponent has been credibly informed, has good reason to be-
"lieve, and verily and in his conscience believes, that the said Charles Miller is
"now immediately about to leave the Province of Quebec and the Dominion of
"Canada, with the intent of defrauding his creditors in general and the plaintiff
"in particular, and deponent's reasons for so believing are that he has been so
"informed by the said John Eggar and by one Miller, of the city of Montreal,
"agent."

Defendant petitioned to quash the said capias in law and in fact, and one of the clauses of his petition was as follows:—

"That the reasons stated by plaintiff for his belief that defendant was about
"to leave the Province of Quebec and Dominion of Canada, with intent to de-
"fraud, are vague, general and totally insufficient to give ground for an arrest
"under a capias, insomuch as the nature and extent of the information given to
"plaintiff is not stated, nor that they have any cause, or arose from statements
"of defendant." The defendant in his petition further alleged that he was not about to abscond; that he was in the employ of The Singer Manufacturing Company, as their agent in the Town of Brockville, Ontario; and that when arrested he was about to proceed to Brockville to fulfil his duties as such agent there.

Two agents of the Singer Company examined by the defendant swear that the defendant was in their employ in Brockville, Ontario, at the time he was capinsed; that he occupied a furnished house there; that they had no immediate intention of dismissing him.

On the other hand it was proved by plaintiff that defendant had moved his furniture, which was the security of plaintiff's claim for rent, secretly, at a late hour on Saturday evening, and had got it out of the Province before it could be seized; that he had done this with a view to defraud, and had counselled one Eggar, who was joint tenant and jointly responsible with him to plaintiff, to do the same thing; that he had several times stated that if he did not succeed in Brockville he would go to Chicago and, further, that the Singer Company required *bonds* from him which he had difficulty in furnishing.

The judgment in the Superior Court (Torrance, J.) was based on the following considerants:

"Considering that the defendant hath not made good the allegations con-
"tained in his petition, and that said petition ought to be dismissed, and that
"defendant hath not disproved the allegations of plaintiff's affidavit, doth dis-
"miss, etc."

This judgment was unanimously confirmed in Review without change of motives.

Archibald & McCormick, attorneys for plaintiff.

Church, Chapleau, Hall & Atwater, attorneys for defendant.

DEPARTMENT OF JUSTICE, 1881.

OTTAWA, 15TH NOVEMBER, 1881.

LAMBERT SARAZIN,

PETITIONER;

vs.

THE BANK OF ST. HYACINTHE,

DEFENDANT.

Scire facias.—Petition to annul the charter of a bank.

In the matter of the petition of Lambert Sarazin, praying that the Attorney "General will prosecute before the Exchequer Court of Canada, in the name of "Her Majesty, the Bank of St. Hyacinthe for certain alleged infractions of its "charter, in order to declare the charter of the said Bank to be forfeited, "together with its rights, powers, privileges and franchises of corporation, and "thereby do justice."

ATT. GEN. A. CAMPBELL.—This matter was argued before me on the 22nd of June by Mr. A. Lacoste, Q.C., for the petitioner, and Mr. Abbott, Q.C., for the corporation, and again, after the fyling of all the affidavits and documentary evidence on both sides, by Mr. Lacoste and Mr. Siccotte respectively on the 2nd inst. it was treated as an application for a *fiat* for a writ of *scire facias*, to be prosecuted in the name of the Attorney General, but by the petitioner, though the petition does not so run.

The Bank of St. Hyacinthe is a corporation created by an Act of Parliament, 36 Victoria, chap. 13, and is domiciled at St. Hyacinthe, in the Province of Quebec.

The petitioner does not allege that he has suffered any prejudice by reason of the alleged infractions of the charter; he, in fact, avers that he is petitioning in the interest of the public.

It has been pressed upon by Mr. Lacoste that the *fiat* of the Attorney General in such a case as this should go as "a matter of right" upon the presentation of an ex-parte reasonable case by the petitioner, and that the Bank should not have been allowed to file affidavits in contravention or rebuttal of the petitioner's *prima facia* case; and before entering into the facts I desire, as far as may be in my power, to state the principles upon which I think the Attorney General should be governed in dealing with an application of this kind.

The ordinary applications in England are against *patents* of incorporation, when the Crown, through its Courts, can cancel, on sufficient ground, what the Crown has granted; but, here, Parliament has incorporated the Bank, and I find no authority (and have asked Counsel on both sides for a reference to any) of a case where an English Court has assumed to annul a charter of incorporation created by Act of Parliament.

Reference is made by Mr. Lacoste to the Canada Joint Stock Companies' Act, 1877, as establishing that no difference exists between charters created by let-

ters patent and charters granted by Parliament, because, by the provision of that Act, charters granted thereunder invest the Company thereby created with all the same powers, privileges, &c., "as if it were incorporated by a special Act of Parliament, embodying the provisions of this Act and of the letters patent."

That provision, it seems to me, is no more than a delegation by Parliament to the Governor General in Council, in certain cases, of certain of its powers, such powers to be exercised upon compliance by intending corporators with the preliminary conditions laid down for that purpose. But the very fact that the Joint Stock Companies' Act specially excludes banking from the purposes for which a charter may be granted thereunder, clearly shows that Parliament did not intend to delegate to the Governor General in Council its powers in respect to chartering banks, and establishes a distinction between the case of a bank incorporated by special Act of Parliament, and a company incorporated under the provision of a general Act. And even as to general patents, the powers therein contained, when they are laid down in enabling Acts of Parliament, only come into life by the breath of the Crown, and, therefore, I think, differ essentially from Acts of Parliament creating corporations.

Mr. Lacoste refers me to the case of Derby *vs.* The Queen, 12 Clarke & Finnelly, 520; but that was a proceeding against a person who had usurped an office created by Act of Parliament, and the proceedings did not tend to annul the Act but to regulate proceedings and redress a wrong committed under it. The Act itself remained untouched, and the corporation created by it was not for a moment in jeopardy. The reference to Blackstone 1, 502 "Corporations." does not seem opposite to the point in question.

I am aware that my predecessor, Mr. Attorney General McDonald, in the case of "La Banque Nationale," which held a charter granted by Act of Parliament, gave his *fiat* upon an ex-parte application for a writ such as is now applied for; and that in some of the States of the Union it has been held that in this respect there is no distinction between charters granted under the great seal of the State and those granted by the Legislature. It is not a question upon which I need express an opinion; but I think its existence increases the responsibility of the Attorney General before whom an application of this kind, against a charter granted by Act of Parliament, is made.

The Counsel of the petitioner endeavored to minimize the discretionary power of the Attorney General, as far as was possible, and urged upon me that, if, assuming the statements made in the petition to be true, I was of opinion that an infraction of the charter—one or more—had been committed, I was bound "*ex debito justitiae*," upon the *prima facie* evidence furnished by the petitioner's declaration of their truth (under the Statute for Suppressing Extra-judicial Oaths), to grant my *fiat* for the writ; but such a doctrine would, in fact, deprive the Attorney General of all discretion, and put it in the power of any malevolent individual, upon an *ex parte* statement, to bring an incorporated bank—no matter of what magnitude, or with what delicate and extended interests—before the Courts in defence of its charter, a position which, even if it

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emerged from the presence of the tribunal without stain of wrong-doing, might be attended with the gravest results to its shareholders, depositors, and other creditors, and be reflected upon the whole community where the corporation was domiciled.

It is contended that under the provisions of article 997 of the Code of Civil Procedure of Lower Canada, it is my duty as Attorney General to prosecute in this case, in Her Majesty's name, upon security being given to indemnify Government against costs. The article in question is founded on C. S. L. C., cap. 88, sec. 2, and expressly states that, in cases of violation by a corporation of its charters, "It is the duty of Her Majesty's Attorney General for Lower Canada to prosecute in Her Majesty's name, &c." It was not referred to in argument, but I have myself examined the Statute creating the office which I hold. It is Act 31 Vic., chap. 39, sec. 30, and by it the Attorney General of Canada is charged with the powers and duties which, by the laws of the several provinces, belonged to the office of Attorney General in each province up to the time when the British North America Act, 1867, came into effect, and which laws, under the provision of the said Act, are to be administered and carried into effect by the Government of the Dominion.

The B. N. A. Act, 1867, sec. 91, certainly confers on the Dominion exclusive legislative authority with respect, *inter alia*, to banking, the incorporation of banks and the issue of paper money, but I can find nothing in it which imposes on the Government of the Dominion the duty of administering or carrying such laws into effect; and on me the consequent duty of prosecuting a forfeiture of a bank charter.

It is the duty of the Government of the Dominion to administer and carry in effect such laws as those relating to Customs and Inland Revenue and Militia, and so forth; but laws relating to banks, save as regards duties imposed by the Banking Act on the Executive, or to be inferred from the law, are administered in the Province where the Bank is domiciled. No doubt if a Bank violated the terms of its charter, and if the public interest suffered, the Government of the Dominion could take proceedings to forfeit its charter; but no duty imperatively devolves upon me under the language of the Statute creating my office in respect of such a proceeding as the present. In coming before me the petitioner must rely on his rights under the common law; these rights are, I think, correctly laid down in the authority to which I shall thereafter refer.

I think it would be most unfortunate if the law, as Mr. Lacoste contends, made it imperative upon the Attorney General, upon a *prima facie ex-parte* statement being made out of such facts as showed a violation of the charter of a Bank, to grant his *fiat* for a writ of *scire facias*.

I believe, however, that the law will not be found to be so unreasonable.

In the first place, the Attorney General in a case of this kind, may, and I think should, investigate the alleged facts, allow them to be controverted by counter affidavits and other documentary proof, on the part of the Bank; and not admit them to be established as the basis of action on his part until their truth shall be made manifest to his satisfaction.

2ndly. If so established, it would be incumbent upon him further to consider whether they amounted to such clear and hurtful infraction of the charter of the Bank as to warrant the machinery of the law being set in motion, at the risk to the probable injury to the important attendant interests before referred to; and,—

3dly. Whether the applicant has suffered any prejudice by reason of the alleged infractions or had any private interest in the question he was endeavoring to raise.

The rule is thus laid down by Lord Campbell in the Queen against the Eastern Archipelago Company, Ellice and Blackburn, vol. 1, p. 354:

"The defendants' counsel rely upon data to be found in the books that "this *fiat* is matter of right. It is a matter of right to all who are justly "entitled to it, but those only are entitled to it who suffer a prejudice by the letters "patent and the breach of the condition upon which they have been granted. No "mandamus would lie to the Attorney General to grant his *fiat* for a *scire facias*. "If he were improperly to withhold it he might be questioned in Parliament, and "he might be punished for his misconduct. But upon such a complaint being "brought forward against him, if he could show that the applicant had no inter- "est whatever in the subject matter, and was only actuated by spleen or male- "volence, and that it was for the public advantage that the letters patent should "not be assailed, instead of being punished, he would be applauded." (And see the judgment of Wightman, J., in the same case, p. 333.)

The facts in the case before me as presented in the petition have, upon the principle I have above referred to, been controverted by the Bank and supported by the petitioner in numerous affidavits at great length, and he has in one of the supplementary affidavits stated for the first time that he was and is a shareholder in the Bank. It has been my duty to examine the various allegations which these affidavits and the documentary evidence submitted to me with them present for my consideration.

The breaches of the terms of the charter of the Bank complained of in the Petition are as follows:—

1st. Taking a higher rate of interest than the law allows to be received by Banks.

2nd. Advancing money on real estate.

3rd. Advancing money on shares of the Bank.

4th. Advancing money on merchandize.

5th. Buying and selling chattels.

6th. Buying and selling real estate.

7th. Buying and selling shares of the Bank.

All these breaches are averred in the petition to have taken place—denials, or explanations exculpatory of all are given in the affidavits fyled by the Bank, and re-assertions with many details and circumstances are submitted in the mass of counter affidavits and papers presented by the petitioner. I have caused a synopsis of the statements made in all these papers to be prepared and placed on record, but in the mean time will consider in succession each of the alleged breaches of the charter in the order in which they are above mentioned.

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1st. The maximum rate of interest which a bank can recover by process of law is, by the Banking Act, fixed at seven per cent., but by express enactment no penalty follows its having accepted payment of a higher rate, and to forfeit its charter would be the extreme penalty to which it could be subjected. I do not think there is anything in this alleged infraction of the Bank of St. Hyacinthe.

2nd. Advancing money on real estate.

There does not appear to have been any advances made on real estate; but after a debt of the ordinary character is incurred by a firm or firms, mortgages are taken as collateral to secure a debt already existing; giving time for the payment of such debts,—and taking renewals of the notes or bills which represent them at the time of the execution of the mortgages, or afterwards, is not contrary to law, and is not advancing money on real estate.

3rd. Advancing money on the shares of the bank.

The transaction with Mr. Lippé was, I think, a legitimate one—there was no reason why he should not transfer bank shares in trust to secure his endorser, nor why, when the paper went into default, the trustee, Mr. St. Jacques, should not transfer them to Mr. Beaudry, the endorser, to be sold to pay the paper.

4th. Advancing money on merchandise.

5th. Buying and selling chattels.

6th. Buying and selling real estate.

These three alleged breaches may be considered together. The Bank of St. Hyacinthe, like [illegible] institutions of the kind, on many occasions, found itself under the ne[illegible] dealing with insolvent debtors, and, to make the most of assets of w[illegible]nk was the beneficiary, disposed, in some cases directly, in others thro[illegible]rd persons, of merchandise and other chattels belonging to the estate of such insolvent debtors, and in other instances bought in the whole assets of the estate and had the business of the insolvent carried on for a certain time, buying additional stock to work out that already on hand, and buying or paying off on occasions, and even as independent transactions, mortgages made by the debtor on real estate which had not passed under his assignment, but which seem to promise to help to make the estate pay the liabilities to the Bank. In all the transactions under these three heads referred to in the mass of papers before me, I found that the Bank has uniformly been in pursuit of the recovery or saving of some already existing debt and not embarking in original purchase or sale of merchandize or chattels in the ordinary way of buyers and sellers. Any one familiar with the affairs of banks in time of depression will quite understand how unwillingly managers are driven into such efforts to secure doubtful debts from danger. It is not necessary, I think, in an application of this kind and when the object is such as it is here, that I should find categorically that each particular transaction complained of is in all its details an act within the powers of the Bank under its charter. I do not think any bank in the Dominion could pass scathless through a searching investigation of that kind, but I certainly shall not use the discretion which the law in my judgment gives me to grant my *fiat* for a writ under which a person who does not auer that he has suffered injury from any of the alleged infractions, (although a shareholder in the Bank

and in a manufacturing company which the Bank advanced money to,) shall seek to have the charter of the Bank declared forfeited. I may add here that whatever may be said from a banker's point of view against the alleged purchase of the right of the debentures referred to in the petition, even if it were proved, which it was not, I think, I do not see in the transaction any violation of the Banking Act.

7th. Buying and selling shares of the Bank.

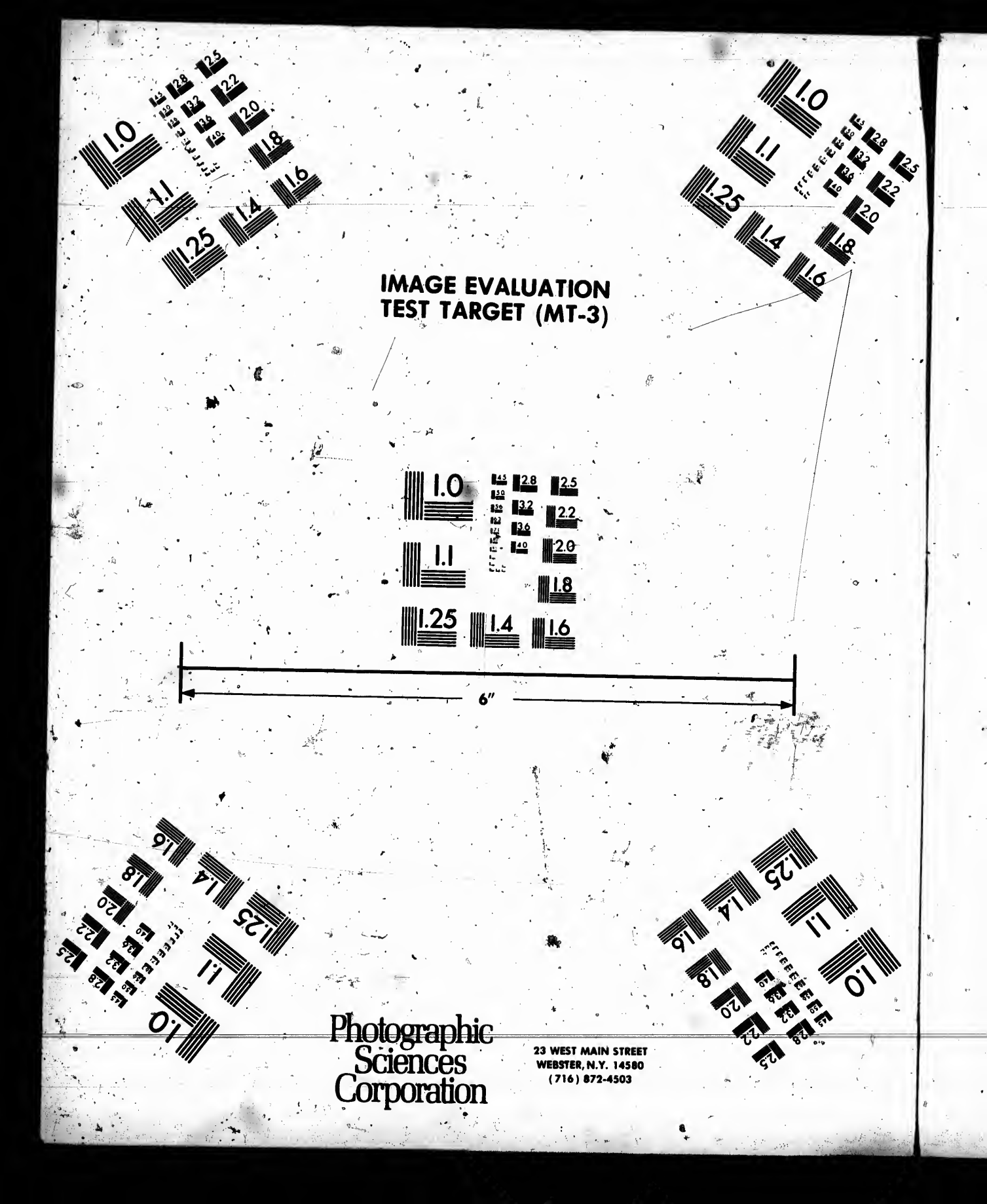
This is not established, I think, by the evidence, [illegible] observations made under the preceding head applied to this—[illegible] all with reference to legitimate debts which the Bank was [illegible] secure, and, as the Banking Act expressly gives a bank a lien on shares [illegible] a debtor, I do not think effect should be given to the objection to the course pursued by the Bank of St. Hyacinthe in the instance set forth in the papers before me.

Mr. Lacoste in his factum calls attention to the last Return to Government made by the bank, which shows that the Cashier hold a large amount of the stock of the Bank *in trust*, and points out the danger to the public which would result from the Bank owning a controlling share of its own stock. I quite agree with Mr. Lacoste as to the danger resulting from such an absorption of stock by a bank, but in the present instance I cannot infer from the Return that the stock mentioned therein as held *in trust* by the Cashier is held otherwise than as permitted by the section of the Banking Act which gives the bank a lien on the stock of shareholders for overdue debts.

As to the *animus* by which Mr. Saraain is actuated in taking these proceedings, I need only remark that its nature appears to me clearly established by the evidence, and that the declarations produced by the petitioner do not, in my judgment, rebut the conclusion that he is inspired by motives of personal vindictiveness.

I may here remark, in passing, that there appears to me to be some force in the objection made by Mr. Sicotte, on behalf of the Bank, that the alleged infractions having all taken place before the 1st of July last, and the charter of the Bank having been renewed from that date by an Act of last session, no proceedings to forfeit the Bank's new charter can be taken on account of alleged violation of the old one.

It does not seem to me that any case is made out under the rules which I endeavored to lay down in the earlier part of this paper for the issue of a *scire facias* as prayed for. After a careful consideration of Mr. Lacoste's able and elaborate factum, and of the authorities quoted by him, the value of which latter has been in some degree lessened by the fact of their exact application not being in all cases pointed out,—and after weighing to the best of my ability the evidence adduced on both sides I am not satisfied that the officers of the Bank have intentionally and materially violated the terms of their Charter; and for an immaterial or unintentional breach of the terms of a Charter the Crown would not at the present day seek to forfeit a charter. I think that in the Acts complained of they have, in dealing with real and personal property, been endea-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voring to realize *quasi* securities for debts legitimately due to the Bank. It would be most lamentable if, under such circumstances, the Attorney General was compelled to grant his *fiat* for an inquiry so calculated to prejudice the Bank and its bill holders, depositors and general creditors, as well as the public in the locality where it does business. I am relieved to believe that no rule of law exists requiring a course fraught with so many evils to be pursued by the Attorney General:

I decline to grant the prayer of the petition.

Lacoste & Co., for petitioner.

Abbott & Co. and Sicotte, St Jacques and R. E. Fontaine, for the Bank of St. Hyacinthe.

COUR DU BANC DE LA REINE, 1871.

JURIDICTION CIVILE.

MONTREAL, 6 SEPTEMBRE 1871.

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

JOEL LEDUC,

(*Defendeur en Cour Inférieure*),

APPELANT,

ET

AMABLE PREVOST ET AL,

(*Demandeurs en Cour Inférieure*),

INTIMES.

Responsabilité contractée par une personne en faveur d'un tiers dans le but ou de lui faire obtenir du crédit ou des effets—Nécessité de l'écrit—Art. 1235, § 3. *C. C.—Statut des fraudes, sec.* 4

Le jugement dont se plaint l'appelant a été rendu le 30 décembre 1860. (Torrance, J.)

L'appelant était poursuivi en recouvrement d'une somme de $481.75, balance réclamée pour effets et marchandises, que les intimés prétendent avoir fournis et livrés à Damase Leduc, frère de l'appelant, mais pour le compte de ce dernier.

La Cour Inférieure n'a toutefois condamné l'appelant qu'à une somme de $150.64, rejetant de la demande tous les items du compte des intimés postérieurs au premier juin 1868, pour les raisons énoncées dans le jugement qui est dans les termes suivants:

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

"Considering that the plaintiffs have proved the material allegations of their "declaration, and that the defendant is indebted to them in the sum of one "hundred and fifty dollars and sixty-four cents, being the balance set forth by the

" statement, plaintiffs' exhibit No. 1, less the items " June 5, $205.49; July 3, " $52.20; July 9, $24.14; July 20, $49.28, which were sold subsequently to " the notice given by the defendant, by his clerk Eugène Paradis, to wit, on or " about the first of June, one thousand eight hundred and sixty-eight, to the " effect that he was not responsible for the purchase made on his behalf, by his " brother Damase Leduc, doth adjudge and condemn the defendant, to pay and " satisfy to the plaintiffs, the said sum of one hundred and fifty dollars and " sixty-four cents, with interest thereon, from the first day of March, one " thousand eight hundred and sixty-nine, date of the service of process in this " cause, until paid, and costs of suit distraits to Messrs. Chapleau, Rainville & " Prévost, Attorneys for plaintiffs.

L'appelant prétend que ce jugement est erroné et que l'action des intimés aurait dû être renvoyée non-seulement pour partie mais pour le tout.

Les marchandises dont il est question en cette cause ont été *vendues et livrées* à Damase Leduc, frère de l'appelant, mais les intimés prétendent que ce dernier (l'appelant) leur a donné ordre de *les charger à son compte.*

L'appelant nie cet ordre, et prétend qu'il résulte de la demande même des intimés qu'on veut le rendre responsable pour une *dette de son frère*, qu'en droit cette responsabilité ne peut être établie que par un écrit (Code Civil, art. 1235 paragraphe 3, qui reproduit la section 4 du Statut des Fraudes.)

La demande des intimés ne repose que sur une preuve testimoniale. Toute la question est donc de savoir si la convention invoquée par les intimés, tombe sous l'effet de la section 4 du Statut des Fraudes.

En Cour Inférieure les intimés se sont surtout appuyés sur deux autorités: *Parsons*, Mercantile Law p. 73 et *Smith*, on Montracts, p. 114, s. 50.

" It is often difficult, dit Parsons, to say whether the promise of one to pay " for goods delivered to another, is an *original* promise, as to pay for one's own " goods or a promise to pay the debt, or guarantee the promise of him to whom " the goods are delivered. The question may always be said to be " *To whom did the seller give, and was authorized to give, credit.* This question " the jury will decide, upon consideration of all the facts, under the direction " of the court. If, on examination of the books of the seller, it appear that he " charged the goods to the party who received them, it will be difficult, if not " impossible, for him to maintain that he sold them to the other party. But if " he charged them to this other, such an entry would be good evidence, and if " confirmed by circumstances, strong evidence that this party was the purchaser. " *But it cannot be conclusive*, for the party not receiving the goods may always " prove, if he can, that he was not the buyer, and that he promised only as " surety for the party who was the buyer; and, consequently, that his promise " cannot be enforced if not in writing. And, in general, in determining this " question, the court will always look to the actual character of the transaction, " and the intention of the parties."

Voici maintenant ce que dit *Smith:* If A says: "let B have goods on " my account,' or 'let B have goods, and charge me with them," in these " cases, no writing would be required, BECAUSE B NEVER WOULD BE LIABLE

Joel Leduc et A. Prevost et al.

" AT ALL; the goods being supplied on A's credit and responsibility, though " handed by his directions to B."

Tout ce que les intimés peuvent invoquer en faveur de leur cause, dit l'appelant dans son factum se trouve, mais avec des restrictions fatales, dans ces deux citations.

1o. Les marchandises ont été chargées, il est vrai, à l'appelant dans les livres des intimés, mais dit Parsons, *this cannot be conclusive.* Et *Browne*, Statute of Frauds, No. 198, ajoute en parlant du créancier, " his debiting of, or pre- " senting the account to the defendant, *is not evidence for him* to show that he " trusted the defendant only, *while in fact the goods were delivered or the* " *services rendered to the third party.*" Ce n'est donc qu'une présomption et non une preuve, présomption qui a besoin d'être soutenue par un concours de circonstances qui ne se rencontrent nullement ici, au contraire.

2o. On prétend que l'appelant a donné ordre aux intimés de livrer des marchandises à son frère et de les lui charger, et qu'en tel cas la preuve testimoniale est admissible. *In these cases no writing would be required* dit Smith, mais il ajoute: BECAUSE B (dans l'espèce, le frère de l'appelant) NEVER WOULD BE LIABLE AT ALL !

Ainsi, d'un côté, le fait de charger les marchandises au nom de l'appelant, non-seulement n'est pas concluant, mais encore ne prouve pas *en faveur* des intimés; et de l'autre, pour que la convention, même telle qu'alléguée par les intimés, puisse être prouvée par témoins, il faudrait que ces derniers eussent accepté l'appelant pour leur seul débiteur et déchargé complètement Damase Leduc de toute responsabilité.

En effet, si celui à qui les effets sont livrés demeure responsable pour leur paiement, l'obligation du défendeur au lieu d'être *directe et unique* devient *collatérale;* c'est un *cautionnement* et par suite cette obligation [illegible] sous l'effet du statut.

Browne, on Statute of Frauds, No. 197 dit: " As to the liability of the person " for whose benefit the promise is made, it was laid down by Mr. Justice " Buller, in the case of Matson *vs* Wharam, *that if he be himself liable at all* " the promise of the defendant must be in writing. If this rule be understood " as confined to cases where the third party and the defendant are liable in the " same way, and to do the same thing, the one as principal and the other as " surety, it may be accepted as the uniform doctrine of all the cases both in " England and in our own country. The defendant is said to *come in aid* to " procure the credit to be given to the principal debtor. The question there- " fore ultimately is, upon whose credit the goods were sold or the money " advanced, or whatever other thing done which the defendant, by his " promise, procured to be done. *If any credit at all be given to the third* " *party, the defendant's promise is required to be in writing as collat-* " *eral.* And the rule applies equally, where there is already an existing lia- " bility of the principal, and the evidence shows that the plaintiff, by accept- " ing the defendant as surety, does not release his claim upon the principal. " *All the cases show that it does not matter upon which of the two parties the*

plaintiff principally depends for payment, so long as the third party is at "all liable to him to do the same thing which the defendant has engaged to "do."

Robert on Statute of Frauds, pp. 208, 209, 210, 211, 237.

Smith's Leading Cases, *Birkmyr* v. *Darnell*, p. 371 édition anglaise, p. 458, éd. am.

Browne cite aussi, (note 4) No. 197, nombre de décisions dans le même sens.

Si donc il résulte de la preuve en cette cause que Damase Leduc, était aucunement responsable (*at all liable*) pour les marchandises à lui vendues il est clair que la responsabilité de l'appelant n'était que *collatérale*, que c'était, un *cautionnement*, une *garantie*, et que cette responsabilité ne peut pas êtr prouvée par témoins, mais qu'il faut un écrit pour l'établir.

Or cette responsabilité de Damase Leduc, ne peut pas être niée.

Interrogé comme témoin, il affirme formellement, non seulement qu'il se considérait lui-même comme responsable envers les intimés, mais encore que ces derniers eux-mêmes le regardaient comme leur débiteur.

Il est évident que l'appelant n'est ni le débiteur des intimés, ni même le garant des avances faites à son frère; et en supposant qu'il serait garant, cette garantie tombe sous l'effet de l'article 1235 du Code Civil, et ne peut être prouvée par témoins.

Les intimés répondent :

Nous soumettons que la convention, telle qu'alléguée et prouvée, ne tombe pas sous le coup de l'art. 1235 de notre Code, et est parfaitement susceptible d'être prouvée par témoins. C'est l'opinion de tous les auteurs sur cette question, et entr'autres celle de Smith dans une espèce absolument analogue : "If A says: "let B have goods on my account," or let B have goods and charge me with "them," in these cases no writing would be required, because B never would "be liable at all; *the goods being supplied on A's credit and responsability*, "though handed by his directions to B."

Smith—On Contracts, p. 114, § 50.

Parsons—On Cont., vol. 2, p. 301.

Parsons—Merc. Law, p. 73.

En face de semblables autorités, le doute n'est plus possible.

Le reste de la cause n'est plus qu'une appréciation de la preuve.

Il est en preuve que l'appelant a fait payer les acomptes, par ses commis, sur les avances faites à son frère.

Toutes ces circonstance démontrent clairement la responsabilité de l'appelant; il y avait volonté, pour lui, de s'obliger.

"Ce n'est pas seulement par des paroles ou par des écrits qu'on peut faire "connaître son consentement ou sa volonté, on peut encore la manifester par des "signes, *par des faits*, quelquefois même *par le silence ou l'inaction, par la "tolérance* d'un fait que l'on pouvait ou que l'on avait intérêt d'empêcher.

Toul., Oblig. No. 32 et 33, Note 1re.

Journal du Palais, *Vo.* consentem. Tab.-Gén.

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" Quand il s'agit de correspondance entre négociants, lorsqu'un marchand écrit " à un autre qu'il est débiteur de quelque chose, celui qui reçoit la lettre et qui " se tait, *est présumé en approuver le contenu et reconnaître la dette.*."

Lemerle, Fins de non recevoir, p. 391, ch. 18, S. 6, § 4.

A plus forte raison doit-il en être ainsi dans la cause actuelle, où il ne s'agit pas seulement d'une lettre, mais d'une succession de factures et d'états de comptes envoyés à l'appelant, pendant près de deux ans.

Voici les considérants du jugement : " Considérant que les demandeurs en Cour Inférieure (intimés) n'ont pas fait une preuve légale des faits matériels dans leur déclaration, et nommément que le défendeur appelant était endetté aux demandeurs en la somme qu'il a été condamné de leur payer par le jugement dont est appel.

" Considérant partant que dans le dit jugement il y a erreur.

Cette cour infirme, casse et amende, le dit jugement et déboute l'action des demandeurs avec dépens contre eux dans les deux cours.

Jugement renversé.

Jetté et Archambault, avocats de l'appelant.
Duhamel et Rainville, avocats des intimés.

COUR DE CIRCUIT.

RICHELIEU, 1884.

GILL, J.

Rouillard vs. *Ricard*.

Jugé :—Que le propriétaire d'un rond à courses est tenu de faire les courses suivant son programme, sous peine de dommages envers les propriétaires de chevaux qui devaient concourir à ces courses.

PER CURIAM :—Le défendeur propriétaire d'un rond de courses, avait invité des propriétaires de chevaux trotteurs à se rendre à son rond pour concourir suivant un programme qui se lit comme suit : " Courses au trot sur le rond de " Hilaire Ricard, au village de la paroisse de St. Guillaume, mardi et mercredi " les 8 et 9 septembre 1885. En cas de mauvais temps, les courses seront remises " aux jours suivants."

Le demandeur s'est rendu de Pierreville à St. Guillaume avec ses deux chevaux trotteurs et un homme pour en avoir soin ; et il s'est installé chez Desseft, hôtelier, en attendant les courses.

Il était dit dans le programme qu'il y aurait des courses le 8 et le 9 et que, s'il faisait mauvais, elle seraient remises aux jours suivants.

Le 8, il a fait beau. Le 9, il pleuvait ; il ne pouvait donc pas y avoir de courses ce jour-là ; d'après le programme, elles devaient être remises au lendemain.

Rouillard vs. Ricard.

Mais il paraît que, dès le 9, le défendeur avait cherché à discontinuer les courses et à les ajourner à un an. Mais le demandeur ne s'en est pas tenu à cela. Il s'est présenté, le 10, au rond du défendeur pour faire trotter ses chevaux : le rond n'était pas très beau, il était affecté par la pluie qui était tombée la veille et le défendeur n'a pas voulu lui permettre d'entrer sur son rond, lui disant que les courses étaient ajournées à un an.

Le demandeur le poursuit maintenant en dommages pour recouvrer les dépenses qu'il a faites sur l'invitation du défendeur de se rendre à St. Guillaume pour concourir aux courses faites par le défendeur, lesquelles n'ont pas eu lieu.

Le défendeur invoque force majeure ; que la pluie l'a empêché de faire ces courses.

Mais, le 10, quoique le rond ne fut pas très propice, il devait laisser trotter les chevaux, suivant son programme. Et l'un des juges, M. Jasmin, qui a de l'expérience dans les courses, a averti le défendeur qu'il ne croyait pas que sa responsabilité était à convert en ajournant les courses à un an, comme il le faisait. Je lui a dit : " tu devrais plutôt les ajourner à 8 jours, c'est évidemment trop long un an.

Mais je considère que même l'ajournement à 8 jours est contre le programme.

Si le rond du défendeur ne pouvait pas supporter une journée de pluie sans être détérioré, il n'aurait pas dû inviter des gens à venir trotter là, et il doit en supporter les conséquences.

Le demandeur demande, par son action, $24, de dommages. Je trouve qu'il n'a pu en prouver qu'au montant de $10.00, s'appliquant aux frais de pension, de déplacement, temps de l'homme qui a été amené là, traverse, temps du propriétaire des chevaux. Donc jugement en faveur du demandeur pour $10.00 avec les dépens distraits à Mes. Germain & Germain, avocats du demandeur.

Germain et Germain, avocats du demandeur.

A. P. Vanasse, avocats du défendeur.

COUR DU BANC DE LA REINE, 1869.

EN APPEL.

MONTREAL, 2 JUIN 1869.

Coram : DUVAL, CARON, DRUMMOND, BADGLEY, et MONK, JJ.

LE REVEREND MESSIRE NAZAIRE HARDY,

(*Demandeur en Cour Inférieure*),

ET

APPELANT;

HILAIRE HARPIN,

(*Défendeur en Cour Inférieure,*)

INTIMÉ.

Jugé :—Qu'une action en réintégrande sera déboutée s'il est prouvé que l'immeuble réclamé a été détenu à titre précaire, v. g. par location,—et s'il est établi qu'il n'y a pas eu de voies de faits et dépossession illicite et violente par le détenteur.

Le jugement final dont est appel a été rendu le 30 octobre 1868, à Montréal,

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par la majorité de trois juges de la Cour Supérieure siégeant en Révision à Montréal, lequel jugement a confirmé le jugement final qui avait été rendu le 18 janvier 1868, à Sorel par la Cour Supérieure siégeant à Sorel pour le district de Richelieu.

Ce jugement est comme suit:

"Considérant qu'il est en preuve que c'est comme locataire du défendeur que le demandeur a joui du terrain dont il demande la réintégrande et que ce n'est que sur la remise du dit terrain faite par le dit demandeur au défendeur que ce dernier en a pris possession, et que conséquemment, il n'y a pas eu de la part du demandeur de possession utile du terrain en question, qu'il n'a pas détenu en son nom, mais qu'il a possédé à titre précaire et que de la part défendeur, il n'y a pas eu de voie de fait et dépossession illicite et violente, deux éléments indispensables pour engendrer l'action en réintégrande qui dans la présente espèce ne compétait pas au demandeur, a débouté et déboute le dit demandeur de son action avec dépens."

L'action de l'appelant, dont il a été débouté, est une demande en réintégrande.

L'appelant prétend:

"La réintégrande" dit Pothier, introduction générale aux Coutumes T. 22 des cas possessoires, No. 41 "est l'action que celui qui a été dépossédé par violence a droit d'intenter contre le spoliateur, pour être rétabli dans sa possession."

Au No. 44 il ajoute ceci: "L'action de réintégrande a lieu contre le *spoliateur*, quand même il serait *vrai propriétaire* de l'héritage; et il ne doit pas même être écouté à *réclamer* son héritage et à *justifier* de son droit de propriété, jusqu'à ce qu'il ait rétabli dans la possession de l'héritage celui qu'il en a dépouillé et qu'il lui ait payé les dommages et intérêts et les dépens auxquels il a été condamné par le jugement de réintégrande."

La réintégrande est une action possessoire d'une espèce particulière dispensée de la possession annale.

Vide. Jurisprudence du 19e siècle ou table générale du recueil de Sirey 1791 à 1850 par Devilleneuve et Gilbert, Vo. action possessoire-réintégrande, No. 353 et suiv. et No. 357.

L'article 947 du Code de Procédure Civile accorde un délai d'un an pour porter une telle action.

Notre Code de Procédure Civile, art. 946 d'accord avec l'ancien droit, fait une grande distinction entre la complainte et la réintégrande; "en autant que "l'action de réintégrande est accordée au *possesseur*." Sans caractériser aucunement sa possession; tandis que l'action en complainte n'est point donnée à tout possesseur quelconque.

Ord. 1667, Tit. 18, art. 5.

"Les demandes en complainte ou en réintégrande ne pourront être jointes au "pétitoire, ni le pétitoire poursuivi, que la demande en complainte ou en réin-"tégrande n'ait été terminée, ou la condamnation parfournie et exécutée."

"Défendons d'obtenir lettres pour cumuler le pétitoire avec le possessoire."

En supposant pour un instant que l'appelant fût le locataire de l'intimé ; ce dernier avait-il le droit de s'emparer du terrain par voie de fait ? Evidemment non ; car alors à quoi bon l'action en expulsion ? à quoi bon l'action en résiliation de bail ?

Evidemment, le juge *a quo* a fait une fausse appréciation des faits et de la loi en considérant " qu'il n'y a pas eu de la part du demandeur de possesion utile," et que de la part du défendeur, " il n'y a pas eu de voie de fait et dépossession " illicite et violente."

L'intimé répond :—

Pour apprécier les faits au point de vue du droit et en faire l'application à la présente cause il est bon de rappeler ici un principe légal, à savoir : que la possession que la loi veut protéger par les actions possessoires est celle qui est intimement liée à l'idée de propriété, qui est l'exercice et l'attribut de la propriété. Ce qui fait dit " Domat.—Tome 2, Edit de Remy, Titre 7. De la Possession qu'on se sert assez souvent du mot de possession pour signifier la propriété" ; et *vice-versa*. Tous les détenteurs n'ont pas l'action possessoire. " Ceux qui ne " possèdent qu'à titre précaire, comme les locataires, par exemple, ont des actions spéciales pour protéger leur détention, mais n'ont pas l'action possessoire. Il faut que ce soit une possession capable de faire acquérir. Pour cela la loi exige dans la possession certains caractères sans lesquels elle ne la considère pas comme une possession utile. La loi ne protége la possession utile que parce qu'elle a en vue les intérêts de la propriété. Elle considère cette possession dit Troplong, Traité de la prescription. No. 230 ;—" Comme une quasi-propriété, qui doit " prévaloir tant que la vraie propriété n'est pas reconnue." Or quand un possesseur reconnaît un autre comme propriétaire ; quand il fait des actes de possession qui ne sont pas la manifestation d'un droit de propriété, mais d'un simple droit de jouissance précaire, cette possession n'est pas à titre de propriétaire et ne donne pas lieu aux actions possessoires. D'après tous les auteurs cette possession, non caractéristique du droit de propriété n'est pas à proprement parler ce que la loi entend par possession ou saisine—elle n'est qu'une simple détention.

" Il n'y a dit Domat, tome 2, titre 7, de la Possession—à proprement parler " qu'une véritable possession, c'est celle d'une personne qui tient une chose à " titre de maître, soit qu'il exerce son droit par lui-même ou par d'autres à qui " il laisse la détention."

Liv. 4. tome 7 " D'où il faut conclure que la vraie possession n'est propre- " ment que celle du maître, et qu'encore que d'autres que le maître puissent " avoir droit de tenir la chose en leur puissance comme le locataire, le fermier " l'usufruitier qui, ayant droit de jouir, doivent par conséquent avoir la déter- " tion ce n'est qu'en eux une possession empruntée, ou plutôt la possession du " maître qui possède par eux, *le droit de la possession ne pouvant être séparé de " la propriété.*"

Titre 7, sec. 1ère. No. 8. " La simple détention d'une chose ne s'appelle pas " proprement possession, et ce n'est pas assez pour posséder qu'on tienne une " chose et qu'on l'ait en sa puissance, mais il faut l'avoir avec le droit d'en jouir " et d'en disposer comme en étant le maître ou ayant un juste sujet de croire

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" qu'on l'est. Car celui qui tient une chose sans avoir ce droit, s'il la tient " contre la volonté du maître, n'est pas un possesseur, mais un usufruitier ; ou, " si c'est par sa volonté, cette détention laisse au maître sa possession et c'est lui " qui possède."

No. 10 même section, " Ceux qui ne possèdent que précairement, c'est-à-dire " comme ayant prié le maître de leur laisser la possession ne l'en dépouillent pas " mais possédant de son consentement possèdent pour lui."

Troplong dans le commentaire de l'article 2228, traité de la prescription Nos. 217, 218, 219, 220, 221, 222, 223, 224, et 226 adopte la même doctrine et dans une page d'une sublime éloquence, démontre que la possession, à la différence de la simple détention est celle qui est la propriété en exercice et que par les actions possessoires la loi n'a en vue de protéger que cette possession là. Conséquemment celui qui possède tout en reconnaissant qu'il ne possède pas sa propriété, n'a pas la possession requise pour intenter une action possessoire, surtout contre celui qu'il a reconnu comme maître.

Vide aussi même traité de Troplong, commentaire, de l'article 2229, No. 363 et suivants jusqu'au No. 368.

En vertu des principes ci-haut posés et discutés, la question entre l'appelant et l'intimé se trouve tranchée. L'appelant s'étant en toute occasion reconnu et manifesté comme locataire ; ayant reconnu l'intimé comme propriétaire et ayant reconnu par ses actes qu'il ne jouissait pas comme propriétaire, se trouve à avoir possédé pour l'intimé. Il n'a été qu'un simple détenteur ; il n'a pas eu la possession utile ; conséquemment il n'avait pas l'action possessoire.

La faculté de prouver par témoins les vices d'une possession est reconnue et admise par tous les auteurs qui ont traité ces matières. Outre les auteurs suscités Vide Troplong. Com. de l'article 2230 ainsi conçu. " On est toujours présumé " posséder pour soi et à titre de propriétaire, s'il n'est prouvé qu'on a commencé " à posséder pour autrui." Ces expressions, *s'il n'est prouvé*, ne veulent-elles pas dire une preuve testimoniale comme tout autre genre de preuves qui puisse détruire la présomption légale.—Troplong soutient l'affimative " Cette présomp- " tion légale, dit-il s'évanouit dans plusieurs cas, entr'autres, lorsque la pré- " somption de la loi est détruite par une présomption contraire plus forte." Dunod cité par Troplong exprime la même opinion en disant " dans le doute on " est censé posséder pour soi-même, plutôt que pour autrui *quand cette pré- " somption n'est pas combattue par de plus pressantes.*" Dargentré, cité aussi " par Troplong dit " Hoc tamen theorema interdum faillit, quum scilicet *alia* " *præsumptione fortiore hoc quod præsumption* sola nitur." Carou confirme le même principe et soutient les prétentions du défendeur en termes positifs. Il dit page 800, " mais lorsque j'allègue qu'un tiers est propriétaire, etc., etc., cela " est vrai ; mais que veut l'article 2229, c'est que la possession soit continue et " non interrompue, paisible, publique, non équivoque et à titre de propriétaire. " Donc si l'*Enquête*, au moyen de laquelle le prétendu possesseur veut établir sa " possession, apprend que ce n'est que comme fermier, usufruitier, ou à tout " autre titre précaire qu'il est en possession de la chose, alors il n'a pas prouvé " qu'il jouissait à titre de propriétaire ou à un titre non précaire : alors donc il

" n'est pas dans les conditions voulues par la loi et son action doit être repoussée." Cette opinion nous paraît d'ailleurs, etc., etc., jusqu'au No. 66.—Danty loc. citée dit la même chose. *Vide* aussi le practicien français, pages 184 et 185 qui décide que des témoins sont entendus pour prouver la possession précaire. Hardy vs. Harpin.

En résumé l'action de l'appelant est mal fondée, et les jugements de la Cour Supérieure à Richelieu et de la Cour de Révision qui l'ont déboutée, doivent être confirmés en tous points.

Il est de l'essence même de l'action en réintégrande qu'il y ait eu dépossession violente. La réintégrande n'est donnée qu'au propriétaire dépouillé.

L'appelant n'ayant pas été dépouillé, mais ayant volontairement abandonné sa possession à l'appelant, son action doit encore être déboutée.

Jugement confirmé.

Lafrenaye et Bruneau, avocats de l'appelant.
A. Germain, avocat de l'intimé.

COUR DE REVISION, 1872.

MONTRÉAL, 30 AVRIL 1872.

MACKAY, TORRANCE BEAUDRY, J.J.

JAMES CALCOTT, *Demandeur*,
ET
JOSEPH ROBERT, *Défendeur*;
ET
JOSEPH ROBERT, *Opposant*.

Jugé:—Qu'il n'est pas nécessaire que le shérif ou l'huissier saisissant un immeuble, fasse mention dans son procès verbal qu'il s'est rendu sur l'immeuble saisi.

Qu'il n'est pas essentiel d'interpeler le défendeur lui-même d'indiquer ses biens immobiliers, quand le défendeur n'est pas à son domicile; mais qu'en ce cas la description qu'en donne une personne raisonnable de la famille du défendeur suffit.

Que partant il est suffisant que le procès-verbal de saisie fasse mention de l'interpellation faite à cette personne raisonnable.

Qu'une telle description est censée fidèle si elle n'est pas contredite.

Que le saisi ne peut demander la nullité de la saisie, suivant l'article 581, que pour cause d'extinction complète de la dette.

Qu'au cas où la dette n'est éteinte qu'en partie, l'opposition n'a l'effet d'empêcher la vente pour plus qu'il n'est dû.

Que dans le cas où un opposant conclut à la nullité de la saisie, lorsqu'il n'a droit qu'à la faire réduire, et que le demandeur ne reconnait pas l'accompte payé, mais veut le maintien de toute la saisie, ils doivent supporter chacun leur frais.

Le demandeur fait saisir par le shérif de Montréal un immeuble appartenant au défendeur et rapporte le bref avec procès-verbal de l'huissier, constatant: qu'il se serait transporté au domicile du défendeur, et aurait parlé *à une personne raisonnable de sa famille*, qui lui dit que la désignation du dit immeuble décrit au dit procès-verbal était correcte.

L'opposant, par son opposition afin d'annuler, demande que la saisie faite par le shérif des immeubles de l'opposant soit déclarée nulle, entr'autres:

1o. Parce que le dit opposant ne devait pas, lors de la saisie, le montant porté au bref d'exécution, ayant déjà payé un accompte sur le paiement;

Jas. Calçott et Jos. Robert et Jos. Robert.

2o. Parce que les procédés de l'huissier saisissant étaient irréguliers, n'ayant ni requis, ni obtenu la désignation des immeubles saisis du défendeur lui-même ni été sur les lieux pour en prendre la description lui-même.

Le demandeur conteste en disant qu'il n'était pas nécessaire que l'huissier du shérif fit mention en son procès-verbal de saisie qu'il s'était transporté sur l'immeuble du défendeur pour en faire la saisie.

Il est en preuve que le demandeur avait reçu, avant l'exécution, un accompte de $10.00 du jugement.

La Cour en première instance (Mondelet, juge), a, le 29 février 1872, maintenu l'opposition et déclaré la saisie nulle.

" Considérant qu'il n'appert pas que l'huissier ou le shérif saisissant se soit transporté sur les lieux pour effectuer la saisie de l'immeuble saisi en cette cause."

" Considérant qu'il n'appert pas que la description de l'immeuble saisi ait été donnée à l'huissier ou au shérif par le défendeur."

Le demandeur a interjeté Révision et dit entr'autres choses dans son factum :

Les articles 637 et 638 C. P. C. déterminent clairement les devoirs de l'huissier saisissant un immeuble, ainsi que les faits que son procès-verbal doit constater.

L'art. 638, en énumérant spécifiquement tout ce que doit contenir le procès-verbal de saisie, ne fait voir en aucune manière que l'huissier doit se transporter sur les lieux pour y effectuer la saisie, et cette cour dans la cause de Sénécal vs. Vienne, le 31 octobre 1871, a décidé que de fait cette formalité n'est pas nécessaire.

L'art. 637 exige qu'avant de procéder à la saisie de l'immeuble, l'officier qui en est chargé interpelle le défendeur de lui indiquer ses biens-meubles, et qu'à défaut près de telle indication ou description, l'officier exécutant peut procéder à saisir les biens qui sont en possession du défendeur et aux risques et périls de ce dernier.

Assurément la loi n'a pas voulu faire dépendre la validité de la saisie du fait que l'interpellation devra être nécessairement faite au défendeur en personne ; autrement, ce dernier n'aurait qu'à se cacher ou s'esquiver pour rendre illusoires toutes procédures sur exécution. Ce que la loi a voulu, c'est d'obtenir de la bouche du défendeur lui-même, si c'est possible, c'est-à-dire de la personne même qualifiée à le faire, la description que l'huissier doit donner de l'immeuble dans son procès-verbal. Or dans la présente cause le but a été pleinement atteint, en parlant à une personne raisonnable, et personne ne se plaint que la description soit irrégulière.

L'opposant dit entr'autre dans son *factum :*

Il est évident que si le défendeur ne fournit pas lui-même la description de ses immeubles, la saisie ne peut s'opérer *mentalement ou par fiction* du bureau du shérif ou de tout autre endroit, mais qu'il faut une espèce de prise de possession par l'huissier qui doit se transporter sur les lieux.

Le Code de Procédure n'exige pas littéralement et sous peine de nullité la mention de ce fait au procès-verbal, mais quand il est nié la preuve en incombe au demandeur.

Jas. Calcott et Jos. Robert et Jos. Robert.

Dans tous les cas le premier moyen de l'opposition seul suffit et le demandeur ayant contesté l'opposition et ayant conclu à son renvoi pur et simple, sans se désister de sa saisie pour le montant déjà payé, et sans offrir les frais d'opposition jusqu'alors, il est mal fondé dans sa contestation.

La Cour de Révision a, le 30 avril 1872, renversé le jugement du 29 février et maintenu la saisie. "Considering the opposition of Robert unfounded in pretending that the seizure made under the execution in this cause issued was or is null, because of the seizing bailiff not alledging that he went upon the land of defendant to seize."

"Considering also that the payment by defendant opposant of ten dollars, as alledged, could and can only entitle opposant to have the amount of the execution against him reduced *pro tanto*, and to prevent the sale for more than due. Doth adjudge that the execution referred to shall be stand reduced by said ten dollars, with interest."

Dorion, Dorion et Geoffrion, pour le défendeur opposant.

Morcau, Ouimet et St-Pierre, pour le demandeur contestant.

COUR DE CIRCUIT, 1884.

MONTRÉAL, 13 SEPTEMBRE 1884.

Corm PAPINEAU, J.

HENRY MARTIN GILES, ès-qualité, DEMANDEUR,

CONTRE

ETIENNE LALUMIERE, DÉFENDEUR;

ET

LE MÊME DEMANDEUR,

CONTRE

EDOUARD NORMANDIN.

Jugé:—1o. Que le demandeur ès-qualité a droit et qualité pour ester en jugement en cette cause. (Art. 19 C. P. C.)

2o. Qu'en matières d'assurances mutuelles la part contributive de chaque assuré pour la réparation des sinistres, n'est pas soumise à la prescription de cinq ans,

PER CURIAM:—Le défendeur, assuré par la Compagnie dite "Niagara District Mutual Fire Insurance Company," et, comme tel membre de cette compagnie dont il a reçu et accepté une police sous numéro 25,546, après avoir donné une prime, partie en argent et partie en un billet fait suivant la formule ordinairement employée en pareil cas, est poursuivi par le demandeur en qualité de receveur nommé par la Cour de Chancellerie, en Ontario. Ce receveur a été nommé après mise en liquidation judiciaire de la compagnie pour cause d'insolvabilité.

La compagnie avait été fondée en 1836, sous l'opération du Statut 6, Guill. 4, ch. 18. Elle avait le droit de faire des affaires dans la Province de Québec, en vertu d'un statut du parlement de la ci-devant Province du Canada.

H. M. Gilles contre Lalumière et le même Demandeur contre Normandin.

La date du billet de prime et de la demande d'assurance, signés par le défendeur, est du 14 de juillet 1876.

Le défendeur plaide, 1. que le demandeur ne peut pas poursuivre en son son propre nom ; qu'il devrait poursuivre au nom de la compagnie dont il n'est que l'agent collecteur.

Ce plaidoyer ne rencontre pas le fait allégué dans la déclaration et il ne s'accorde pas avec la preuve faite : le demandeur n'est pas un agent de la compagnie, il est un officier de la Cour de Chancellerie, nommé par elle en vertu d'une loi d'Ontario, (36 Vict. ch. 44) et par elle autorisé à poursuivre.

Le pouvoir de la Cour de Chancellerie de faire cette nomination, et celui appartenant au demandeur d'agir en vertu de cette nomination, ne sont pas mis en question par le plaidoyer ; cette cour n'a donc pas à décider ces deux points.

Le défendeur plaide, en second lieu, la prescription, par le lapse de cinq ans, de la cause même du droit d'action invoquée par le demandeur, comme si l'action était fondée sur un billet ordinaire.

Le document sur lequel la poursuite est fondée n'est pas un billet ordinaire, un effet de commerce. Il n'est donc sujet qu'à la prescription de 30 ans et non à celle de cinq ans.

La créance de la compagnie n'est pas non plus, une des créances énumérées dans l'article 2250 de notre code ; le titre invoqué n'est pas un titre produisant des fruits naturels ou civils ; la créance réclamée n'est pas une créance produisant des arrérages à échéances déterminées d'avance, exigibles à époques fixes prédéterminées comme les arrérages de rentes ou d'intérêt. C'est une créance éventuelle, dépendant d'un fait d'incendie qui peut arriver ou n'arriver jamais.

Une telle créance n'est pas susceptible de la prescription quinquennale établie comme exception seulement à la règle générale ; elle ne peut s'étendre des cas expressément mentionnés dans cet article du Code à d'autres cas. Les courtes prescriptions sont de droit étroit.

On a cité de la part du defendeur, les autorités suivantes : 2, Alauzet, assurance, p. 514, No. 585 ; 32 Laurent, Droit Civil, No. 470, p. 495 ; Quenault, assurance, p. 261 ; Brun et Jollint, assurance, p. 407 ; Persil, assurance, p. 407 et Code Napoléon, art. 2277. En comparant le contexte des auteurs cités avec les passages lus à l'audience, on voit que ces auteurs sont plutôt contraires que favorables à la prétention du défendeur.

En troisième lieu, le défendeur plaide qu'il n'a souscrit son billet de prime et sa demande d'assurance que sur la représentation que la compagnie était " alors solvable," pendant qu'elle ne l'était pas, et sur cette autre représentation qu'il n'aurait jamais à payer plus de $6 à $7 par année ; de plus, qu'il a signé un billet écrit en anglais sans l'avoir compris ; qu'il a payé $13 lors de sa demande d'assurance et plus tard, qu'il ne s'est écoulé que dix mois entre le moment de son assurance et celui de la mise en liquidation de la compagnie ;

Qu'il n'existe pas de répartition légale dont il soit responsable ; qu'il n'a jamais eu avis public ni privé d'aucune répartition légale ; enfin que les allégations de la demande sont mal fondées en fait.

La contestation ayant été liée sur ces aliégations respectives des parties, elles ont procédé à la preuve.

H. M. Giles contre Lalumière et le même Demandeur contre Normandin.

Le demandeur a produit un certificat du secrétaire de la Compagnie (c'est le demandeur lui-même qui était secrétaire de la compagnie), spécifiant qu'une répartition de $66.30, étant la balance non encore payée du billet de prime consenti par le défendeur, Etienne Lalumière, le 14 de juillet 1876, et donné pour obtenir la police No. 25,546; que cette répartition couvre toute la période de durée de cette police jusqu'à la date de telle répartition; qu'elle est payable au bureau du receveur, à Ste Catherine, en Ontario, 30 jours après la date de l'avis mallé par la poste à l'adresse du défendeur; que tel avis a été ainsi mallé, à l'adresse du demandeur mentionné par lui dans sa demande d'assurance, le 26 de septembre 1877, et qu'il était alors dû sur le dit billet de prime une somme de $66.30 avec intérêt du 26 d'octobre 1877.

Le statut précité (36 Vict., chap. 44, sect. 48) dit, que dans une poursuite pour recouvrement des répartitions, un tel certificat sera pris et reçu comme preuve *prima facie* de son contenu, devant toute Cour de la Province.

On peut prétendre qu'un tel certificat n'a pas la même force probante dans la Province de Québec. Le défendeur n'a pas émis cette prétention. Il existe d'ailleurs, dans le dossier, une autre preuve suffisante au maintien de la poursuite.

Il convient d'ajouter aussi que le défendeur n'a pas prouvé son allégation que la compagnie était insolvable lors de son contrat d'assurance avec lui, ni qu'il ait signé son billet sans le comprendre.

Le défendeur a bien plaidé le défaut de répartition légale, mais il n'a signalé aucune illégalité spécialement. La Cour ne doit pas s'occuper de les rechercher à sa place et de les signaler, lorsque lui-même n'a pas voulu ou n'a pas pu en signaler.

Le certificat précité mentionne que les avis de répartition ont été mallés à l'adresse du défendeur. Ce dernier, probablement en voulant prouver le contraire a interrogé le secrétaire de la compagnie tout spécialement sur ce fait. Le secrétaire affirme les avoir mis à la poste lui-même, à l'adresse donnée par le défendeur comme étant bien la sienne.

Le même secrétaire ayant été requis d'apporter en Cour les livres de la compagnie, l'a fait et a donné le montant des pertes par l'incendie qui s'y trouvent entrées. Elles ont été très considérables dans les deux ou trois mois qui ont suivi la date de la police du défendeur.

Le fait que la répartition n'a pas été payée, en général, par les assurés de la Province de Québec a déterminé au dire de ce témoin, la liquidation des affaires de la compagnie.

Les pertes constatées dans les livres et détaillées dans les états produits et les déficits inévitables dans les recettes probables d'une pareille liquidation sont suffisants pour justifier l'appel de toute la balance restant due sur les billets de prime des assurés.

Les billets de prime ne portent pas, en vertu de la loi qui régit la compagnie en question, privilége sur tous les immeubles des membres qui les ont signés comme les billets de prime sous l'opération de notre loi des assurances mutuelles dans la Province de Québec; les rentrées de fonds sont en conséquence beaucoup moins certaines et il faut faire plus large la proportion des déficits probables.

H. M. Giles contre Lalumière et le même Demandeur contre Normandin.

Le défendeur n'a pas prouvé le paiement des $13 qu'il prétend avoir payées.

Sous ces circonstances, la défense du défendeur ne peut être maintenue.

Le jugement de la Cour du Banc de la Reine, siégeant en appel, dans la cause de la Compagnie d'Assurance Mutuelle de Joliette contre Dupuis, que l'on m'a cité comme précédent à suivre, a été prononcé sous l'opération d'une loi et sur des faits différents de ceux de la présente cause.

Le demandeur doit donc avoir jugement suivant ses conclusions.

Il en est de même dans la cause No. 4954 de H. M. Giles contre Edouard Normandin, où les circonstances dévoilées par la plaidoirie et la preuve sont semblables à celles de la présente cause.

Voici le jugement de la Cour :

The Court, having heard the parties and their witnesses and after having deliberated :

Considering that plaintiff *ès-qualité* is legally entitled to sue defendant in this cause, as he did ;

Considering that sufficient proof was afforded by plaintiff *ès-qualité*, to maintain each and every the allegations of his declaration in this cause, doth grant the conclusion thereof and therefore doth condemn said defendant to pay to plaintiff *ès-qualité* the sum of seventy dollars and fifteen cents, to wit: fifty-four dollars and forty cents, principal as assessment on defendant's premium note, and fifteen dollars and seventy-five cents, interest accrued on said amount from the nineteenth October, eighteen hundred and seventy-seven, up to date of service of process in this cause; with interest from said last date, to wit: the twenty-eighth of August, eighteen hundred and eigty-two, till final payment and costs *distrits* to Messrs. Préfontaine et Major, attorneys for plaintiff *ès-qualité*.

Préfontaine et Major, avocats du demandeur.

Pagnuelo et St. Jean, avocats des défendeurs.

COUR SUPERIEURE, 1872.

MONTREAL, 24 DECEMBRE 1872.

JOHNSON, J.

Laframboise vs. *D'Amour* et divers intervenants.

Jugé : Que la caution *judicatum solvi*, exigée par l'article 29, C. C., peut l'être de la partie absente, même dans le cas où d'autres parties procédant conjointement avec elle, seraient résidentes dans la Province de Québec, pourvu que ces différentes parties ne forment pas une seule personne morale.

Que dans les mêmes cas peut être exigée une procuration pour ester en justice dans la dite Province.

Les intervenants qui sont de différents pays, ayant produit leur intervention, le défendeur produit une *exception dilatoire*, alléguant que parmi les intervenants il y en a un certain nombre d'absents de la Province de Québec et n'y ont plus de domicile.

Laframboise vs. D'Amour et divers intervenants.

Que de plus, il n'est produit aucune procuration de la part des dits intervenants absents sus-nommés, à l'effet d'autoriser quelqu'un à demander à intervenir dans la présente cause et à poursuivre leurs droits en icelle. Il conclut à ce que la cause soit suspendue jusqu'à ce que émition soit donnée pour frais et procuration soit produite de la part des intervenants absents.

Les intervenants répondent :

Qu'ils demandent acte de la procuration qu'ils produisent.

Que quant à la partie de la dite exception par laquelle le défendeur requiert des intervenants un cautionnement pour les frais en cette instance, les intervenants allèguent que la dite intervention ayant été faite au nom des absents, conjointement avec les autres intervenants qui sont tous domiciliés en la Province de Québec, le dit défendeur n'est pas fondé à demander aux dits intervenants absents un cautionnement pour les frais de leur intervention, le défendeur ayant une sûreté suffisante pour ces frais par les intervenants résidant en cette Province.

Dorion, Dorion et Geoffrion, pour les intervenants.

Bertrand, pour le défendeur.

COUR SUPERIEURE, 1872.

MONTREAL, 30 MARS 1872.

BERTHELOT, J.

Philippe vs. *Desmarais*.

Jugé :—Que le prix de la boisson même vendue au verre par un restaurateur, pour consommer pendant le repas, peut être recouvrée en loi.

Que cette boisson est censée faire partie du repas, le prix pour icelle n'étant pas celui dont la Coutume de Paris a entendu prohiber le recouvrement.

Que la loi, en refusant à un aubergiste de recouvrer le montant de boisson vendue au verre, n'a pas entendu comprendre la boisson qu'un consommateur prend pendant son repas.

Le demandeur fait émaner contre le défendeur un *capias ad respondendum*, alléguant que le défendeur lui doit $42.00 pour pension, frais d'hôtellerie, etc.

Le défendeur prétend, entr'autres, que parmi ces consommations se trouvent pour plus de $2.00 de boisson vendue au verre ; ce qui réduirait la somme due à moins de $40.00, insuffisants pour permettre l'émanation d'un *capias*.

Chapleau & McMahon, pour le demandeur.

Augé et Daoust, pour le défendeur.

COUR SUPÉRIEURE, 1872.

MONTREAL, 18 DÉCEMBRE 1872.

JOHNSON, J.

J. Bte. Robert et Aristide Ste. Marie.

Jugé :—Que le père n'est pas de droit tuteur de son fils mineur ni seigneur de ses actions.

Qu'il faut pour poursuivre les actions d'un mineur qu'il soit pourvu d'un tuteur qui poursuive ès-qualité.

Que si le mineur n'est pas pourvu d'un tuteur, il faut lui en faire nommer un *ad hoc*.

Que le père ne peut conclure en sa faveur à des dommages causés sur quelqu'un de ses enfants que s'il était résulté des dommages pour le père, comme s'il avait été privé de ses services ou qu'il eut fait des dépenses pour faire soigner son enfant.

Le demandeur déclare qu'il est le père de J. Bte. Robert, son fils mineur, et que comme tel il a le droit de poursuivre toute réclamation et dommages que son fils peut avoir soufferts.

Que le défendeur a assailli le dit fils du demandeur et lui infligea des blessures qui l'empêchent de vaquer à ses affaires.

Que le fils du demandeur a souffert des dommages et que le demandeur est bien fondé, comme père de le représenter dans cette action.

Pourquoi le demandeur conclut à ce que le défendeur soit condamné à lui payer $100.

Le défendeur produit une défense au fonds en droit, par laquelle il prétend que l'action ne peut se maintenir en droit :

Parce que le demandeur en cette cause n'intente pas son action en qualité de tuteur, mais en son nom, tandis que d'après les allégués, il revendique un droit qu'il ne peut avoir qu'en qualité de tuteur *ad hoc* à son enfant mineur.

Parce qu'il n'allègue pas qu'il soit le tuteur *ad hoc* de son fils, et qu'un tel procédé ne peut être pris que par un tuteur *ad hoc*.

La Cour considérant les moyens de la défense en droit bien fondés, maintient a dite défense en droit et déboute l'action.

Ainsi jugé en Révision dans une cause de Leclair contre Beauchamp.

Maillet, pour le demandeur.

Lanctôt et Lanctôt, pour le défendeur.

COUR DE CIRCUIT, 1872.

MONTREAL, 30 NOVEMBRE 1872.

Corm TORRANCE, J.

Cyr vs. *Cadieux.*

Maitres et Serviteurs—Art. 1669 *C. C.*

Le demandeur réclame du défendeur la somme de $38 pour 2½ mois de salaire comme domestique ou employé de ferme—Entr'autres choses, le défendeur allègue par un plaidoyer spécial un engagement verbal pour une année au prix de $185 ; qu'il offre de prouver par son serment et prétend que le demandeur ayant sans

raison valable, malgré les protestations réitérées du défendeur, abandonné le service de ce dernier avant l'expiration de son engagement, son action doit être déboutée.—qu'il n'y a aucun doute que d'après la loi et la jurisprudence établie le serviteur qui déserte le service de son maître avant l'expiration de son engagement, ne peut être reçu à réclamer le salaire qui pourrait lui être dû pour le temps qu'il a fait; car le maître ne peut être tenu de payer le salaire de son employé qu'en autant que ce dernier a rempli de son côté ses obligations. Mais le demandeur prétend que d'après l'engagement verbal allégué par le demandeur, il avait été expressément convenu, qu'il pourrait abandonner le service du défendeur quand bon lui semblerait et que dans ce cas ce dernier sera tenu de lui payer le temps qu'il aurait fait. Le défendeur admis en vertu de l'article 1669 du Code Civil, à prouver par son serment l'engagement allégué par son plaidoyer, nie formellement les avancés du demandeur. De son côté ce dernier fait entendre quatre témoins, son père et trois sœurs, qui prouvent les allégation, de sa réponse. Le défendeur s'est objecté à cette preuve comme illégales s'appuyant sur la seconde partie de l'article déjà cité, lequel se lit comme suit: " Dans toute action pour salaire par les domestiques ou serviteurs de ferme, le " maître peut, à défaut de preuve écrite, offrir son serment quant aux conditions " de l'engagement et aussi sur le fait du paiement en l'accompagnant d'un état " détaillé. Si le serment n'est pas offert par le maître, il peut lui être " déféré, *et il est de la nature décisoire* quant aux matières auxquelles il est " restreint."

Cette objection, réservée par la Cour, renferme toute la difficulté de la cause Le texte de la loi est formel et appuyé sur l'autorité de plusieurs anciens auteurs cités par les codificateurs, et la Cour, après mûr examen de la question, prononce en faveur du défendeur et déboute l'action du demandeur.

COURT OF QUEEN'S BENCH.

(APPEAL SIDE.)

MONTREAL, 8TH MARCH, 1870.

Coram CARON, DRUMMOND, BADGLEY, MONK, JJ.

EDWARD SPELMAN & AL,

(*Plaintiffs in the Court below,*)

APPELLANTS;

AND

ANDREW ESINHART, JR.,

(*Defendant in the Court below,*)

RESPONDENT.

What constitutes a perfect acceptance and legal delivery of the goods sold.

The appeal in this case is taken from a judgment rendered in the Superior Court, at Montreal, on the 30th June, 1868, by which the plaintiff's action was dismissed with costs.

In the month of January, 1868, the appellants instituted an action against the respondent, to recover the sum of $1002.89, as the price and value of six

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hundred and three gallons of high-wines, and five puncheons containing the same, sold and delivered by the said plaintiffs to the said defendant, and for which the said defendant agreed to give his promissory note at ninety days from the 20th January, 1868.

In the declaration there follows this statement:

That the respondent refused and neglected to give his note for the said sum of $1002.89, although thereunto often requested.

The respondent pleaded to this action that the agreement was, that the high-wines should be delivered to carters he should send for the same, whilst the appellants sent over the high-wines to Laprairie by their own carters, on the 21st January, 1868; and that before he could examine, guage and accept delivery of the same, to wit, on the 22nd January, 1868, they were seized as forfeited to Our Lady the Queen, for breach of revenue laws, and taken away by officers of excise, *and notice thereof was given to the appellants*, which notice the respondent declared he produced with his plea.

That the said five puncheons were never delivered to the respondent, and were never accepted by him, and that the said seizure by the excise officer was made in consequence of fraud attempted to be practised by the appellants.

That respondent could not oppose the entry of the excise officer nor the taking away of the high-wines; and that respondent could not be held to pay for high-wines never delivered to him, and which, moreover, were forfeited to the Crown.

Before leaving the appellants' premises, the puncheons had been guaged and the quantity established.

On the other hand it is urged by the respondent, that he had not time to examine and guage the five puncheons of whiskey. But the appellants allege that the conduct of the respondent constitutes a perfect acceptance of the goods sold, he having exercised the rights of a proprietor. Moreover, the sale having been made of the five puncheons, containing 603 gallons specifically, and their contents having been guaged by the appellants and found correct, so soon as that guaging was finished, and the puncheons set apart as respondent's property, the ownership vested in him.

Code Civil, 1472, 1474, 1492, 1493. Hanson *vs.* Meyer, 6 East, 214. Rugg *vs.* Minet, 11 East, 209. Lagury *vs.* Turnell, 2 Camp., 240. Logan *vs.* Lemesurier, 6 Moore P.C.C., 116. Brown on Stat. of Frauds, § 317, 318, 322, 324, 330, 334.

Having thus, as the appellants believe, satisfactorily established the fact, that on the 22nd of January, 1868 (the day of the pretended seizure by the excise officers), the whiskey, and the puncheons containing it, were absolutely the property of the respondent. The appellants respectfully call the attention of this court to the fact that it was the duty as well as the privilege of the respondent to have notified the excise authorities of his intention to claim the said articles seized within one month from the day of the said seizure. The 163 Section of Cap. 8, 31 Vic (Canada) is couched in the following words:

"163. All vehicles, goods and other things seized as forfeited under this

"Act, or any other Act relating to excise, or to trade or navigation, shall be "deemed and taken to be condemned, and may be dealt with accordingly, unless "the person from whom they were seized, or the owner thereof, do, within one "month from the day of seizure, give notice in writing to the seizing officer, the "collector of Inland Revenue, in the Inland Revenue Division, in which such "goods were seized or superior officer of Inland Revenue, that he claims or "intends to claim the same."

Here is the judgment of the Court below (Mondelet, J.)

The court having heard the parties by their counsel upon the merits of this cause, examined the proceedings, proof of record and the evidence adduced, and having upon the whole maturely deliberated, considering that the plaintiffs have not proved the material allegations of their declaration, and, namely, that according to their promise and undertaking of the twentieth of January, one thousand eight hundred and sixty-eight, they have duly delivered to defendant the quantity of gallons of high-wines, by them alleged to have on the said twentieth of January, one thousand eight hundred and sixty-eight, been sold to said defendant.

Considering on the contrary, that defendant has proved the material allegations of his exception, and, namely, that said plaintiffs have failed to make defendant the legal delivery they were bound to make to him of the said high-wines. Considering, moreover, that the defendant was, on the day that said high-wines were sent to him, dispossessed of said high-wines, by the act of their being seized by the excise officers, for and in consequence of a violation and infringement of the law, with respect to said high-wines, by said plaintiffs.

Considering therefore that plaintiffs have no right to recover from defendant the amount of money they sue for, nor any part thereof. The court doth maintain the exception pleaded by defendant, and it is adjudged that plaintiffs action be, and the same is dismissed with costs.

Judgment confirmed.

(M. Justice DRUMMOND, *diss.*)

W. H. Kerr, for the appellants.

L. Betournay, for the respondent.

COURT OF QUEEN'S BENCH.

(APPEAL SIDE.)

MONTREAL, 9TH SEPTEMBER, 1868.

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

ISAAC MANNING,
(Defendant in the Court below,)
APPELLANT;

AND

SAMUEL LEE SUNBURY,
(Plaintiff in the Court below,)
RESPONDENT.

Purchase at a municipal sale—What the plaintiff must prove in an action en complainte—What does or does not establish possession—Saisine possessoire.

This is a possessory action—action *en complainte*—The plaintiff alleges that

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he was in possession as proprietor of the west half of the east half of lot number *two*, in the first range of Ascot for more than a year and a day, prior to certain *troubles* by defendant on or about the 23rd day of December, 1865, and that the defendant, without his permission, and against his will, on or about the last mentioned date, entered upon said land and cut and felled divers trees thereon, and erected a building thereon; and concludes in the ordinary manner that defendant be held to desist from said *troubles*, and that plaintiff be maintained in his possession. The defendant pleads two exceptions, and a general plea of defense *au fonds en fait*.

In all three of his pleas it must be observed that he does not claim any personal possession, or right of possession, prior to the 14th day of December, 1865. He alleges that one Joseph S. Walton, in February, 1863, obtained from the Secretary-Treasurer of the Municipal Council of the County of Compton, a certificate of purchase of said land for taxes, and in February, 1865, said Walton obtained a municipal tax deed of said land; that said Walton was in possession of said land from the date of his certificate till the 14th day of December, 1865, when he transferred and made over his rights to the defendant, who had been in possession since.

To sustain this plea it is clear that defendant was bound to show *actual* possession of said land by Walton from February, 1863, to December, 1865. He entirely fails to do this, but invokes section 61, sub-section 4, of the Municipal Act as vesting Walton with the possession. This section says the holder of the certificate "may forthwith enter upon and take possession of such lot or parcel of land." This simply confers the *right* of possession, not actual possession. This right may be disputed and successfully disputed, if the proper formalities of the law have not been observed to effect an alienation or partial and conditional alienation, of the land. And when there is an adverse possession this possession permitted by this clause of the Municipal Act, cannot be taken *forcibly*, but the party claiming under the municipal title, must take his recourse in the same manner as if holding any other title, to eject the possessor. Even a sheriff's deed does not confer actual possession where there is an adverse or a *de facto* possession, of another, but it must be followed by a writ of possession, to put the purchaser into possession of the real property acquired by him. "*Nul ne peut se faire justice a soi-même*," is a maxim held sacred by the law.

The land in question in this cause was acquired by Silas Todd, by Location Ticket of the British American Land Company on the 8th of January, 1865, and Todd entered into possession and cut timber for a saw mill owned by him, from year to year, on said land. On the 16th day of July, 1864, Todd, still retaining the undisturbed possession which he had held for nine years, transferred his location ticket to plaintiff, ordering the British American Land Company to deed to plaintiff. On the first of October, 1864, the British American Land Company executed a deed of said land to plaintiff, which was in the form prescribed by the registry ordinance, and conveyed to him "the seizin, estate, freehold *and possession*." Vide Con. Stat. L. C., c. 37, sec. 56. Upon the execution of this deed the plaintiff entered into possession.

The land in question was 50 acres adjoining the rest of plaintiff's farm, and

it was uncultivated land, consequently it was not subject to the same proofs or signs of possession as a cultivated lot, on which crops are grown; but plaintiff's other land was not separated from it. His cattle were pastured upon it. He cut shingle timber upon it. He paid the taxes accruing upon it from year to year, and was reputed in the neighborhood and known to be the proprietor and in possession as such of said land.

Mr. Walton was examined by defendant, and he does not state that he had ever been in possession of the land, and it is clear from his evidence that he never attempted to get possession under his certificate, because he says, "I did not understand anything about whether the certificate carried possession or not;" but he says, "I afterwards took means through the defendant to obtain possession." In this he evidently refers to the possession taken, or attempted to be taken, by defendant on the 14th December, 1865. It is clear from his evidence that he made no move respecting said land till after he got his deed, which was in February, 1865, when he offered "to sell his interest, whatever it might be," to plaintiff. He does not seem to have had much faith in his municipal deed. In fact he had little occasion to have, for the other like deeds given in said municipality, that had been tested, proved valueless. It was a *ruse* on the part of Walton and defendant to take possession of this land *forcibly* in December, 1865, in order if possible, to compel plaintiff to seek to eject him, and then he could avail himself of the lapse of two years after the purchase, after which a person holding possession under a municipal deed, cannot be troubled in his possession, and so the plaintiff would be deprived of his legal rights. In addition to the proofs of actual possession by plaintiff, which appear most conclusive, it appears that shortly before the 14th December, 1865, the plaintiff and defendant, and another contignous proprietor, had lines run by a Provincial Surveyor, and this 50 acres was bounded with the rest, the defendant being present, and acquiescing, and this 50 acres was separated, or the line delineated between plaintiff and defendant. This appears by T. Francis' evidence as well as by the evidence of Lyman Sunbury, and the cross-examination of James Francis. Had plaintiff not supposed that his proof was ample, he could have brought the Surveyor who actually verbalized this survey, and the proces verbal was signed by defendant as well as plaintiff. What more perfect recognition of plaintiff's possession could defendant have given than this? After having acquiesced in this survey, in a few days he boldly enters upon this parcel of land and erects a shanty thereon. This he did *to take* possession as is evident from defendant's answer to the fourth interrogatory upon *faits et articles*. Defendant says Mr. Walton "gave me liberty to go forward and take possession on it at once, as *a quit claim*, and so forth." It is quite evident that his permission to take possession was after Walton's quit claim to him, which defendant alleges to have been on the 15th December, 1865. On reference to Mr. Walton's evidence it will be seen that he knew nothing of defendant's doing any thing on the land prior to the 14th December, 1865, when he gave him a receipt for money and told him to keep possession. He says defendant then, to wit, on the 14th December, 1865, "told him he had sugared on the land." This was the first he knew of it.

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Defendant has endeavored to prove some anterior possession to 14th December, 1865, by trying to show that he tapped some trees on the land. This he does not allege, and, if proved, would avail nothing. He falls upon this device evidently as an after-thought. It is shown by plaintiff's witnesses that no trees could be found giving indications that they were tapped upon this land till last spring, and it is shown that defendant tapped trees upon plaintiff's other land, a few trees over the line in the woods, which plaintiff never inquired into or regarded as an attempt at possession. Farmers holding wild land are not particular with each other about the tapping of a few straggling sugar trees across the line upon a neighbor's land, when it does not interfere with such neighbor's sugar works. If any sugar trees were tapped by defendant prior to last spring on the disputed land, which is very questionable from the evidence, it was simply the tapping of a few straggling trees near to the defendant's land and where he was sugaring, and more trees were tapped upon plaintiff's land nôt in dispute than upon the parcel in dispute; and it was a kind of neighborly liberty taken by one farmer with another, which was unknown to plaintiff, and perhaps would not have been objected to had it been known. The plaintiff was never troubled in his possession; he paid the taxes from year to year; he held the title, and the land was not separated from the rest of his farm by fence; his cattle ran upon it; he used it as he required to use it, and had all the signs of possession of which the nature of the moveable was susceptible.

Pothier Proc. Civile, mot complainte sec. iii. La possession quelqu'un aurait usurpée par violence, *ou clandestinement* au préjudice de celui contre qui il intenterait la complainte, ou qu'il tiendrait précairement de lui, ne peut pas non plus servir de fondement à sa complainte; car, vis-a-vis de lui, il n'est pas reputé possesseur; c'est pourquoi notre ancienne coutume Art. 369, disait qu'on acquiert possession en jouissant par an et jour *nec vi*, NEC CLAN NEC PRECARIO ab adversario."

The question in this case is simply this: can a person who has possessed land under title in good faith for eleven years be *forcibly* ejected and be compelled to dispute another's title, or pretended title, with the advantage of possession given to his antagonist? The maxim of the law is, "*Spoliatus ante omnia restituendus.*" The plaintiff was not aware that the land was advertised for taxes, and knew of no pretence of title in it on Walton's part till after the deed was given him, in February, 1865. It is plain that he could not have been disturbed in his possession. The plaintiff adverts to his titles, not that there is a *combat de titres* in this cause; there cannot be, but as signs of possession, defendant proves Mr. Walton's title to no purpose, because he proves no possession by Walton, and he proves no *alienation* from Walton to him. Possession cannot be connected except by an alienation and a transfer of the *seisin*. It is simply a receipt which he produces and which promises, what? Not a deed, but a quit claim. Defendant in such case cannot plead Walton's rights. Walton could not do it by intervening in the cause. By sec. 64, sub-sec. 8, M. Act, it is rendered necessary before any person can be dispossessed, *who possesses under a municipal sale*, to institute an action to set the sale aside by some competent tribunal. By 27 Vic., c. 9. sec. 11, it is required that such action to annul a

sale shall be brought within two years after the adjudication. When Walton obtained his deed two years had expired. The plaintiff knew nothing about the municipal sale, and of course had brought no action to set it aside. Walton had no possession. If he could by hook or by crook get possession, he could then set plaintiff at defiance by pleading these two provisions of the municipal law. If plaintiff was compelled to sue for possession defendant would have opportunity to test the validity of plaintiff's title. This is the reason why the defendant has taken the course he has. The case of Morkill and Heath which came before the Court of Review has settled the principle involved in this case. Morkill sued Heath for possession. It was a petitory action based upon his municipal deed. Heath held under a location ticket from the British American Land Company. Heath pleaded that the municipal sale was void for the reason of the formalities of the law not having been observed, and because it was prematurely executed. Morkill demurred to this plea upon the ground that Heath had not obtained a judgment annulling the municipal sale under 64 sec., 4. sub. sec. of Municipal Act. This demurrer was maintained by Mr. Justice Short and the defendant's plea rejected. The case was carried into review and reversed by this court, *una voce*. It was held that Heath must have the privilege of invoking his title, and testing the title of his adversary. The judgment was reversed, and Heath's title has been since sustained, and the municipal sale held void.

Here is the judgment of the Court below:

The court now here sitting as a 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 Saint Francis, on the twenty-fourth day of December, one thousand eight hundred and sixty-six, having examined the records of proceedings had in this cause and maturely deliberated, considering that the plaintiff hath proved the material allegations of his declaration, and namely: that during more than one year and one day previous to the institution of the present action, he was, and since has been, and now is, in the legal possession of the West half of the East half of lot number two, in the first range of the Township of Ascot, as in and by said declaration described;

Considering that the defendant hath, on or about the end of December, one thousand eight hundred and sixty-five, entered without any right whatsoever, but illegally and wrongfully, *par voie de fait*, upon the said West half of the East half of said lot number two, and hath thereupon felled trees of value and to the damage of said plaintiff to the amount of ten dollars;

Considering, therefore, that in the said judgment of the twenty-fourth of December, one thousand eight hudred and sixty-six, dismissing plaintiff's action, there is an error, this Court doth reverse, annul and set aside the said judgment, and proceeding to render the judgment which the Court below should have rendered:

It is considered and adjudged that the defendant do pay to the plaintiff the sum of ten dollars, with interest thereon from this day and costs as in a cause under one hundred pounds, and all the costs in this Court of Review, distraction whereof is granted to Messrs, Sanborn & Brooks, attorneys for plaintiff.

I. Manning and S. L. Sunbury. And this Court doth order that the record be remitted to the said Court in the District of Saint Francis.

RESPONDENT'S AUTHORITIES.

"This certificate of purchase does not convey a legal title, but is evidence of an equitable title to the land, and enables the purchaser to call in the legal title." Blackwell on Tax Titles, p. 298.

"Deed creates no estoppel upon the former owner. Idem, p. 364.

"The purchaser at a tax sale cannot recover the possession from the former owner or any person claiming under him in an action of forcible detainer. Ejection is his only remedy." Idem p. 492.

"Beyond the power of the Legislature to declare deed conclusive evidence of title." Idem, p. 80.

APPELLANT'S LIST OF AUTHORITIES:

1ST PROPOSITION. The purchaser at a municipal sale, may, upon receiving a certificate of sale, forthwith enter into possession; and he cannot be dispossessed until certain formalities, wanting in this instance, have been observed within a limited period, which is now past: Con. Stat. for Lower Canada, cap 24, s. 61, ss. 4, 6, 11 & 12. Consol. Stats. for Lower Canada, cap. 24, s. 64, ss. 8. 27th Victoria, cap. 9, sec. 11.

2ND PROPOSITION. The purchaser at a municipal sale may not carry away timber from the land purchased during the first year of possession, and ought not to commit waste by cutting, when he can not use it; and the same acts which begin may continue possession. Con. Stats. for L.C., cap. 24, sec. 61, ss. 5.

3RD PROPOSITION. The plaintiff in an action *en complainte* should prove *undisturbed* and *public* possession during a year and a day immediately prior to the *trouble* alleged. Samson *vs.* Bolduc *Rev. de* J. vol. 3, p. 361, *et seq.* Cremieu *Action. Poss.*—secs. 296, 299 and 300. Anc. Denisart *Vo Complainte*, No. 14. Argou *Droit Franc.* Vol. 1, p. 238. Ferriere *Gr. C. de Paris* Vol. 1, p. 1512, No. 24, and p. 1517. Guyot *vo. voi de fait*, p. 600, vol. 17. Jourdain *vs.* Vigoureaux K. B. Q. 1809.

4TH PROPOSITION. The straying of cattle does not establish possession; there must be the will to possess accompanying the act of possession. Pothier *Traite de la Posses.* Nos. 40 and 41.

5TH PROPOSITION. The alleged *troubles* may have been so numerous and protracted as to amount to possession *against even* an *actual possessor* for a year and a day. Ferriere—*Grand C. de Paris* vol. 1, p. 1514, No. 3. Code [illegible]. No. 3419.

6TH PROPOSITION. A corporation can only possess by its officers, who in the present case never saw the land. Pothier, *Traite de la Pos.* No. 47.

7TH PROPOSITION. It is merely the *Saisine possessoire* and not possession that can be [illegible] *la seul intention.* Cremieu *Actions Pos.*, secs. 293 & 294.

8TH PROPOSITION. Possession by [illegible] agent profits his principal and those

who derive from him; and titles may be produced to show the character and *accession* of possession. Pothier, *Traité de la Pos.* Nos. 1, 34, 52, and 54. Code Civil, No. 2192. Cremieu *Actions Possess.* sec. 270, Ferriere *Grand Coutume de P.* Vol. 1, p. 1524, No. 29. 1 Manning and S.L. Sunbury

5TH PROPOSITION. The possession of an *adjudicataire* is incontestable however short, when derived either at a judicial or a municipal sale. Ferriere Grand C. de P. vol. 1, p. 1525, No. 31. Consol. State. L. C. cap. 24, sec. 61, sub-sec. 4.

10TH PROPOSITION. The judgment in a possessory action should declare who is possessor or dismiss action, or order the parties to proceed *au petitoire*. Pothier *Traité de la Pos.* Nos. 104 and 105. Rhodier *Quest sur l'Ord. de 1667*, p. 254.

FIFTH PROPOSITION. In case of doubt he is preferred who has enjoyed the fruits and who has the better title. Ferriere *Grand C. de P.* vol. 1, p. 1524, Nos. 28 and 29.

(M. Justice BABOLEY, *diss.*) Judgment confirmed.

F. W. Terrill, attorney for appellant.

Sanborn & Brooks, attorneys for respondent.

IN THE COURT OF QUEEN'S BENCH.

(APPEAL SIDE.)

MONTREAL, 30TH DECEMBER, 1885.

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

THE EASTERN TOWNSHIPS BANK,
(*Defendants in the Court below*),
APPELLANT,

AND

E. H. PAQUETTE,
(*Plaintiff in the Court below*,)
RESPONDENT.

Interpretation of Contract—Manner in which interest to be computed.

The judgment from which the present appeal is taken was rendered by the Superior Court, at Sherbrooke, on the 28th day of May, 1884, as follows:

"The Court having heard the parties by their respective counsel on the merits of this action, examined the record and deliberated, considering that the plaintiff has proved the material allegations of his declaration and, that the sum of four hundred and seventy-one dollars, tendered by him to the defendants on the fourth day of February, one thousand eight hundred and eighty-four, was all that was then remaining due and unpaid by him to defendants under the deed of sale from Richard Baldwin to him, said plaintiff, of date the twenty-fourth day of Oct., one thousand eight hundred and seventy-one, and of the transfer of one thousand six hundred dollars and interest by said Richard Baldwin to defendants, on the twenty-fifth day of January, one thousand eight hundred and seventy-six, including three dollars for registration of discharge, and that plaintiff was and is entitled to have from defendants a full discharge of the hypotheque granted by

The Eastern Townships Bank and E.H.Paquette.

him to the said Richard Baldwin and transferred to the defendants, and that defendants ought to have executed said discharge when requested so to do by the ministry of J. T. L. Archambault, notary public, on the fourth day of February last, the date of said tender, which has been repeated, and said sum of money brought into court for defendants by plaintiff, with the return of his present action, and which has been withdrawn by defendants, doth declare the obligation from plaintiff to Baldwin, for one thousand six hundred dollars and interest transferred to defendants to have been fully paid by plaintiff to defendants, and doth adjudge and condemn defendants to execute a discharge of said hypotheque acquired by them as aforesaid of said Richard Baldwin on the real property so purchased by plaintiff so far as the said sum of one thousand six dollars and all interest transferred is concerned; and to cancel the registration of said mortgage as aforesaid of said real property bought by plaintiff, within one month from the service upon them of this judgment, and that in default of their so doing the judgment of this Court herein rendered shall avail to said plaintiff as such discharge; and the court doth further condemn the defendants to pay to plaintiff the costs of this suit *distraits* to Messrs. Cabana & Chartier, attorneys for plaintiff."

No witness has been examined in this case, which presents purely a question of law as to the interpretation of a contract, and as to the manner in which interest is to be computed.

The following clause, taken from the deed of sale (paper No. 4 in the record) is the subject of dispute:

"This present sale was made for the price and sum of *thirty-six hundred* "*dollars* with interest on the said sum from this date at *seven per centum per* "*annum*, such sum in capital and interest to be paid by payments of *four* "*hundred dollars* a year, the first payment on the said capital to be paid in one "year from this date, and the first payment of *four hundred dollars* on the "interest to be paid one year after the last payment of the capital, and so on "until the entire payments of the whole sum in principal and interest be paid. "The five first payments on the capital sum representing the sum of two "thousand dollars shall be paid to Albert Knight, Esquire, of Stanstead, for "which the said vendor gives for himself *quittance* of so much to the said "purchaser; and the balance remaining of *sixteen hundred dollars* on the "capital and the interest to become due on the whole capital sum of *thirty-six* "*hundred dollars* from this date shall be due and payable to the said vendor by "payments as above stated."

Plaintiff bought a piece of real property from one Richard Baldwin on the 24th October, 1871, and agreed to pay for it $3,600, in the manner above set forth.

On the 25th January, 1876, the vendor, Baldwin, transferred the balance of $1,600, to the appellants.

The transfer reads as follows:

"4thly. The sum of sixteen hundred dollars said currency due and payable "to said assignor by one Eusebe H. Paquette under and in virtue of that cer- "tain deed of sale dated and passed before H. C. H. Chagnon, notary, on the

"twenty-fourth day of October, one thousand eight hundred and seventy-one, and "recorded in said Registry Office on the 4th November, 1871 in Reg. B., Vol. "1, No. 270, with all the interest due to the said assignor in virtue of said "deed." The Eastern Townships Bank and E. H. Paquette.

Various other sums were transferred to appellants under the same deed, amounting altogether to the sum of $6,984; the consideration given by the Bank being an equal amount of $6,984.

The plaintiff paid to Albert Knight the $2,000 going to him, and paid to the appellants up to the 24th Oct., 1882, the sum of $2,400, as proved by receipts produced and filed.

Plaintiff claims that under the terms of the deed the balance due the Bank at date of tender and of action is $460, with interest on $400 from 24th October, 1883; and tenders and brings into court the sum of $473 to cover this balance and the interest thereon as above stated and costs of registering discharge and transmission, according to the requirements of Act 2148 C.C.

By his conclusion plaintiff asks that his tender be declared sufficient, and appellants ordered to execute a discharge of the mortgage held by them.

Appellants plead that the interest *was not to diminish as payments were made on capital, but that interest was to be paid on the whole* $3,600 *until the capital was finally extinguished.* That is to say, that plaintiff was to pay $3,600 of capital and nine years interest on $3,600, which amounts to $2,268, making in all $5,868, payable in instalments of $400 per annum.

By this interpretation of the contract there would be due the Bank on 24th Oct., 1883, $1,468, or more than $1,000 above that which plaintiff claims to be due.

In other words plaintiff claims that interest *does diminish* by payments on capital, and here is the issue between the parties.

In the deed of sale no provision is made for *interest on interest*, and by the express terms of the contract the annual payments are to be applied justly on capital and afterwards on interest.

There is no express statement that interest is to diminish as payments on capital are made, but the imputation of the payments on capital must annually diminish the capital, which alone in the absence of a provision for interest on interest can bear interest.

As the capital decreases the interest must decrease, if the rate is the same.

Judgment confirmed.

Doak & Beaulne, for appellants.
Ives, Brown & French, for respondents.

COUR DU BANC DE LA REINE
(En Appel.)

MONTRÉAL, 23 MAI 1870.

Coram L'Hon. juge Caron, Drummond, Badgley, Monk, JJ.

P. GUYON DIT LEMOINE,
(*Demandeur en Cour Inférieure,*)
Appelant ;

vs.

P. L. MORIN,
(*Défendeur en Cour Inférieure,*)

et

J. U. BEAUDRY,
(*Tiers-Saisi en Cour Inférieure,*)

et

DEMOISELLE LÉONTINE MORIN,
(*Mise en Cause en Cour Inférieure,*)
Intimés.

Que doit prouver la femme mariée séparée de biens, qui réclame la propriété de biens meubles ?—Possession vaut titre—La règle Nisi peut-elle être employée pour mettre partie en cause ?

Le 29 août 1868, un bref de saisie-arrêt après jugement fut émané en cette cause, et signifiée le 31 août au tiers-saisi, Joseph Ubalde Beaudry, qui fit la déclaration suivante :

" Vers la fin de juin dernier, Demoiselle Léontine Morin, fille du défendeur " et majeure au meilleur de la connaissance du tiers-saisi, quittant la maison de " M. Peter McDonald, son oncle, où elle était en pension, vint se retirer pendant " quelques jours chez le dit tiers-saisi, et y apporta tous ses effets dont elle a " ensuite transporté une partie à Longueuil ; qu'il est resté dans la maison du " tiers-saisi un piano, un miroir, deux bancs de pieds, un petite horloge de " cheminée, un buste en plâtre, un petit piedestal en marbre, deux portraits, " deux autres cadres et deux cartes géographiques. Le défendeur en cette cause " a dit au tiers-saisi qu'il était le propriétaire du miroir. Quant aux autres " articles, le tiers-saisi ne peut dire qui en est le véritable propriétaire ; mais il " s'en considère responsable envers la dite Léontine Morin, à moins que la Cour " n'en décide autrement après que cette dernière aura été mise en cause."

Le défendeur fit défaut.

Le 22 septembre 1868, le demandeur fit motion, en s'appuyant sur cette déclaration, que la dite Léontine Morin fut assignée à comparaître devant cette Cour le ou avant le 26 septembre, pour là et alors voir dire et déclarer que les dits effets sont la propriété de son père, le défendeur en cette cause, à moins que cause au contraire ne fut montrée le dit jour 26 septembre, le tout avec dépens contre qui de droit.

Cette motion fut accordée, et une règle, émanée le même jour, fut signifiée à la mise en cause personnellement et rapportée le 26 septembre.

Cette Demoiselle comparut le même jour par procureur sans réserve d'aucune sorte, et le 17 octobre fut fixé pour produire sa réponse par écrit.

Voici le résumé de cette réponse qui fut produite au jour fixé.

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L'allégation du demandeur que les dits effets sont la propriété du demandeur est fausse et mal fondée *en autant* qu'elle s'applique au piano, et à un des portraits, savoir: celui de la grand'mère de la mise en cause, et elle nie que *ces deux effets* soient la propriété de son père. Ces effets sont au contraire sa propriété exclusive ; elle les possède depuis plusieurs années à titre de propriétaire, comme fille majeure et usant de ses droits ; elle les avait déposés elle-même en son propre nom chez le tiers-saisi.

Ce piano lui a été donné par sa mère, maintenant décédée, en son vivant séparée de biens du défendeur, *laquelle l'avait acquis de ses propres deniers, et le possédait à part et devis des biens du défendeur*, son mari, *et ce il y a environ huit ans*, lors du mariage de la sœur de la mise-en cause, le portrait lui a été laissé par sa mère, en mourant. Qu'en décembre alors dernier, la mise en cause est allée demeurer chez son oncle, Peter McDonald, où elle s'est mise en pension et où elle a apporté ces effets, et qu'en juin suivant elle les a transportés chez le tiers-saisi.

Elle conclut à ce que le piano et le portrait de sa grand'mère soient déclarés sa propriété.

Elle produisit, avec cette réponse, le contrat de mariage de ses père et mère, où la séparation de biens est stipulée avec cette clause, qui d'ailleurs ne fait que reproduire le droit commun :

" Pour distinguer les biens mobiliers que la dite future épouse acquerra ainsi " que ceux qui lui écherront de quelque manière que ce soit, la dite future " épouse *devra* les *constater* ou les faire constater par des inventaires, partages, " états, reçus, quittances ou autres documents, suivant le cas," on excepte son linge et ses bagues et joyaux ; mais *son linge, son argenterie et ses livres* devront *porter son chiffre*.

La mise en cause ne fit donc aucune objection au mode adopté pour la mettre en cause, et ses prétentions se bornèrent *au piano* et au portrait de sa grand'mère. Le défendeur ayant fait défaut, et suivant la déclaration du tiers-saisi, les effets qu'il énumère ne pouvant appartenir qu'au défendeur ou à sa fille Léontine, il ne pouvait donc y avoir difficulté que pour ce piano et ce portrait.

Or, le demandeur ne conteste pas cette réponse quant au portrait qu'il abandonna à la mise en cause ; mais il la conteste quant au piano, en alléguant :

" Que ce piano n'a jamais appartenu à la mère de la mise en cause, mais au défendeur ; qu'il n'a pas été payé des deniers de sa mère, mais de ceux de son père, le défendeur, que la mise en cause n'a jamais été propriétaire de ce piano ; qu'elle n'est majeure que depuis quelques années ; que le défendeur lui laissait l'usage de cet instrument comme des autres effets mentionnés en la déclaration du tiers-saisi, mais qu'il n'a jamais cessé d'en être propriétaire. Il concluait au rejet de la dite réponse, quant au piano et aux dépens."

Telle est la contestation liée. La seule question à décider, entre le demandeur et la mise en cause, et de savoir si le piano appartient à celle-ci ou au défendeur.

La Cour Supérieure débouta la saisie. Ce jugement fut confirmé par la Cour de Révision.

La preuve du demandeur consiste 1o. dans les présomptions de droit, quant à

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la propriété des biens meubles réclamés par une femme mariée, séparée de biens, et qui résultent de la contestation en cette cause, 2o dans la clause déjà citée du contrat de mariage du défendeur, et dans une admission de la mise en cause qu'elle aura vingt-trois (23) ans en mars 1869, de sorte qu'elle n'aurait eu que quatorze ans et demi, quand sa mère lui aurait fait ce don, puisqu'il y a plus de huit ans de cela, tel qu'admis dans la réponse de la mise en cause.

Celle-ci, invoquant comme son titre un don que sa mère, alors sous puissance de mari, lui aurait fait du piano, alors qu'elle n'avait que quatorze ans et demi, il lui fallait prouver 1o le don, et elle n'a jamais produit aucun écrit, ni aucun témoin à ce sujet, 2o que ce piano appartenait réellement à sa mère ; or aucune preuve quelconque n'a été produite non plus sur ce point.

D'après son contrat de mariage, Madame Morin *était tenue constater* par des inventaires, partages, états, reçus, ou quittance tous les biens mobiliers qu'elle pourrait acquérir, ou qui lui écherraient par succession ou autrement, afin de les distinguer de ceux de son mari ; d'ailleurs, cette clause, ainsi qu'on l'a dit ne fait que reproduire le droit commun.

2 Pigeau p. 197 " Lorsque la femme (séparée de biens) demeure avec son " mari, et acquiert des meubles, elle doit prendre quittance du prix, de ceux qui " les lui vendent, *pour prouver sa propriété aux créanciers du mari*, qui pré- " tendraient que ces meubles appartiennent à celui-ci ; et il faut que ces quit- " tances soient devant notaires, ou si elles sont sous seing-privé qu'elles soient " contrôlées, pour qu'elles aient une date certaine, et que les créanciers ne puis- " sent pas dire qu'on les a fabriqués, lorsqu'ils ont poursuivi le mari, pour faire " passer les effets de celui-ci sous le nom de sa femme et les soustraire aux con- " traintes, etc., etc."

Telle est la doctrine de tous les auteurs sur la matière ; il suffira de citer Duplessis, *communauté*, Livre 2, ch. 2, *comment la société se dissout*

13 Toullier, No. 112, p. 178, 9—vol. 14 No. 24, p. 28.

L'Honorable juge Mondelet a prétendu que la mise en cause n'avait pas été assignée convenablement, et que sa contestation ne pourrait pas la lier pour cette raison ; il a été jusqu'à qualifier d'*exotique* le mode employé par le demandeur, et qui a consisté dans une règle *nisi*. Le demandeur soumet que ce procédé n'est pas tout-à-fait inconnu dans ce pays, où il a été importé probablement depuis la conquête ; tous les jours du terme de la Cour de Circuit, de la Cour Supérieure, même quelquefois de la Cour de Révision, comme dans la cause de Raymond et Lanctôt, et souvent de la Cour d'Appel, on voit des règles *nisi* demandées et accordées dans toutes sortes de circonstances ; dans une cause presqu'analogue a celle-ci, où l'un des avocats du demandeur était concerné, et qui a parcouru tous les degrés de juridiction (No. 2304, l'Hon. J. R. Rolland *vs.* Kierzkowski et divers, T. S.), le procédé du demandeur a été adopté pour mettre une partie en cause, et il a parfaitement pris racine dans le pays. (Voir d'ailleurs Pigeau, p. 290, No. 2. *de la mise en cause.*

L'intimée demande, de son côté, la confirmation des deux jugements, pour les raisons suivantes :

1o. Parce que l'appelant n'a nullement prouvé que les meubles en question et notamment le piano, fussent la propriété de l'intimé Pierre L. Morin, malgré qu'il l'affirmât dans sa règle *Nisi* et dans sa contestation de la déclaration de la dite mise en cause, l'intimée Delle Léontine Morin.

2o. Parce que d'après la loi du pays, *possession valant titre* en fait de meubles, la dite intimée, est, vû l'admission à cet effet de l'appelant, seule propriétaire du piano en question, jusqu'à preuve du contraire.

3o. Parce que faute de preuve par l'appelant, la dite intimée n'était pas tenue en loi de faire aucune preuve de sa déclaration en réponse à un procédé aussi étrange et peu connu que la règle *Nisi* prise et émanée contre elle pour la forcer à venir déclarer ou dire pourquoi sa propriété ne sera pas déclarée être celle d'une autre personne.

4o. Enfin, parce que les dits jugements sont conformes à la loi et au fait dans espèce.

Jugement confirmé.

Barnard et Pagnuelo, avocats de l'appelant.
Jetté et Archambault, avocats de l'intimée.

COUR DU BANC DE LA REINE.

(En Appel.)

MONTREAL, 8 MARS 1870.

Coram les hon. juges Caron, Drummond, Badgely, Monk.

CHARLES FALARDEAU, FILS,
(*Défendeur en Cour Inférieure,*)
Appelant,

et

DIEUDONNÉ ARCHAMBAULT,
(*Demandeur en Cour Inférieure,*)
Intimé.

Subrogation formelle.—Subrogation légale—Art. 1156, *C. C.*

Le jugement, longuement motivé, rendu par la Cour de Circuit pour le district de Montréal, sous la présidence de l'honorable juge Torrance, le 31 mars 1869, explique suffisamment la nature de la contestation élevée entre les parties en cette cause. Voici en quels termes ce jugement est conçu :

" The Court having heard the parties by their Counsel, upon the merits of this " cause, examined the proceedings, the evidence and proof of record, and having " on the whole duly deliberated : Considering that plaintiff is entitled to a " subrogation in the rights of *La Société de Construction Canadienne de Mon-* " *tréal* for one hundred dollars and interest from the first May 1867, which the " defendant hath not yet given him ;

" Considering that the plaintiff hath been obliged to disburse ten dollars for " the cost of a protest made necessary by the default of the defendant;

" Considering that the defendant hath failed to prove the material allegations " of his *défense*, doth condemn defendant to pay to plaintiff the sum of $113 " with interest from the thirteenth of May 1868, date of the service of " process :—unless the said défendant choose rather, within eight days after " signification of a copy of this judgment, furnish at his own costs to the " plaintiff, as well the certificate of the registrar of Montreal, mentioned in the " declaration, as the subrogation also mentioned in said declaration, of the

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" rights of the said *Société de Construction Canadienne de Montréal*, so that " Elie Leclaire mentioned in said declaration and in the pleadings in this cause, " may be constrained to the payment of the said sum of one hundred dollars " and interest as aforesaid, and in that case to pay to plaintiff the sum of thir- " teen dollars only, for the cost of said protest and the other disbursement " incurred by said plaintiff:—With costs of this action against defendant in any " case, distraits to Messieurs Bondy & Fauteux, attorneys for plaintiff.

" And the Court doth reject the further conclusions of plaintiff's declara- " tion."

Il s'agissait donc, dans cette cause, d'une somme de cent piastres que l'appelant disait lui être due par un nommé Elie Leclair, à l'acquit duquel il aurait payé ce montant à la Société de Construction Canadienne de Montréal, et qu'il avait ensuite transportée à l'intimé, en s'obligeant envers ce dernier de lui faire donner une subrogation des droits de la dite Société de Construction, de manière à pouvoir contraindre le dit Elie Leclair au remboursement de cette somme.

L'acte du 14 janvier 1868, reçu devant le notaire Mathieu, à Montréal, par lequel l'appelant avait cédé et vendu à l'intimé diverses rentes constituées et créances, avec promesse de garantie de tous troubles et empêchements quelconques, s'exprime ainsi à l'égard de la créance dont il est question en cette cause : " Neuvièmement enfin, une somme de cent piastres du cours actuel, due et " payable au dit cédant dans trois années à compter du premier mai dernier " (1867), avec intérêt à raison de six pour cent payable tous les six mois à " compter du premier novembre dernier (1867), par Elie Leclaire, charpentier, " demeurant au village St. Henri, pour autant que le dit vendeur a payé, à son " acquit et décharge à la Société de Construction Canadienne de Montréal, à " compter d'une obligation consentie à la dite Société de Construction devant " maître N. G. Bourbonnière et son confrère notaires, en date du 29 février 1861, " s'obligeant le dit vendeur de faire donner au dit acquéreur une subrogation des " droits de la dite Société de Construction, de manière à pouvoir obliger le dit " Elie Leclaire au remboursement de la dite somme de cent piastres avec intérêt " comme dit est, le tout aux frais du dit vendeur, sous le plus court délai possible ; " s'obligeant, de plus, le dit vendeur de fournir à ses frais au dit acquéreur, un " certificat du bureau d'enregistrement du comté de Montréal attestant qu'il n'y " a aucune hypothèque sur les dits constituts, ni qu'il a transporté les dits cons- " tituts et somme de derniers à d'autres personnes, s'obligeant, le dit acquéreur " de prêter le dit certificat au dit vendeur en cas de besoin."

Cette action de l'intimée était la seule qu'il pût intenter sous ces circonstances. En l'absence de la subrogation et des titres qui lui avaient été promis par l'acte de transport et vente du 14 janvier 1868, il se trouvait les mains liées, sans recours, sans droit, sans action possible contre le nommé Elie Leclaire, et surtout contre la propriété que ce dernier avait hypothéquée en faveur de la Société de Construction par l'acte d'obligation du 20 février 1864. Cette créance de $100 devenait ainsi nulle, illusoire, irréalisable entre les mains de l'intimé, et ce dernier était bien fondé à réclamer de suite, non seulement l'intérêt échu sur cette créance ainsi transportée, mais le remboursement même de la somme capitale de $100 qu'il avait payée en échange d'une créance, imaginaire peut-

être, mais assurément irréalisable et de nulle valeur entre ses mains, du moment où l'appelant ne voulait pas ou ne pouvait pas remettre à l'intimé les titres qui auraient pu lui en assurer le recouvrement.

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Les défenses de l'appelant à l'action de l'intimé peuvent se résumer dans ces quelques mots : qu'il ne pouvait pas donner à ce dernier d'autre subrogation légale résultant des paiements faits à la Société de Construction à l'acquit du nommé Elie Leclair ; qu'il avait offert les reçus qui constataient ces paiements, à l'intimé qui les avait refusés ; et qu'il offrait de nouveau à l'intimé ces reçus qui étaient pour lui un titre suffisant pour en recouvrer le montant du dit Elie Leclair.

Ces prétentions, dit l'appelant dans son factum, sont insoutenables. Et d'abord l'intention des parties clairement exprimée dans l'acte de transport du 14 janvier 1868, est que l'appelant devra fournir à l'intimé une subrogation formelle et directe des droits et de l'hypothèque de la Société de Construction contre Elie Leclair. Ce n'est pas une subrogation que l'appelant fournira lui-même de son chef, puisque l'acte dit en termes exprès qu'il s'oblige de faire donner à ses propres frais, sous le plus court délai possible, à l'intimé, par la Société de Construction, une subrogation des droits de cette dernière de manière à pouvoir obliger le dit Elie Leclair au remboursement de la dite somme de cent piastres avec intérêt. Si les parties avaient voulu se contenter de la subrogation qui pouvait être créée par les reçus seuls, elles auraient tenu un autre langage, et elles auraient dit que l'appelant, porteur de reçus qui le subrogeaient tacitement et légalement dans les droits de la Société de Construction contre le nommé Elie Leclair, subrogeait à son tour l'intimé dans ces mêmes droits, et lui remettait à l'instant même les reçus en question comme les titres réels et valables de ce transport privilégié.

Non : il y a loin de cette subrogation tangible, explicite, formelle, contemplée par les parties contractantes dans l'acte de transport même, à la subrogation boiteuse, incertaine et litigieuse que l'appelant offre maintenant sous la forme de reçus irréguliers, incomplets et insuffisants. Car enfin, la subrogation légale créée dans ce cas par l'article 1156 de notre Code, n'est devenue loi que le 1er août 1866, tandis que les reçus produits par l'appelant remontent à une époque antérieure, c'est-à-dire aux mois de mai, juin et juillet 1866.

Le point sur lequel repose le jugement en Cour Inférieure, est, qu'il aurait fallu à l'appelant, une subrogation formelle lors des paiements, ce qui revient à soutenir que la subrogation " légale " n'a pas lieu, dans notre droit au profit du créancier hypothécaire postérieur qui paie un créancier hypothécaire qui lui est préférable.

L'appelant soumet à l'encontre de cette opinion les autorités suivantes ;

Argou, t. 2, livre iv. ch. v, p. 354.

Pocquet de Livonnière, Règle du droit français, édition 1768, p. 360.

Rénusson, Subrogation, ch. iv. Code Civil Canadien, Art. 1156.

2. L'effet de la subrogation légale est de mettre le nouveau créancier dans tous les droits et actions de l'ancien créancier.

Argou suscité. Journal du Palais, tome 6, page 452, édition in 4to., et page 26 du tôme 2 de l'édition in folio de 1701.

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Journal des Audiences, tome 4, liv. 2, chap. 19.

Arrêté du Parlement du 6 juillet 1690 rapporté au journal des Audiences, tôme 5, livre 6, chap. 18.

Jugement confirmé.

T. & C. C. de Lorimier, avocats de l'appelant.

D. Bondy, avocat de l'intimé.

COUR DU BANC DE LA REINE.

(EN APPEL.)

MONTREAL, 9 DÉCEMBRE 1869.

Présents: CARON, DRUMMOND, BADGELY, et MONK, JJ.

BENONI LEROUX,
(*Défendeur en Cour Inférieure,*)
APPELANT;

ET

JEAN-BAPTISTE DICAIRE,
(*Demandeur en Cour Inférieure.*)
INTIMÉ.

Jugé:—Que l'action hypothécaire n'est accordée contre le détenteur de l'immeuble hypothéqué que lorsque la créance est claire et liquide (Art. 2058, C. C.)

Voici dans quels termes est conçu le jugement de la Cour de Circuit pour le district de Montréal, présidée par l'honorable juge Torrance, le 10 décembre 1868, et dont l'appelant demande la révision:

"La Cour, après avoir entendu les parties par leurs avocats, tant sur le mérite de cette cause, que sur la défense au fonds en droit plaidée par le dit défendeur à l'action du demandeur, et aussi sur la réponse en droit du demandeur à l'exception péremptoire plaidée par le dit défendeur en premier lieu, avoir examiné la procédure, pièces produites et preuve, et sur le tout mûrement délibéré, a débouté et déboute la défense au fonds en droit plaidée par le dit défendeur à l'action et demande du dit demandeur, avec dépens distraits en faveur de Messieurs Doutre & Doutre, avocats du demandeur.

"Et la Cour maintient la réponse en droit du demandeur à la prémière exception péremptoire en droit du dit défendeur, et déboute la dite première exception péremptoire en droit, avec dépens distraits en faveur de Messieurs Doutre & Doutre, avocats du demandeur.

"Et la Cour faisant droit sur le mérite de la demande principale, considérant que le demandeur a suffisamment établi en preuve que parmi les divers articles de rente et pension qu'il a droit d'avoir et de se faire payer annuellement en vertu de l'acte de donation entre-vifs mentionné en la déclaration en cette cause, certains items d'iceux et nommément un casque et des bottes, une servante, un un banc d'église, l'usage d'un four et aussi l'usage d'un cheval et d'une voiture et ses fournitures et l'entretien de maison n'ont pas été fournis et délivrés pour les années mil huit cent soixante-six et mil huit cent soixante-sept;

"Considérant qu'il a établi en preuve que ces cinq items ou articles de rente évalués par année, comme suit, savoir: le casque et les bottes à huit piastres et cinquante centins, la servante trente piastres, le banc d'église une piastre et

vingt-cinq centins, le four cinq piastres, l'entretien de maison dix piastres et le cheval et la voiture et ses fournitures à douze piastres, forment pour un an la somme de cinquante-six piastres et soixante-quinze centins, pour les deux années la somme de cent treize piastres et cinquante centins;

" Considérant que le dit défendeur, comme détenteur de l'immeuble ci-après désigné, était le trente décembre mil huit soixante-sept, endetté envers le dit demandeur en la dite somme de cent treize piastres et cinquante centins, ayant négligé et refusé de remplir les charges et conditions de la dite donation, et particulièrement de fournir les articles et services dessus mentionnés; la Cour déclare la terre en dernier lieu mentionnée et désignée dans la déclaration du demandeur comme suit, savoir: " Une terre située au sud-ouest de la Côte Emmanuel, en la paroisse de St. Clet, et désignée numéro trente-six, de la contenance d'un arpent et demi de front ou environ, sur vingt et un arpents de profondeur, tenant devant à la bâse de la dite Côte, par derrière aux terres de Ste. Anne, d'un côté à Joseph Sauvé et d'autre côté à Amable Huneau," affectée et hypothéquée en paiement de la somme de cent-treize piastres et cinquante centins, du cours actuel de cette province, avec intérêt sur la dite somme à compter du huit février mil huit cent soixante-huit, jour de l'assignation en cette cause, jusqu'à l'actuel paiement, et aux dépens distraits en faveur de Messieurs Doutre & Doutre, avocats du demandeur, le tout pour prix et valeur de certains articles de rente et pension, devenus dûs le trente décembre mil huit cent soixante-sept, pour les années mil huit soixante-six et mil huit cent soixante-sept, tel que plus haut expliquée et tel que mentionnée en la déclaration en cette cause: Condamne en conséquence le défendeur comme possesseur et détenteur de la dite terre, à payer au demandeur la dite somme de cent treize piastres et cinquante centins, dit cours, ensemble les intérêts et les dépens de cette action, distraits comme susdit; si mieux n'aime le dit défendeur délaisser en justice la dite terre pour être vendue par décrêt au plus offrant et dernier enchérisseur, en la manière ordinaire et accoutumée, sur le curateur qui sera créé au délaissement pour, sur le prix de la dite vente, être le demandeur payé sur et en déduction de son dû tant principal et intérêt que frais, ce que le dit défendeur sera tenu d'opter sous quinze jours de la signification de la présente sentence, sinon et le dit temps passé, la Cour condamne le dit défendeur personnellement au paiement de la dite somme de cent treize piastres et cinquante centins, intérêt et dépens de cette action, distraits en faveur de Messieurs Doutre & Doutre, avocats du demandeur.

" Et la Cour condamne le défendeur personnellement au paiement des frais de la contestation."

Ce jugement, dit l'appelant, pèche au double point de vue du droit et du fait.

" L'action hypothécaire," dit l'article 2058 du Code Civil du Bas-Canada, est accordée au créancier qui a une créance *liquide et exigible*, contre tout possesseur à titre de propriété de la totalité ou de partie de l'immeuble hypothéqué à cette créance."

Or l'obligation de vêtir le demandeur, de le servir, d'entretenir sa maison, de lui fournir un cheval et une voiture, une place de banc dans l'église, l'usage d'un

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four pour cuire son pain, est-elle bien une créance *liquide* qui puisse être l'objet direct et spécial d'une action hypothécaire contre un tiers-détenteur, sans que cette créance ait été débattue et constatée préalablement avec le débiteur personnel, et que le montant ait été déterminé et précisé à l'égard de ce dernier? Est-ce là une créance *exigible* aussi longtemps que le débiteur n'aurait pas été mis en demeure par une demande par écrit en conformité à l'article 1067 de notre Code?

L'appelant soumet comme proposition légale que dans toutes les obligations *in faciendo*, le débiteur ne peut être mis en demeure que par une sommation préalable, et que sa négligence se résout en une question de dommages-intérêts qui doivent être liquidés avant de pouvoir être réclamés par la voie de l'action hypothécaire contre un tiers-détenteur. C'est en vue de cette proposition que l'appelant a opposé en premier lieu à l'action de l'intimé une défense en droit qui aurait dû être maintenue par la Cour Inférieure, sans donner à cette action l'épreuve et l'honneur d'une enquête et d'une audition au mérite.

Avant d'entrer dans la discussion de la preuve, l'intimé dit dans son factum qu'il croit de son devoir de résoudre de suite les questions de droit soulevées, tant par l'appelant que par l'intimé.

L'appelant se basait sur l'article 2058 du Code Civil, pour dénier à l'intimé son droit de le poursuivre, hypothécairement. L'intimé répondait que l'art. 2044, C. C., 2nd paragraphe, faisait exception à la règle générale pour les rentes viagères, ou autres obligations appréciables en argent stipulées dans les donations entrevifs et cet article donnait au donateur l'action hypothécaire.

L'appelant n'avait aucun droit de dénier à l'intimé la jouissance de ces droits civils, lorsque ce dernier n'était frappé d'aucune interdiction qui pouvait l'en priver. Et de fait, l'appelant a failli complètement dans la preuve de cette allégation, ou plutôt n'a fait aucune preuve pour l'appuyer. En sorte que le jugement de la Cour Inférieure a renvoyé avec raison la défense en droit de l'appelant et maintenu la réponse en droit de l'intimé.

Ce n'est pas la première fois que les tribunaux sont saisis de semblables réclamations. Les donateurs, se voyant arriver à un état de vieillesse, qui réclame le repos et la tranquilité, donnent leurs biens à leurs enfants, pour que ces derniers prennent soin de leurs derniers jours d'existence et entourent leur vieillesse de toute la tendresse filiale. Jamais il n'est venu dans la pensée des donateurs, au moment où ils se dépouillaient des biens recueillis au prix de nombreux sacrifices, pour en revêtir leurs enfants, que ces biens qu'ils avaient acquis dans l'espérance de les voir se transmettre dans leur descendance, se trouveraient un jour la propriété d'un étranger, indifférent à leurs besoins intimes et familiers, et peu soucieux de leur montrer cette tendresse, cette indulgence et cette sollicitude qui ne se retrouvent que dans la famille. Si on leur eût dit que ce jour était proche, où cet étranger les insulterait dans leur vieillesse, mettrait en doute leur intelligence, et se ferait poursuivre pour leur procurer les objets nécessaires à l'existence, il n'y a pas de doute que leurs mains eussent refusé de signer un acte qui devait rendre si amers leurs derniers jours. C'est ce qui malheureusement s'est réalisé dans cette cause. L'intimé avait acquis les deux terres mentionnées dans l'acte de donation, et se voyant vieillir, incapable de les faire profiter, il a voulu

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que son fils pût, de son vivant, les avoir en propriété, à la condition de prendre soin de lui, de le nourrir, loger et vêtir. Dans sa tendresse paternelle, il n'a pas voulu interdire à son fils le droit de disposer de ses propriétés, confiant que s'il en disposait, il ferait un choix judicieux de celui qui devait le remplacer auprès de lui. Malheureusement pour l'intimé, l'appelant fut choisi, et s'il n'y avait aucun fait dans la preuve pour dévoiler l'esprit de malveillance qui a toujours animé l'appelant à l'égard de l'intimé, le plaidoyer qu'il a opposé à la juste réclamation de ce dernier serait suffisant pour le rendre éclatant. L'appelant, au lieu de se contenter de plaider qu'il avait intégralement fourni les effets de rente, a poussé la malveillance et l'injure, jusqu'à accuser l'intimé de folie et d'imbécilité. C'est là le triste dénouement de cet acte de libéralité de la part de l'intimé à l'égard de son fils.

Il est toujours difficile d'apprécier en argent les obligations stipulées dans les donations entrevifs, car elles sont toujours subordonnées à la position du donataire vis-à-vis du donateur, c'est-à-dire du fils vis-à-vis du père. Or comment apprécier à prix d'argent tous ces petits soins qu'un fils doit porter à son père! Ces obligations sont plus écrites dans le cœur de l'enfant que dans l'acte de donation. Que le donataire cesse d'être le fils du donateur, tout change et se refroidit; tout s'évalue et se pèse; et les termes de l'acte sont scrupuleusement étudiés, afin de donner le moins possible, et ce qu'il y a de moins dispendieux. Ainsi l'intimé avait besoin de quelqu'un pour le servir tant que son fils fut près de lui, c'était toujours la même famille et ils s'entr'aidaient réciproquement. Dès que l'intimé fut à la merci de l'appelant, il n'eût pas d'autres moyens de subsistance que la rente que ce dernier était tenu de lui payer. Ces moyens ne lui permettaient pas de garder sa fille, qu'il avait toujours eue auprès de lui. Elle eût à chercher ailleurs de quoi vivre et elle travailla à la journée. L'intimé se trouva privé de ses soins. L'appelant se crut en droit d'obliger cette fille de servir gratuitement son père, et de vivre deux avec une rente qui pouvait difficilement faire vivre un seul. Il serait trop long d'entrer dans tous les détails de cette cause, ils démontrent amplement la mauvaise volonté de l'appelant de remplir les conditions de la donation.

La preuve de l'intimé se résume comme suit dans l'estimation annuelle des items qui ne lui ont pas été fournis :

Casques et Bottes	$8.50
Servante	30.00
Banc à l'Eglise	1.25
Four	5.00
Entretien de la maison	10.00
Cheval et voiture	12.00
	$66.75

Cette somme de $66.75 ne représente qu'une année. L'intimé réclamait les années 1866 et 1867, en sorte qu'il avait droit à $123.50. La Cour Inférieure en reconnaissant les chiffres de chaque item, s'est trompée dans le total et a adjugé à l'intimé pour les deux années, la somme de $113.50 au lieu de $123.50. Cette erreur eût dû engager l'appelant à se soumettre de bonne grâce à une condamnation qui ne rend qu'imparfaitement justice à l'intimé.

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La Cour d'Appel a unanimement renversé le jugement de la Cour Supérieure. Voici les considérants :

"Considérant en droit que l'action hypothécaire n'est accordée contre le détenteur de l'immeuble hypothéqué qu'au créancier qui a une créance claire et liquide.

"Considérant en fait que les objets, soins et services réclamés par le demandeur intimé contre le défendeur appelant sont loin de constituer une créance claire et liquide, mais qu'ils sont au contraire incertains, contestables et contestés.

"Considérant en outre que l'intimé n'a nullement établi que les dits effets, soins et services ainsi réclamés, étaient lors de l'action, nécessaires, dûs et exigibles ; qu'ils avaient été demandés et injustement refusés et le dit appelant mis en demeure de les rendre et fournir, et que partout dans le jugement dont est appel, savoir le jugement rendu par la Cour de Circuit pour le Bas-Canada siégeant à Montréal, le dixième jour de décembre 1868, il y a erreur et mal jugé, casse et annulle le dit jugement et pour rendre celui qu'aurait dû rendre la dite Cour, déboute le dit intimé, demandeur de son action avec dépens en Cour Supérieure et en Appel."

Jugement renversé.

Bondy et Fauteux, avocats de l'appelant.
Doutre, Doutre et Doutre, avocats de l'intimé.

IN THE QUEEN'S BENCH.

APPEAL SIDE.

MONTREAL, 9TH DECEMBER, 1869.

Coram DRUMMOND, BADGLEY, MONK and POLETTE, JJ.

ELIZABETH WOOLRICH, WIDOW,
(*Plaintiff in the Court below,*)
APPELLANT ;

AND

THE BANK OF MONTREAL,
(*Defendant in the Court below,*)
RESPONDENT.

Saisine et délivrance de legs—Art. 891 *C. C.*

Here is the judgment of the Court below (Beaudry J.) :

"La Cour, après avoir entendu sur le mérite la demanderesse et la Compagnie appelée *The Bank of Montreal*, assignée en cette cause sous le nom de la Banque de Montréal, par leurs avocats, examiné la procédure et sur le tout délibéré ; considérant que dès le 4 de décembre 1865, sur une déclaration faite conformément aux dispositions du Statut du Canada, passé dans la 19e année du règne de Sa Majesté, ch. 76, sec. 17, Thomas R. Johnson, Casimir Fidèle Papineau et Charles Smallwood, en leur qualité d'exécuteurs testamentaires *et fidei* commissaires en vertu des testaments et codiciles de feue Dame Julia Woolrich, veuve de feu William Connolly, écuier, en son vivant de la dite Cité de Montréal, ont été entrés dans les livres de la dite défenderesse comme représentant la dite feue Julia Woolrich, et investis des 49 parts ou actions dans la dite Banque qui appartenaient à la dite Julia Woolrich, lors de son décès ; con-

sidérant que la déclaration de transmission faite par la demanderesse et produite à la dite défenderesse afin d'être déclarée propriétaire, et demande pour quatre parts et un douzième d'une part, portions des dits quarante-neuf parts était insuffisante et ne pouvait être reçue par la défenderesse tant que le titre des dits Thomas R. Johnson, Casimir F. Papineau et Charles Smallwood n'avait pas été mis de côté et annulé par un jugement du tribunal compétent ou par un partage de la succession de la dite Julia Connelly; et considérant qu'il n'appert pas que tel partage ait jamais eu lieu, ou que le titre des dits Thomas R. Johnson, Casimir F. Papineau et Charles Smallwood ait été mis de côté ou annulé et considérant que les dits Thomas R. Johnson, Casimir F. Papineau et Charles Smallwood en dite qualité n'ont pas été appelés en cette cause, non plus que les autres légataires appelés par le testament de la dite Julia Woolrich a recueilli le reste des biens de cette dernière et que la Cour ne peut sans léser les droits des autres intéressés dans la dite succession adjugée à la dite demanderesse les conclusions de sa demande; a débouté et déboute la dite action de la demanderesse avec dépens."

Appellant arguendo:—By the Quebec Act, Imperial Statute of the 14th of Geo. the 3rd, cap. 83, and the declaratory Act of Lower Canada, 41 Geo. 3rd, cap. 4, sec. 1, and by the able decision given by the late Judge Pyke in the case of Desrivières *vs.* Richardson, confirmed by the Privy Council (Stuart's Reports, page 218) it was supposed that the case of *saisiné et délivrance de legs* would never arise in our Courts, nevertheless in the case of Lelièvre *vs.* Fréchette, in Quebec, in the year 1840, a contrary decision was come to and confirmed in Appeal. In this Court, in the case of Blanchet et al. and Blanchet, 11 L. C., Report 204, that decision was reversed "attendu qu'en conséquence de cette législation spéciale" (the Imperial Statute of the 14th Geo. 3rd, cap. 83, sec. 10 "tel qu'expliqué par le Statut Provincial du Bas-Canada, 41 Geo. 3rd, cap. 4,) la règle de notre ancien Droit Coutumier le mort saisi le vif a cessé de recevoir son application lorsqu'il existe des dispositions testamentaires et actes de dernière volonté de la part du défunt. Attendu que la faction de testament et la succession testamentaire sont tombés dans le Bas-Canada sous l'empire du droit écrit. Attendu que dans ce droit le légataire universel devenait saisi de l'hérédité du testateur, en vertu par la force seul du testament; et que dans l'espèce l'intimé n'était pas tenu de demander *délivrance de legs à qui que ce soit.*" La Cour annulle et mit au néant le dit jugement en entier. In the case of Webb & Hall, 15 L. C. Reports, page 172, in this Court, the principle has again been confirmed in Quebec, 17 December, 1864, by the whole Court.

The article 891 of the Code Civil of Lower Canada is in conformity with the Imperial Statute, and the Provincial Parliament of Lower Canada, and the decisions of the Court of Appeal. In the Code Civil Napoléon, Art. 1006: Lorsqu'au décès du testateur il n'y aura pas d'héritiers auxquels une quotité de ses biens soit réservée par la loi, le légataire universel sera saisi de plein droit par la mort du testateur, *sans être tenu de demander la délivrance.*

"The allegation in the exception of the Bank "that without the knowledge "and consent of the said executors and trustees the defendants could not and "cannot legally *transmit or allow to be transmitted to the Plaintiff the said four*

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"*shares and one-third of one-fourth of another share, part of the said forty-*"*nine shares,*" &c., is useless. The instant the death of William Allen Connolly without heirs was stated and proved by the transmission of the appellant, (and the will was already registered in the Bank), it became as a matter of course, and by the 891st Article of the Code, that her claim of one-third of one-fourth in the estate was undoubted, apart entirely from any one, without reference to any one of the remaining two-thirds of one-fourth belonging to Margaret Woolrich, her sister, or to the children of Mary Woolrich, her sister, the wife of the late Dominique Mondelet. The right of Johnson and of the fidei commissaires ceased; hence no steps were taken on their part against the appellant, nor was anything done on the part of the Bank against them. The defence set up by the Bank was purely of its own accord, *sponte*, and solely with the view to embarrass the appellant and to keep the dividends as long as they chose to keep them.

The plea of the Bank is an exception *des droits d'autrui*. First, on the ground of Johnson, Papineau and Smallwood, they do not complain, nor could they, the appellant has the *saisine* by reason of the death of William Allen Connolly, secondly on the ground of the other co-legatees, all that she asks for is her own personal share, her right of one-twelfth, in the 49 bank stock. Her right is apart from any claim on the part of the co-heirs or co-legatees, it is as distinct from any other party as she is from them. She can only obtain her *portion virile*, as they can theirs indistinctly. No other party can have any right but her own and their own. What right has the Bank to interfere with parties who are not concerned? *Personne ne peut plaider avec le nom d'autrui—Code de procédure, article* 19. Is there to be a privilege in favor of the Bank of Montreal? *Le Roi seul plaide par Procureur.* The plea therefore is bad, and there being no *défense en fait*, the appellant is entitled to judgment.

The statement that the Bank had no means of knowing the residue of the testatrix's estate is a matter wholly indifferent to the Bank; all that the Bank had a right to enquire was respecting the 49 shares, which was all they had a right to examine. The question whether there was among the residuary legatees in the said will named and in the proportions is perfectly indifferent to the Bank, or whether the said 49 shares were or are set aside or appropriated and held by the said executors to the end of applying the dividends or income derivable therefrom to or towards the payment of the several annuities and *rentes viagères* by the testatrix bequeathed; the whole of this is *hors de propos*, and only brought on the part of the Bank to annoy the appellant. Unless, indeed, this may be an attempt on the part of the Bank after the decisions given upon the delivrance de legs to have another interminable law-suit like as the old case of the Estate Forretier—that is, of the Hon. Denis Benjamin Viger against Toussaint Pothier. Fortunately, however, the fact of a special answer to the exception to which the respondents did not plead is, according to the article 144 of the Code of Civil Procedure, and therefore it is held to be admitted that the story of the annuities and *rentes viagères* need not have been gone into. Now the same thing may be said with reference to the probate of the 28th of July, 1865, although it was admitted in the 7th of the defendants'

articulation of facts, dated Montreal, 31st December, 1868, that the exception of the 28th of July was a clerical error, and that, as nothing has been attempted to correct this error, it remains still uncorrected, and hence the whole of the exception falls to the ground. There is no defense en fait which has been fyled on the part of the Bank, so that the whole of the defence is useless.

It is unnecessary to add anything in regard to the special answer, the fact by the will it is expressly required that there should be no testamentary executors as fidei commissions, unless it were done by an *acte notarié*, and that there should be an acceptance express of the burthen of will; it is conclusive neither Papineau nor Smallwood subscribe together any writing; Smallwood not a word. How, then, can there be any valid transmission? The Bank should have taken care to enquire into the will, and as to the necessity of an *acte notarié*.

The Bank has no interest whatever, save and except the 4 and 1-12th, with reference to that, the signature of the appellant is all that is required. "Cette "*division de l'obligation se fait du côté du débiteur, ou du créancier lorsqu'il* "*laisse plusieurs héritiers. Chacun des héritiers est créancier seulement de sa* "*part, donc il suit qu'il ne peut exiger cette créance que pour cette part, qu'le* "*ne peut donner de quittance que pour cette part.*" *Il faut donc bien prendre* "*garde à ne point confondre l'indivision et l'indivisibilité, c'est la première des* "*clefs de Dumoulin.*—Pothier, Obligations, No. 299.

There can be nothing to *léser les droits des autres non plus que les autres légataires intéressés dans la dite succession* as stated in the judgement. There can be no *partage*, the number of shares in the bank, being equal to cash and being a *créance somme de deniers*, a mere *meuble*, it was divisible *par portions viriles*. The succession, it is true, was partible by a *partage* of the *whole estate* of the succession; but of that the Bank has nothing to do; all that is now in question is nothing more than less the shares of the bank stock which were divided and divisible as a sum of money. As to the *motif*, that Johnson, Papineau and Smallwood, n'ont pas été appelés, there was no necessity. The transmission given by the appellant put an end to these parties, it was for the respondent to sue *en garantie*, if they thought fit.

As to the worthlessness of the exception, nothing more will be said in this case, which is conclusive as to the fundamental errors which pervade the judgment now appealed from, apart from the objections, as to the necessity of an action en garantie, and of a dilatory exception.

The appellant, having the *saisine*, as a légataire universelle, des dits *biens en propriété*, it was à être divisés également as to a *créance*. It became idle to speak of the exception, which was irrelevant and demurrable. Why talk of the legatees fidei commissaires, when the *biens en propriété*, become *saisis* by the Article 891. It is not *intervallo* by means of the fidei commissaires, the will itself, *par l'événement qui donne effet au legs*, a sum of money made the appellant to be the owner of one-twelfth of the 49 shares of the bank stock. The sum of the matter is: why should the *fidei commissaires* be noticed at all, whether for good or for evil? It was not by any agency on their part, it was apart from the appellant and the appellant from them. How stands the matter, to be decided by arithmetic, easily done by the Bank? Divide 49 x shares by

E. Woolrich and The Bank of Montreal.

12 = to 12 out of 49 the shares = 4 1-12ths, the appellant's claim. How then comes it about Johnson, Papineau and Smallwood, who have no longer anything in the matter to say. How they can then be called upon as to make a *partage*, or how the *légataires appelés en cette cause, non plus que les autres légataires appelés par le testament de la dite Julia Woolrich a recueilli le reste des biens de cette dernière.* The *partage* can be no *partage*, it is a sum in division of 49 shares which the Bank can easily perform if it only pleases.

The judgment of the Superior Court was unanimously reversed. Here are the considerants:

Considering that instead of dismissing the action of the plaintiff appellant the Court below should have ordered the persons (to wit, Thomas R. Johnson, Casimir F. Papineau and Chs. Smallwood) named in the defendant's pleas and in the judgment appealed from as holding a title from the defendants to the bank shares, whereof the appellant by her action has demanded the transmission, to be made parties in the cause;

Considering therefore, that there is error in the said judgment the Court here doth reverse, annul and set aside the same;

And proceeding to announce that judgment which the Court below should have given, the Court doth order that the said Thomas R. Johnson, Casimir F. Papineau and Chs. Smallwood be brought into this cause as parties thereto at the diligence and costs of the plaintiff, the whole with the costs of this appeal against the defendants respondent.

Judgment reversed.

Henry Stuart, for the appellant.
F. Griffin, for the respondent.

COUR DU BANC DE LA REINE.

JURISDICTION CIVILE.

MONTREAL, 8 JUIN 1869.

Coram L'hon. DUVAL J. C., CARON, BADGLEY, MACKAY, LORANGER, JJ.

JEAN BTE. HOMIER,

(*Défendeur en Cour Inférieure,*)
APPELANT;

ET

FRANÇOIS BENOIT, ES-QUALITÉ,

(*Demandeur par Reprise d'Instance en Cour Inférieure,*)
INTIMÉ.

JUGÉ:—Que pour exercer utilement l'action possessoire ou pétitoire il faut que la preuve démontre que le défendeur détient l'immeuble à titre de propriétaire, ou qu'il apparaisse qu'il a été fait des actes de possession ouverte et publique.

QUÆRE.—Le propriétaire inférieur d'un emplacement situé à un endroit où le sol a une grande déclivité ou inégalité due à la position naturelle des cours, peut-il contraindre son voisin à bâtir un contre-mûr pour retenir chez lui les terres?

L'appelant et l'intimé *ès-qualité* sont propriétaires de deux terrains contigus, situés sur la rue St. Constant de cette cité de Montréal.

Le terrain a, à cet endroit, une grande déclivité ou inégalité de sol, due à la

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position naturelle des lieux; l'intimé est le propriétaire supérieur et l'appelant le propriétaire inférieur.

Dans l'année qui s'est écoulée depuis 1860 à 1861, ce dernier fit construire sur sa propriété une maison en brique à deux étages et à deux côtés, faisant face sur la dite rue St. Constant et ayant son pignon nord-ouest dans la ligne qui sépare les deux propriétés en question. Inutile de dire que l'appelant, en construisant cette maison, n'a nullement empiété sur la propriété de l'intimé, appartenant alors à Dame Josephte Dufresne, veuve Namur, décédée pendant l'instance en Cour Inférieure. Cette dernière ou plutôt l'intimé a aussi sur sa propriété en brique, séparée de celle de l'appelant, par un passage lui appartenant (l'intimé) d'environ sept pieds et demi de largeur. La différence de niveau entre les deux propriétés est considérable et quelque temps après la construction de sa maison, c'est-à-dire environ un an après, l'appelant s'apercevant que les terres du passage de la dite Dame veuve Namur forçaient le pignon de sa maison qui par suite de cela était ébranlée et travaillait ou remuait sur ses fondations, fit connaître par protêt à ses entrepreneurs cet état de choses, les notifiant en même temps et les mettant en demeure d'y remédier, sous les peines de droit.

Voyant cela les dits entrepreneurs, Messieurs Barbeau, choisirent et nommèrent des hommes compétents comme arbitres ou experts qui, après avoir fait une descente sur les lieux et avoir avisé décidèrent que le seul moyen à employer pour fortifier la dite maison et la protéger contre les terres du passage de la dite Dame veuve Namur, était de faire des contre-murs le long et autour des murs de fondations de la dite maison pour les fortifier et empêcher de travailler celle-ci qui menaçait de s'écrouler.

Conformément à cette décision et opinion des experts, les dits entrepreneurs Barbeau procédèrent à la confection de trois contre-murs, dont un fut fait le long du mur du dit pignon nord-ouest de la maison de l'appelant, dans le passage de l'intimé, savoir dans le passage appartenant alors à la dite Dame veuve Namur. Ce contre-mur mesure à peu près seize pouces d'épaisseur à sa base, quatre pouces à sa surface, et se prolonge sur toute la longueur du mur même de fondation de la dite maison, mais se trouve complètement sous la terre qui le cache à la vue, et fait que l'intimé a, comme la dite veuve Namur l'a toujours eue, la possession de tout son terrain et emplacement, spécialement de son passage.

La dite Dame veuve Namur a laissé construire sans rien dire, le contre-mur en question, allait tous les jours sur les lieux pendant sa confection, n'a pas protesté, mais a cependant, le 31 de mars 1865, c'est-à-dire environ quatre ans après, pris et institué contre l'appelant, une action possessoire, réclamant de ce dernier la possession de cette portion de terrain concluant, après avoir allégué le fait de l'empiétation, comme suit: "Therefore the said plaintiff prays that in as much as "the said plaintiff is the true and lawful owner of the said lot of land and "premisses, the said defendant who unlawfully detains and withholds the possession thereof of the said portion thereof from the said plaintiff, may be adjudged "and condemned to desert from, quit and abandon the possession and occupation "of the said lot of land or the said portion thereof so possessed and occupied by "him, and to render and deliver up the same to the said plaintiff, and also to pay

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"to the said plaintiff the value thereof from the time of his unjust and "illegal possession, and to pay to the said plaintiff the aforesaid sum of ninety "pounds with interest to be paid and costs of suit *distraits* to the under- "signed."

A cette action l'appelant a plaidé 1o. par une défense en fait niant les allégués de la dite action, et notamment qu'il s'était approprié et occupait ou possédait la portion de terre en question ; 2o. Par une exception péremptoire, disant qu'à l'endroit où sont situées les dites propriétés du dit intimé et de l'appelant, il existe une inégalité de sol considérable, laquelle inégalité est due à la position naturelle des lieux, et que lui dit appelant est propriétaire du sol inférieur.

L'appelant alléguait en sus les faits ci-dessus relatés et spécialement que la terre du dit passage de la dite Dame veuve Namur déversait sur son pignon de maison (l'appelant) avec une force considérable, et que vû cela, le propriétaire supérieur, c'est-à-dire la dite Dame Namur était tenue de faire chez elle et à ses dépens, un contre-mur pour retenir chez elle ses terres, et pour protéger la dite maison de l'appelant.

La prétention de ce dernier est en conséquence, comme elle l'était en Cour Inférieure, que non seulement il était en droit de faire construire le contre-mur en question, comme cela a été fait, mais qu'il pouvait même contraindre son voisin, (la dite Dame veuve Namur,) à le faire chez elle et à ses dépens, en conséquence de quoi elle était mal fondée à se plaindre comme elle le faisait par son action, l'appelant ayant fait à ses frais et dépens, une chose qu'elle était elle-même tenue de faire.

Qu'au reste le contre-mur avait été ainsi construit sans la participation du dit appelant, mais bien par ses entrepreneurs Barbeau qui le firent sur leur propre responsabilité.

L'appelant rencontra de plus de la dite action par une deuxième exception péremptoire, alléguant, en sus des faits ci-dessus et des moyens plus haut mentionnés, que la dite action était mal fondée et devait être déboutée, parce qu'en supposant vrais les faits y contenus, cela ne justifiait pas de la part de la dite Dame veuve Namur l'action pétitoire ou possessoire par elle prise et que la seule action qu'elle aurait pu instituer en pareil cas était une action pour demander la valeur du dit terrain en question et occupé pour la construction du dit contre-mur qui pouvait être considéré comme mur mitoyen, ce que le dit appelant avait droit de faire.

La dite Dame veuve Namur a répondu généralement à ces exceptions et la procédure et l'enquête étant complétées de part et d'autre, cette dernière étant par la suite décédée, l'intimé a repris en ses noms et qualité la dite instance, et la cause fut plaidée au mérite devant son Honneur M. le Juge Monk qui, le 31 décembre 1866, rendit en la dite cause le jugement suivant: "The court having heard the parties by their Counsel upon the merits of this cause, exam- "ined the proceedings, proof of record and duly deliberated ; Considering that it "results from the evidence adduced that the wall in question in this case has "not caused and does not cause any inconvenience or damage to the plaintiff ; "Seing that the said wall was necessary, under the circumstances disclosed by "the testimony in this cause, in order to protect both the house of the defendant

" and that of the plaintiff against injury and damage of a serious nature ; Con- J. B. Homier et Frs. Benoit.
" sidering that the defendant had not and hath not any other means than the
" construction of the said wall to protect the wall of his house from the water
" flowing, the ground and premisses of the plaintiff; Seing that the said wall so
" constructed and built by the defendant upon the property of the plaintiff, is
" mutually beneficial to the plaintiff and defendant in this cause ; Considering
" that the said plaintiff did consent to the construction of the said wall, and when
" completed expressed herself satisfied therewith, doth dismiss the action of the
" plaintiff with costs, distraits to Messieurs Jetté and Archambault, substituted
" attorney for defendant ;

" The court reserving to the plaintiff *par reprise d'instance* in this said cause,
" his recourse for the value of the land upon which said wall is built, or so
" much thereof as defendant may be liable to pay for."

L'intimé se trouvant lésé par ce jugement en demanda la révision par inscription à cet effet produite avec le dépôt requis par la loi, au bureau du prothonotaire de la dite Cour Supérieure, le sept de janvier 1867.

Les parties ayant de nouveau été entendues devant la dite Cour Supérieure siégeant en Révision, cette dite cour, l'hon. Mr. le Juge Mondelet, l'hon. Mr. le Juge Berthelot et l'hon. Mr. le Juge Monk, siégeant, rendit en la dite cause, le 29 octobre 1867, le jugement suivant, savoir : " La Cour Supérieure siégeant à
" Montréal, présentement en Cour de Révision, ayant entendu les parties par
" leurs avocats respectifs, sur le jugement rendu le 31 décembre, mil huit cent
" soixante-six, dans la Cour Supérieure du district de Montréal, ayant examiné
" le dossier et la procédure dans cette cause et ayant pleinement délibéré ;
" Considérant que la dite Marie Josephte Dufresne, demanderesse en cour de
" première instance, a fait preuve des allégués de sa déclaration et nommément
" qu'elle était lors de l'institution de son action propriétaire et en possession de
" la propriété sise en la cité de Montréal, décrite en sa dite déclaration, sur
" laquelle sans aucun droit le défendeur a bâti un contre-mur suivant qu'allégué
" en icelle déclaration ; Considérant néanmoins que le dit contre-mur a été bâti
" par le défendeur au vu et su d'elle dite demanderesse qui n'a alors ni en
" aucun temps, avant l'institution de son action, réclamé contre le défendeur, et
" au reste qu'elle n'a souffert aucun dommage ; Considérant qu'il y a erreur
" dans le susdit jugement du 31 décembre 1866, lequel déboute l'action de la
" demanderesse ; Considérant qu'attendu la reprise d'instance faite en cette
" cause par le dit François Benoit, ce dernier est en droit de faire réformer le
" dit jugement, et procédant à rendre celui qu'aurait dû rendre la cour de pre-
" mière instance, déclare le dit demandeur par reprise d'instance propriétaire de
" l'héritage décrit en la dite déclaration, savoir : " A certain lot of land situated
" in the St. Lawrence Suburb, in this city, containing fifty feet in width, by
" eighty feet in depth, more or less, and as then actually fenced in, bounded in
" front by St. Constant Street, in rear by the said purchaser, on one side by
" Messrs. Boucher et Deguise, and on the other side partly by one John Bower
" and partly by the said vendor, with all and every the dependances and appar-
" tenances ;" sans frais contre le défendeur en cour de première instance, mais

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" avec dépens, contre ce dernier en Cour de Révision, l'honorable Juge Monk ne " concourre pas dans ce jugement."

C'est de ce jugement qu'est appel et l'appelant prétend qu'il est mal fondé.

La première proposition soumise par l'appelant au Tribunal d'Appel est celle-ci, savoir:

Qu'étant le propriétaire inférieur d'un emplacement situé à un endroit où le sol a une grande déclivité ou inégalité, laquelle est due à la position naturelle des lieux, il était en droit de contraindre son voisin, propriétaire supérieur, (la dite Dame Josephte Dufresne,) à faire un contre-mur pour retenir chez lui ses terres et empêcher qu'elles ne fissent crouler la maison de l'appelant; que pour contre-mur, le terrain et les matériaux devaient être fournis et le coût payé par ce propriétaire du terrain le plus élevé, et qu'en conséquence ce dernier ne peut pas se plaindre de ce qu'on fasse pour lui, sans qu'il lui en coûte, ce qu'il est tenu de faire lui-même; que lui dit appelant et la dite Dame veuve Namur se trouvant dans ce cas-là, cette dernière ne pouvait instituer l'action qu'elle a instituée, ni aucune autre pour se plaindre de la construction de ce contre-mur.

Au soutien de cette proposition l'appelant cité en Cour Inférieure et cite encore:

1o. Vagnat 1, Parallèle des lois des bâtiments, 166 et suivantes, jusqu'à 170 inclusivement.

2o. Toullier, Vol. 3, No. 162.

3o. Coutume de Paris commentée par Desgodets et Goupy, Ar. 192, No. 5 et suivants.

6o. Fremy-Ligneville, Tit. 2, No. 673;
do do, Vol. 2, Cap. 27, pages 217 et 219 inclusivement.

5o. Solon, Servitudes réelles, Nos. 218, 219, 220 et 221.

6o. Demolombes, Servitudes réelles, Vol. 1, page 57, No. 46.

7o. Code des Constructions, (Perrin) au mot contre-mur, page 229, Art. 1247, où il est dit:

" Lorsque le contre-mur est rendu nécessaire par l'inégalité du sol le terrain " pour le contre-mur doit être fourni, et la construction du contre-mur doit être " supportée en entier, si l'inégalité du terrain est naturelle, par le propriétaire " du terrain le plus élevé; si elle provient du fait de l'homme, par celui qui l'a " occasionnée."

La deuxième proposition de l'appelant est que la construction de ce mur n'est pas de sa part une empiétation pouvant justifier la dite Dame veuve Namur d'instituer une action pétitoire ou possessiore.

En effet, l'appelant n'a jamais eu la possession de cette portion de terre revendiquée par l'intimé ou son auteur, et n'en a jamais de fait ni par aucun de possession ouverte réclamé la propriété.

Voici le jugement de la Cour d'Appel:

Respondent arguendo:—

The action was a petitory action setting up the titles to a certain property in St. Constant street in this city, and alleging an *empiétation* and taking possession by the appellant of a certain portion thereof, to wit, of sixteen inches at the

base, diminishing to 4 inches at the top and extending 27 feet along the property of the plaintiff.

The defendant in the Court below entertained an erroneous impression as to the character of the action, treating it as possessory in its conclusions and, what may be considered more extraordinary, the learned judge who rendered the first judgment in the case participated in this error. It may be only necessary to ask the Court to examine the conclusions of the declaration, which are in these terms:

"Wherefore the said plaintiff prays that inasmuch as the said plaintiff is the true and lawful owner of the said lot of land and premises, the said defendant who unlawfully detains and withholds the possession thereof, or of the said portion thereof, from the said plaintiff may be adjudged and condemned to desist from, quit and abandon the possession and occupation of the said lot of land or the said portion thereof so possessed and occupied by him, and to render and deliver up the same to the said plaintiff and also to pay to the said plaintiff the value thereof from the time of his unjust and illegal possession, and to pay to the said plaintiff the aforesaid sum of ninety pounds, with interest till paid, and costs of suit."

It would perhaps be unnecessary to add that this conclusion is similar to one in the case of Stuart and Lawrence in the Records of the Superior Court, which last was framed by one of the ablest special pleaders who ever adorned the profession, the late Sir James Stuart.

The Court of Revision had no doubt on this point, although the learned judge who pronounced the judgment in the Court below persevered in considering the suit possessory, instead of petitory. Such pretension being necessary to warrant him in continuing to affirm the first judgment.

The defendant pleaded several pleas, and substantially denied the pretensions of the plaintiff, so that if 30 years had elapsed the right of property would have absolutely been transferred from the plaintiff and vested in the defendant. It may be well to observe that the evidence establishes beyond doubt that the possession of the 16 inches of ground *usque ad cœlum* was of the property of the plaintiff. This is not denied, and the defendant must rest his defence upon his right to enter upon my property and erect walls serviceable to himself without my consent legally obtained, and without indemnity.

It may be confidently asserted that a gross violation of the rights of property has been attempted by the defendant, which has been properly rebuked and punished by the judgment of the Court of Review.

The extraordinary pretension of the defendant is that, being the owner of an inferior lot, and being about to build thereon, he is to be permitted to oblige the owner of the superior lot to indemnify him for his natural inferior position by taking possession of his land for the purpose of aiding him in improving and benefiting his inferior property.

The evidence of most respectable and disinterested witnesses establish that the wall so built on the plaintiff's property is of no use for the object intended and that the defendant should have built the wall within his own premises, and the respondent would earnestly call the attention of the Court to the evidence adduced by him as conclusive in his favor.

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"Considering that the action and demand in this cause was mainly for the dispossession of the appellant, defendant below of the land and premisses mentioned in the pleading in this cause filed, alledged to be by him wrongfully detained from the said plaintiff and subsidiarily for damages suffered by the plaintiff for his, the appellant's unjust possession;

"Considering that it is proved in the cause that at the institution of this action the appellant was not in such adverse possession of the said land and premises, viz., that the same then were and had been since the building of the said wall by the appellant on and upon the said land and premises in the possession of the said plaintiff."

Considering that the building of the said wall by the appellant upon the said land and premises of the said plaintiff gave him no proprietary rights in the said land and premises in the said wall, so built upon her said property;

Considering that no demand on demolition of the said wall is made by this action nor any judgment sought against the said appellant for the removal thereof;

Considering that no damages have been proved to have been suffered by the plaintiff;

Considering that the said judgment below appealed from adjudges the plaintiff or her representative *par reprise* proprietary right in the said land and premises, which right is not the subject of the said *demande* or of the said action;

Considering that the said action and demande for the said dispossession of the appellant of the said land and premises have not been established and that the said action and demande should have been dismissed by the said Court below;

"Considering, therefore, that there is error in the said judgment appealed from; proceeding to render such judgment, etc.

Jugement infirmé.

Diss: Duval, C. J. Caron J.

Jetté et Archambault, pour l'appelant.

Henry Stuart, pour l'intimée.

COUR DU BANC DE LA REINE,

EN APPEL.

MONTREAL, 9 SEPTEMBRE 1868.

Coram DUVAL, CARON, DRUMMOND ET BADGLEY, JJ.

CHARLES TURCOT,
(*Défendeur en Cour Inférieure,*)
APPELANT;

ET

JOSEPH OLIVIER GUILMETTE,
(*Demandeur en Cour Inférieure,*)
INTIMÉ.

JUGÉ:—Que le propriétaire peut agir négatoirement contre quiconque l'empêche de disposer librement de sa chose ou se permet sur elle des entreprises qu'une servitude seule peut autoriser.

Le jugement de la Cour Inférieure (Monk, J.) explique les faits de la cause. Il s'agit d'une action négatoire; voici la teneur du jugement:

Chs. Turcot et J. O. Guillemette.

1. Considérant que le demandeur est propriétaire et en possession d'un terrain situé au lieu appelé village St. Henri, dans la paroisse de Montréal, de la contenance qu'il peut avoir tant en front qu'en profondeur et contenu dans les limites suivantes, savoir :—en front au chemin de Lachine, en profondeur au chemin de fer du Grand Tronc, d'un côté par le demandeur pour partie, savoir : par le terrain ci-après décrit, et partie par le défendeur en cette cause, et de l'autre côté par les représentants d'Hélène Lenoir, et par le demandeur, le dit terrain de forme irrégulière de cent cinq pieds à peu près de largeur sur le devant, et de deux cents pieds à peu près sur le derrière, sur une profondeur totale de trois cents pieds, ou à peu près, pour l'avoir acquis de Germain Lefebvre, cordonnier de la dite paroisse de Montréal par acte reçu devant Maître Jobin et son confrère, notaires, à Montréal, le 7 juillet 1856, et qu'il est aussi propriétaire et en possession du terrain ci-après décrit, savoir :—" Un terrain ou emplacement sis et situé au dit village St. Henri, dans la dite paroisse de Montréal de la contenance qu'il peut avoir tant en front qu'en profondeur, et contenu dans les limites suivantes, savoir : tenant en front par le chemin de la Reine, conduisant à Lachine, en profondeur et d'un côté par le terrain ci-dessus décrit, et de l'autre côté par Désiré Turcot, pour l'avoir acquis de Germain Lefebvre, fils, cordonnier de la paroisse de Montréal susdite, par acte devant Maître Jobin et son confrère, notaires, le 14 juillet 1866." Et que ces terrains sont contigus et ne forment plus qu'un seul lot, que le demandeur possède à titre de propriétaire depuis la date des dites acquisitions.

2. Considérant que le défendeur possédait à titre de propriétaire à toutes les épargnes ci-après mentionnées, le terrain décrit dans la déclaration comme suit : —" Un terrain sis au dit village St. Henri dans la dite paroisse de Montréal, voisin et contigu à celui ci-dessus en premier lieu décrit, d'une forme irrégulière, borné par devant au chemin de Lachine, en arrière par le chemin de fer et d'un côté par le demandeur, comme il a été dit plus haut pour partie, et par Désiré Turcot pour partie, et de l'autre côté par des personnes inconnues au demandeur."

3. Considérant que les dits terrains des parties en cette cause sont voisins et contigus et séparés par un fossé et une clôture de ligne suivant l'usage et la loi depuis plus de dix ans avant l'institution de cette action.

4. Considérant que le défendeur prétend injustement et sans titre à un droit de passage à pied et en voiture sur les dits terrains du demandeur, en faveur de son dit terrain, et qu'en conformité à cette prétention il aurait depuis le premier mai 1865 jusqu'au jour de l'institution de cette action, passé tant à pied qu'en voiture sur les dits terrains du demandeur pour se rendre de son propre terrain au chemin public, et qu'il aurait de plus, dans le mois de mai 1865, illégalement et malgré le demandeur construit une barrière dans la clôture de la ligne et un pont sur le fossé de ligne qui sépare les héritages des parties en cette cause afin de se faciliter l'exercice de la dite prétendue servitude de passage ;

5. Considérant que le dit pont et la dite barrière ainsi situés, sont des entreprises qu'une servitude seule peut justifier, leur seul objet n'étant que de faciliter le passage du défendeur sur les terrains du demandeur et que le défendeur n'a pas invoqué ni produit de titre à telle servitude ;

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6. Considérant que la prétention du défendeur que son terrain s'étend à quelques pieds plus loin que la clôture et le fossé de la ligne est mal fondée que le défendeur ne peut faire valoir telle prétention que par une demande régulière au pétitoire ou en bornage, et qu'il n'a pas d'ailleurs justifié des allégués de sa défense;

La Cour a déboute et déboute le défendeur de sa dite défense à cette action.

7. Et considérant que le demandeur a justifié de tous les allégués de sa déclaration, excepté en ce qui regarde les dommages. La Cour déclare les dits terrains du demandeur ci-dessus décrits, libres de tout droit de passage sur iceux en faveur du défendeur comme propriétaire et possesseur du terrain ci-dessus en dernier lieu décrit; Et la Cour fait défense et prohibition au dit défendeur de traverser et passer à l'avenir sur les dits terrains du demandeur, tant à pied qu'en voiture et le condamne à défaire et détruire la dite barrière dans la clôture de division entre les héritages des parties en cette cause et à rétablir la dite clôture et aussi à défaire et détruire le dit pont, et à défaut par le défendeur de ce faire sous quinze jours de la signification de la présente sentence, le demandeur est autorisé à défaire les dits ouvrages et à rétablir la dite clôture aux frais et dépens du défendeur.

L'appelant allègue qu'il n'a passé sur le terrain de l'intimé qu'avec la permission du locataire de celui-ci, et qu'il n'a causé aucun dommage.

L'intimé a répondu spécialement que les terrains des parties étaient bornés et séparés par une clôture de ligne et un fossé de ligne, suivant la loi et l'usage du pays, depuis au-delà de trente ans, et que l'appelant ne pouvait de lui-même changer les limites des héritages, comme il le prétendait, et empiéter sur celui de Guilmette. Si l'appelant n'était pas satisfait des limites actuelles, il devait se pourvoir en bornage ou au pétitoire. Quand à la convention alléguée, elle n'avait jamais eu lieu, et le prétendu arpentage de Régnault était complètement nul, ayant été fait en l'absence de l'intimé, sans son consentement, les formalités n'ayant pas été observées, et aucun procès-verbal régulier n'en ayant jamais été dressé ni communiqué à Guilmette. Celui-ci n'a jamais consenti au rétablissement du pont, mais au contraire s'y est toujours opposé—supposant même que l'appelant ait eu droit à quelque pieds de terrain chez l'intimé, cela ne pouvait l'autoriser à passer sur tout le terrain de celui-ci, car il ne touche à celui de Turcot que sur une partie de son étendue. Son locataire n'avait aucun droit de permettre à l'appelant de passer, comme celui-ci l'avait fait, sur son terrain, vû les défenses de l'intimé, et de fait ne lui avait pas donné cette permission. Que le bail de Carroll à Turcot était simulé, et fait de concert entre eux, quelques semaines seulement avant l'institution de l'action, afin de couvrir les empiétations de l'appelant; que d'ailleurs il ne pouvait autoriser celui-ci à se servir du passage établi sur la propriété de l'intimé, pour l'usage de son propre terrain. Enfin que ce bail était nul, en ce qu'il tendait à aggraver la servitude établie en faveur de Carroll, dont le terrain, lors de son acquisition par ce dernier, était en culture et en verger, d'où en en faisant une carrière il aggravait la servitude en faveur de l'appelant et aux dépens de l'intimé.*

* Prevost de la Jannes, p. 330, No. 3—3 Toullier, No. 650, p. 492, des servitudes—Pardessus, des servitudes No. 60, p. 77, 6e édition.

L'intimé cite l'autorité suivante pour établir son droit à l'action négatoire d'après les faits ci-dessus allégués. Chs. Turcot et J. O. Guillemette.

" Le propriétaire agit négatoirement contre quiconque l'empêche de disposer librement de sa chose, ou *se permet sur elle des entreprises qu'une servitude seule peut autoriser* (Bonjean, traité des actions, 2 vol. 280, p. 119. Edition de 1845.)

Jugement confirmé.

Leblanc et Cassidy, pour l'appelant.
S. Pagnuelo, pour l'intimé.

COUR DU BANC DE LA REINE.

(JURIDICTION CIVILE D'APPEL.)

MONTRÉAL, 9 DÉCEMBRE 1868.

Coram L'honorable Juge DUVAL, C.J., et les honorables Juges CARON, LORANGER et JOHNSON.

JEAN CADIEUX,

(*Défendeur en Cour Inférieure,*)

APPELANT;

ET

JEAN BAPTISTE ALIAS NARCISSE DEBIEN,

(*Demandeur en Cour Inférieure,*)

INTIMÉ.

Exception de cumulation—L'acheteur ne peut exiger la livraison de la chose s'il n'a pas offert tout le prix d'achat—Déchéance du droit de réméré.

L'appelant demande à ce tribunal l'infirmation de deux jugements, rendus contre lui en cette cause par la Cour Supérieure à Montréal, l'un le 30 avril 1866, par son Honneur le Juge Smith, confirmé ensuite le 29 septembre suivant, par la Cour de Révision, composée des Honorables Juges Badgley, Berthelot et Monk, renvoyant une exception de cumulation d'actions opposée par l'appelant, comme premier moyen, à l'action de l'intimé; l'autre rendu le 12 avril 1867, par son Honneur le Juge Monk, sur le mérite de la cause.

Les faits qui ont donné naissance au présent litige sont les suivants :

Le 28 juin 1864, l'appelant Cadieux vend à un nommé Nazaire Meunier, une terre en culture située à Ste. Rose, et une terre à bois, située dans la concession Ste. Marianne.

Il est stipulé que l'acquéreur prendra possession pour les travaux d'automne à faire sur cette terre, à la St. Michel alors prochaine, et quant à la maison et aux bâtiments au 1er mars 1865 seulement.

Cette vente est faite à la charge de payer :

1. Une rente créée sur la terre de Ste. Rose, en faveur de deux rentiers M. et Madame François Cadieux;

2. Cent francs à chacun des quatre frères de Félix Cadieux, fils des rentiers et auteur du vendeur l'appelant;

3. Pour acquitter l'appelant Cadieux d'une dette due à un nommé Désormeaux et dont Meunier l'acquéreur était cessionnaire;

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4. Enfin pour une somme de mille francs, payable le 1er mars 1865 si l'appelant n'exerçait pas la faculté de rachat stipulée au dit acte.

L'appelant se réservait en effet, jusqu'au 1er mars 1865, le droit de "reprendre à titre de réméré, les dits immeubles présentement vendus au dit acquéreur;" et ce dernier s'obligeait d'en faire la remise à première demande, aux conditions suivantes: 1. Pourvu que l'appelant remît en un seul paiement comptant à l'acquéreur ou à ses ayant cause la somme de quatre mille francs avec intérêt de la St. Michel 1864;

2. De payer aussi tous les frais et loyaux coûts qui auraient été déboursés par l'acquéreur;

3. De payer les frais de labour que Meunier aurait pu faire dans l'automne 1864;

4. De continuer à payer la rente de François Cadieux et femme;

5. De payer les cent francs à chacun des frères de Félix Cadieux;

6. De faire les paiements dûs pour l'Eglise.

Cette vente n'étant que conditionnelle, l'appelant demeure ensuite en possession des terres vendues, avec l'assentiment de l'acquéreur Meunier.

Le 27 janvier 1865, Meunier vend à l'intimé Debien, les mêmes terres qu'il avait achetées de l'appelant, aux mêmes conditions qu'il les avait eues, réservant pour l'appelant la faculté de rachat stipulée au premier contrat sus relaté.

La prise de possession par l'intimé des terres susdites, vendues par l'appelant, devait avoir lieu le 1er mars 1865, sur paiement à l'appelant des mille francs stipulés en l'acte de vente à Meunier, si toutefois l'appelant n'exerçait pas son droit de rachat.

Néanmoins le 1er mars 1865, l'appelant demeure en possession de ses terres, sans que ni l'intimé ni Meunier ne lui fasse aucune demande de livraison ni aucune offre des mille francs qui devaient être payés pour obtenir possession des dites terres.

Ce n'est que le 14 avril 1865, c'est-à-dire un mois et demi après l'époque fixée, que l'intimé fait signifier à l'appelant une copie de l'acte de vente à lui consenti par Meunier, pour l'informer qu'il était aux droits de ce dernier.

Néanmoins cette signification n'est pas accompagnée de l'offre des mille francs stipulés payables le 1er mars 1865, et l'appelant continue à demeurer en possession de ses terres. Les choses restent ainsi pendant près d'une année.

Le 13 décembre 1865, l'intimé poursuit l'appelant, alléguant les faits ci-dessus, et disant de plus:

Que le 1er mars 1865, l'appelant n'avait pas exercé son droit de réméré, que l'appelant est insolvable;

Qu'il a gardé les terres vendues depuis le 1er mars 1865 et en a perçu les fruits valant £50, ce qui est plus que suffisant pour compenser les mille francs dûs par l'acquéreur le 1er mars 1865 et qu'il les offre en compensation de la dite somme, que sans cela il serait tenu de payer;

Que l'appelant n'était pas propriétaire de la terre à bois de Ste. Marianne, lorsqu'il l'a vendue, que par suite il n'a pu la vendre, et que la valeur de cette terre étant de 3,000 francs, cette somme doit être déduite du prix de la vente;

Enfin que l'appelant doit faire remise des frais et loyaux coûts qui s'élèvent à $30.

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Puis, il conclut comme suit :

" Pourquoi le demandeur conclut à ce que la faculté de réméré stipulée en " faveur du défendeur, dans l'acte du 28 juin 1864 et mentionnée dans celui du " 27 janvier 1865, soit déclarée éteinte à compter du premier de mars dernier " et le défendeur déchu de ce droit en conséquence, faute par lui de l'avoir " exercé dans le délai mentionné aux dits actes, savoir à venir jusqu'au premier " mars dernier, et à ce que le demandeur soit en conséquence déclaré le pro- " priétaire incommutable des dits terrains et le défendeur condamné à en aban " donner la jouissance au demandeur, sinon à ce que le demandeur en soit mis- " en possession sous l'autorité de cette Cour ; à ce que le défendeur soit condamné " à payer au demandeur la somme de cinquante louis courant (£50) étant la " valeur des fruits et revenus des dits biens, à compter du premier mars dernier, " si mieux n'aime convenir d'experts pour en faire l'estimation en la manière " ordinaire ; à ce qu'il soit donné acte au demandeur de la déclaration qu'il fait, " qu'il est prêt à payer au défendeur la dite somme de mille livres ancien cours, " en raison de la déchéance du dit droit de réméré, mais que cette dernière " somme soit déclarée éteinte et compensée au moyen de celle de cinquante louis " dit cours d'Halifax, égale à deux cents piastres, valeur des dits fruits et revenus " et ce en autant que droit peut être ; à défaut de quoi le demandeur se " déclare prêt à la payer et se réserve le droit de la consigner en Cour avant le " prononcé de la sentence, s'il y est contraint ; à ce qu'il soit déclaré que le " défendeur n'a jamais été le propriétaire de l'un des immeubles décrits aux dits " actes, savoir du terrain décrit en troisième lieu, comme suit : " Un terrain " situé en la côte Ste. Marianne de la paroisse Ste. Thérèse de Blainville, de la " contenance d'un demi arpent de front, sur vingt-trois arpents de profondeur, le " tout plus ou moins, tenant d'un bout au chemin de la dite côte Ste. Marianne, " de l'autre bout au trait quarré des terres de la grande ligne, joignant du côté " nord à Salomon Leclaire et du côté du sud au restant de la terre de François " Cadieux, ou représentants, dont le dit terrain faisait ci-devant partie, sur lequel " il n'y a aucun bâtiment, étant en bois debout ; " et qu'il soit condamné à payer " au demandeur cessionnaire du dit Nazaire Meunier, la valeur de ce terrain qui " est de cinq cents dollars courant, si mieux n'aime fournir et livrer au demandeur " des titres valables à cette propriété, et à livrer le dit immeuble au demandeur " sous tel délai que la Cour fixera ; et au cas où ce terrain ne serait pas livré au " demandeur comme susdit, qu'alors tout autant de la valeur d'icelui soit imputé " en extinction de la somme de mille livres dit cours, égale à cent soixante-et-six " piastres et soixante-et-six centins, et au cas où le défendeur ferait valoir la dite " faculté de réméré qu'alors il soit condamné à payer au demandeur la dite " somme de quatre mille livres égale à celle de six cent soixante-et-six piastres et " soixante-et-six centins, comptant, ainsi que porté en l'acte du vingt-huit juin " mil huit cent soixante-et-quatre, avec intérêt du vingt-neuf septembre mil huit " cent soixante-et-quatre, et à toutes les autres charges, clauses, réserves et " servitudes détaillées au dit acte du vingt-huit juin mil huit cent soixante-et-

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" quatre ; à payer celle de ($30.00) trente piastres pour frais et loyaux coûts et " les frais des présentes, et le demandeur dans ce cas déchargé de toute respon" sabilité en conséquence ; le demandeur se réserve le droit de prendre des " conclusions subsidiaires ou supplétoires s'il y a lieu et le cas échéant ; le tout " avec dépens distraits aux soussignés."

L'appelant opposa d'abord à cette action une exception de cumulation, prétendant que l'action de l'intimé ne pouvait être maintenue telle qu'intentée, et que l'appelant ne pouvait être tenu de produire maintenant ses défenses au fond, vû que l'intimé cumulait dans une même demande plusieurs actions incompatibles, entre autres les suivantes :

1. Une action en déchéance de faculté de réméré ;

2. Une demande en recouvrement des fruits et revenus d'une propriété en litige entre le demandeur et le défendeur ;

3. Une action en diminution de son prix d'achat des propriété désignées en la déclaration en cette cause, parce que le défendeur n'aurait pas eu lors de la vente d'icelles, la propriété d'un des terrains par lui vendus ;

4. Une action en recouvrement d'une somme de quatre mille livres, ancien cours, stipulée payable au demandeur dans le cas où le défendeur exercerait la faculté de réméré, dont le demandeur demande en même temps la déchéance.

L'appelant prétendait que l'intimé était non recevable à exercer simlutanément ces diverses actions, et demandait que l'action du demandeur fût renvoyée, à moins que ce dernier n'optât entre les différentes actions contenues dans sa demande et n'abdiquât les autres.

Cette exception plaidée devant Son Honneur le juge Smith, fut par lui renvoyée le 30 avril 1866, par le jugement suivant :

" La Cour ayant entendu les parties par leurs avocats sur le mérite de l'ex" ception péremptoire faite et produite par le défendeur à l'encontre de cette " action, ayant examiné le dossier et la procédure dans cette cause, et ayant déli" béré, a débouté et déboute la dite exception péremptoire."

" L'appelant inscrivit aussitôt sa cause sur le rôle de la Cour de Révision, espérant faire renverser ce jugement.

Le 29 septembre 1866, la Cour de Révision composée des honorables juges Badgley, Berthelot, et Monk, confirma ce jugement dans les termes suivants :

" La Cour Supérieure, siégeant à Montréal présentement en Cour de Révi" sion, ayant entendu les parties par leurs avocats respectifs, sur le jugement " rendu le trente avril mil huit cent soixante-six, dans la Cour Supérieure du " district de Montréal, ayant examiné le dossier et la procédure dans cette " cause, et ayant pleinement délibéré ; considérant qu'il n'y a point d'erreur dans " le susdit jugement, confirme par les présentes le dit jugement en tous points, " avec dépens contre le dit défendeur, dont distraction accordée à messieurs " Moreau, Ouimet et Chapleau, avocats du demandeur."

Lorsque plusieurs actions compètent au même créancier contre le même débiteur, dit l'appelant dans son factum il ne peut le réunir dans une même demande, que si l'ordre des actions le permet, c'est-à-dire qu'il ne peut réunir que celles d'une espèce, qui procèdent d'une même source, conduisent à un même but et ne sont pas incompatibles entre elles.

Mais si ces actions sont totalement différentes, surtout si elles sont incompatibles et se repoussent, l'intérêt de la justice exige qu'elles soient séparées.

Or, comment concilier celles que l'intimé a réunies dans une même demande? Il suffit de mettre en regard le résumé de chaque partie distincte des conclusions de la déclaration, pour voir que l'intimé demande des choses totalement différentes et même incompatibles. Ainsi il demande à être déclaré propriétaire incommutable des terres à lui vendues par l'appelant, et en même temps il demande à la Cour de déclarer que l'appelant n'a jamais été propriétaire de l'une de ces terres, que par conséquent, il n'a pas pu la lui vendre, et que par conséquent encore, il ne peut en être déclaré lui, l'intimé le propriétaire incommutable!

L'action en déchéance de faculté de réméré et l'action en diminution de prix d'achat, exercées à la fois par l'intimé étaient donc incompatibles, elles se repoussaient mutuellement. Et lorsque la Cour de Révision eût renvoyé l'exception de l'appelant, ce dernier se trouva fort embarrassé pour plaider à toutes ces demandes.

Peut-on aussi réunir avec les deux demandes dont il vient d'être question, une action en recouvrement de fruits et revenus d'une propriété en litige entre les parties, et offrir ces fruits et revenus en compensation d'une somme stipulée payable comme prix d'achat? Le motif de l'intimé est tangible, nous le discuterons plus loin, lorsque nous en serons au mérite de la cause; mais en vertu de quel principe de procédure peut-on joindre une semblable demande aux deux dont nous avons parlé? N'est-ce pas là une demande entièrement séparée et distincte des deux autres? N'est-ce pas là une demande qui conduit à un but totalement différent?

Enfin l'appelant prétend que l'intimé ne pouvait joindre à sa demande en déchéance de faculté de réméré, une demande pour les quatre mille francs stipulés payables dans le cas où l'appelant n'exercerait pas la faculté de réméré.

L'appelant n'ayant pas exercé cette faculté dans le délai fixé, l'intimé n'avait qu'à en faire prononcer la déchéance pure et simple, c'était à l'appelant seul à se prévaloir de son droit s'il existait encore.

Pigeau, *Procédure Civile*, Tome 1er (Edition de 1837), page 105, énumère les principes qui doivent guider là-dessus, et cite un exemple qui s'applique parfaitement à cette cause.

Chapitre 1er, section 7, il dit:

" Si les diverses actions que la loi nous présente pour arriver au même but, " peuvent chacune *séparément* nous y conduire, alors, *on ne peut* les intenter " toutes; on a seulement le droit de choisir parmi elles, celle qu'on juge la plus " convenable *dans la position ou on se trouve*; et ce choix fait exclut l'usage " des autres actions pour lesquelles on n'a pas opté.

" Par exemple, Charles a contracté avec Paul, l'obligation de lui défricher 20 " hectares de bois et s'est engagé à lui payer 1000 francs à défaut par lui de " remplir cette obligation. Charles ne fait point le défrichement. Paul aura le " choix, ou de poursuivre l'exécution de l'obligation principale ou d'exiger les " 1000 francs, stipulés par la clause pénale. Ainsi les deux actions lui sont " ouvertes sans qu'il puisse demander à la force le capital et la peine."

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Or, quelle est, dans la cause qui nous occupe, l'obligation principale? C'est celle de livrer la terre. Quelle est la cause pénale? Le paiement des 4000 francs. L'obligation n'étant pas remplie dans le délai fixé, l'intimé pouvait demander, soit la livraison de la terre, soit la somme, mais non les deux. Mais on dira peut-être ici, comme on a dit en Cour Inférieure et comme le savant juge qui a le premier renvoyé l'exception de l'appelant l'a dit aussi dans le motivé verbal de son jugement: toute les demandes réunies dans cette action résultent du même acte, d'un seul et même contrat, rien n'empêche donc qu'elles soient réunies et ce serait exiger un circuit d'action inutile que de ne pas accuillir une semblable demande.

La réponse à cette objection avait été faite d'avance par le savant juge Smith lui-même, le 31 mars 1863, dans une cause de Robertson vs. Stuart, rapportée au 13e volume des Décisions des Tribunaux, p. 462, où il a jugé: "Que dans "l'action intentée il y avait cumul de trois actions différentes et distinctes: "1. Une action pétitoire; 2. Une action pour faire remplir une excavation; 3. "Une action alléguant qu'un certain passage était trop haut. Que ces actions, "*quoique résultant du même acte de vente* par le demandeur au défendeur, ne "pouvaient être jointes."

1. L'intimé ne peut pas demander livraison de la chose achetée par lui sans en payer le prix, puisque ce prix était stipulé payable de suite; et l'appelant est bien fondé à demeurer en possession de sa terre, tant que l'intimé ne satisfait pas à cette obligation.

2. Pour être admis à demander livraison, l'intimé devait payer le *prix entier* et ne pouvait pas en retenir la moindre partie.

3. L'intimé ne peut réclamer les fruits tant qu'il n'a pas payé ses prix d'achat, et l'appelant demeuré légalement en possession, a régulièrement et de bonne foi fait ces fruits siens.

4. L'intimé ne peut pas offrir les fruits et revenus, non liquidés, des terres vendus en compensation de la somme qu'il avait promis de payer le 1er mars 1865.

5. En supposant même que cette compensation pourrait être admise la preuve n'établit pas la valeur du revenu des terres en question à une somme suffisante pour compenser les 1000 francs dûs.

Les 1000 francs, stipulés par l'acte de vente, payables par l'acquéreur le 1er mars 1865, étaient sans contredit, partie du prix de la chose vendue. Cette date du 1er mars était l'époque de la livraison. L'appelant était-il tenu à l'époque convenue pour la livraison d'abandonner sa terre et de la remettre à l'acheteur, qui ne la demandait même pas, sans que celui-ci lui payât la balance de son prix d'achat? Telles sont nos deux premières propositions.

La réponse des auteurs sur ce point est péremptoire:

Pothier, *Vente*, No. 63: Régulièrement l'acheteur ne peut intenter l'action *exempto* contre le vendeur, qu'il ne lui offre le prix convenu, s'il ne l'a pas encore payé; car il ne peut être recevable à demander que le vendeur satisfasse à son engagement, s'il n'est de son côté prêt à satisfaire au sien.

Il doit offrir le paiement de tout le prix qu'il doit: s'il n'en offrait qu'une

partie, il ne serait pas recevable à demander la livraison de la chose qui lui a été vendue, ni même de la moindre partie de cette chose : le vendeur ayant droit de la retenir comme par forme de nantissement pour la sûreté du paiement entier du prix qui lui est dû. C'est pourquoi de même qu'un débiteur n'est pas reçu à redemander la plus petite partie de la chose qu'il a donnée en nantissement à son créancier, s'il ne lui paie la somme entière pour laquelle elle est en nantissement, de même l'acheteur n'est pas reçu à demander la plus petite partie de la chose qui lui a été vendue, s'il n'est prêt à payer le prix entier qu'il doit au vendeur.

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Aussi Nos. 50 et 66.

Domat, *Conventions en général*, Titre 1er. Sec. III, No. 2. et *Contrat de vente*, Titre 2, Sec. III, Nos. 1 et 3.

No. 3. Si l'acheteur ne paie au terme, et que le vendeur n'ait pas encore fait la délivrance, il peut retenir la chose vendue par forme de gage, jusqu'au paiement.

Delvincourt, Tome III page 71. Le vendeur est tenu de livrer la chose de suite, ou à l'époque fixée par le contrat.....mais cette disposition n'a lieu en faveur de l'acquéreur qu'autant qu'il a payé, *ou qu'il offre à payer le prix en entier*, ou que le vend[illegible] a accordé terme et délai pour le paiement ; *autrement celui-ci n'est pa[illegible] livrer.*

Et le même auteur, aux Notes, page 136, ajoute : *Le prix en entier*, tellement qu'eût-il payé les trois quarts du prix, il ne pourrait demander la livraison de la plus petite partie de la chose.

Dalloz, *Jurisprudence du Royaume, Verbo* Vente et Echange, page 864. Vol. 12, Chap. 1er, sec. 2, 7, Art. 1er Nos. 6 et 17.

Ce dernier auteur va jusqu'à dire que quand même le vendeur aurait été condamné à livrer la chose vendue, sans avoir opposé l'exception de non-paiemen, il pourrait encore exiger le paiement avant de livrer la chose. C'est aussi le sentiment de Pothier No. 66.

Troplong, *Vente*, Nos. 295, 310, 311.

Ces principes sont élémentaires et il est inutile d'insister.

L'intimé ne peut réclamer les fruits des terres vendues, tant qu'il n'a pas payé son prix d'achat, et l'appelant demeuré légalement en possession a de bonne foi fait les fruits siens.

L'appelant tant qu'il n'est pas payé, demeure en effet propriétaire de toute la chose, principal et accessoire. Il ne peut être forcé de se déposséder de l'un et de l'autre que par le paiement que lui ferait l'acheteur, et si ce dernier se refuse de faire ce paiement, le vendeur est bien fondé à lui refuser de son côté la livraison et de la chose vendue et des fruits qu'elle produit. Le contrat de vente est bilatéral et celui du contractant qui refuse de remplir les obligations ne peut exiger de l'autre plus qu'il n'est prêt à faire lui-même.

Sur ce point comme sur la proposition précédente, les auteurs sont précis, et établissent formellement que l'acheteur n'a droit aux fruits qu'en autant qu'il a payé le prix.

Pothier, *Vente*, No. 47. L'obligation de livrer une chose renferme aussi celle

Jean Cadieux et J.-Bte. al. Narc. Demien.

de livrer toutes les choses qui en font partie, ou qui sont des accessoires...il doit remettre avec la chose les fruits tant naturels que civils, nés et perçus *depuis que l'acheteur a payé le prix.*

Troplong, *Vente*, No. 734. L'article 1665 fait connaître quelle est la position de l'acheteur lorsque la condition du retrait est encore pendante,.....No. 735. Cette position de l'acheteur *lui assure les fruits quand il a payé le prix* car les fruits appartiennent au propriétaire et surtout au propriétaire qui possède.

Or, quel était ici le propriétaire ? l'appelant, qui tant qu'on ne lui a pas payé le prix de sa chose la garde avec raison, avec bonne foi, et fait les fruits siens.

Troplong au No. 769, cite un exemple qui s'applique parfaitement à l'espèce présente.

Nous avons donc raison de conclure sur ce point que les fruits, comme la chose elle-même, appartenaient à l'appelant tant que l'intimé se refusait de payer le prix, et qu'il ne pouvait les offrir en compensation du prix, puisqu'ils ne lui appartenaient pas et qu'il n'y avait pas droit.

Voici le jugement de la Cour Inférieure, (Monk, J.)

La Cour ayant entendu les parties par leurs avocats respectifs au mérite de cette cause, et aussi sur la motion du demandeur de produire des conclusions supplétoires et subsidiaires, examiné la procédure, pièces produites, et la preuve, et sur le tout mûrement délibéré. Considérant qu'aux termes de l'acte de vente en date du vingt-huit juin mil cent soixante-et-quatre, il fut convenu entre le défendeur et Nazaire Meunier, comme suit, savoir : " Le vendeur, le défendeur, se réserve le " droit d'ici au premier de mars 1865, de reprendre à titre de réméré les dits " immeubles présentement vendus au dit acquéreur ; en conséquence ce dernier " s'engage à en faire la remise au dit vendeur, à sa première demande et requi- " sition, sous la condition que le dit vendeur payera en un seul paiement comp- " tant, au dit acquéreur, ses hoirs et ayant cause, la somme de quatre mille " livres ancien cours, avec intérêt, à compter de la St. Michel, mil huit cent " soixante-et-quatre, ainsi que les frais et loyaux coûts qui auraient été " déboursés par le dit acquéreur, frais de labour, continuer à payer la rente aux " rentiers Cadieux et aux quatre enfants Cadieux, chacun cent livres dit ancien " cours, de manière à ce que le dit acquéreur soit entièrement indemnisé en " faisant la dite remise, avec aussi convention expresse que dans le cas où le dit " vendeur n'exercerait pas son dit droit de réméré d'ici au premier de mars pro- " chain (1er mars 1865), en ce cas et alors le dit acquéreur rentrera immédiate- " ment en possession et jouissance de tous les dits immeubles et de leurs " dépendances comme susdit et lui appartiendront en toute propriété. Il est bien " entendu que faute par le dit vendeur d'avoir exercé le dit droit de réméré dans " le délai ci-dessus fixé le dit acquéreur deviendra propriétaire incommutable des " dits immeubles et de leurs dépendances, sans qu'il soit besoin d'aucun acte de " procédure," vû que par l'acte de vente en date du vingt-sept janvier mil huit " cent soixante-et-cinq, le dit Nazaire Meunier a vendu et cédé tous ses droits au demandeur ; Considérant que par l'acte en date du quatorze avril mil huit cent soixante-et-cinq, l'acte de vente et cession du vingt-sept janvier mil huit cent soixante-et-cinq, a été signifié au défendeur ; vû que par la clause de l'acte du

vingt-huit juin, mil huit cent soixante-et-quatre sus-précité, le défendeur était obligé, soit d'exercer la dite faculté de réméré ou de remettre au dit Nazaire Meunier, le premier mars mil huit cent soixante-et-cinq, les immeubles décrits dans le dit acte aux conditions y mentionnées ;

Considérant que le défendeur n'a pas au premier mars, mil huit soixante-et-cinq, ni depuis exercé la dite faculté de réméré ni offert de le faire, et qu'il a toujours refusé de faire remise des dits immeubles au dit Nazaire Meunier ou au demandeur : vû que le demandeur par et en vertu des actes précités, a le droit de faire déclarer le défendeur déchu de son droit d'exercer la dite faculté de réméré stipulée aux dits actes de ventes susdits, et de plus qu'il est en droit d'être déclaré le propriétaire incommutable de deux des dits immeubles décrits aux dits actes, des vingt-huit juin mil huit cent soxante-et-quatre, et vingt-sept janvier mil huit cent soixante-cinq, comme suit savoir : " 1o. Un terrain situé " en la grande côte de la paroisse Ste Rose, de la contenance d'un arpent et trois " quarts et demi de front, sur quarante arpents de profondeur, le tout plus ou " moins et sans garantie de mesure précise, mais bien pour l'étendue renfermée " dans les limites suivantes : la rivière Jésus qui le borne au nord, le terrain de " Pierre Ouimet et de Pierre Chartrand ou représentants où il aboutit en pro- " fondeur, le chemin de montée qu'il porte pour moitié du côté du sud-ouest, " et le terrain ci-après désigné, du côté du nord-est, avec une maison, grange " et autres bâtisses dessus construites" ; 2o. Un autre terrain situé au même " lieu, de la contenance de quarante-cinq arpents en superficie, plus ou moins, " borné au nord par la Rivière Jésus, au sud par Jean-Baptiste Chartrand et " Pierre Ouimet ou leurs représentants, joignant du côté du nord-est à " François Locas et Joseph Ouimet et du côté sud-ouest au susdit terrain en " premier lieu décrit, et sans aucun bâtiment ;"

Considérant que par l'acte de vente du vingt-huit juin mil huit cent soixante-et-quatre, le dit Nazaire Meunier, aux droits duquel se trouve le demandeur, s'est obligé de payer au défendeur au cas que ce dernier n'exercerait pas la dite faculté de réméré au temps, et de la manière mentionnée au dit acte, la somme de mille francs, ancien cours ; vû que le défendeur a refusé de remettre les dits deux immeubles sus-décrits, au demandeur ou au dit Nazaire Meunier, le premier mars, mil huit cent soixante-et-cinq, et qu'il a continué à en demeurer en possession et qu'il les retient encore sans droit, ayant fait les fruits siens, depuis son injuste détention : Considérant qu'il résulte de la preuve produite en cette cause, que les fruits et revenus des deux immeubles sus-décrits, que le défendeur a perçus et retirés à son profit sans droit, depuis le premier mars mil huit cent soixante-et-cinq, jusqu'au premier mai mil huit cent soixante-et-six, valent la somme de cent cinquante dollars argent courant : vû que la terre en bois debout décrite comme suit à l'acte du vingt-huit juin mil huit cent soixante-et-quatre, savoir : "3o. Un terrain situé en la côte Ste. Marie Anne de la " paroisse de Ste. Thérèse de Blainville, de la contenance d'un demi arpent de " front sur vingt-trois arpents de profondeur, le tout plus ou moins, tenant d'un " bout au chemin de la dite côte Ste. Marie Anne, de l'autre bout au trait " quarré des terres de la grande ligne, joignant du côté du nord à Solomon

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" Leclair et du côté du sud au restant de la terre de François Cadieux ou " représentants, dont le dit terrain faisait ci-devant partie, et sur lequel il n'y " a aucun bâtiment, étant en bois debout," n'a jamais appartenu au défendeur qui l'a vendu sans avoir droit à la propriété d'icelui, au dit Nuzaire Mounier, et que le demandeur peut également demander une réduction au prix stipulé au dit acte du vingt-huit juin mil huit cent soixante-et-quatre, à cet égard, et que la valeur de cette dernière terre est estimée à cinquante dollars ;

Considérant que le demandeur a droit et est bien fondé à offrir les deux dernières sommes formant ensemble celle de deux cents dollars en compensation de celle de mille livres ancien cours, que le défendeur avait eu droit d'exiger du demandeur, en cas qu'il aurait exercé la dite faculté de réméré ;

Considérant enfin qu'il n'y a pas lieu d'adjuger sur la motion du demandeur par laquelle il demande à présenter de nouvelles conclusions ;

La cour déclare la dite somme de mille francs, ancien cours, avec intérêt sur icelle à compter du premier mars mil huit cent soixante-et-cinq, dûment éteinte et compensée par celle de deux cents dollars, argent courant, comme susdit, rejette la dite motion du demandeur, par laquelle il demande à présenter de nouvelles conclusions, comme inutile, déclare le demandeur le propriétaire incommutable des deux lots de terre en premier lieu décrits aux présentes, et en conséquence condamne le défendeur à remettre et restituer au demandeur les dits deux immeubles, sous quinze jours de la présente sentence, si dans ce délai le défendeur n'a pas exercé la dite faculté de réméré aux conditions portées en l'acte du vingt-huit juin, mil huit cent soixante-et-quatre ; et ce délai passé, la dite faculté de réméré sera éteinte entièrement et le demandeur mis en possession des dits deux immeubles, par toutes voies que de droit sous l'autorité de cette cour et le défendeur expulsé des lieux ; le tout avec dépens dont distraction à Messieurs Moreau & Ouimet, avocats du demandeur. La cour réservant au demandeur tel recours que de droit contre le défendeur.

Jugement confirmé.

Jetté et Archambault, avocats de l'appelant.
Moreau et Ouimet, avocats de l'intimé.

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OF THE

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COMPILED BY

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