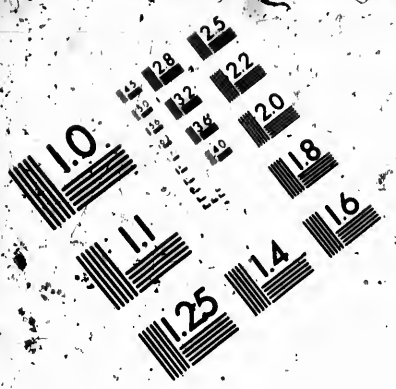

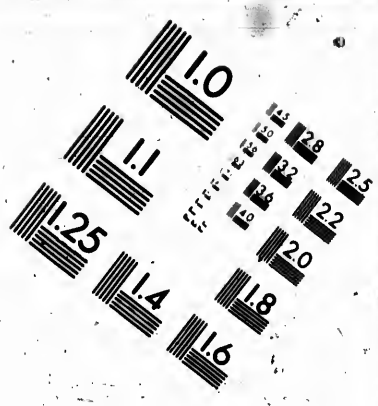

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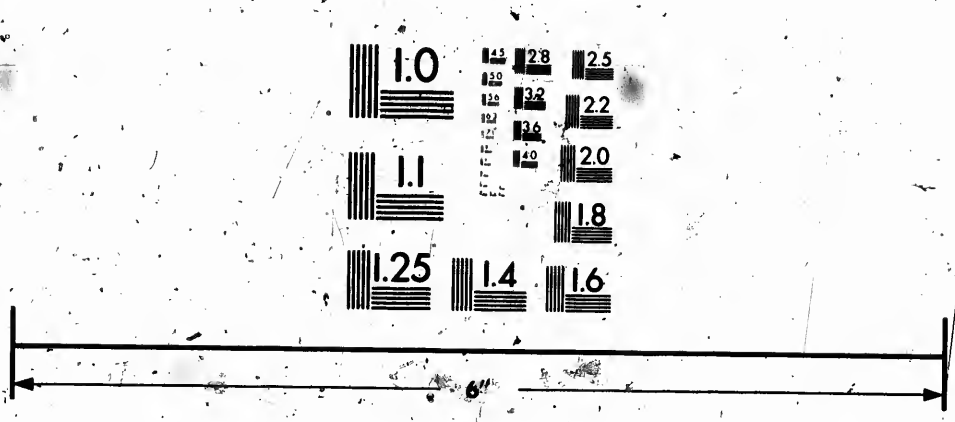

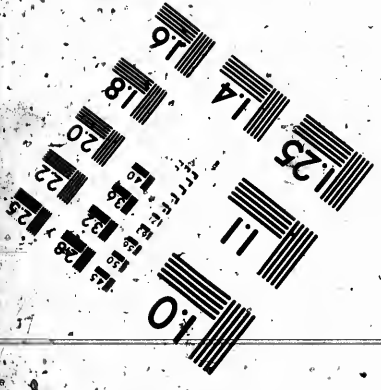

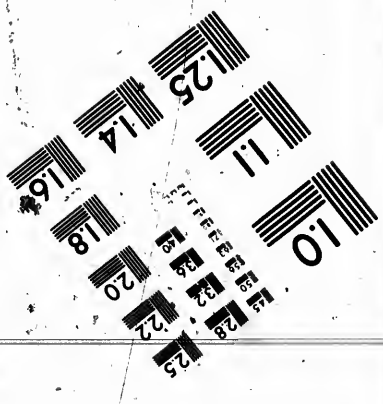

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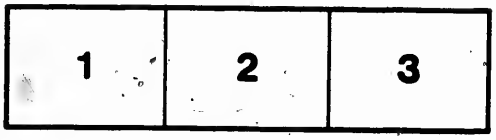

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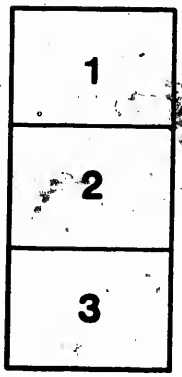

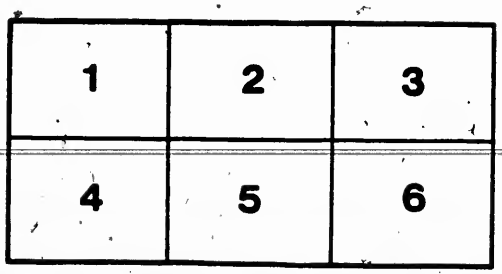

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THE

LOWER CANADA

Jurist.

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DU

BAS-CANADA.

VOL. XIV.

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

THE INDICES:
BY S. BETHUNE, Q.C.

Montreal:
PRINTED AND PUBLISHED BY JOHN LOVELL.
1870.

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OF THE

LOWER CANADA JURIST.

COMPILED BY

STRACHAN BETHUNE, Q. C.

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THE

LOWER CANADA Jurist.

COURT OF QUEEN'S BENCH, 1869.

MONTREAL, 9TH MARCH, 1869.

Coram, DUVAL, C. J., CARON, J., BADGLEY, J., MONK, J., MACKAY, A. J.

No. 36.

JEAN ELIE LAFOND *et al.*,
(*Plaintiffs in Court below,*)
APPELLANTS;

AND

FRANCOIS A. N. ENO,
(*Defendant in Court below*),
RESPONDENT.

A man and wife made a will leaving a certain property to their two sons, a third to one, and two thirds to the other, with a substitution in favor of the children of the surviving son, in the event of the death of the other without leaving children. One of the sons died without children, and subsequently the surviving son transferred the whole property to the widow of his deceased brother. The widow took possession, and by her will made her nephews and nieces her universal legatees, but made a special legacy of the property above mentioned to one of her nephews. All the other legatees joined in the *délivrance de legs* to the special legatee, whose possession exceeded ten years, and, joined to that of his aunt, at the time of the institution of the suit, exceeded thirty years.

HELD:—That the prescriptions of ten and of thirty years were acquired, and that the *délivrance de legs* made by the universal legatees, including the assignor of the appellants, to the special legatee (defendant) debarred any of them or their representatives from claiming under the substitution contained in the will of the grandfather and grandmother.

This appeal was from a judgment of the Superior Court at Montreal, on the 30th of November, 1865, dismissing the plaintiffs' action. The plaintiffs instituted a petitory action, as *cessionnaires* of Henri Eno, claiming an undivided fifth of the Seigneurie de l'Isle du Pads from the defendant, the *détenteur* of the Seigniory.

The plaintiffs alleged by their declaration that the late François Eno and his wife, Charlotte Huberdeau, by will made 9th March, 1794, bequeathed to François Eno, one of their sons, two thirds of the Seigniory in question, and the other third to Antoine Eno, their other son, with a substitution in favour of their children. In case François Eno died without children his share was to go to the children of his brother Antoine Eno. The plaintiffs then set out the decease of

Lafond and Eno.

the testators, François Eno, the father, having died 6th April, 1794, and his wife on the 9th June, 1811. François Eno, the son, died without children, so that his two thirds of the seigniory, according to the plaintiffs' pretension, fell to the children of his brother Antoine. Antoine died 4th December, 1827, and the substitution then became open in favour of his five children, of whom Henri Eno, the *cédant* of the plaintiffs, was one, and it was his fifth of the seigniory that the plaintiffs claimed as his *cessionnaires*.

The defendant pleaded a number of exceptions, which may be summed up as follows:

1. That the will of 29th March, 1794, creating the alleged substitution, had not been carried into execution, François and Antoine, the legatees therein named, having received the seigniory as heirs of their father and mother. That on the death of François, without children, Antoine became the proprietor of the whole, and retained possession till 2nd July, 1816, when he sold it to his brother's widow, Thérèse Dubord, for £500. This lady possessed it till 31st March, 1842, when she left it by will to her nephew, the defendant, who had been in possession ever since, and had acquired the prescription of thirty years.

2. The defendant invoked a deed of 8th January, 1844, by which the universal legatees of Thérèse Dubord, of whom one was Henri Eno, the *cédant* of the plaintiffs, made *délivrance* to the defendant of the legacies mentioned in the will of the said Thérèse Dubord, including the seigniory in question. The defendant, therefore, opposed the *exception de garantie* against the plaintiffs.

3. The defendant set up another *exception de garantie* on the ground that Antoine Eno, father of the plaintiffs' *cédant*, had, on the 12th of April, 1826, by his will, appointed said *cédant* his universal legatee, thus making him responsible for his obligations towards Thérèse Dubord and her heirs, and one of these obligations was to give them peaceable possession of the seigniory which he had sold to Thérèse Dubord on the 2nd of July, 1816.

4. The defendant invoked his own possession for more than ten years.

5. The will of 29th March, 1794, had not been registered, and thus had no effect as regards the defendant, the representative of a *tiers acquereur* buying in good faith.

The judgment of the Superior Court, dismissing the plaintiffs' action, is *motivé* as follows:

"La Cour, après avoir entendu les parties par leurs avocats au mérite de cette cause, examiné la procédure, pièces produites, preuve, et avoir sur le tout mûrement délibéré: Considérant que pendant plus de trente ans avant l'institution de cette action, le défendeur a possédé, tant par lui que par son auteur Dame Thérèse Dubord dite Lafontaine, les immeubles et propriétés seigneuriales désignées et mentionnées en la déclaration et les exceptions en cette cause, et ce publiquement, paisiblement et à titre de propriétaire:

Considérant de plus que pendant dix ans et plus avant l'institution de cette action, le dit défendeur a possédé et joui des dits immeubles et propriétés seigneuriales paisiblement, publiquement, à titre de propriétaire et de bonne foi, en vertu du legs particulier qui lui en avait été fait par la dite Thérèse Dubord dite Lafontaine, dans et par le testament du 31 Mars 1842, duquel

legs particulier il lui a été fait délivrance au désir du dit testament, par tous les légataires et héritiers de la dite testatrice, ainsi qu'il appert à l'acte qui en a été fait le 8 janvier 1844, devant Gagnon et son confrère, Notaires, auquel dit acte a comparu et agi comme l'un des dits héritiers et légataires, Henri Eno, le cédant des demandeurs, lequel est devenu par là le garant du dit défendeur quant à la propriété et possession des dits immeubles et propriétés seigneuriales :

Considérant que pour toutes ces raisons les dits demandeurs sont mal fondés en leur présente action, les en a déboutés avec dépens.

The plaintiffs appealed from this judgment.

Loranger & Loranger for the Appellants :—

La question principale, soulevée par la première exception de l'intimé, est celle de savoir, si l'intimé ayant possédé pendant trente ans la seigneurie de l'isle du Pads, à la connaissance de l'appelé à la substitution, ce dernier peut être reçu à revendiquer ses droits. Pour profiter de la prescription trentenaire, l'intimé est obligé de joindre sa possession à celle de ses auteurs ; or celle de ces derniers n'a pas le caractère voulu par la loi, pour lui permettre de s'en prévaloir, étant celle de légataires universels tenus de faire valoir les obligations du testateur par rapport à la chose léguée. Dame Thérèse Dubord, l'auteur de l'intimé, était elle-même légataire universelle de François Eno, son époux, un des grevés de substitution, (voir le testament du 6 Aout 1808,) et elle était tenue de transmettre les biens substitués. Sa possession, pas plus que celle du grevé, n'a pu préjudicier aux droits des institués. La même obligation incombe à l'intimé légataire universel de cette dernière, et quelque durée qu'ait eu sa possession, elle lui enlève tout le bénéfice qu'il pourrait en tirer contre les appelés. La seule prescription qui pourrait lui compéter serait celle de dix à vingt ans, et les appelants démontreront par la suite qu'elle ne peut lui être d'aucun profit.

Bourjon D. C. de la France, tome 1er, p. 1084. *Part VI.*

" La bonne foi n'est pas absolument requise pour la prescription de trente ans. Mais si la mauvaise foi y était évidente, il serait bien difficile d'admettre cette prescription.

" Le Maître, titre 6, page 163, combat la proposition et estime que la mauvaise foi fait obstacle à cette prescription, mais Brodeau la soutient, et estime *que cela ne doit s'entendre que de la mauvaise foi qui résulte du titre.* Tel est le vrai sens de la coutume.....Ainsi ces conditions concourant avec le temps nécessaire pour cette prescription, la prescription est acquise nonobstant la mauvaise foi survenue, et même nonobstant la mauvaise foi dans l'origine de la possession de celui qui l'allègue, *pourvu qu'elle ne naisse pas du titre même du possesseur si aucun était rapporté.*"

Dunod, de la prescription, pages 19 *et* 20.
Le même, page 45.
Denizart, Col. de Jur. tome III, p. 700, *No.* 18.
Merlin, Rep. de Jur. vol. 9 *p.* 439.
Le même auteur, page 429 *du même volume.*
Delvincourt, Vol. 2, *page* 417.

Mais si l'intimé ne peut invoquer la prescription de trente ans, le titre en vertu duquel ses auteurs ont possédé étant vicieux, peut-il au moins se prévaloir de sa

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possession personnelle, et opposer la prescription de dix et vingt ans? La Cour de première Instance a jugé dans l'affirmative, et sur ce point encore, les appelants soumettent humblement qu'il y a eu erreur, et fausse application des principes sur lesquels repose la prescription de dix ans. La possession de l'intimé ne remonte qu'à l'époque du jour de la passation du prétendu acte de délivrance du legs fait à son profit par le testament de Dame Thérèse Dubord, son auteur immédiat; or les appelants ont intenté leur action en Novembre 1859, établissant une possession de quinze ans.

S'il est de l'essence de la prescription de dix ans que la possession a été *animo domini*, avec titre et bonne foi, assurément on ne prétendra pas que le détenteur qui n'a d'autres titres que celui que lui a transmis son droit de grevé de substitution, puisse l'invoquer avec avantage contre celui même auquel il est obligé de transmettre. La mauvaise foi peut n'être pas un obstacle à la prescription trentenaire, et encore faut-il que celui qui l'invoque n'ait d'autre titre que sa possession, car eut-il un titre, s'il est vicieux, la présomption de bonne foi qui s'infère de la longue durée de sa possession, disparaît. Mais il n'en est plus ainsi pour la prescription de dix ans, non seulement la possession doit être de bonne foi, il faut en outre qu'elle repose sur un titre qui lui donne le droit de transférer le droit de propriété. Or, quels sont les titres de l'intimé? 1o. Le testament de Dame Thérèse Dubord, légataire universelle de François Eno, un des grevés de substitution et comme telle chargée de transmettre les biens substitués; 2o. L'acte de vente fait sans droit, par l'autre grevé de substitution, Antoine Eno, à la dite Dame Thérèse Dubord.

Les autorités que les appelants ont citées pour démontrer que la prescription de trente ans ne peut profiter à l'intimé, s'appliquent *à fortiori* à la prescription de dix ans.

Un second moyen tiré des exceptions de l'intimé se déduit de l'allégation que François et Antoine Eno, les légataires nommés au testament du 29 Mars 1794, ont répudié cette succession testamentaire pour s'en tenir à la succession légitime de leur père et mère.

Que Antoine Eno s'étant trouvé à la mort de son frère François Eno décédé sans enfants, investi de la propriété de la seigneurie de l'Isle du Pads en totalité, il avait le droit d'en disposer comme il l'a fait, au profit de l'auteur de l'intimé.

Les légataires nommés au testament du 29 Mars 1794, ont-ils en effet renoncé à cette succession, et reçu comme héritiers de leur père et mère, François Eno et Charlotte Huberdeau, l'héritage dont les appelants réclament une partie indivise?

Cet allégué n'est soutenu par aucune preuve. Un examen soigneux des pièces justificatives qui composent le dossier, démontre au contraire que François Eno, un des légataires, a accepté la charge qui lui était imposée, savoir: de transmettre le bien qu'il avait reçu par le testament de ses père et mère. On trouve dans son testament en date le 6 Août 1808 le dispositif de tous ses biens au profit de son épouse Thérèse Dubord. En vain cherche-t-on dans cette énumération, la mention de la seigneurie de l'Isle du Pads. Ce silence n'indique-t-il pas l'impuissance dans laquelle il se trouvait de disposer de ce bien. L'intimé a compris toute l'éloquence de ce silence, et il a trouvé un moyen ingénieux pour se soustraire à la conviction qu'elle inspire. On trouve

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dans le testament de François Eno, une disposition par laquelle le testateur transmet à son épouse les Fiefs Chicot et Dusablé.

L'intimé a prétendu que ces deux Fiefs et la seigneurie de l'Isle du Pads étaient une seule et identique propriété, connue indifféremment sous les noms de Fiefs Chicot et Dusablé ou Isle du Pads. Plusieurs témoins ont été entendus, mais on trouve un fait bien étrange dans les transquestions qui leur sont soumises.

Quand on leur demande la position respective de chacun de ces Fiefs, nul ne peut dire ou se trouve le Fief Dusablé.

Mais en admettant que les légataires auraient renoncé à la succession testamentaire de leur père, les appelants soumettent que leur qualité d'héritiers les rend responsables de toutes les charges du testament.

Domat, vol. 2 des successions, P. 395.
Merlin, Rep. de Juris. vol. 6, *p.* 703 *Art. III.*
Page 710, *même Vol.*
Page 711, 730.
Ricard, Des donations, Vol. II, P. 243.

L'intimé a prétendu en outre que tenant son titre de l'un des grevés de substitution nommés au testament du 29 Mars 1794, Henri Eno, le fils de ce dernier, (le cédant) était son garant, ayant été institué son légataire universel par son testament en date le 12 Août 1826.

L'aliénation faite sans droit, par le grevé des biens qu'il doit transmettre ne peut en aucun cas nuire aux institués. La vente qu'il en aurait faite n'empêcherait point ces derniers d'en poursuivre la revendication même contre les tiers acquéreurs qu'il trouverait en possession. Sur ce point il serait oiseux de citer des autorités. Les appelants se borneront à les indiquer.

Toullier.—Vol. 5, Page 513, No. 546.
Le même.— Do, do, Page 688, No. 744.
Pothier.—Des substitutions, No. 199.
Grenier.—Des Donations, Vol. I, Page 534, No. 306.
do do do Page 536.

La qualité de légataire universel, attribuée au cédant, ne saurait le rendre responsable de l'obligation de garantie qui incombe au grevé de substitution, les biens qui ont été légués au dit cédant ne venant point du chef de son père mais bien du chef de son ayeul à titre de substitution.

D'ailleurs le cédant Henri Eno n'a point accepté la succession de Antoine Eno.

L'intimé n'en a point fourni la preuve. Telle preuve eut été facile à faire, l'intimé et le cédant étant liés par les liens de la parenté, et leurs biens respectifs étant situés dans la même localité—Si le cédant a bénéficié du legs universel à lui fait par le testament de son père, le grevé de substitution, pourquoi n'a-t-on pas établi l'acceptation qui en a été faite, par une preuve de possession ou par des actes de propriété qu'il eut été si aisé de démontrer?

Le moyen qui semble avoir mérité à l'intimé le plus de faveur en Cour Inférieure se trouve dans un prétendu acte de délivrance de legs en date le 8 janvier 1844. Le cédant des appelants aurait conjointement avec les héritiers de Dame Thérèse Dubord (l'auteur de l'intimé) fait délivrance du legs fait par cette der-

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nière à l'intimé de la seigneurie de l'Isle du Pads. S'il est de droit que pour que la renonciation à l'hérédité soit valable, il faut que l'intention de l'héritier qui renonce soit clairement et manifestement énoncée et les biens répudiés, spécifiés, il suffit de lire ce prétendu acte de délivrance pour se convaincre que le cédant n'a jamais eu l'intention de compromettre les droits qui lui venaient de son ayeul. En effet, dans quels termes est conçue cette renonciation ? Les comparants font à Dame Fauteux (Tutrice de l'intimé) délivrance *de tous les droits et prétentions que pouvait avoir Dame Thérèse Dubord dans la seigneurie de l'Isle du Pads.* Or il a été démontré que Dame Thérèse Dubord n'avait aucuns droits dans la Seigneurie de l'Isle du Pads, tenant ses titres des grevés de substitution, qui ont aliéné sans droits les biens des appelés.

Ainsi donc, ce prétendu acte de délivrance n'est d'aucune valeur quant à cette partie, et le cédant n'était point tenu d'en demander la nullité dans les dix ans comme le prétend l'intimé pour se purger de l'obligation de garantie qu'il lui oppose.

Il ne reste plus à examiner que deux questions soulevées par l'intimé dans ses 4e et 6e exceptions, savoir que le testament du 29 Mars 1794 n'a aucune valeur légale, 1o Parce qu'il a été fait par deux personnes en un seul et même acte. 2o Parce que ce testament n'a pas été insinué ni enregistré.

La réunion de Antoine Eno et Charlotte Huberdeau dans un même testament entache bien il est vrai, cet acte d'un vice qui le rend nul, mais quels sont ceux qui peuvent être admis à s'en plaindre ? Assurément pas ceux auxquels il a profité. En prenant pour admis que les grevés de substitution ont accepté la charge qui leur était imposée (et les appelants ont démontré qu'il y a eu telle acceptation), cette acceptation ne couvre-t-elle pas tous les vices qui ont pu infecter l'acte qui a créé la substitution ?

Comment le défendeur, légataire universel de Dame Thérèse Dubord, elle-même aux obligations de l'un des grevés de substitution, pourrait-il mériter plus de faveur qu'eux et être admis à se plaindre de son propre titre ?

Quant au défaut d'enregistrement, nul doute que le tiers acquéreur peut toujours l'invoquer avec avantage, s'il n'est pas lui-même aux droits et obligations de la personne qui était obligée de faire insinuer. Tel est le cas dans l'espèce actuelle. L'intimé étant aux obligations des grevés de substitution ne peut pas opposer ce défaut d'insinuation, vu que c'était un devoir de la charge des grevés de faire insinuer, et qu'il est lui-même obligé de transmettre.

Toullier, Vol. 5, *P.* 703, *No.* 771.

Cette exception ne pourrait être proposée par les donataires, légataires ou héritiers de celui qui aurait fait la disposition, ni pareillement par les donataires, légataires ou héritiers.

Pothier, Des substit. Vol. 8, *P.* 464, *No.* 34.
Page 522, *No.* 195.
Merlin. Rep. de Jurisp. titre substit. fidei commis. Vol. 2, *Page* 316.
Merlin. Page 318, *Vol.* 12, *No.* 31.
Furgole.—Des Testaments, Ch. 7, *Sec.* 4, *No.* 42.
Merlin. Vol. 12, *P.* 406, *Sect. XIII.*
Furgole.—Des substitutions, Art. XVIII, P. 270.
Même auteur, substit. Art. XXXIV, P. 308.

L'intimé par sa 5me exception expose qu'il a acquis de divers propriétaires des parts indivises dans la seigneurie de l'Isle du Pads, et en est ainsi devenu le propriétaire pour la totalité. L'intimé a pu en effet augmenter sa propriété et en accroître l'étendue. Mais il n'est point menacé dans la partie de ce bien qu'il a acquise de ses derniers. Si jugement intervenait en faveur des appelants, l'intimé n'aurait qu'à distraire de la seigneurie, telle que primitivement léguée aux substitués, l'étendue de terrain qu'il a acquise lui-même.

Les appelants ont répondu à chacune des prétentions de l'intimé et croient l'avoir fait avec avantage, et ils ont la conviction que le jugement dont est appel sera infirmé.

Dorion & Dorion for respondent :

L'intimé a prouvé,

1o. Sa possession et celle de ses auteurs tel qu'il les avait allégués.

2o. La vente avec garantie par Antoine Eno à Dame Thérèse Dubord dite Lafontaine, le 2 juillet 1816, de ses droits dans la Seigneurie de l'Ile du Pads.

3o. Que Henri Eno, l'auteur des appelants, a accepté le legs universel que lui a fait le dit Antoine Eno, son père.

4o. Que le dit Henri Eno, comme étant l'un des légataires universels de Dame Thérèse Dubord dite Lafontaine, a fait délivrance à l'intimé de son legs particulier de la Seigneurie de l'Ile du Pads.

Sur cette preuve la Cour Inférieure a renvoyé l'action des appelants. Ce jugement ne peut qu'être confirmé par cette Honorable Cour. En effet, Henri Eno, l'auteur des appelants, ne pouvait leur conférer plus de droits qu'il n'en avait lui-même. Or, comme légataire universel de son père, il était tenu de la garantie que celui-ci a stipulé dans l'acte de vente du 2 juillet 1816, et les appelants ses cessionnaires sont également tenus de cette garantie, et ne peuvent troubler l'intimé. Comme légataire universel de Thérèse Dubord dite Lafontaine, le dit Henri Eno était tenu d'acquitter le legs particulier qu'elle a fait de la Seigneurie de l'Ile du Pads à l'intimé—et en faisant à l'intimé la délivrance de ce legs par l'acte du 8 janvier 1844, il a reconnu la validité de ce legs. Enfin l'intimé a possédé la partie de la Seigneurie de l'Ile du Pads, qui a autrefois appartenu à François Eno et à Thérèse Huberdeau son épouse, tant par lui-même que par son auteur Thérèse Dubord dite Lafontaine, depuis au delà de trente ans, savoir, depuis le 2 juillet 1816, et par lui-même depuis au delà de dix ans, (8 janvier 1849) avec titre et bonne foi, en sorte qu'il en a acquis la propriété incontestable.

CARON, J., (dissenting). L'action était portée par l'appelant, comme cessionnaire de Antoine Eno, pour une certaine part que ce dernier disait posséder dans la Seigneurie de l'Ile du Pads. Elle était dirigée contre l'intimé en possession de la totalité de la dite Seigneurie, (voir les allégués de la déclaration résumée dans le factum de l'intimé, page 1.) La conclusion est que " un cinquième de la dite Isle soit livré au demandeur."

La défense est longue et volumineuse. Elle se trouve au long dans le factum des Intimés, de page 1 à 3. Elle est parfaitement résumée au factum de l'appelant, page 2, comme suit :

1o. Le testament du 29 Mars 1794, qui a créé la substitution alléguée, n'a pas eu d'exécution. François et Antoine Eno ont recueilli l'Isle du Pads,

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comme héritiers de leur père et mère, et non comme légataires, que Antoine ayant survécu à François, décédé sans enfants, et *ab intestat*, a succédé à titre d'hérifier à la part de ce dernier dans la dite isle, et en a possédé la totalité comme propriétaire jusqu'au 2 juillet 1816; qu'il l'a cédée à Dame Thérèse Dubord, épouse du dit Frs. Eno, à raison de £500. Par suite de cette cession, la Dame Thérèse Dubord, devenue propriétaire de la dite Isle en totalité, l'a léguée par son testament en date du 31 Mars 1842, à l'intimé, qui depuis l'a possédée publiquement, &c.; par suite de quoi, il a acquis la prescription de 30 ans, tant au moyen de sa propre possession, qui est de plus de dix ans, que de celle de la dite Dame Dubord, qui toutes deux forment un espace de plus de 30 ans.

2o. Le nommé Henri Eno, cédant des appelants, est comparu à l'acte du 8 Janvier 1844 par lequel les légataires de la dite Dame Thérèse Dubord, dont Henri était un, ont fait à l'intimé délivrance du legs à lui fait par la dite Dame Dubord, de l'Isle du Pads; par suite de quoi, les appelants, qui sont aux droits de Henri seulement, sont, comme lui, garants du dit intimé et ne peuvent le troubler dans la possession du dit immeuble.

3o. Le cédant *Henri Eno* est encore garant de l'intimé comme légataire universel de Antoine Eno, père de lui dit Henri, et partant tenu comme tel de garantir la dite Dame Thérèse Dubord dans la possession de la dite Seigneurie (aussi bien que ses héritiers), laquelle le dit Antoine Eno avait vendue à la dite Dame Thérèse Dubord.

4o. Prescription de dix ans avec titre et bonne foi, par la possession personnelle que lui, le dit intimé, a eue de la dite propriété.

5o. Le testament du 29 Mars 1794, qui a créé la substitution prétendue, est nul, faute d'enregistrement, dont a droit de se prévaloir le dit intimé, représentant, pour partie, la dite Dame Thérèse Dubord, qui a acquis cette Seigneurie à titre onéreux comme mentionné plus haut.

Le jugement dont est appel admet la prescription de 30 ans, tant par la possession de la dite Dame Dubord que par celle de l'intimé lui-même, et aussi la prescription de 10 ans par suite de la possession qu'il a eue lui-même, fondée sur le testament de la dite Dame Dubord, 31 Mars 1842, à titre de legs particulier, et de l'acte de délivrance du 8 Janvier 1844; déclare le cédant des appelants (Henri Eno,) garant de l'intimé, et pour ces raisons renvoie l'action.

L'appelant conteste les propositions émises par l'intimé en sa défense, et soutient avec beaucoup d'habileté et de labeur:

1o. Que la prescription de 30 ans n'a pu être acquise, parce que pour l'obtenir, l'intimé doit joindre à sa propre possession, celle de son auteur Dame Dubord, laquelle étant légataire universelle de feu Frans. Eno, son époux, (testament 6 Août 1808, et le représentant en cette qualité, a été empêchée de prescrire par la raison que son dit mari était tenu de délivrer les biens qui lui avaient été légués, et entre autres l'Isle du Pads, aux intimés, suivant le testament susmentionné du 29 Mars 1794; que la possession qu'a eue la dite Dame Dubord, étant pour cette cause entachée de mauvaise foi, ne peut être invoquée avec avantage par le dit intimé, pas plus que ne pourrait le faire elle-même la dite Dame Thérèse Dubord, qui ne pouvait pas plus prescrire que n'aurait pu le faire le dit

François Eno, son mari, et son auteur, tenu comme susdit de mettre à exécution la substitution contenue au dit testament (29 Mars 1794), le titre en vertu duquel la dité Seigneurie lui est advenue, s'opposant à ce qu'il eût cette possession requise même pour la prescription de 30 ans.

Que partant l'intimé ne pouvait joindre la possession de la dite Dame Dubord à la sienne, il ne se trouve pas avoir les trente ans de possession qu'il allègue, étant par là tenu de se borner à sa propre possession qui ne peut dater que du décès de la dite Dame Thérèse Dubord, ou même de la délivrance du legs qui aurait été faite à l'intimé par l'acte déjà mentionné, en date du 8 Janvier 1844, formant 15 ans, à peu près, avant l'action des appelants intentée en Novembre 1859. Le résumé de cette réponse de l'appelant se réduit à dire : les titres produits sont contre l'intimé ; ils sont vicieux et s'opposent à la prescription. Sans ces titres vous auriez pu prescrire, mais avec, vous ne le pourrez pas, par 30 ans du moins.

2o. Vous ne le pouvez pas d'avantage en vous fondant sur votre possession personnelle de dix ans avec titre et bonne foi ; et la raison est que, pour acquérir de cette manière, il faut non-seulement la bonne foi, mais il faut en outre un titre valable ; or les titres produits par l'intimé sont vicieux à leur face : c'est d'abord le testament de Dame Thérèse Dubord qui était légataire universelle de François Eno, son mari, n'a pu prescrire, ni passer à autrui une possession capable de permettre la prescription, et ensuite la vente faite de partie de la Seigneurie par Antoine Eno, qui était tenu de la substitution comme son frère François.

Toute la cause se réduit à une question de prescription. L'Intimé a-t-il acquis la prescription de 30 ans, si non a-t-il celle de dix ?

La solution de ces deux questions dépend de savoir si le testament du 29 Mars 1794, est valable, et en second lieu si étant valable et accompagné des formalités voulues, il pouvait être mis de côté volontairement, par les héritiers des testateurs, et finalement si les héritiers, ou ceux qui les représentent, peuvent se prévaloir des défauts de forme ou formalités qui peuvent affecter le dit testament.

Une des causes de nullité qu'on lui attribue, est qu'il a été fait conjointement par les deux testateurs. Cette objection n'est pas valable. Avant l'ordonnance de 1735, ces testaments étaient permis. C'est cette ordonnance qui en a aboli l'usage.

Une autre cause de nullité est que le dit testament n'a été ni enregistré ni publié en la manière voulue par la loi, pour les cas de substitution, comme ceux que contient celui dont il s'agit.

Il paraît constant, et même admis, que ces formalités n'ont pas eu lieu. Pour cette raison la substitution y contenue serait nulle si elle était invoquée par des tiers non tenus à l'accomplissement des charges imposées par le dit testament ; mais ce défaut de formalités ne peut être invoqué par les grevés, dont c'est l'obligation de les accomplir, ni par leurs représentants à titre universel. Or dans le cas actuel, ce défaut est invoqué par l'intimé, qui est légataire universel de Dame Dubord, laquelle représentait aussi à titre universel le nommé François Eno, son mari, l'un des grevés de substitution, laquelle ne pouvait pas plus que le grevé lui-même, se prévaloir d'un défaut qui devait lui être imputé, et dont il était légalement responsable. Il me parait que l'intimé est aux lieu et place des grevés, les représentant à titre universel.

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Or si, en fait, cette proposition est vraie, le défaut des formalités allégué ne peut pas être par lui invoqué, plus que les grevés n'auraient pu le faire eux-mêmes.

Si c'est le cas, le testament de 1794, qui crée la substitution, est, *quant aux parties* dans l'instance, bon et valable, et doit être regardé et traité comme tel.

De là il suit que la renonciation de François et de Antoine Eno, grevés, si elle était prouvée, ce qui n'est pas le cas, (le contraire paraissant au dossier) n'empêcherait pas que le testament dût être exécuté quant à la substitution, et autres charges y imposées.

L'héritier, légataire en même temps, ne peut pas se dispenser d'exécuter le testament, en y renonçant; la volonté des testateurs ne dépend pas de l'acceptation ou de la renonciation de l'héritier. Le légataire peut bien renoncer pour lui-même, mais en le faisant, il ne peut altérer les droits des tiers intéressés à l'exécution du testament.

Si tel est le cas, et la chose ne parait pas douteuse en regardant aux autorités citées par l'appelant, il s'en suit que les droits des institués ont été preservés, nonobstant la renonciation directe ou tacite des grevés; or l'intimé représentant, pour les raisons assignées plus haut, les grevés Antoine et François Eno, et étant, pour les raisons aussi invoquées, leur représentant à titre universel, ne peut invoquer contre l'appelant, qui est lui le représentant de l'un des substitués, ni la prescription trentenaire fondée sur la possession de Dame Thérèse Dubord et celle de l'intimé lui-même, ni celle de 10 ans, fondée sur la possession de l'intimé lui-même, vû que cette possession n'est pas de bonne foi, dans l'acceptation légale du mot, et n'est pas fondée sur des titres valables et qui puissent valoir en pareils cas.

Pour ces raisons, je pense que le jugement est incorrect, qu'il devrait être infirmé; l'action des demandeurs maintenue et le défendeur condamné à leur faire remise du cinquième de la Seigneurie de l'Isle du Pads qu'ils réclament.

BADGLEY, J. The will of 1794 is alleged to contain a substitution of the bequeathed property to the children of François and Antoine, to whom a life interest only in its possession by unequal parts is given by the will, with right of survivorship to each upon the death of the other without children. The life interest is not in contest. By the death of François childless in 1813, the entire life interest in possession passed to Antoine, and as stated by the appellants in their factum, "lequel se trouva ainsi investi de la possession de la totalité de cette Seigneurie," the entire title and right in the substituted property being in Antoine's five children, of whom Henri, the assignor of the appellants, was one. The factum admits that the substituted property was in the possession of Antoine alone, and therefore it is plain that he alone, as surviving *grevé* in possession, was bound to transmit the property to the substitutes. The possession of François was divested by his death when his *qualité de grevé* absolutely ceased, by the effect of the testamentary survivorship. By François's will he vested his own acquired property in his widow Thérèse Dubord, as his universal residuary legatee, but that investment did not touch the substituted property, the right and title to which were in the substitutes, and the full possession fell to Antoine, the surviving *grevé*, therefore the heritable *qualité* of the widow as universal legatee of François was entirely unconnected with her testator's *grevéship*, and

could only affect his own personal property which he gave to her; his bequest to that extent cannot be contested. But the appellants contest the respondent's trentenary prescription through her, because they allege in their factum that the alleged possession for thirty years through her, "n'a pas le caractère voulu par la loi," because it was "celle de legataires universels tenus de faire valoir les obligations du testateur par rapport à la chose léguée." In other words, that the respondent being the universal légatee of Dame Thérèse Dubord, who was the universal legatee of François, who was a *grevé de substitution*, her title was vicious and could not establish the prescriptive time, because the inheritable *qualité* bound them all to transmit the substituted property to the substitutes. There is a patent fallacy here. Dame Dubord was not the implied heiress of the *grevé* François as to the substituted property, her implied inheritance was in her husband's personally acquired property, which he could give to her, but not in the substituted property which he did not give to her, and the possession of which by survivorship under the will of 1794 passed to the surviving *grevé* Antoine, for transmission to his children, Henri among the number. It would be waste of time to delay upon this point of contestation; the alleged disqualification and imputed *vice de titre*, in and through her, under the will of François, have no application, and do not interfere with the respondent's trentenary period for the contested prescription. It must be remembered also that the dates are something on this point. François died in 1813, his brother Antoine, the surviving *grévé sujet à transmettre*, died in 1827, leaving his son Henri of full age, having been born in 1801; his assignment to the appellants was made on the 6th of September, 1859, and this action was instituted in November of the same year. Henri, the substituted owner of the property, was twenty-six years old at his father's decease in 1827, and has allowed thirty-two years from that time to elapse without making his claim known. During all this time it was competent for him to urge his title if he had one against the respondent's *auteur* or himself, who were in open possession of the contested property. This he has not done, and his silence proves his acquiescence and consent. As to the ten years, the respondent's title and liberation from Henri's claim are protected upon the grounds already stated, and they have besides the formal acquiescence of Henri himself as a legatee of Dame Dubord under her will, in company with her legatee, the respondent. Her will was dated in March 1842, and shortly afterwards became executory by her death. The testamentary inventory and settlement of her estate were duly executed, and by the Act of 8th January, 1844, to which Henri and her other legatees were parties, he formally made *délivrance de legs* to the respondent of the legacy made to the latter of the property in contest in this suit. At that time Henri was forty-three years of age *usant de ses droits*, and declared in the Act, after acknowledging that he had communication of all the legacies under the will, and of the disposition of the testatrix in respect of them, which he with the other legatees have well heard and understood, he and they declare, "avoir iceux pour agréables et consentent qu'ils soient executés "selon leur forme et teneur, nonobstant tous défectuosités qui pourraient s'y "rencontrer: making cession et délivrance, to the said respondent, de tous les "dits droits, parts et prétensions qu'avait la dite défunte et qui lui appartenaient

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"au jour et heure de son décés dans les dits fiefs et seigneuries de l'Isle du "Pads, etc., etc., ensemble de tous les droits y attachés sans aucune reserve ou "exception pour, etc., etc., à l'effet de quoi les dits dénommés, (the legatees) ont "remis to the said respondent *all* the titles and papers thereof, &c." The Act of formal acquiescence and *délivrance* was made in 1844, after the death of the testatrix Dame Dubord, and the investment thereby of the respondent in this property bequeathed by her: but his title was not questioned until the institution of this action in November, 1859, after the respondent's possession of nearly sixteen years, thereby clearly validating the respondent's prescription of ten years. In addition to the foregoing, the appellants' assignor, Henri, was the garant of the testatrix as being the universal legatee of his father and mother under their respective wills executed in 1826, and as such universal legatee bound to warrant his father's agreement with the testatrix: it is useless to enlarge upon this point which has been much elaborated in the factums of the parties. Under all the circumstances of the case, the judgment below should be maintained.

DUVAL, C. J. The four judges constituting the majority of the Court are all of opinion that the *délivrance de legs* in which Henri Eno took part, constitutes a *fin de non recevoir* against the plaintiffs' claim in this cause, and, therefore, the judgment dismissing the action must be confirmed.

Loranger & Loranger, for the appellant. Judgment confirmed.
Dorion & Dorion, for the respondent.
(J. K.)

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, 1869.

COUNCIL CHAMBER, WHITEHALL, 6TH JULY, 1869.

Coram THE RIGHT HON. LORD JUSTICE GIFFARD, THE RIGHT HON. SIR J. W. COLVILE, THE RIGHT HON. SIR JOSEPH NAPIER, THE RIGHT HON. SIR LAWRENCE PEEL.

WARWICK H. RYLAND,
(*Plaintiff in the Court of first instance,*)
APPELLANT;

AND

ALEXANDRE M. DELISLE,
(*Defendant in the Court of first instance,*)
RESPONDENT.

HELD:—(Reversing the judgment of the Court of Queen's Bench of L. C.) That compensation does not take place, *pleno jure*, of the debt due by a shareholder in the Montreal and Bytown Railway Company, incorporated by 14 and 15 Vic., cap. 51, to a judgment creditor of the Company, with a debt due by the Company to the shareholder for arrears of salary as President of the Company, where the first mentioned debt is for stock not paid up, and where no calls have been made by the Company on such unpaid stock.

This was an appeal to the Judicial Committee of the Privy Council, from a judgment rendered by the Court of Queen's Bench for Lower Canada, on the 5th March, 1868, a report of which will be found in the *Lower Canada Jurist*, vol. 12, p. 29.

The appellant submitted that the judgment of the Court of Queen's Bench was erroneous in fact and law, for the following reasons:

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1. The judgment proceeded, as appears from the observations of Caron, J., in delivering the judgment of the majority of the said Court, upon the fallacy of assuming that the statute on which the action was founded only transferred to the creditor of the Company the rights of the Company against its shareholders, and arguing therefrom that the creditor could only sue the shareholder when, and so far only, as he might have been sued by the Company; whereas the statute gives a personal, individual and original right to the creditor as against the shareholder, a right which is to continue until the whole of his stock is "*paid up*," and which may be exercised at a time when the stock may not have been called up by the Company, and when, consequently, no right to sell could exist in the Company.

2. Inasmuch as the statute makes the shareholder personally and originally liable to the creditors of the Company, it follows that that liability can only be discharged, either by the ordinary modes of acquittance between a debtor and his creditor, or by the additional mode prescribed by the statute, *i. e.*, "*paying up*" the stock, and, consequently, that compensation or set-off between the shareholder and the Company, which is *quoad* the creditor's rights merely a third party, cannot affect those rights.

3. By virtue of the statute the amount of stock not paid up is pledged to the judgment creditors of the Company, and the shareholders are in the position of trustees for them, and it is upon the faith of this security that credit is given to the Company. It would, therefore, be contrary to the scope of the statute if this security could be taken away by transactions between the Company and the shareholders, of which the person giving credit must necessarily be in ignorance, and by which the shareholder, although he becomes a creditor of the Company, is not a creditor of the *class* intended to be protected by the statute, *i. e.*, a judgment creditor, and it would be equally opposed to the principles of the Civil Code of Lower Canada, which expressly declares, by article 1196, that "compensation does not take place to the prejudice of rights acquired by third parties."

4. The requisites of compensation, as declared by the Code, did not, in the present case, exist, inasmuch as the Company had not *called up* the amount remaining unpaid upon the shares of the respondent; it never was, in respect of such amount, "*a creditor*" of the respondent, nor had such amount ever become "*a debt*" within the meaning of Article 1187 of the Civil Code of Lower Canada, which said article is as follows:

"When two persons are mutually debtor and creditor of each other, both debts are extinguished by "compensation, which takes place between them in the cases and manner hereinafter declared."

Assuming that the Company and the respondent were, in respect of the said amount and the salary alleged to be due to the respondent, "mutually debtor and creditor of each other," and the said amount and salary had become "*debts*" within the meaning of the said Article 1187; yet the debts were not debts "equally liquidated and demandable," nor did they ever "exist simultaneously" within the meaning of Article 1188, for while on the one hand the respondent

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had an immediate title to the payment of his salary, the Company, on the other hand, could not sue him for the amount unpaid on his shares until a *call* had been made upon him, and the formalities and times prescribed by paragraph 10, section 18, of the hereinbefore mentioned Provincial Statute of Canada, and the special act of the Company had respectively been complied with and elapsed.

5. The judgment of the Court of Queen's Bench was opposed to the facts proved, in stating that the set-off to the entire amount of the calls took effect before the Company became insolvent; for the evidence of William H. Hopper, which was uncontradicted, established that the Company was insolvent when he became secretary in the early part of 1854, and consequently before the set-off in respect of salary could have accrued. The principles, therefore, applicable to insolvent companies ought, if necessary, to govern the case; and it would be opposed to such principles to allow, in respect of stock which has never been called up, and which, consequently, never became a debt to the Company, a set-off which, at the time of action brought, had not been credited to the Company in the books over which the respondent, as President and Director, had control, and the effect of which set-off would be to give the respondent, being a partner in the insolvent Company and a creditor of the Company only in respect of salary as President and Director, a preference over persons who, having no share in the Company, have given credit to the Company upon the faith of the unpaid capital, and who are judgment creditors of the Company with executions unsatisfied.

Lord Justice Giffard:—The appeal in this case is from a judgment of the Court of Queen's Bench in Lower Canada, reversing a judgment of the Superior Court of the District of Montreal, with costs.

The judgment in the Lower Court in Canada, which was delivered on the 31st of March, 1866, found the respondent to be debtor to the Montreal and Bytown Railway Company in £900 on the stock held by him, and approved the appellant's claim as a judgment creditor of a Company, having execution against the Company unsatisfied, and condemned the respondent accordingly, as prayed by the appellant.

Now, the action in which that judgment was given was an action brought by a creditor of the Company against a shareholder as a defendant, and in that action it was proved that there had been a return by the sheriff of *nulla bona* with reference to the Company and the action, defended in the first place on the section of the General Railways Act, which is under the head of "Shareholders," and is the first paragraph of section 19. By that section it is enacted that "Each shareholder shall be individually liable to the creditors of the Company to an amount equal to the amount unpaid on the stock held by him for the debts and liabilities thereof, and until the whole amount of his stock shall have been paid up, but shall not be liable to an action therefor before an execution against the Company shall have been returned unsatisfied, in whole or in part, and the amount due on such execution shall be the amount recoverable with costs against such shareholders." That being the case of the plaintiff, of course the case made by the defendant was that there was due to him from the Company for salary as secretary a sum very far exceeding anything that he was or could be made liable to the Company for in respect of calls; and we must presume that

no calls beyond calls for a sum beyond £100 had been made, because if any such calls had been made, it was the business of the defendant both to allege that they had been made, and to prove that they had been made, and there is neither allegation nor proof that they had been made; and, moreover, the Courts below all seem to proceed on the assumption that they never had been made. Rylands and Dellale.

That being so, he alleged that these sums due to him in point of fact extinguished his liability to the Company, and that inasmuch as the Company never could have maintained proceedings against him in respect of any calls that they might make, the shareholders are in no better position than the Company.

Their Lordships are of opinion that that is not the true position of the shareholder, and that the point of fact what the shareholder, in order to maintain his action, has to ascertain is this, and nothing else, namely, aye or no, has there or has there not been payment by the shareholder to the Company of everything due from him to the Company in respect of calls? It is not at all for their Lordships to decide on this present occasion what the effect would have been of the clause in the Code to which they have been referred, if calls had been actually made by the Company antecedently to the time when this creditor brought his action against the shareholder. It may possibly be that if calls had been actually made by the Company antecedently to the time when this creditor brought his action against the shareholder, then the debt would have been extinguished, and that then there would have been payment within the meaning of the first clause of the 19th section. But here there was nothing of the sort, and we must therefore turn to the clause in the code and see what it is which that clause provides.

First of all it is said in the 1187th clause, "When two persons are mutually debtor and creditor of each other, both debts are extinguished by compensation which takes place between them in the cases and manner hereinafter declared;" then the 1188th clause is, "Compensation takes place by the sole operation of law between debts which are equally liquidated and demandable, and have each for object a sum of money, or a certain quantity of indeterminate things of the same kind and quality;" then what follows is not exactly the same translation as that which is given to us in the case. The translation which is given to us in the case is, "So soon as the debts exist simultaneously they are mutually extinguished, in so far as their mutual amounts correspond;" but it is enough for us to say that there could have been no compensation, as between this shareholder and the Company at the time of the action being brought, because when we turn to the Railway Act, we see that before any action could have been maintained as against the shareholder there must have been calls made by the Directors against the shareholder, and thirty days must have elapsed antecedently to any action being brought by the Company against the shareholder.

It is quite clear at the time when the creditor brought his action, this gentleman, if he had any claim at all, had a right to proceed against the Company, and recover from the Company the £2,000, or whatever sum was due to him as treasurer or secretary, and the Company could never have set up, as against that action, any counter claim which they might have had in respect of his being a shareholder, because the Company at that time had not made any call. So here

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their lordships are of opinion the creditor is in a position different from that of the Company, and that the creditor here had a right to recover from the shareholder, everything that was due from the shareholder to the Company, which was not actually paid, discharged or extinguished, and that this clause in the Code has no operation whatever on such a state of circumstances as this—a state of circumstances in which, although there was a claim by the defendant against the Company, there was no counter right on the part of the Company, and no compensation as between him and them, and consequently no extinguishment of the debt.

This being so, their lordships will humbly advise Her Majesty that the judgment of the Court of Queen's Bench should be reversed.

That will, of course, restore the judgment of the Superior Court in Lower Canada; and their lordships are of opinion that the appellant should have the costs in both of the Courts below, and also the costs of this appeal.

The report of the Judicial Committee of the Privy Council is as follows:

"Your Majesty having been pleased by your general order in Council of the 4th November, 1867, to refer unto this Committee the matter of a humble appeal from the Court of Queen's Bench for Lower Canada, etc. ..... The Lords of the Committee, in obedience to your Majesty's said general order of reference, have taken the said humble petition and appeal into consideration, and having heard counsel on both sides, their Lordships do this day agree humbly to report to your Majesty, as their opinion, that the judgment of the Court of Queen's Bench, of the Province of Lower Canada, of the 5th March, 1868, ought to be reversed, and that the judgment of the Superior Court for Lower Canada of the 3rd May, 1866, ought to be affirmed, with the costs of the proceedings in both the Courts below, and of this appeal to your Majesty.

And in case your Majesty should be pleased to approve of this report, and to order as is herein recommended, then their Lordships do direct that the sum of £187 14s. 11d. sterling, be paid by the respondent to the appellant for the costs of this appeal, in addition to the principal sum and interest, payable by the respondent, and to the costs of the proceedings in the Courts below."

"Her Majesty having taken the said report into consideration, was pleased, by and with the advice of her Privy Council, to approve thereof, and to order, as it is hereby ordered, that the said judgment of the Court of Queen's Bench for the Province of Lower Canada, of the 5th March, 1868, be, and the same is hereby reversed, with £187 14s. 11d. sterling, for the costs of this appeal to her Majesty, and that the judgment of the Superior Court for Lower Canada, of the 3rd May, 1866, be, and the same is hereby affirmed, with the costs of the proceedings in both the Courts below."

H. W. Austin, for appellant.
W. H. Kerr, for respondent.
(J. K.)

Judgment of Court of Q. B. reversed.

SUPERIOR COURT, 1869.

MONTREAL, 20TH OCTOBER, 1869.

Coram TORRANCE, J.

No. 1521.

Ryland vs. *Delisle and Workman* et al., T. S.

SAISIE ARRET AFTER JUDGMENT—SERVICE.

HELD:—That by article 545 of the Code of Civil Procedure, a Writ of *Saisie Arrêt* after judgment should be addressed to the Sheriff of the District in which it is to be executed, being the District where the judgment was rendered, and not to a bailiff, *vide* C. C. P. 461.]

TORRANCE, J. This case comes before the Court on a motion to quash an attachment after judgment on the ground that the writ should have been addressed to the sheriff of the District, in which it was to be executed, being the District where the judgment was rendered (*vide* C. C. P. 461,) whereas in fact it was addressed to a bailiff of the Superior Court. The defendant contends that by C. C. P. art. 545, the writ required to be addressed to the sheriff of the District. That article is the first of the chapter treating of the compulsory execution of judgments, and a *saisie arrêt* after judgment is in the nature of an execution. On the other hand, the plaintiff relies upon the 615th article which says that the rules concerning the service of ordinary writs of summons apply to seizures by garnishment, and says he is authorized by the terms of article 615 to employ a bailiff for the service. He also invokes article 857 which authorizes the employment of a bailiff for the service of writs of *saisie arrêt* before judgment. If we look at the reason of the rule one would think that the same rule should be applied to the two cases. But that is a consideration for the Legislator. It is the duty of the Court to apply to the construction of the Code the ordinary rules of grammatical construction, and carefully to consider what is required by the context. Regarding the case from this point of view, the Court sees that the 615th article is in the chapter which treats of compulsory execution, and it is to be taken in connection with the 545th article, which lays down the general rule for the execution of judgments. That general rule requires the intervention of the Sheriff for the service of such writs after judgment, and the article 615 simply indicates that as regards service of these writs, the same rules shall apply in other respects, such as time and manner of service, as to the service of an ordinary summons. The Court is therefore of opinion that the motion of the defendant is well founded and should be granted. Motion granted.

H.W. Austin, for plaintiff.

W.H. Kerr, for defendant.

(J.K.)

MONTREAL, 30TH OCTOBER, 1869.

Coram TORRANCE, J.

No. 34.

Wurtele et al. vs. *Douglas and the Mayor* et al. *of the City of Montreal*, T.S.

HELD:—That the wages of an employé not due at the time of the service of a writ of *saisie arrêt* are exempt from seizure.

TORRANCE, J. This case is before the Court on the merits of a *saisie arrêt* after judgment. The garnishees declare that at the time of the service there was

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nothing due to the defendant, "but there have since become due the sum of $115 $\frac{47}{100}$, being balance of two months' wages which have accrued to the said William Douglas." The defendant invokes C. C. P. 558 which declares that wages and salaries not yet due are exempt from seizure; (also 628); and plaintiff has cited C.C.P. 619, 623, contending that by the terms of these articles he is justified in claiming that the attachment is good, as the garnishee is required to declare not only what was due at the time of service, but also what should be due at the time of the return. The Court is against the plaintiffs, and holds that the C.C.P. 558 is imperative in its terms, and that the seizure should be discharged.

Saisie Arrêt declared null.

Carter & Hatton, for plaintiffs.
R. Roy, Q.C., for defendant.
(J.K.)

MONTREAL, 30TH OCTOBER, 1869.

Coram TORRANCE, J.

No. 2320.

The Newark Patent Leather Co. vs. *Wolff.*

HELD:—That the rule requiring application for security for costs to be made within four days after return of action is not complied with by making a motion for a rule *nisi causa* within four days, returnable after the four days.

TORRANCE, J.—This case is before the Court on a rule for security for costs. The action was returned into Court on the 22nd September last, and on the 25th September the defendant made a motion without notice for security for costs as it appeared that the plaintiff was resident without the limits of the Province, unless cause to the contrary be shown on the 18th October instant. A rule was taken on the motion and duly notified to plaintiff, and returned into Court on the 18th.

The plaintiff objects to the rule being made absolute as coming too late; that the usual course was for the defendant to make his application to the Court within four days after return of the action, which has not been done here; that if defendant's pretension be maintained he will have had a delay of 26 days, from the 22nd September to the 18th October. The defendant relies upon the 58th rule of practice, which says that a motion for security for costs may be made *nisi causa*; that he made the motion within four days, and had to make the rule returnable on the 18th October, to prevent a short service. The Court calls attention to the 62nd rule of practice, which requires the application to be made within four days, and does not consider that the taking of a rule within that time is a compliance with its requirements. The Code of Civil Procedure says itself that, if a demand for security be made by *exception dilatoire* the exception must be fyled within four days after return. The Court thinks that due despatch of business requires that the rule should be discharged.

B. Devlin, for plaintiff.
Carter & Hatton, for defendant.
(J.L.M.)

Rule discharged.

MONTREAL, 30TH NOVEMBER, 1869.

Coram MACKAY, J.

Nos. 34 & 41.

Buchanan et al. vs. *McMillan, et al.*

HELD:—1st. A married woman cannot appear and plead, *ester en jugement*, without her husband or his authorization.

2nd. When a married woman and her husband are each summoned in a cause, the husband in his own name as well as for authorizing his wife, and they do not appear together, but each separately in their own names, and plead separately, the appearance and preliminary plea fyled by the wife will be rejected on motion, as made without authority.

The facts of this case will appear from the argument of counsel, as follows:

Abbott, Q. C., counsel for plaintiffs, remarked that it was necessary for the Court to have a brief statement of the allegations of the declaration, in order to show the position of the parties to the proceeding about to be discussed, and the manner in which they were summoned. It was a case of fraud on the part of the defendants, of the most glaring kind. The declaration set out a deep laid plot and conspiracy on the part of the defendants, John McMillan, and his wife, Elizabeth McCormick, to obtain money fraudulently. That having agreed together that the husband's real estate should be transferred to the wife, Elizabeth McCormick, and that she should procure money, pretending to give security thereon, and afterwards replace said property in her husband, without having, in fact, created any hypothec thereon, they went together to a notary's office, and on the 11th November, 1867, an illegal deed of sale of said property was made to one Senez for £1,400 0s. 0d., alleged to be paid in cash.

That, immediately thereafter, under the next number in the notary's minutes, another illegal deed of sale of said property was made by Senez to Elizabeth McCormick, the wife, for £1,400 0s. 0d., alleged to be paid in cash.

That no money was paid down *bonâ fide*, at either of said illegal sales.

That at the same time, as part of said plot, McMillan, the husband, gave the wife a notarial power of attorney, then drawn by the same notary, by which he gave her full power to act for him in all things, and to manage his estate, and to transfer, sell and dispose of all the immoveable property belonging or thereafter to belong to her, situated in the city of Montreal or elsewhere, in the same way as if he were personally present.

That she had then no other real estate standing in her name in Montreal, except that just then transferred to her by said illegal deeds.

That on the 19th of June, 1868, producing said power of attorney, and representing that she was duly authorized, she obtained a loan of $3,000.00 from the plaintiff, and mortgaged said property by deed of that date, passed before Hunter, N. P., duly registered.

That in the borrowing of the said sum, and the mortgaging of said property with the approval of her husband, she acted as the mandatary of her husband.

That having so far succeeded in their fraudulent design, McMillan and his wife, on 31st August, 1868, again went to the office of said notary, Simard, and by the aid of one Perrault, retransferred said property to the husband, McMillan, first by a deed from the wife, McCormick to Perrault, and then by deed from Perrault to the husband, McMillan; the consideration being as before in each

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deed, stated to be £1,400 0s. 0d. paid in cash, and the property being stated to be free and clear, *franc et quitte*.

That no money was *bonâ fide* paid.

The declaration then sets up that on the 15th day of September, 1868, and the 5th of November, 1868, as part of the said plot, the wife making the same representations as before as to authority from her husband, obtained a further loan of $4,000.00 from the plaintiff on other property in Montreal, which she had purchased in part with the money obtained first from the plaintiff, and passed mortgages for the same. That she built six houses with the money on the property, and the defendants are living rent free in one of the houses, and their daughter and son-in-law in the other.

That both husband and wife have profited and benefited by said money lent, to them.

That they now refuse to pay the interest overdue, and both openly assert that the wife had no legal or sufficient authority to borrow any of said sums of money, and defy the plaintiff to recover or to hold the properties liable and mortgaged. That one of the properties has since been transferred by a pretended deed of sale to a pretended *tiers détenteur* who is not a *bonâ fide* purchaser, and was fully protected and has no interest in this contestation.

In one case the prayer is that the defendants McMillan and his wife be summoned to hear the property declared mortgaged for the said sums, and that they be jointly and severally condemned for its re-payment, and that the *tiers détenteur* be also summoned to hear the property declared so mortgaged without costs against him, unless he contests the action, but with costs against him if he contests. In the other case, where there is no *tiers détenteur*, the prayer is that it may be declared that the husband, John McMillan, is and always has been the owner of the property mortgaged for the $3000.00, and that the deed of mortgage of 19th June, 1868, was made and executed by the wife as mandatary of her husband, and that said property to her husband belonging, be declared mortgaged and hypothecated under said deed in favor of the plaintiff for said sum, and that the defendants, husband and wife, be jointly and severally condemned to pay said sum and interest.

Most of the allegations of the declaration were proved *in limine* by the fyling of authentic copies of the deeds mentioned in the plaintiffs' declaration.

After the return of the writ, the defendant, Elizabeth McCormick, fyled an appearance in each case independently of her husband, and with no word to shew that she was authorized.

The defendant John McMillan also fyled appearances independently of his wife, for himself alone, and with no word in them to shew that he knew of his wife's appearance. Almost immediately afterwards, they both fyled separate and independent *exceptions à la forme*, in neither of which was there anything to shew that the husband knew of his wife's acts or that he authorized her.

The plaintiffs now moved that the appearances and *exceptions à la forme* fyled by the said Elizabeth McCormick, wife of John McMillan, in her own name, as Elizabeth McCormick, and without her husband, or his authorization, be rejected from the record and declared illegal, null and void, because said appearances and

exceptions à la forme do not contain or allege any authorisation from said John McMillan to his wife to appear or plead in the causes, and the same are illegal and contrary to law.

In support of the motion, the plaintiffs' Counsel referred to Code Civil du B. C. art. 176 which says the wife cannot appear in judicial proceedings without her husband or his authorization..

In this case, she has not got his authorization, and she has certainly not appeared with him. On the contrary, she has appeared without him and he without her. They have both appeared and pleaded separately and independently of each other, but not with each other. If they had appeared together by the same appearance, then the law would have been met; she would have appeared with her husband. But the husband having appeared for himself alone and the wife for herself alone, and having severed in their defence, the strongest presumption arises that the wife was not authorized to appear and plead, and that the husband did not consent to her so doing and did not even know of it.

Perkins, for defendant McCormick, said that as both husband and wife appeared by the same attorney the authority was presumed and nothing more was required.

MACKAY, J., in rendering judgment, referred to the fraud which he could perceive on the part of the defendants, and said he was with the plaintiffs. The law had not been met, the female defendant appeared separately from her husband, who was summoned in his own right, and appeared for himself. She appeared without him and he without her. The plaintiffs were right in moving to reject the appearances and *exceptions à la forme*, which were irregularly and illegally fyled. It was better to do so now and have the matter remedied and the proceedings made regular than for the parties to go on and find out after a long contestation, that all their proceedings were null and that they had been fighting in vain. The motions would therefore be granted. Motions granted..

Thos. W. Ritchie, Q.C., attorney for plaintiff.

J. J. C. Abbott, Q.C., counsel.

John A. Perkins, Jr., attorney for defendants.

(J. K.)

MONTREAL, 30TH NOVEMBER, 1869.

Coram TORRANCE, J.

No. 1033.

IN RE

Bessette et al., insolvents, and *La Banque du Peuple*, claimant, and *Quevillon* contesting claim of *La Banque*.

HELD:—That where a claimant in insolvency has received from an indorser of a note a composition on the amount of his claim, in consideration of which the claimant has released the indorser, reserving his recourse against all the other parties to the note, whatever the claimant has received from the indorser must be deducted from his claim.

TORRANCE, J. This is an appeal from a judgment rendered by Louis J. R. Giard, assignee to the estate of the insolvents, Bessette & Frère, on the 4th of October, 1869. On the 3rd February, 1868, La Banque du Peuple was holder of four notes made by the insolvent, M. A. Bessette, and indorsed by Charles

Bessette and La Banque du Peuple.

Quevillon, who made a deed of composition with his creditors of that date. By this deed the creditors gave Quevillon his discharge in consideration of his paying them 33½ cents in the dollar, and they accepted from him notes indorsed by J. Barsalou, payable at 4, 8, 12, 16 months, reckoned from the 22nd November, 1867. All these notes have been paid, as appears by the admission of the bank, signed on the 12th August, 1869.

The insolvent, Bessette, against whom the bank retained its claim, became insolvent, and on the 29th May, 1868, the bank fyled a claim against his estate, supported by affidavit, for the sum of $939.69, being the entire amount of the notes including the 33½ cents in the dollar paid by Quevillon. On the 30th July, 1868, Quevillon fyled his claim against the same estate for $1341.07, including the amount of the composition. On the 12th March, 1869, the assignee prepared a dividend sheet, by which the bank was collocated for the entire amount of its claim, including the composition paid by Quevillon, and the claim of the latter was passed by. The collocation for the bank has been contested by Quevillon, who complained that the bank was collocated for the total amount of its claim without giving credit for what Quevillon had paid, and that in this way the bank was paid twice. The bank answered that Quevillon had no right, to the prejudice of the bank, so long as it had not received the entire amount of the notes; that the bank, by the dividend sheet, was only collocated for 6s. in the £, which, with the 7s. 6d. paid by Quevillon, would be far from paying it in full; that the bank had accepted a composition of 7s. 6d. in the £, but specially reserved its recour e against all the other parties to the said notes.

The contestation of Quevillon was rejected by the assignee and the collocation of the bank maintained in its entirety.

The creditor, Quevillon, has appealed from the decision of the assignee, under the provisions of the Insolvent Act of 1869, sec. 82, and the appeal has been heard before me. The facts are not disputed by the parties, and a naked question of law is submitted for my decision. That question is, whether the bank has a right to claim from the estate of the insolvent the entire amount of the notes without giving credit for the amount paid to it by Quevillon, until it has received 20s. in the £.

Mr. Bell, in his Commentaries on the Laws of Scotland, vol. 2, p. 338, says that the rule has been different in England from what it has been in Scotland. He says: "In England it has been settled, that although the holder of a bill, "bond or other obligation in which several are bound, is entitled to claim the "whole sum from every person bound, to the effect of receiving full payment; "yet, if he have drawn dividends from any co-obligant, before claiming in bank- "ruptcy, what he so draws must be deducted. For he cannot swear truly that "the whole is due, when he has already received a part. It has been said that "this has been settled on grounds not peculiar to the English system of juris- "prudence, but on general principles universally applicable." The same rule is laid down in 1 Archbold's Bankruptcy, by Griffith, p. 608, edition of 1867. I think that the rule should be applied in the present case, and, applying it the contestation should be maintained and the claim of the bank reduced.

The judgment is in the following words:

I, the undersigned judge, having heard by their counsel, the claimant

Besette and La Banque du Peuple.

La Banque du Peuple, and the claimant Charles Quevillon, on the merits of the appeal of the said Quevillon, from the judgment of Louis J. R. Giard, assignee in this matter, of date the 4th October, 1869, dismissing the contestation of the said Quevillon of the claim of the said bank, having examined the pleadings and evidence of record and seen the admissions, and duly deliberated;

Considering that, in law, the claimant, La Banque du Peuple, has no right to claim or be collocated for or paid a greater sum than its rateable proportion or dividend out of the assets of the estate of the insolvent, deduction made from its claim of the sums of money already received by the claimant on account and in deduction of its claim;

Considering that La Banque du Peuple, on the 3rd February, 1868, was the holder of the notes forming the basis of the claim fyled by it against the estate of the insolvent, upon which notes the said Charles Quevillon was liable to La Banque du Peuple as indorser;

Considering that La Banque du Peuple then accepted from the said Charles Quevillon a composition of 7s. 6d. in the £, payable by the notes of the said Charles Quevillon, indorsed by J. Barsalou, payable at 4, 8, 12, 16 months, reckoning from the 22nd November, 1867, in consideration of which composition La Banque du Peuple discharged the said Quevillon from his liability as said indorser, reserving its recourse against all the other parties to the notes;

Considering that it appears by the admissions of the parties, of date the 12th August, 1869, that the said notes given for the said composition have been paid;

Considering, nevertheless, that La Banque du Peuple has been collocated for a dividend on the amount paid to it by the said Charles Quevillon, namely a dividend on the sum of $342.38, do maintain the appeal of the said Charles Quevillon, and do reform the said judgment of the said assignee, Louis J. R. Giard, to wit, the judgment rendered by him on the 4th October, 1869, and do order that the dividend sheet prepared in this matter by the said assignee on the 12th March, 1869, be reformed, and that the claim of the claimant, La Banque du Peuple, for the sum of $939.69 be reduced by the amount of the said composition, to wit $342.38, so that the claim of the said claimant shall be $597.31 and no more, on the assets of the insolvent, and do order that the said Charles Quevillon be collocated for the said sum of $342.38, on the said assets, in the place and stead of the claimant, La Banque du Peuple, and I do order that the claimant, La Banque du Peuple, do pay the costs of the said Charles Quevillon, as well on the contestation before the said assignee as on the appeal from the said judgment of the said assignee.* Judgment of assignee reversed.

R. Laflamme, Q.C., for Quevillon.

Dorion, Dorion & Geoffrion, for La Banque du Peuple.

(J. K.)

Authorities referred to by the bank:

2 Boulay Paty—Faillites et Banqueroutes, Nos. 331, 2, 3.
5 Pardessus—Droit Comm.: 224, 225, 231, 246. No. 1214 1°, 1214 2°, No. 1218.
Journal du Palais, 1814 and 1815, p. 156.
Volquaert & Mulders.
2 Doria & Macrae, 888. James on Bankruptcy, 95. Kinnear on Bankruptcy, 76.

*EDITOR'S NOTE. QUERE.—Might not a distinction be made between the cases where a payment had been made to the creditor before he made his claim and a payment afterwards; also the cases where a payment had been received before the preparation of the dividend sheet and a payment afterwards. Insolvent Act of 1864, s. 5 ss. 6, and s. 11 ss. 6. Insolvent Act of 1869, s. 63.

Whatever the creditor receives before claim fyled is on account, leaving the balance only as his debt due (sec. 13) which shall remain due at the time of proving such claim. This modifies sections 5 & 6.

MONTREAL, 27TH NOVEMBER, 1869.

Coram TORRANCE, J.

No. 182.

Hervey vs. *Rimmer, & Lindsay*, petitioner.

INSOLVENT ACT OF 1869.—ASSIGNMENT.—ACCEPTANCE.

HELD:—That by the law of the Province of Quebec, the acceptance of an assignment under the Insolvent Act of 1869, must be made by the Official Assignee in person, and cannot be made by Attorney.

TORRANCE, J.—On the 15th November, instant, a deed of assignment by the defendant was executed in favour of the petitioner, William Lindsay, who was represented at the passing of the deed by his attorney, Robert Watson, appointed under a power, executed before a witness, and deposited with William Ross, Notary Public. On the 19th November, instant, a writ of attachment for compulsory liquidation was issued against the estate of the defendant under the provisions of the Insolvent Act of 1869. On the 23rd November, the petitioner Lindsay presented a petition to the Court in this case, setting up the assignment made to him on the 15th, and praying that the attachment be therefore set aside. On the 25th two answers in writing were fyled to this petition, by the plaintiffs. The first answer is a *défense en droit*, alleging in effect as reasons that the petitioner is not a party to the record, that the Court has no power to quash the writ; that the petitioner is not an intervening party in the cause; and there follows a fourth general reason. The second answer alleges in effect that the plaintiff is a creditor for $378; that there was no assignment to the petitioner by the defendant, but only an irregular assignment: that the defendant had been guilty of frauds, which are indicated; that the petitioner had never taken possession of the estate, that the petitioner was a public officer as official assignee; and that his attorney, Robert Watson, had failed to get the appointment; that the assignment had been accepted by Watson, and that the petitioner, as official assignee, could not delegate his authority to accept as assignee.

The petitioner has demurred to these answers, and also denied them. The case is before the Court, on a law hearing as to the sufficiency in law of the answers and of the petition itself.

Two questions are presented to the consideration of the Court.

1. Is William Lindsay an interim assignee of the estate of the defendant? In other words, did he validly accept the assignment, and was it validly made to him by the medium of Robert Watson as his attorney?

2. If so, could he take the place of the insolvent under Sec. 26 of the Act and pray that, as the estate has not been subject to compulsory liquidation, therefore the attachment should be set aside?

If now we look at the provisions of the insolvency act, we find by Sec. 142, that the assignment in the Province of Quebec shall be before a notary, and therefore we may safely conclude, whatever be the law in other portions of the Dominion, the assignee in this Province must be a party by himself or his attorney to accept the assignment. Let us now consider the duties of the assignee under the Act. By Sec. 1, any debtor unable to meet his engagements may make

an assignment to any official assignee resident within the county, and the assignee shall forthwith call a meeting of the creditors and by Sec. 2, he shall, previous to the meeting, prepare and there exhibit statements showing the position of the affairs of the insolvent and *inter alia*: "a statement showing the amount and nature of all the assets of the insolvent, including an inventory of his estate and effects." By Sec. 10, the assignment shall convey all the estate of the insolvent to the assignee. By Sec. 31, the Board of Trade or the Council thereof, and in certain cases, the Judge, may appoint official assignees, and may remove them "for such causes as such Board or Judge may deem sufficient."

The office of official assignee is a personal trust. Could the acceptance of the assignment by Mr. Lindsay be delegated to another? Story Agency §13 says: "One who has a bare power or authority from another to do an act, must execute "it himself, and cannot delegate his authority to another; for, this being a trust "or confidence reposed in him personally, it cannot be assigned to a stranger, "whose ability and integrity might not be known to the principal, or who, if "known, might not be selected by him for such a purpose." After specifying a number of cases in which the rule would be applied, he goes on to say: "The reason is plain; for, in each of these cases, there is an exclusive personal trust and confidence reposed in the particular party. And hence is derived the maxim of the common law; *Delegata potestas non potest delegari*, and the same rule prevailed to some extent in the civil law; *procurator alium procuratorem facere non potest*. It seems also to be the general rule of the Scottish law."

It is of importance here to inquire what has been the jurisprudence in matters of a similar nature such as the office of a tutor. The digest of Justinian says: "Tutor statim in ipso negotio præsens debet auctor fieri: post tempus vero, aut per epistolam interposita ejus auctoritas nihil agit." Dig. Lib. 26, T. 8, l. 9, § 5. 2 Pigeau, 333, 4 says, "Ceux qui ont droit d'assister à l'inventaire, peuvent donner procuration pour les représenter; mais un tuteur ou curateur n'en doit pas donner, il doit faire sa fonction lui-même; en la faisant remplir par un tiers qui a pu se laisser corrompre, et ne pas faire comprendre exactement dans l'inventaire tout ce qui devroit y être mis, il viole la promesse qu'il a faite sous serment, de stipuler fidèlement les intérêts des mineurs." Demolombe, 1 minorité, tutelle, &c., n. 374, 609 writes in the same sense, and uses these words, n. 609, "la tutelle est une charge personnelle et que certainement le tuteur ne peut pas la résigner ni s'en démettre dans les mains d'un autre." 2. Williams Executors, 617,1099. Assuredly the Court would not say that a power of attorney could not for any purpose be given. But the acceptance of the office by the assignee is the basis of his obligations, and his very first duty is *forthwith* to call a meeting of the creditors and meanwhile to prepare statements of the estate assigned and make an inventory. Has the assignee a right to make the inventory by attorney? Pigeau says that the tutor cannot do so, and the Court is of opinion that the assignee cannot do so, and considering the many responsibilities and obligations of the assignee at the very commencement of his administration, the Court is of opinion that he should be present in person at the very beginning, and therefore at the acceptance of the assignment.

It is unnecessary under the circumstances to discuss the second question. The judgment of the Court is motivé as follows:—

Hervey vs. Rimmer.

The Court having heard the plaintiff and petitioner on the merits, as well of the demurrer of the petitioner to the answers of the plaintiff made to the petition of the said petitioner as of the demurrer of the plaintiff to said petition, having examined the pleadings and duly deliberated:

Considering that the deed of assignment of date the 15th of November, 1869, by the defendant to the petitioner, did not validly convey the estate of the defendant to the petitioner according to the requirements of the Insolvent Act of 1869, inasmuch as the said assignment was not accepted by the petitioner in person, but only by his attorney, Robert Watson, and said acceptance by said attorney was *ultra vires*, doth maintain the said answer of the plaintiff, and doth dismiss the petition of the petitioner, William Lindsay, with costs.

L. N. Benjamin, for the plaintiff. Petition dismissed.
W. H. Kerr, for the petitioner.
(J. L. M.)

MONTREAL, 20TH OCTOBER, 1869.

Coram TORRANCE, J.

No. 308.

Dupuis et al., vs. *Dupuis*.

HELD:—That where a testator made a will and subsequently another will revoking the first, and then made a revocation of the second will, the revocation had not the effect of reviving the first will, for want of words in the revocation indicating that the testator intended to revive the first will.

TORRANCE, J. The plaintiffs brought an action *en partage* against their brother, the defendant, Toussaint Dupuis. The declaration alleges that from the marriage of François Xavier Dupuis and Flavie Barse *alias* Demers, there were issue seven children, namely the plaintiffs Dupuis, and the defendant. That F. X. Dupuis died on the 1st July, 1864, and Flavie Barse *alias* Demers died on the 22nd November, 1867, both of them being intestate, and leaving an estate worth $10,000 which defendant had wrongfully taken possession of, and the conclusion was for an inventory, division (*partage*), and account by the defendant.

The plea of the defendant alleges that on the 5th January, 1858, F. X. Dupuis made a will in favour of Flavie Barse *alias* Demers, his wife, and then died. That on the 22nd December, 1864, the will was registered. That on the 11th October, 1865, Flavie Barse made an *acte* of donation in favour of the defendant which was registered on the 12th July, 1866. That on the 7th February, 1866, she made a will in favour of the defendant, and died on the 22nd November, 1867, and on the 24th July, 1867, her will was registered. That the defendant was, in consequence, the proprietor of the property claimed by the plaintiffs. The plea concluded for the dismissal of the action.

The plaintiffs replied specially that on the 5th January, 1858, F. X. Dupuis made a will of all his property in favour of his wife Flavie Barse *alias* Demers. That on the 18th October, 1859, F. X. Dupuis and his said wife made a donation in favour of Arsène Dupuis of all their property: That on the 19th October, 1859, F. X. Dupuis made a will by which he bequeathed to Arsène Dupuis

certain moveables and to Angélique and Anastasie Dupuis all his other property, revoking all other wills: That on the 11th June, 1860, Arsène Dupuis retroceded to his father and mother all the property donated by the deed of 18th October, 1859. That on the 10th November, 1860, F. X. Dupuis revoked his will of the 19th October, 1859, and then died, and that it resulted from the above allegations that the said will of the 5th January, 1858, invoked by the plea of the defendant, had been well and duly revoked and annulled.

The only question in the case is as to the effect of the revocation of the will of date the 10th November, 1860 in these words: "Lequel (F. X. Dupuis) après "avoir eu lecture qui lui a été faite par Mtre. F. X. Langevin, l'un des Notaires "soussignés, de son testament reçu devant Mtre. E. L. Normandin, Notaire et "les témoins y nommés, en date du dix neuf Octobre, mil huit cent cinquante "neuf, nous a dit et déclaré librement et volontairement, que, quoique ce soit ses "intentions qui sont exprimées au susdit testament, cependant aujourd'hui il "entend et veut le révoquer et annuller (le susdit testament) en son entier, "comme par ces présentes il le révoque et annulle expressément, comme s'il "n'avait jamais été fait ni avenu." Had this revocation the effect as contended for by the defendant of reviving the will of 5th January, 1858? There are two authorities in Troplong Tom. 4 des testaments n. 2065 and Demolombe Tom. 22, n. 161, a. 162 pp 130-2 referring to older authorities upon which the Court bases its judgment. Troplong (loc. cit.) says: "Un testateur peut-il faire revivre un premier testament révoqué par un second, en se bornant à révoquer ce second testament?

La négative est généralement adoptée; la révocation du second testament ne suffit pas pour faire revivre le premier; il faut qu'en outre le testateur manifeste formellement qu'il entend réhabiliter le premier testament précédemment révoqué." He goes on to cite D'Aguesseau, plaidoyer 46, p. 222. "Un retour certain de volonté est absolument nécessaire pour le rétablir dans son premier état."

The Court has no difficulty in holding that here there has been no reviving of the first will.

The judgment is recorded as follows:—The Court, etc.

Considering that Flavie Barse, *alias* Demers, mentioned in the pleadings in this cause, made a will in favour of the defendant, of date the 7th February, 1866, whereby she bequeathed to him all her estate and then died without having revoked said will, doth dismiss the action and *demande* of plaintiffs as regards the succession of the said Flavie Barse, *alias* Demers;

Considering further that François Xavier Dupuis, mentioned in the declaration in this cause, made a testament of date the 5th January, 1858, in favour of his wife said Flavie Barse, *alias* Demers, whereby he bequeathed to her all his estate;

Considering that the said François Xavier Dupuis, on the 19th of October, 1859, made another testament in favour of Arsène Dupuis, one of the plaintiffs, by which will he revoked all his previous wills;

Considering that the said Frs. Xavier Dupuis by *acte* of revocation, of date 10th November, 1860, revoked the said will, of date the 19th October, 1859, declaring that though his intentions were expressed by the said will, nevertheless he wished the said will to be revoked and annulled expressly as if it had never been made;

Dupuis vs. Dupuis.

Considering that the said revocation had not the effect of reviving the will, of date the 5th of January, 1858, which remained cancelled and inoperative;

Considering that it is proved that the plaintiffs are heirs each for one seventh in the succession of the said François Xavier Dupuis their father;

Considering, therefore, that the plaintiffs are well founded in demanding a *partage* of the succession of the said late François Xavier Dupuis, doth order and adjudge that the defendant do within two months after service upon him of a copy of this judgment make an inventory of the property left by said François Xavier Dupuis in order that the said property may be divided (*partagé*) among his heirs according to the right of each as aforesaid, if the said *partage* division be possible, and if not possible, that the said property be *licité* according to law and the proceeds of said licitation be divided among them, and further that the defendant do within the delay aforesaid render *en justice* to the said plaintiffs, a just, true, and faithful account, &c., &c., &c.

Judgment for plaintiffs.

Dorion, Dorion & Geoffrion, for plaintiffs.
Cartier, Pominville & Béttournay, for defendant.
(J.K.)

CIRCUIT COURT, 1869.

MONTREAL, 30TH NOVEMBER, 1869.

Coram TORRANCE, J.

No. 2252.

Berthelot vs. *Lalonde*, and *Lalonde*, opposant.

HELD:—That where a writ of execution issues for principal, interest and costs of suit, and the defendant fyles an opposition *à fin d'annuller* alleging and proving that the costs had been paid before the seizure made under the writ, the defendant is entitled to costs on his opposition.

This case came before the Court on an opposition *à fin d'annuller* by the defendant complaining of a seizure made under an *alias* writ of execution for principal, interest and costs of suit, whereas the costs of suit had been previously paid.

Desnoyers, for opposant, cited *Russell & Larocque*, 10 L. C. Repts. 367; *Lafleur* v. *Verville*, 1 Revue Legale, 45 (Sorel).

The Court maintained the opposition with costs.

Opposition maintained.

Cartier, Pominville & Béttournay, for plaintiff,
Belanger & Desnoyers, for opposant.
(J. K.)

IN THE PRIVY COUNCIL, 1868.

WHITEHALL, 23RD DECEMBER, 1868.

Coram LORD CHANCELLOR HATHERLEY, LORD CHELMSFORD, SIR JAMES W. COLVILE, LORD JUSTICE SELWYN.

In Appeal from the Court of Queen's Bench, Montreal, Appeal Side.

ALEXANDRE E. KIERZKOWSKI,
(*Plaintiff in the Superior Court,*)
APPELLANT;

AND

JEAN BAPTISTE T. DORION AND ZEPHIR DORION,
(*Defendants in the Superior Court,*)
RESPONDENTS.

HELD:—1. The right of action under the old French law, (that of 1777) to recover back from the lender any money received by him, on a usurious contract, in excess of the principal and legal interest, is assignable; and the joinder in the instrument of assignment of any number of persons who had nothing to assign does not affect the validity of the assignment by the persons who alone were interested.

2. Where, in the opinion of the Court, the proof established that an agent of the lender received or retained from the borrowers a sum of £1500 as remuneration for his services in attending to the negotiation of the loan, the contract (made while the law of 1777 was in force) was not usurious.

3. Assuming that the contract in question was usurious, no right of action existed under the Provincial act of 24th March 1863, to recover from the lender money paid to him in excess of legal interest subsequent to that Act, where the payments sought to be recovered were made under a new contract dated 7th May, 1863, upon a good and sufficient consideration, substituted for such assumed usurious contract.

The judgment appealed from was rendered by the Superior Court at Montreal, (SMITH, J.,) on the 31st of December, 1863, condemning Jean Baptiste Dorion and his brother Zéphir, jointly and severally, to pay the plaintiff Kierzkowski, £3,958, with interest from 4th October, 1862.

The plaintiff alleged in his declaration:—

Que le 11 Novembre 1845, par acte reçu devant Mtre. Laparre et son confrère, notaires, l'Intimé, tant en son nom que pour et au nom de feue Dame Louise Aurélie Débartzch, son épouse, et comme procureur de Lewis Thomas Drummond, Ecuier, avocat, et Dame Josephte Elmire Debartzch, son épouse, de Samuel Cornwallis Monk, Ecuier, avocat, et Dame Rosalie Caroline Debartzch, son épouse, de feu Edouard Sylvestre, Comte de Rottermund, et de Dame Marguerite Cordelia Debartzch, son épouse, reconnut avoir reçu à titre de prêt de Dame Marie Louise Cousineau, représentée au dit acte par le dit Jean-Baptiste Théophile Dorion, l'appelant, son procureur, une somme de £4,875, qu'il s'obligea de rembourser à la dite Dame Cousineau de la manière mentionnée au dit acte.

Que sur cette somme l'Intimé n'a reçu du dit J. Bte. T. Dorion, agissant comme susdit, que la somme de £3,325, et que le dit défendeur garda la balance, savoir; £1,550 comme *bonus*, prime ou intérêt illégal et usuraire, et pour une partie de laquelle somme, £50, il donna son reçu le même jour.

Que ni l'Intimé ni aucun de ses constituants ne reçut, ni alors ni depuis, du dit J. B. T. Dorion, soit comme procureur de la dite Dame M. L. Cousineau, soit personnellement, la dite somme de £1,500, ainsi retenue illégalement comme intérêt illégal.

Kierzkowski and Dorion.

Qu'à l'époque de cette transaction les dites Dames Louise Aurélie Debartzch, Josephte Elmire Debartzch, Rosalie Caroline Debartzch, Marguerite Cordelia Debartzch étaient sous puissance de mari et communes en biens avec eux.

Que la créancière Dame Marie Louise Cousineau décéda, laissant pour ses légataires universels ses trois fils, Jean-Bte T. Dorion, Eustache Dorion, et Zéphir *alias* Zéphirin Dorion.

Que Jean-Baptiste Théophile Dorion, par acte du 20 Juillet 1855, devint acquéreur et cessionnaire de tous les droits héréditaires de son frère Eustache Dorion, le laissant conjointement avec son frère Zéphir Dorion seuls représentants de leur mère décédée.

Que le 11 Juillet 1850, Dame Louise Aurélie Debartzch, l'épouse d'Alexandre Edouard Kierzkowski, est décédée, instituant par son testament du 14 Avril 1849, reçu par Mtre J. E. Leblanc, son époux légataire universel en usufruit et ses enfants survivants ses légataires en propriété.

Que du mariage du dit Alexandre Edouard Kierzkowski avec la dite Dame Louise Aurélie Debartzch naquirent deux enfants, auxquels il fut nommé tuteur.

Que depuis le 11 Novembre 1845, date de l'obligation ci-haut mentionnée, les débiteurs firent à compte du capital et des intérêts plusieurs paiements jusqu'à la date du 6 Mars 1854, laissant une balance de £2,138,8s,5d, due sur cette obligation, le reste ayant été payé.

Que le dit jour 6 Mars 1854, l'Hon. L. T. Drummond et son épouse, deux des débiteurs de la dite obligation, vendirent à l'Hon. D. Mondelet partie de la propriété affectée au paiement de la dite obligation, et le premier Septembre 1855, intervint entre le dit Honorable D. Mondelet et plusieurs des créanciers des dits vendeurs au nombre desquels se trouvaient les dits Jean-Baptiste Théophile Dorion et Zéphir Dorion, un acte d'arrangement par lequel le dit Hon. D. Mondelet paya à ces derniers une somme de £78,15s,9d, et promit leur payer une autre somme de £5,023, 2s, 8d, le tout à compte du capital et des intérêts de la dite obligation du 11 Novembre 1845.

Qu'à cette date 6 Mars 1854, les débiteurs de la dite obligation ne devaient que la somme de £2,138,8,5; qu'ayant effectivement payé par l'entremise du dit Hon. D. Mondelet, à compte de cette date en sus du capital et de l'intérêt légal dû, une somme de £2,963,10s, l'intérêt sur cette somme à compter du 6 Mars 1854, calculé jusqu'au 6 Septembre 1862, s'élevait à la somme de £1513.

Qu'en outre de cette somme, £2963, illégalement obtenue par les Intimés, ces derniers se firent en outre donner une somme de £600, le 31 Novembre 1855.

Que toutes les susdites sommes, capital et intérêts s'élevèrent à £5329, 10s, montant total illégalement perçu par les appelants des débiteurs de la dite obligation et que ces derniers ont droit de recouvrer avec intérêt du jour de la demande, 21 Octobre 1862.

Que le dix-huit Mars 1862, par acte reçu devant Mtre. C. F. Papineau et son confrère, notaires, l'Hon. Lewis Thomas Drummond et Dame Josephte Elmire Debartzch, son épouse, l'Hon: Samuel Cornwallis Monk et Dame Rosalie Caroline Debartzch, son épouse, et Dame Marguerite Cordelia Debartzch, veuve de feu Edouard Sylvestre Comte de Rottermund, représentée et agissant par son

procureur le dit Hon Samuel Cornwallis Monk, cédèrent et transportèrent à l'Intimé tous les droits et actions généralement quelconques des dits cédants ou aucun d'eux pour demander et obtenir le recouvrement de la dite prime usuraire de £1500 cours actuel et des intérêts accrus et à accroitre sur icelle et le recouvrement de tous autres intérêts, primes, considération et frais usuraires illégaux, payés sur les dites obligations et pour demander et obtenir la nullité et rescision en tout ou en partie des dites obligations à cause d'usure, et pour demander et obtenir le remboursement de tout ce qui a été payé en intérêt sur les dites obligations par aucun des débiteurs nommés aux dites obligations.

Que le dit Alexandre E. Kierzkowski en vertu de ce que dessus avait droit de réclamer des défendeurs la dite somme de £5329,10,0 que les défendeurs en leur qualité, savoir: comme légataires universels de leur mère Marie Louise Cousineau et le dit Jean-Baptiste Théophile Dorion personnellement et comme cessionnaire de son frère Eustache Dorion, doivent et sont tenus de rendre conjointement et solidairement au dit Intimé.

Que les dits Jean-Baptiste Théophile Dorion, Eustache Dorion et Zéphir Dorion ont accepté chacun d'eux le legs à eux fait par leur dite mère, feue Dame Marie Louise Cousineau.

En conséquence le dit Intimé réclamait des dits Jean-Baptiste Théophile Dorion et Zéphir Dorion conjointement et solidairement la somme de £5329.10 avec intérêt de 21 Octobre 1862.

Les Défendeurs plaidèrent séparément à cette action.

Jean-Baptiste Théophile Dorion par sa défense alléguait l'obligation du 11 Novembre 1845, par laquelle les débiteurs y nommés se reconnurent débiteurs envers Dame Marie Louise Cousineau, acceptant par l'entremise du dit Jean-Baptiste Théophile Dorion, en la somme de £4,875, pour pareille somme avancée et prêtée par elle aux dits débiteurs et payée par la dite Dame Cousineau au dit Intimé lors de la passation du dit acte et £3375, que la dite Dame Cousineau s'obligea de payer aux créanciers hypothécaires des dits emprunteurs sur l'indication qu'ils lui feraient, en par les créanciers la subrogeant dans tous leurs droits, priviléges et hypothèques résultant des titres de leurs créances sur les biens appartenant aux débiteurs, laquelle somme de £4875, le dit Kierzkowski s'obligea lui-même et ses dits constituants solidairement payer à la dite Dame Cousineau dans huit ans avec intérêt payable semi-annuellement, affectant spécialement certains immeubles désignés.

Qu'à cette obligation intervinrent et furent présents l'Hon. Pierre Dominique Debartzch et Dame Josephte de St. Ours, son épouse, se portant pleiges et cautions solidaires.

Que la dite Dame Cousineau paya subséquemment cette somme de £3375 avec £31, 1. 4d d'intérêt du 11 Novembre 1845 au 6 Janvier 1846, aux créanciers des dits débiteurs, comme suit:—

1o. £1516,10s,8d, à Aimé Massue, Ecuier, négociant, de Varennes, montant en capital et intérêts de deux obligations consenties par feu l'Hon: Pierre Dominique Debartzch; 2o—£200,7s,6d, pour les intérêts dus et échus sur ces obligations jusqu'au 20 Mai et 28 Novembre 1844, et sur £1000, moitié de £2,000 due au dit Massue par obligation reçue à Varennes, devant Mtre.

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Archambault, notaire, le 4 Février 1842, les intérêts sur ces £1000 calculés jusqu'au 4 Février 1845; lesquels deniers la dite Dame Cousineau paya à l'acquit des dits débiteurs et débitrices au dit Massue leur créancier hypothécaire, ces derniers étant spécialement tenus payer la dite dette en vertu de l'acte de donation à elle consentie par feu Pierre Dominique Debartzch reçue devant Mtre. Brin, le 23 Juin 1845, et en considération du paiement le dit Massue mit et subrogea la dite Dame Cousineau en tous ses droits, actions, priviléges et hypothèques; 3o.—Une somme de £1063. 18s. 6d. à Errol Boyd Lindsay, Ecuier, et autres héritiers représentant et légataires de feu Pierre Guerout *alias* Pierre Guillaume Guerout et Dame Marie Josephte Woolsey, son épouse, agissant par leur procureur Benjamin Holmes, Ecuier, savoir:—£1000, balance du capital d'un jugement obtenu par eux contre le dit Mr. Debartzch, le 20 Novembre 1844, plus la somme de £63,18s, 10d pour les intérêts dûs et échus sur la dite somme de £1000, à compter du 5 Janvier 1845, jusqu'au 28 Janvier 1846, lesquelles sommes la dite Dame Cousineau a payé à l'acquit des débiteurs avec subrogation par acte reçu devant Mtre. Leblanc et son confrère, le 28 Janvier 1846; 4o—A François Evanturel, bourgeois, de Québec, £336 0s 8d, cours actuel, ce qui appert par acte du 16 Mars 1846, reçu devant Mtre. Belle; 5o—£489. 19s. 2d. payées à Dame Charlotte Robitaille, veuve de Benjamin Beaupré, suivant acte reçu devant Mtre. Leblanc et son confrère, notaires, le 17 Janvier 1846:

Que les débiteurs des dites sommes ainsi payées par la dite Dame Cousineau ont approuvé et sanctionné tels paiements.

Et le dit Jean-Baptiste Théophile Dorion allègue par son dit plaidoyer:

Que le 11 Novembre 1845, il était le procureur de la dite Dame Marie Louise Cousineau et comme tel était autorisé à prêter aux dites Dames Drummond, Monk, Kierzkowski et de Rottermund, et à leurs époux la dite somme de £4875, à raison de six par cent par an et qu'il est de fait que comme tel procureur il a avancé et prêté aux dits emprunteurs pour payer leurs dettes la dite somme.

Que le dit prêt d'argent a été fait non pas par la dite Dame Cousineau elle-même, mais agissant par le ministère du dit Jean-Baptiste Théophile Dorion, son procureur, et que la dite Dame n'a jamais stipulé et exigé aucun *bonus* ou intérêt usuraire; et qu'elle n'a jamais autorisé son dit procureur, soit directement ou indirectement, à stipuler et exiger aucun *bonus* ou intérêt usuraire pour ou relativement au dit prêt, et n'a jamais ratifié ou approuvé aucune convention par laquelle un *bonus* ou intérêts usuraires auraient pu être stipulé ou exigé des dits emprunteurs par rapport au dit prêt; que la seule chose que la dite Dame Cousineau a autorisé son dit procureur d'exiger des dits emprunteurs à part la stipulation d'un intérêt de 6 par cent par an sur le montant du dit acte d'obligation du 11 Novembre 1845, a été le paiement par les emprunteurs du montant des honoraires qu'elle avait à payer à ses avocats pour faire l'examen de leurs titres ayant rapport aux biens immeubles qu'ils offraient d'hypothéquer pour garantir le dit prêt ensemble avec les frais du coût des actes nécessaires.

Que le dit Jean-Baptiste Théophile Dorion sur sa responsabilité personnelle et dans son propre intérêt, hors la connaissance de la dite Dame Cousineau,

pour avoir obtenu le dit prêt et pour s'indemniser de ses pas et démarches faits dans l'intérêt et pour le profit des dits emprunteurs, a vers le dit jour 11 Novembre 1845, mais avant cette date fait une convention avec les dits emprunteurs, par laquelle ils se sont obligés de lui payer pour le récompenser, un *bonus* de £1,500, courant, à part et indépendamment d'une somme de £25, même cours, qu'ils sont convenus de payer pour les honoraires des avocats de la dite Dame Cousineau, pour avoir fait l'examen des divers titres de propriété que les emprunteurs offraient d'hypothéquer à son profit pour sureté du prêt de la dite somme de £4875, cette somme de £25 étant comprise dans celle de £50, dont mention est faite dans la pièce No. 7 du Demandeur (l'Intimé).

Que le 11 November 1845, après avoir fait aux dites emprunteurs pour la dite Dame Cousineau le susdit prêt de £4875, les dits emprunteurs lui ont payé à lui personnellement la dite somme de £1500, pour le *bonus* par lui stipulé tel que susdit, et le même jour les emprunteurs lui ont payé pour être réservée à Pierre Moreau, Ecuier, avocat de la dite Dame Cousineau, une somme d'environ £25 comme honoraires, pour examiner des titres et avis et consultation concernant le dit prêt.

Que ce *bonus* de £1500, qu'il a ainsi reçu a été pour son seul profit qu'il a retenu et gardé sans en rendre compte à personne et se prétend justifiable d'en avoir ainsi agi, que cette somme n'a jamais appartenu à la dite Dame Cousineau mais à lui personnellement.

Que les emprunteurs, subséquemment au 11 Novembre 1845, ont à plusieurs reprises ratifié et confirmé le dit acte d'obligation, qu'ils ont été à plusieurs reprises poursuivis par leur créancier pour le paiement des intérêts échus sur le capital du dit acte d'obligation du 11 Novembre 1845, et n'ont jamais prétendus n'avoir reçu le montant entier mentionné dans l'acte, et que les Sieur et Dame de Rottermund ont même été poursuivis par la dite Dame Cousineau pour le capital du dit acte d'obligation et ont été condamnés à la lui payer.

Que si les dits emprunteurs n'eussent pas reçu le montant entier mentionné dans l'obligation en question ils auraient réclamé.

Qu'il est encore dû sur la dite obligation une somme excédant £3500, à part et indépendamment du montant payé.

Que les emprunteurs ne se sont jamais conformé au dit acte d'obligation pour effectuer le paiement des intérêts, et que plusieurs poursuites ont été en conséquence intentées contre eux en recouvrement de diverses sommes dues par eux, pour intéret, et contre les dits Sieur et Dame de Rottermund, jugement aurait été prononcé les condamnant au paiement du capital.

Qu'une partie considérable des deniers que les dits emprunteurs ont payé ont été d'abord imputés sur les frais et la balance sur les intérêts et le capital.

Qu'à l'époque de l'institution de l'action il était encore dû aux représentants de la dite Dame Cousineau, une somme excédant £3500, laquelle est encore entièrement due par eux.

Cette première défense est suivie d'une défense ou dénégation générale des faits de la demande.

Le demandeur répondit généralement niant les allégations de faits du dit Jean Baptiste T. Dorion et particulièrement :

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Que la dite Dame Cousineau ayant par l'acte du 11 Novembre 1845, contracté vis-à-vis des emprunteurs l'engagement de prêter et fournir la dite somme de £4875, et ces derniers n'ayant reçu d'elle que la somme de £3375, quoiqu'ils s'obligeassant au paiement de la somme entière, paiement qu'ils avaient effectué, elle devenait responsable et ses héritiers tenus et obligés de rendre la différence; que le dit Jean-Baptiste Théophile Dorion a agi comme procureur pour et au nom de sa mère, que la prétention énoncée par lui, qu'il avait retenu une somme de £1500 pour pas et démarches sur un prêt de £8000, était absurde.

Que la dite Dame Cousineau était responsable à tout évènement du dit prêt et des fautes et délits de son procureur par lui commis dans l'exercice de son mandat.

Que la somme mentionnée dans l'obligation n'a jamais été prêtée en entier, mais seulement moins celle de £1500 que le dit Jean-Baptiste Théophile Dorion a retenue.

Que l'absence de preuve jusqu'a l'époque de l'institution de l'action a seule motivé le silence des parties intéressées et a été la seule cause du retard apporté à leur réclamation.

Qu'il n'y a eu et ne peut y avoir aucune justification légale de l'extorsion usuraire faite par le dit Jean-Baptiste Théophile Dorion, à l'occasion des prêts faits par lui; que les jugements mentionnés par lui n'ont pu opérer aucune ratification ni établir aucune fin de non recevoir à l'encontre de l'action, que Dame Marguerite Cordelia Debartzch, une des cédantes, contre laquelle le jugement invoqué par l'appélant fut rendu, était à cette époque sous puissance de mari, et son mari étant depuis décédé, avait pu nonobstant tel jugement valablement transporter le droit de réclamer sa part dans le montant de la prime et des sommes illégalement perçues par le dit Jean-Baptiste Théophile Dorion.

The following was the judgment rendered by the Superior Court (SMITH, J.,) on the 31st December, 1863:

"The Court having heard the parties by their respective counsel upon the merits of this cause and the issues raised by the several and respective pleas of the said defendants to the action and demand of the said plaintiff; having examined the proceedings, proof and documents of record, and having maturely deliberated; Considering that the said plaintiff hath fully proved the facts of the said action and declaration, and that at the time of the effecting of the loan to the plaintiff and his co-obligés, as stated in the said declaration by and through the agency of the said plaintiff, by Dame Marie Louise Cousineau, on the 11th of November, 1845, for the sum of £4875 currency, being part and parcel of a larger loan, then effected by the said parties, she, the said Marie Louise Cousineau, did exact from the said plaintiff and his co-obligés through their agent aforesaid, a sum of £1500. 0. 0. currency, in the nature of a bonus or premium or usurious interest, and which sum of £1500. 0. 0 was then and there exacted and deducted from the said sum of £4875. 0. 0., the sum for which the said loan was effected from the said Dame Marie Louise Cousineau, upon which total sum, including the said £1500. 0. 0., the said Marie Louise Cousineau and her representatives have exacted and received interest; and further seeing that the said Marie Louise Cousineau did in truth advance to the said Alexander Edouard

Kierzkowski, acting for himself, in his own name, and as the agent as aforesaid of his co-obligés named in the said obligation, representatives of the late Hon. Pierre Dominique Debartzch, the sum only of £3375. 0. 0. currency, and not the said sum of £4875. 0. 0, as stated in the obligation of the eleventh day of November, 1845, and that the said sum of £1500 0. 0, currency, was so illegally and usuriously taken and received by the said Marie Louise Cousineau, contrary to law and to the statute in such case made and provided; and further considering that at the date of the institution of this action the said defendants had exacted and received from the said plaintiff and his co-obligés, his cédants debtors named in the said obligation, divers sums of money upon the said obligation, amounting, at the date of service of process in this cause with interest, to the sum of £3958. 6. 0, over and above the amount really due to the said defendants, and that the said Alexandre Edouard Kierskowski, acting now in his own name and under the various transfers from the said debtors mentioned and described in said obligation first above mentioned, by reason of which transfers, the right to demand back the said sum and all excess of interest, so illegally retained and exacted, is vested in him, as well as all other amounts paid by the said plaintiff and his co-obligés, his cédants, upon the said amount loaned by the said Dame Marie Louise Cousineau, by virtue of the deed of obligation first above mentioned, hath a right in law to claim and demand from the said defendants jointly and solidarily and severally, as the representatives of the said Dame Marie Louise Cousineau, all such excess of capital and interest illegally retained; and further seeing that the said defendants have altogether failed to establish the material facts set up in their said exceptions and pleas, severally pleaded, and further seeing that it is established that the sum of £3958. 6. 0 is the amount of capital and interest, which the said Marie Louise Cousineau and the said defendants had so illegally exacted and retained, and which the said defendants had in their hands at the date of the institution of this action, the Court doth condemn the said defendants, jointly and severally, to pay to the said plaintiff the sum of £3958. 6. 0., with interest from the 4th day of October, 1862, date of service of process in this cause, and further condemn the said defendants to pay the costs of this action jointly and severally, and the said Zéphir Dorion to pay the costs of his separate plea, and of which costs *distraction* is, etc."

The defendants appealed to the Court of Queen's Bench from this judgment.

Leblanc, Cassidy & Leblanc for the Appellants:—Première question—Le 11 Novembre 1845, Jean-Baptiste Théophile Dorion, (l'appelant) a fait à la famille DeBartzch, deux prêts d'argent. L'un de ces prêts fut fait par lui comme procureur de sa mère Mad. Cousineau, d'une somme de £4875. 0. 0. courant; l'autre fut fait par l'appelant en sa qualité de tuteur à la substitution créée par le testament de son oncle, Jacques Dorion. Les deux obligations qui constatent ces prêts, sont les pièces, Nos. 8 et 54 du dossier.

L'Intimé par son action prétend que sur le prêt fait par Mad. Cousineau, il a été retenu une prime usuraire de £1500. 0. 0. par l'appelant, (Jean-Bte. Dorion). Ce dernier admet par ses défenses, avoir reçu £1500 des emprunteurs, tout en affirmant que ce montant ne lui a pas été payé comme prime usuraire. Mais que le payement de cette somme lui a été fait subséquemment, pour le recom-

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penser de ses pas et démarches, et que le payement de cette somme n'a pas eu pour cause le prêt lui-même, mais que le prêt n'en a été que la condition. Par ses répliques aux défenses, l'Intimé a reconnu que, de fait, il n'avait été payé que £1500 à Jean Baptiste T. Dorion. Il avait d'abord cru pouvoir inclure dans cette prime, une somme de £50, (mentionnée dans la pièce No. 9 du dossier, mais réflexion faite, il s'est convaincu que les £50 devaient être laissés de côté. La Cour de première Instance, tout en reconnaissant par son jugement, que les emprunteurs n'avaient payé au dit Jean-Baptiste T. Dorion, que £1500, a néanmoins commis une première erreur, en déclarant que les emprunteurs, déduction faite de cette prime de 1500, n'avaient reçu de Mme. Cousineau, que £3325. Il y a évidemment erreur dans cette soustraction, et si le jugement dont est appel, était régulier d'ailleurs, (ce qui est loin d'être le cas,) il devrait néanmoins être réduit de £50. 0. 0., car en retranchant £1500. 0. 0. de la somme de £4875 il reste une balance de £3375 et non pas £3325 comme le déclare le jugement. Après avoir ainsi fait voir quel est le véritable montant qui a été reçu par Jean-Baptiste T. Dorion, nous allons discuter les autres points de la cause.

Seconde Question.—Dans cette seconde question, voici les prétentions qui seront émises:

1o. Que Madame Cousineau a payé aux emprunteurs, tous les argents qu'elle était convenue de prêter, et que les £1500 reçus par Jean-Baptiste T. Dorion, n'ont pas été retenus sur le prêt.

2o. Que les £1500 reçus par Jean-Baptiste T. Dorion, ont été reçus par lui des emprunteurs, subséquemment au prêt; que cette somme n'était pas usuraire, et qu'elle ne peut être déduite du montant de l'obligation de Madame Cousineau.

3o. Que Madame Cousineau n'a point, conjointement avec son fils, ni autrement, stipulé le paiement d'une prime usuraire:

4o. Qu'en supposant que Jean-Baptiste T. Dorion ait stipulé une prime usuraire, sur les deux prêts, à l'insçu de sa mère, Madame Cousineau, cette dernière ne pouvait être liée par une telle convention, faite par son procureur, en dehors de son mandat;

5o. Si la somme de £1500 que Jean-Baptiste T. Dorion a reçue doit être considérée comme prime usuraire sur les deux prêts du 11 Novembre 1845, et si le tribunal est d'avis que madame Cousineau est devenue responsable sous ce rapport, ce ne peut être, à tout évènement, que pour une moitié de cette somme, car elle n'était intéressée que dans un seul de ces prêts.

La somme de £1500 que les emprunteurs ont payé à Jean-Baptiste T. Dorion, a-t-elle été exigée dans l'intérêt particulier et personnel de Jean-Baptiste T. Dorion, ou cette prime a-t-elle été reçue, en tout ou en partie, dans l'intérêt de Madame Cousineau, avec son approbation et en a-t-elle profité, et enfin est-elle devenue en loi responsable de cette prime ou de partie d'icelle? Comme il n'y a aucun écrit où il soit question de cette prime, c'est à la preuve testimoniale, qu'il faut recourir pour obtenir la solution de cette question.

Ovide Leblanc, témoin produit par l'intimé, a fait tous ses efforts pour établir le fait que Madame Cousineau a stipulé cette prime, conjointement avec Jean-Baptiste T. Dorion, mais quand on confronte son témoignage avec celui d'autres

témoins également produits dans la cause, il nous semble qu'il faut admettre que Madame Cousineau n'a pas été partie aux conventions verbales qui ont pu avoir été faites par rapport à cette prime, et que rien ne fait voir qu'elle ait autorisé de telles conventions, si elles ont eu lieu, ou qu'elle ait jamais reçu aucune partie de cette somme de £1500.

Monsieur Leblanc nous dit que le prêt en question devait d'abord être de £10,000 si les prêteurs pouvaient réussir à retirer les argents dus à la succession Jacques Dorion, et que finalement ce prêt a été réduit au montant des deux obligations produites dans la cause, portant la même date (11 Novembre 1845) et pièces nos. 8 et 54 du dossier, l'une en faveur de Madame Cousineau pour £4875 (dont il est question en cette cause) et l'autre en faveur de Jean-Baptiste T. Dorion, en sa qualité de tuteur à la substitution créée par le testament de Jacques Dorion, son oncle, pour £3626. 8. 6 et qu'une prime de £1500 a été mentionnée par Jean-Baptiste T. Dorion, en présence de Madame Cousineau, à raison des argents qui seraient prêtés, mais que le prêt ne fut conclut avec Jean-Baptiste Dorion, que deux ou trois mois plus tard. Ce témoignage comme on le voit tend à rendre Madame Cousineau responsable d'une moitié de la prime de £1500, l'autre moitié devant être attribuée à Jean-Baptiste T. Dorion en sa qualité de tuteur à la substitution créée par le testament de Jacques Dorion. En lisant ce témoignage du notaire Leblanc on ne peut se défendre d'en soupçonner la véracité, car il est donné dans la plus grande incertitude; et quand on a lu celui rendu par le Juge Monk qui est un des emprunteurs, qui a cédé ses droits à l'intimé, son beau frère, il faut admettre qu'il contredit positivement celui du notaire Leblanc en un point important. M. Monk nous dit qu'il n'a point parlé de l'emprunt à Madame Cousineau mais que lorsqu'il fut d'abord question de cet emprunt, J. Bte. Dorion devait lui-même personnellement ou comme curateur à la substitution Jacques Dorion, avancer les deniers. Que le nom de Madame Cousineau n'a été connu des emprunteurs que le jour même des deux prêts, savoir le 11 Novembre 1845. Cette déclaration de M. Monk est assurément une contradiction positive du témoignage de M. Leblanc qui veut faire croire que les emprunteurs connaissaient depuis trois ou quatre mois avant la date du prêt (11 Novembre 1845) que Madame Cousineau devait fournir partie des argents. Si les emprunteurs n'ont su que le jour même du prêt que partie des deniers était avancée par Madame Cousineau, il n'est donc pas exact de dire comme le fait M. Leblanc, que trois ou quatre mois avant le prêt, il était connu que Madame Cousineau devait être un des prêteurs. D'ailleurs le témoin Leblanc admet dans son témoignage, que c'est Jean-Baptiste Théophile Dorion qui a parlé de cette prime; ajoutons à cela un autre fait que voici, qui doit nous faire présumer qu'il n'a pas été question d'une prime dans l'intérêt de Madame Cousineau. Il est en preuve que les £4875, montant total de cette obligation du 11 Novembre 1845, consentie à Madame Cousineau, ont été payés aux emprunteurs. Une somme de £1500 leur a été payée lors de la passation de cet acte en présence des Notaires qui ont vu compter et payer cet argent: cette déclaration se trouvé dans l'acte d'obligation; et quant au surplus, £3975, Madame Cousineau l'a payé, à l'acquit des emprunteurs; ce fait est reconnu dans les repliques de l'intimé et dans son témoignage. L'intimé prétend, il est

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vrai, que les £1500 qui ont été mentionnés comme payés, lors de la passation de l'acte d'obligation, n'ont jamais été payés aux emprunteurs, et que ce montant a été retenu par Jean Baptiste T. Dorion comme prime usuraire sur les deux prêts et prélevé sur les argents de Madame Cousineau ; mais il n'a produit aucune preuve pour constater ce fait. Au contraire la preuve écrite et testimoniale établit que tout l'argent a été payé. Les £1500, que Madame Cousineau devait payer lors de la passation de l'acte d'obligation, ont été comptés et payés à vue des Notaires : ils n'ont donc pas été retenus. Mais il y a plus, dans son témoignage le Juge Monk nous dit que les emprunteurs ont fourni à l'intimé, leur procureur, qui a consenti les obligations pour lui-même et ses co-obligés, les £1500, qui ont été payés à Jean Baptiste T. Dorion. Il est donc faux que les £1500 dont mention est faite dans l'obligation de Madame Cousineau, aient été retenus par Jean-Baptiste T. Dorion comme primé. Or s'il était vrai que Madame Cousineau fut convenue d'une prime pour faire le prêt, ou y eut donné son assentiment, pourquoi n'aurait-elle pas retenu cette prime sur le montant du prêt au lieu de payer tout le montant prêté? On peut encore considérer comme invraisemblable, le fait que Madame Cousineau se serait occupée d'aucune prime, quand on voit par la preuve, que cette dame, agée d'environ 60 ans, n'avait aucune éducation et qu'elle ne gérait point elle-même ses affaires.

S'il est vrai que Madame Cousineau n'a point participé dans la stipulation de cette prime de £1500, comme le prétend l'appelant, nous aurons alors à examiner la question que voici : Jean Baptiste T. Dorion ayant le même jour (11 Novembre 1845) fait deux prêts d'argent à la famille DeBartzch, l'un en sa qualité de tuteur à la substitution créée par le testament de Jacques Dorion, et l'autre comme procureur de sa mère, Madame Cousineau, et ayant, à l'insçu de sa mère et dans son propre intérêt, reçu des emprunteurs, subséquemment au prêt, une somme de £1500, les emprunteurs sont-ils fondés à se faire rendre compte de cette somme et par qui?

Madame Cousineau, est-elle devenue responsable vis-à-vis les emprunteurs de cette prime ou de partie de cette prime qui a été ainsi reçue par son fils?

L'appelant prétend qu'il a stipulé le payement de cette somme de £1500 à son profit personnel, en vertu de conventions particulières intervenues entre lui et les emprunteurs pour le récompenser de ses pas et démarches, en rapport avec le prêt d'argent; qu'aucun des prêts en question n'a été la cause principale à laquelle il a du le payement de ces argents. Comme il a été observé plus haut il est prouvé (voir témoignage du Juge Monk), que les emprunteurs ont payé les £1500. Non pas sur et à même les argents du prêt, mais avec leurs propres deniers, provenant d'une source différente. Les choses étant ainsi, c'était à l'intimé à prouver que les £1500 avaient été payés comme usure, et il nous semble qu'il a failli sur ce point. Il n'y a que le Notaire Leblanc qui ait parlé de cette prime usuraire. Il nous dit que quelque temps avant la date du prêt, c'est-à-dire avant le 11 Novembre 1845, les emprunteurs ont informé J. B. T. Dorion, qu'ils consentaient de lui accorder une prime de £1500, dont il avait été question entre eux trois ou quatre mois auparavant, pour un prêt de sept ou huit mille louis ; si l'on doit croire ce témoignage, voilà tout ce qu'il contient. Suivant ce que prétend aujourd'hui l'intimé, la prime de £1500 qu'il a payée

sur les prets, a été retenue sur les argents que Madame Cousineau prêtait. Or la preuve tant écrite que testimoniale constate que cela est faux, que Madame Cousineau a payé tout ce qu'elle avait promis prêter, savoir: £4875, dont £1500 comptant et la balance plus tard à l'acquit des emprunteurs. Les £1500 ont été payés. L'acte d'obligation contient à cet effet une déclaration qui n'est pas contredite. Le Notaire Leblanc qui était présent lors de la passation des deux obligations du 11 Novembre 1845, en l'étude du Notaire Lappare, n'a pas osé dire que les emprunteurs n'avaient point reçu les 1500 de Madame Cousineau, lors de la passation de son obligation. Il a gardé le silence sur ce point. Pourquoi donc l'intimé n'a-t-il pas prouvé par ce témoin, qu'il a lui-même produit, que Madame Cousineau n'avait point payé aux emprunteurs les £1500 qui, par l'obligation, sont déclarés être payés au comptant? Remarquons bien que lors de la passation de l'acte d'obligation du 11 Novembre 1845, Madame Cousineau ne devait payer ce jour là que £1500, elle devait payer le surplus des argents à l'acquit des emprunteurs. Il était donc facile aux personnes présentes chez le Notaire, lors de la passation de l'acte d'obligation, de voir si les deniers étaient payés ou non. L'intimé a évité soigneusement de tenter une telle preuve. Que doit-on conclure de ces faits? Tout simplement ceci: que si Jean-Baptiste T. Dorion avait d'abord parlé d'exiger une prime usuraire à même les argents qu'il devait prêter, qu'il s'est ensuite désisté de cette prime usuraire pour s'en tenir à la rénumération de ses services et que les £1500 qu'il a reçus subséquemment à la passation des actes d'obligations du 11 Novembre 1845, l'ont été dans les conditions mentionnées dans ses défenses, c'est-à-dire pour une cause différente de celle du prêt, le prêt n'en ayant été que l'occasion, et qu'il ne peut y avoir lieu de déduire cette somme du capital de l'obligation de Madame Cousineau. L'appelant ira même plus loin et il émettra la proposition que voici: Les emprunteurs lui ayant payé subséquemment au prêt, la somme de £1500, alors qu'ils étaient parfaitement libres de ne la point payer, la présomption légale est qu'ils en ont fait don à l'appelant Jean-Baptiste T. Dorion. D'un autre côté en supposant que ces £1500, reçus par Jean Baptiste T. Dorion serait un gain usuraire, dont il aurait été convenu entre les emprunteurs et Jean-Baptiste T. Dorion, agissant alors en sa double qualité de tuteur à la substitution Jacques Dorion et de procureur de madame Cousineau, cette dernière ne pourrait être devenue responsable des conséquences de telles conventions faites à son insçu et en dehors de mandat donné à son fils pour gérer ses affaires, et les emprunteurs seraient en loi non recevable à se plaindre d'un acte illégal dans lequel ils auraient été participans avec le mandataire de Madame Cousineau.

Sourdat, de la responsabilité, vol. 2 No. 888, p. 187, dit que la responsabilité du commettant est limité aux actes commis par le préposé dans l'exercice de ses fonctions.

Même au No. 905. Si la partie lézée a donné lieu au dommage ou lorsqu'elle a participé dans un acte illicite qui a donné lieu au dommage, elle ne peut être écoutée à se plaindre.

Cette autorité est sans doute applicable dans l'hypothéose qui vient d'être faite. S'il a été convenu d'un profit usuraire entre les emprunteurs et le procureur de Madame Cousineau, à l'insçu de cette dernière, et s'il est vrai qu'elle ne l'ait

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point approuvé, il en est résulté du tort à cette dernière, car elle n'a point profité du gain qui a été retenu par son procureur, et elle serait assujettie néanmoins, (suivant ce que prétend l'intimé) à rendre compte de cette usure résultant d'une convention illicite et qu'elle aurait ignorée.

Si Madame Cousineau n'est jamais devenue responsable des £1500, que son fils a reçus, cette poursuite, intentée contre les deux appelants en leur qualité de légataires de leur mère, doit être déboutée, car, à ce point de vue, il serait encore dû un montant assez considérable sur cette obligation.

Maintenant examinons la cause dans l'hypothèse que voici: Supposons que Madame Cousineau soit devenue responsable relativement aux £1500 que J.-Bte. T. Dorion a reçus: est-elle devenue obligée quant au total de cette somme ou seulement pour moitié? L'intimé dans son témoignage, nous dit que lorsqu'il fut question d'une prime entre lui et Jean Bte. T. Dorion, cette prime devrait se rattacher aux deux prêts, à celui de la succession Jacques Dorion, et à celui de Madame Cousineau. Ovide Leblanc nous dit la même chose. Le Juge Monk qui a parlé de cette affaire avec M. Kierzkowski dépose dans le même sens ainsi que monsieur Moreau. Si l'on veut rendre Madame Cousineau responsable, ce ne doit donc être à tout événement que d'une moitié des £1500. La Cour de première instance a décidé au contraire que madame Cousineau devrait être seule responsable du total de la prime. Il est à présumer que l'Honorable juge qui a décidé cette cause eut été d'opinion que madame Cousineau n'aurait été responsable que de la moitié des £1500 s'il ne se fut point mépris sur la preuve. Il a pensé qu'il était prouvé que Jean Baptiste T. Dorion avait retenu pour prime les £1500, mentionnés comme payés au comptant, dans l'obligation de madame Cousineau, et de là il a conclu que cette dernière était seule responsable. Quand bien même les £1500 n'auraient été prélevés que sur les argents de madame Cousineau pour former la prime, ce qui cependant n'est pas prouvé, il nous semble que cela ne devrait pas tirer à conséquence. Ce qu'il y avait à savoir c'était si la prime était pour couvrir les deux prêts. Si tel était le cas, la prime se divisait et la responsabilité de même, Jean-Baptiste T. Dorion comme tuteur devenait responsable d'une moitié et madame Cousineau de l'autre. D'ailleurs la preuve constatait clairement que les £1500 ne provenaient pas des deniers de madame Cousineau. Le jugement dont est appel comporte indubitablement une erreur en ce point. L'appelant a un grand intérêt à ne point négliger l'examen de cette question, car il est actuellement poursuivi par Rollin A. Mitchell, tuteur à l'enfant de Sévère Dorion et par Eustache et Firmin Dorion comme intéressés dans la succession Jacques Dorion, en recouvrement de moitié de la prime de £1500, qui fait l'objet du présent litige. Voir admission No. 80 du dossier. Et s'il fallait reconnaître que la Cour de première instance a bien jugé en déclarant que madame Cousineau est seule devenue responsable des £1500 que son fils a reçus, son jugement dont est appel, même dans ce cas, devrait être modifié pour plusieurs raisons qui seront mentionnées dans la troisième question qui va être proposée.

Troisième Question.—Dans cette troisième question voici les prétentions qui seront émises:

1°. En supposant que madame Cousineau soit seule devenue responsable

des £1500, le jugement de la Cour Inférieure est erroné en ce qu'il accorde à l'intimé un montant trop élevé. Légalement il ne pouvait être accordé des intérêts sur les sommes payées par les emprunteurs comme excédant de ce qui pouvait être dû. De plus la Cour a déclaré comme ayant été payées par les emprunteurs à madame Cousineau et à ses légataires, des sommes de deniers payées à Jean Baptiste T. Dorion, comme tuteur à la substitution ;

2°. La condamnation ne pouvait être solidaire contre les appelants.

3°. Comme ce fut le 1er Septembre 1855, que les légataires de madame Cousineau ont reçu le prétendu intérêt usuraire, dont le remboursement est demandé, cet intérêt a été reçu légalement par les créanciers.

4o. M. de Rottermund et son épouse ayant été condamnés à payer et rembourser à madame Cousineau, le montant entier de son obligation, (voir pièce No. 26 du dossier,) madame de Rottermund est dès lors devenue non fondée à se plaindre des prétendus faits d'usures antérieurs à ce jugement, et n'a pu faire à l'intimé un transport de ses prétendus droits. En outre M. de Rottermund étant décédé, ses droits ne sont pas échus à son épouse, et cette dernière n'a pu céder à l'intimé que sa part.

Dans la première question qui a été ci-haut proposée, il a été établi qu'il y avait une erreur de £50 dans le jugement dont est appel ; maintenant l'appelant va procéder à faire voir quelles sont les erreurs que contient ce jugement par rapport aux argents payés par les emprunteurs, soit à madame Cousineau ou a son procureur, soit à ses légataires.

L'intimé a commis de graves erreurs dans l'énumération qu'il a faite des sommes de deniers qui ont été payées sur l'obligation de madame Cousineau, et ces erreurs ont été en grande partie sanctionnées par le jugement dont est appel. Dans certains cas il a fait double emploi de quelques sommes de deniers. Dans d'autres il s'est fait créditer pour des argents qui n'ont pas été payés, et enfin il s'est fait créditer sur l'obligation de madame Cousineau pour des sommes de deniers qui ont été payées à Jean-Baptiste T. Dorion, comme tuteur à la substitution Jacques Dorion.

En supposant que les £1500 de prime qui ont été payés à Jean-Baptiste T. Dorion, soient imputés à la date du 11 Novembre 1845, sur l'obligation de madame Cousineau, il s'agit de savoir si l'excédant, que les emprunteurs ont payé, doit porter intérêt du jour où cet excédant a été payé, ou seulement du jour où l'action a été intentée. L'appelant prétend que cet excédant ne porte intérêt que du jour où l'action a été intentée en répétition, et non pas du jour où cet excédant a été payé : que l'intérêt, dans l'espèce actuelle, ne devrait courir que du 24 Octobre 1862, date de la signification de l'action.

La Cour de première instance a maintenu la doctrine contraire, et en cela l'appelant prétend qu'il y a eu violation de la loi. En lisant le jugement qui est soumis à révision, il est impossible de savoir quel est le montant qu'il accorde pour intérêts. Ce jugement accorde à l'intimé £3958. 6. pour capital et intérêts payés comme excédant de la vraie dette et voilà tout ce qu'il contient. L'Etat que l'appelant produit, marqué de la lettre M. de l'appendice de son factum, fait voir que l'excédant de créance que madame Cousineau et ses légataires ont reçu, toujours en supposant que madame Cousineau soit seule devenue responsable des

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£1500 de prime, est de £1076. 12. 4, courant, et que cet excédant a été ainsi reçu le 1er Septembre 1855. Si contrairement aux prétentions de l'appelant, l'intérêt doit être accordé à l'intimé depuis le jour du paiement, cet intérêt calculé jusqu'à la date de l'action, 21 Octobre 1862, couvrant une période de sept ans, un mois et 21 jours, formerait £461. 2. 9. qu'il y aurait à ajouter au capital de £1076. 12. 4. ce qui formerait un total de £1537. 15. 1. Si mad. Cousineau n'est devenue obligée que pour une moitié de la prime de £1500, que Jean-Baptiste T. Dorion a reçu, ses trois légataires ne sont responsables que de moitié de l'excédant, dont deux tiers dus par Jean-Baptiste T. Dorion, vu qu'il représente son frère Eustache, dans la succession de sa mère, et un tiers par l'autre appelant Zéphir Dorion, ainsi que cela est démontré dans l'Etat formant partie de l'appendice de ce factum. S'il est maintenu que le capital de l'obligation de madame Cousineau n'a été que de £3376, même dans ce cas, l'intimé devrait être débouté de son action; ce ne fut que le 1er. Septembre 1855, que les emprunteurs ont payé un surplus d'intérêt: or à cette époque là, les légataires de madame Cousineau étaient autorisés par la loi à recevoir un intérêt excédant six par cent.

L'appelant croit devoir soumettre une dernière proposition que voici:

M. de Rottermund et son épouse ayant été condamnés à payer à madame Cousineau le plein montant de son obligation, sont dès lors devenus non recevables en loi à se plaindre de la prime de £1500 payée à Jean-Baptiste T. Dorion, et par conséquent madame DeRottermund n'a pu faire à l'intimé un transport de ses prétendus droits sous ce rapport. Il faut encore remarquer que madame DeRottermund étant devenue veuve, il y a deux ou trois ans passés, n'a pu céder à l'intimé les droits de son époux contre la succession de madame Cousineau par rapport aux £1500. La Cour Inférieure cependant a jugé au contraire, et c'est là sans doute une autre erreur qu'il y a à rectifier.

Si le jugement dont la cassation est demandée en cette cause, auprès du tribunal d'appel, n'est point infirmé en entier, il devra à tout événement subir des modifications importantes.

R. & G. Laflamme for the respondent in Court of Q. B.:—

La plaidoirie ne soulevait sérieusement qu'une question de fait, savoir;—

1°. Si lors de l'acte du 11 Novembre 1845, l'appelant Jean-Baptiste Théophile Dorion avait réellement comme procureur de sa mère exigé et obtenu des emprunteurs une prime de £1500; et, 2o Si les paiements mentionnés par l'intimé dans son action ont été faits pour le montant qu'il prétend et jusqu'à concurrence de celui pour lequel jugement a été obtenu.

Sur cette question, il suffit d'examiner la preuve. D'abord l'appelant Jean Baptiste Théophile Dorion a juré positivement, dans une cause où il ne s'agissait de cette prime qu'incidemment, qu'elle avait été effectivement retenue par lui comme procureur de sa mère. (Voir la déposition dans la cause de Firmin Dorion & al., vs. Jean-Baptiste Théophile Dorion, pièce No. du dossier.) Poursuivi dans cette cause par ses frères qui réclamaient leur part de bénéfice dans les exactions usuraires qu'il avait commises, il déclare positivement que toute la prime de £1500 a été retenue par lui comme procureur de sa mère, dont lui et son frère Zéphirin étaient les seuls représentants et que conséquemment

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Zéphirin Dorion seul pouvait en réclamer sa part. Dans ses défenses et dans une déposition nouvelle donnée dans la présente cause il admet avoir perçu £1500 au delà des intérêts, il admet que sa mère Dame Marie Louise Cousineau n'a jamais avancé le montant mentionné dans l'obligation, mais qu'elle n'a effectivement payé la somme que déduction faite de ces £1500, mais il jure positivement le contraire de sa première déposition, il prétend maintenant que c'était individuellement et non comme procureur qu'il a retenu cette somme.

Il est difficile de comprendre la valeur de la prétention de l'appelant Jean-Baptiste Théophile Dorion lorsqu'il veut assumer en son nom personnel et individuellement toute la responsabilité de cette extorsion de £1500, à titre de pas et démarches sur un prêt hypothécaire de £3325, d'argent appartenant à sa mère. Quelque invraisemblable et absurde que puisse être cette hypothèse, le fait de l'exaction des £1500 au delà des intérêts légitimes, par l'appelant lui-même, est constaté, et ce fait est un fait d'usure qui le rend passible du remboursement. On ne peut guère apercevoir l'intérêt qu'il pouvait avoir de jurer dans la présente cause le contraire de ce qu'il avait juré dans l'autre relativement à ces £1500. Il était poursuivi personnellement et comme légataire universel et représentant de sa mère. Il est indubitable que personnellement ou comme légataire universel de sa mère il est tenu de rembourser cette somme de £1500 avec intérêt et selon sa prétention il devrait y être tenu seul à l'exclusion de son frère.

Indépendamment de la preuve contenue dans les admissions faites par l'appelant, plusieurs témoins ont été entendus de la part de l'intimé, lesquels établissent d'une manière plus positive encore toute la transaction usuraire telle qu'alléguée dans l'action. Mr. Leblanc, notaire de la famille Debartzch à l'époque où l'emprunt fut effectué avait été chargé de le négocier. Il eut une entrevue avec Madame Dorion mère, Marie Louise Cousineau. L'intérêt usuraire fut stipulé et elle déclara que son fils, l'appelant, était autorisé par elle à conclure définitivement aux conditions qu'il arrêterait. L'Honorable Samuel Cornwallis Monk, aujourd'hui absolument sans intérêt dans le recouvrement des sommes réclamées par l'intimé, corrobore en tout la preuve déjà faite, ainsi que d'autres témoins. En lisant leurs dépositions il ne peut exister un doute sur le fait que l'appelant Jean-Baptiste Théophile Dorion a exigé et obtenu comme procureur de sa mère à l'occasion du prêt du 11 Novembre 1845, une somme de £1500, c'est-à-dire que la créancière n'a réellement et effectivement prêté que la somme de £3325, pendant qu'elle obtenait une reconnaissance pour £4875, avec intérêt sur le montant reconnu.

Ceci établi, l'intimé, comme cessionnaire de ses co-débiteurs, avait incontestablement le droit d'obtenir contre l'appelant jugement pour cette somme de £1500 avec intérêt à compter du jour de l'obligation, et il ne lui restait plus qu'à établir le chiffre du montant payé sur l'obligation et constater si réellement en outre de la prime les débiteurs avaient payé plus que le montant réel de l'obligation avec intérêt.

L'appelant Jean Baptiste Théophile Dorion, interrogé sur faits et articles et comme témoin, jure positivement qu'aucune somme d'argent n'a été payé si ce n'est quelques louis à compte des intérêts, et déclare que le montant intégral de

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l'obligation est encore dû. Il nie des paiements constatés par acte authentique auxquels il était lui-même partie.

Il est prouvé que la sommo entière pour laquelle jugement a été obtenu par l'intimé a été payée au delà du montant de l'obligation, intérêts calculés, jusqu'au jour de chaque paiement. En référant aux états produits par l'intimé on trouve l'indication des actes et quittances qui démontrent l'existence de tous ces paiements.

La loi, en matière d'usure, n'admet pas de ratification et quelques auteurs prétendent même qu'il n'y a pas de prescription possible pour en couvrir le vice. Les faits de ratification invoqués par l'appelant se réduisent au silence gardé par les débiteurs sous l'effet de la créance qui pesait sur eux. On ne pourra jamais légalement interpréter cette inaction comme une renonciation au droit de recouvrer ce qui avait été illegalement et usurairement obtenu.

The judgment of the Superior Court was reversed in appeal, 9th June, 1866, *Coram* DUVAL, C. J., MEREDITH, J., MONDELET, J., BERTHELOT, J., MEREDITH, J., dissenting. In the appeal by Zephir Dorion, the judgment is *motivé* simply that the plaintiff had not proved the allegations of his declaration. In the appeal by Jean Bte. Dorion the *considérants* of the judgment are that the judgment of the Superior Court is erroneous, because by the evidence adduced it is established that the sum of money claimed under the transfer of 18th March, 1862, was paid through and by the Hon. L. T. Drummond and Dame J. E. Debartzch, his wife, who alone can claim the amount, if usuriously and illegally exacted as pretended, and the other assignors, who have paid no part of said sum of money, have no right of action against the appellants to recover any part of the sum. A report of the remarks made by Chief Justice Duval, and Mr. Justice Meredith, will be found in volume 2, Lower Canada Law Journal, pp. 70, 71.

The following is the judgment of the Lords of the Judicial Committee of the Privy Council, delivered 23rd December, 1868:

PER CURIAM.—This is an appeal from judgment of the Court of Queen's Bench of Lower Canada, reversing a judgment of the Superior Court of that Province, in an action by the appellant against the respondent.

The action was brought to recover from the defendants, jointly and severally, as universal legatees of their mother, Marie Louise Cousineau, a sum of 5,329*l*. 10s., alleged to have been paid to them by the plaintiff, in excess of the amount of legal interest payable under a contract for the loan of 4,875*l*. by Madame Cousineau to the plaintiff and his wife, Lewis Thomas Drummond and his wife, Samuel Cornwallis Monk and his wife, and Edward Silvester Count de Rottumund and his wife.

The declaration in the action states, that by an obligation dated the 11th November, 1845, the plaintiff in his own name, and in the names of the other borrowers, acknowledged to have received, by way of loan, from Madame Cousineau (represented by the defendant, Jean Baptiste Theophile Dorion) a sum of 4,875*l*., which they bound themselves to repay to Madame Cousineau in manner mentioned in the obligation. That the plaintiff received from the defendant, Jean B. T. Dorion. acting as aforesaid, only 3,325*l*., and that he

retained the balance of 1,550*l.*, as a bonus or premium, or illegal and usurious interest.

The declaration states the death of Madame Cousineau, leaving the two defendants and their brother, Eustache Dorion, her universal legatees, and that the rights of Eustache Dorion having been ceded to Jean B. T. Dorion, the two defendants are the only representatives of their mother.

It then states various payments made on account of principal and interest due on the obligation of the 11th November, 1845, which, on the 6th March, 1854, left a balance of 2,138*l.* 8s. 5d.; and that on that day Mr. and Mrs. Drummond, two of the debtors in the obligation, sold to the Hon. Judge Mondelet, part of the property charged with the payment of the loan; and that on 1st September, 1855, by an arrangement between Judge Mondelet, and the two defendants, and divers other creditors of the vendors, he paid to the defendants a sum of 78*l.* 15s. 9d., and afterwards another sum of 5,023*l.* 2s. 8d., on account of principal and interest upon the obligation.

That as at this time there was due upon the said obligation only the sum of 2,138*l.* 8s. 5d., the defendants received beyond the principal and legal interest at 6 per cent a sum of 2,963*l.* 10s. That this sum, with interest, amounts to 5,329*l.* 10s., which the borrowers are entitled to recover from the defendants, with interest.

The declaration then states an assignment to the plaintiff of all the interests and rights of action of the other debtors in the obligation of the 11th of November, 1845, to demand and recover the usurious premium of 1,500*l.*, and interest and all other illegal and usurious interests paid in respect of the obligation, by which, as the plaintiff alleges, he is alone entitled to maintain the action.

The plea of the defendant, Jean B. T. Dorion, alleges that the loan in question was made by Madame Cousineau through his agency, and that she never stipulated for, or required any bonus or usurious interest upon such loan.

That upon his own responsibility and for his own interest, unknown to Madame Cousineau, and to indemnify him for the steps and proceedings taken by him in the interest and for the profit of the borrowers, he entered into an agreement with them, by which they bound themselves to pay him a bonus of 1,500*l.* And that on the 11th November, 1845, after having made the before-mentioned loan of 4,875*l.* for Madame Cousineau, the borrowers paid him, on his own account, the said sum of 1,500*l.*

The plaintiff, in his answer to this plea, says that the sum of 1,500*l.* was exacted by Madame Cousineau, acting by the defendant as her agent, and was retained, not for himself but for and in the name of Madame Cousineau.

The defendant Zephir Dorion, put in a separate plea, in which all that it is necessary to notice is that he repudiated all interest in the bonus paid to the other defendant, and renounced all claim to any part of it.

Upon the issues thus raised between the parties, and after hearing evidence on both sides, the Superior Court was of opinion that the plaintiff had proved the facts alleged in his declaration. That the 1,500*l.* was exacted by Madame Cousineau as a bonus upon the loan made by her, and was deducted from the sum of 4,875*l.*, which she agreed to advance, and the Court condemned the

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defendants, as her representatives, to pay to the plaintiff the sum of 3,958*l.* 6s., the amount of excess of interest which they had exacted and received from him together with interest and the costs of the action.

The defendants appealed separately to the Court of Queen's Bench from this Judgment.

The principal grounds of appeal alleged by Jean B. T. Dorion were—

That the plaintiff had not proved the facts alleged in his declaration:

That it was proved that if Jean B. T. Dorion received money from the plaintiff it was paid to him on his own account and for his own benefit, and was not received by Madame Cousineau, and therefore her legatees could not be made liable for it; and

That the plaintiff and the other borrowers of the moneys confirmed and ratified the obligation of the 11th November, 1845.

The other defendant, Zephir Dorion, in the *factum* upon his appeal, said that the only difference which existed between his defence and that of J. B. T. Dorion was that his mother, Madame Cousineau, never stipulated for the premium of 1,500*l.*, nor authorized her agent, Jean B. T. Dorion, to require any such premium for himself; that she never received any part of the premium which was taken by Jean B. T. Dorion for his own benefit; that Madame Cousineau incurred no responsibility in respect of it; and that he (Zephir Dorion) repudiated every agreement which might have been made by Jean B. T. Dorion as to the premium of 1,500*l.*

The Court of Queen's Bench gave judgment for Zephir Dorion, on the ground that the plaintiff in the Court below had not proved, as to him, the material allegations of his declaration. And upon the appeal of Jean B. T. Dorion, they reversed the judgment of the Superior Court, because (as they held) the evidence established that the money claimed by the plaintiff, under and by virtue of the transfer of the 18th March, 1862 (the assignment by the other debtors on the obligation of the 11th November, 1845, of all their claims and rights of action in respect of the alleged usury), was paid through and by Lewis T. Drummond and his wife, who alone could claim the amount if usuriously and illegally exacted, and that the other assignors, who had paid no part of the money, had no right of action against the defendants.

The present appeal is from both these judgments. Their Lordships cannot acquiesce in the reasons assigned by the Court of Queen's Bench for reversing the judgment of the Superior Court in the case of Jean B. T. Dorion.

It seems clear that by the old French law which prevailed in Canada, when upon an usurious contract, the principal and legal interest have been fully paid, any money afterwards received by the lender beyond the legal amount due may be recovered back from him. (4 Pothier, "Traité de l'Usure," p. 114, Art. 113.] A right of action, therefore, is vested in the person so paying such usurious interest; and by the law of Canada, such right of action is assignable. The Civil Code of Lower Canada, which, though not established till 1866, embodies all such provisions relative to civil matters as were in force at the time of the passing of the Act respecting the codification of the laws of that Province, may properly be referred to for the law on this point. By article

1570, "The sale of debts, and rights of action against third persons is perfected by the seller and buyer by the completion of the title, if authentic, or by the delivery of it, if under private signature." And the only exception to the right of dealing with these subjects is to be found in Article 1,485, which prohibits "judges, advocates, attorneys, clerks, sheriffs, bailiffs, and other officers, from becoming buyers of *litigious rights*, which fall under the jurisdiction of the Court in which they exercise their functions."

Assuming that Mr. and Mrs. Drummond were entitled to recover back what they paid beyond the amount of principal and legal interest, they had by law an assignable right of action. This right of action, by the instrument of the 18th March 1862, they transferred and made over to the appellant, in the fullest and amplest manner. The other parties named in the obligation of the 11th November, 1845, joined in this assignment. Whether they were bound to repay to Mr. and Mrs. Drummond their shares of the money so paid is immaterial. The right of action to recover back the money was vested either in Mr. and Mrs. Drummond alone, or in all the parties to the obligation jointly. If all of them were entitled to maintain the action, the appellant has the assignment of all: and if the sole right of action was in Mr. and Mrs. Drummond, they have transferred that right to the appellant, and the joinder in the instrument of assignment of any number of persons who had nothing to assign, cannot affect, or in any way prejudice, the validity of the assignment by the persons who alone were interested.

It has, very properly, not been attempted to maintain the judgment of the Court of Queen's Bench on the ground upon which it was placed in the case of the defendant, Jean B. T. Dorion.

The questions which their Lordships have been called upon to consider in this Appeal are:—

1st. Whether the plaintiff has proved the allegation in his declaration that the contract between him and Madame Cousineau was an usurious contract by reason of her having stipulated for and received a sum of 1,500*l.* as a bonus or premium for the loan of 4,875*l.*, which was to be repaid with full legal interest of 6 per cent. upon the whole sum lent.

2ndly. If the original contract was illegal and void by the usury laws of Lower Canada in force at the time of its being entered into, whether transactions which took place between the parties after a change of those laws either ratified and confirmed the contract itself, or substituted for it another contract founded upon good and valid consideration.

The first question is one entirely of fact. The plaintiff was bound to prove that the loan upon which the £1,500 was retained was made by Madame Cousineau, and that the retention was for her benefit. If it were not, the respondents could not be liable in the character in which they were sued, that of her legatees. It was not necessary to show that Madame Cousineau personally received or retained the £1,500 for her own use. If she either authorized her agent, Jean B. T. Dorion, to retain it for himself out of the loan made by her, or, knowing that he had so retained it, ratified what he had done, her contract would have been usurious.

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The facts which appear to be clearly established are, that an advance of £10,000 having been originally required, it was arranged that a sum of £1,500 should be given by the borrowers for this advance, and that when it was afterwards found that no more than £7,000 could be lent, no reduction was made in the sum to be paid in respect of the loan. These facts are quite independent of the question to whom and for what the £1,500 was to be paid. The loan of £7,000 was made in two sums, one of £4,875 by Madame Cousineau, the other of £3,626 by Jean B. T. Dorion, out of an estate of which he was curator; but the £1,500 was deducted and retained out of the sum advanced by Madame Cousineau. This is proved by the fact that obligations having been entered into for repayment to the lenders, respectively of the sums each advanced, both dated on the 11th November, 1845, that which was given to Madame Cousineau states that the £1,500 was paid at the time of the execution of the deed, and received as part of the loan of £4,875.

This statement in the deed is directly opposed to the appellant's case. He is compelled, therefore, to rely upon witnesses to prove the essential fact upon which alone he can recover in this action, viz., that the usury which he alleges entered into the contract with Madame Cousineau.

The principal witness produced by him to prove his case was the notary Leblanc, who was employed by the appellant and the other proposed borrowers to negotiate for the loan. He went with the appellant to St. Eustache, where Madame Cousineau was residing, and saw her in the presence of her son, Jean B. T. Dorion.

He stated that, as well as he could recollect, the appellant addressed himself to Madame Cousineau, and that it was perfectly understood that the loan was to be made at a rate above the legal interest, and this by the payment of a premium of £1,500. That on occasion of the interview with Madame Cousineau, the appellant, to the best of the witness's recollection, remarked that the premium demanded was very high; to which either Jean B. T. Dorion, or Madame Cousineau—but he believed it was Jean B. T. Dorion—said they could place out their capital at a more advantageous rate; *but*, the witness added, this was said in the presence of Madame Cousineau. Upon his cross-examination he said it was M. Kierzkowski who held the conversation about the premium, and with Jean B. T. Dorion, though in the presence of his mother.

M. Leblanc spoke, as he was likely to do at the distance of eighteen years, very uncertainly, as to the particulars of a conversation in which he did not take much part, and to which his attention had probably not been called in the intervening period. He stated that M. Kierzkowski took the principal part in whatever conversation took place, and that it passed between him (the appellant) and Jean B. T. Dorion. From the appellant, therefore, we should naturally expect the best information respecting this important interview with Madame Cousineau, but he spoke with even more uncertainty than M. Leblanc. He said, "I only saw Madame Cousineau once upon the subject of the loan in question, and I *believe* I spoke to her about the premium, and told her the premium was too much. I *think* she made the same remark as her son, that they could lay out their capital on more advantageous terms."

This, at best, is but slight evidence to fix Madame Cousineau with the knowledge of, and make her a party to the alleged usurious transactions. But, weak as the evidence is, it is much more weakened by other witnesses produced by the appellant himself, and especially by the evidence given by M. Leblanc upon the subject of this loan in a suit of Mitchell *v.* Jean B. T. Dorion, in which he was a witness. Upon this occasion he never mentioned the name of Madame Cousineau in connection with the loan, but stated that all the arrangements for the loan, and all the stipulations as to the premium, passed with Jean B. T. Dorion. Jean B. T. Dorion himself was called as a witness in that suit, and though he alleged that the sum of £1,500 was actually deducted from the money advanced by Madame Cousineau, he admitted it was retained as a premium in respect of the whole loan.

It must be observed that in this other suit, if M. Leblanc had not kept Madame Cousineau's name out of the transaction, it would have prejudiced the plaintiff's case for whom he was called; and that if he had not proved in the present action that she took an active part in the negociations for the loan and the premium, the appellant must have failed.

The whole proof of Madame Cousineau's participation in the usurious agreement rests upon the appellant and his witness, M. Leblanc. He produced other witnesses, but their evidence either added nothing, or was unfavourable to his case. M. Moreau, an advocate, stated that the transaction of the loan was conducted by Jean B. T. Dorion, Madame Cousineau not at all interfering in the matter; and Judge Monk, who was one of the borrowers named in the obligation, knew nothing of the transaction except what was reported to him by the appellant and M. Leblanc, but understood (of course from them), that Jean B. T. Dorion agreed to lend the money, and exacted the bonus of £1,500.

The appellant examined Jean B. T. Dorion, who swore in the most positive terms that the affair of the premium was his own personal affair. He said he required it to pay him for all the time he had to occupy himself in the matter, and for the loss of his practice as a physician for twelve months, while he was ascertaining the value of the property of the borrowers, searching the registers, remaining a great part of the time at Montreal, travelling a great deal, and incurring an infinite number of other expenses. He also said that his mother never spoke to M. Leblanc about a premium, that all she did was to consent to the loan, and that she died without knowing that he had received the premium.

Of course this evidence (if believed) was fatal to the appellant's case, but he probably thought that he might safely make Jean B. T. Dorion his witness, as in a former suit brought against him on behalf of the heirs of his brother, Jacques Dorion, in which the question was on whose account he received the £1,500 premium, he swore that it was not retained by him for the heirs of Jacques Dorion, but as the agent to his mother, Madame Cousineau. He swore further that the affair was settled between the notary, Leblanc, and his mother, and that he remembered many and long conversations between them, which ended in her consenting to a certain loan at a certain premium, and (he added) it was only by the wish of his mother and upon what she told him, that he consented to act in the affair.

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Upon comparing the evidence given by Jean B. T. Dorion with that which he gave in the present suit, it is impossible to place the slightest reliance upon his testimony, as he evidently swore just as it suited his interest upon the particular occasion. In the suit with the heirs of Jacques Dorion he could only protect himself from the claim made upon him by swearing that his mother exacted the premium and received it for her own benefit, and he swore accordingly. In the present suit, which alleged that the £1,500 was exacted and retained by him for his mother, Madame Cousineau, if he had repeated this evidence, he would have established his liability as her legatee, and he therefore swore positively the other way.

But by thus proving the contradictory evidence as to the transaction given by Jean B. T. Dorion, the appellant could not call upon the Court to believe what he had formerly sworn, and to discard his testimony in the present suit as worthless. There were no means of determining upon which occasion he had sworn truly or falsely. All that could properly be done was to regard his evidence as utterly unworthy of credit, and to dismiss it without further consideration.

The defendant, Zephir Dorion, produced two witnesses to prove that, upon the occasion of the appellant and M. Leblanc going to the residence of Madame Cousineau at St. Eustache in 1845, she was unwell, and in her bedroom, and never came down-stairs or spoke to them while they were there. It is unnecessary to dwell upon this evidence, which is certainly open to the objection that it refers to events that occurred many years before, and in which one of the witnesses (at least) had no interest to retain it in his memory.

In the opinion of their lordships the appellant failed entirely to prove the allegation in his declaration that the contract with Madame Cousineau was tainted with usury. That she should have taken a prominent, or, indeed, any part in the transaction, after she had entrusted the management of it to Jean B. T. Dorion, and especially when he was present, seems, from the account given of her want of education, and the state of her health, to be highly improbable. There is great reason to believe that Madame Cousineau gave Jean B. T. Dorion the sum she was to advance upon the execution of the deed, and that he either retained it or paid it over and received it back at that time. M. Leblanc in his evidence in another suit, speaking of the transaction, said, "After the execution of the obligation, I saw Kierzkowski count the money, but I did not count it myself, nor did I know how much money was given upon the occasion."

The only money that could pass at that time is the £1,500. For by the obligation the sum of £1,500 is stated to have been counted and delivered in the presence of the notaries to Kierzkowski, who thereby acknowledged the same. And the sum of £3,375, the remainder of the advance by Madame Cousineau, was only to be paid when she received it from the Corporation of Montreal, who were indebted to her in that amount.

The appellant's case might be disposed of upon the ground of its having failed upon the facts, but their lordships are unwilling to dismiss the appeal without considering the defence in point of law, which has been argued upon the assumption that the case of usury has been proved against the defendants.

It was contended on their behalf that the contract was either subsequently

ratified, or that a new contract was substituted for it, founded upon a sufficient consideration.

At the time of the agreement for the loan, the Act respecting usury, which was in force in Lower Canada, was that of 1777, which provided that "all bonds, contracts, and assurances, whereupon or whereby a greater interest (than 6 per cent.) should be reserved and taken, should be utterly void; and that every person who should either directly or indirectly take, accept and receive a higher rate of interest should forfeit and lose treble the value, &c."

There can be no doubt that if the 1,500*l.* had been retained on the loan by Madame Cousineau, that the moment 6 per cent. was paid upon the entire sum, usury would have been committed, for which the lender would have been liable to the penalty; but no excess of interest could have been recovered back till the payments had amounted to a sum exceeding the principal and legal interest.

In this case there was no excess of payment before the 24th March, 1853, when an Act was passed in Lower Canada which altered the law of usury.

That Act enacted "that no contract to be hereafter made in any part of this province, for the loan or forbearance of money at any rate of interest whatsoever, and no payment in pursuance of such contract shall make any party to such contract or payment, liable to any loss, forfeiture, penalty, or proceeding, civil or criminal, for usury, any law or statute to the contrary notwithstanding: And it provided that every such contract, and every security for the same, shall be void so far, and so far only, as relates to any excess of interest thereby made payable above the rate of 6*l.* for the forbearance of 100*l.* for a year, and the said rate of 6 per cent. interest, or such lower rate of interest as may have been agreed upon, shall be allowed and recovered in all cases where it is the agreement of the parties that interest shall be paid."

It was contended on the part of the respondents that this Act prevented the plaintiff recovering back any usurious interest which was paid in excess of principal and legal interest under the contract. But an action to recover such excess could not properly be called "a civil proceeding for usury," though it would be brought on account of usury, the words of the Act evidently pointing to a proceeding upon the fact of usury itself, and not upon claims which resulted from it.

On the part of the appellant it was argued that the Act of 1853 leaves an usurious contract still a void contract, as it was before the passing of the Act. But the words "such contract or security shall be void so far, and so far only, as relates to any excess of interest, &c.," can only mean that the lender shall not recover more than 6 per cent.; not that the contract itself shall be affected by the stipulation for more than legal interest. The whole effect of this Act is that an usurious contract shall no longer subject a party to any penalty or forfeiture; but that it shall be invalid so far as it stipulates for more than 6 per cent.

Upon the subject of the alleged ratification of the usurious contract, the appellant's counsel cited the authority of many eminent writers upon French law, to show that any number of confirmations or compromises made while the debtor

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was under the pressure of the usury, could not be urged as a defence to his action to recover back the money paid by him beyond the legal rate of interest. To which it was answered that the transactions which recognized and ratified the contract, all took place after the Act of 1853, which had made usurious contracts no longer unlawful. And Toullier, under the head of "Contrats et Obligations Conventionelles," vol vii, Article 561, was cited, where, upon the subject of the ratification of contracts, which are void from regard to public order or the general interests of society, after stating that "la ratification serait elle-même infectée des mêmes vices que l'acte ratifiée," he adds, "Cependant si les choses en étaient venues au point où la Convention cesserait d'être illicite et pourrait prendre naissance, elle pourrait alors être ratifiée, soit expressément soit tacitement."

But the contract of the 11th November, 1845, could not have had a legal existence, nor have been enforced in its entirety after the Act of 1853; it would only have been available to the extent of enabling the lender to recover the legal interest of 6 per cent. Therefore, no subsequent confirmation or ratification of it, supposing it to have been originally usurious and void, could afterwards have given it complete validity.

But the case of the respondents does not rest upon mere ratification. They assert that the old contract has been entirely done away with, and a new one substituted for it upon a good and sufficient consideration, and that it was under the latter contract the payments sought to be recovered were made. No payment beyond the amount of principal and legal interest was made until the year 1855. But on the 7th May, 1853, a deed was executed by Mr. Fraser, as agent for Mr. and Mrs. Drummond, and for the Count and Countess Rotturmund and Jean B. T. Dorion, acting for the legatees of Madame Cousineau, by which the first-named parties became bound to pay the balance of interest due on the 11th November then next, and in consideration of this the Dorions granted a delay of four years to pay the capital of the two obligations of 4,875*l.* and 3,626. 8*s.* 6*d.*, and at the end of that time the capital of the two obligations was to be paid in one payment. And Mr. and Mrs. Drummond gave a new security for the debt by mortgaging to the Dorions property belonging to them in Montreal.

This was not a ratification of the contract of 11th November, 1845, but a new contract made upon totally different terms, and in consideration of forbearance, and with an additional security given for performance.

It is not contended, however, that there was any actual taking of usurious interest after the 1st. September, 1855, when Judge Mondelet purchased some property from Mr. and Mrs. Drummond, and a deed was executed whereby he agreed to pay the purchase money in satisfaction of debts of the vendors, and amongst them what was due to the Dorions, who were parties to the deed. The transaction was to this effect:—the Drummonds had contracted to sell their property to Judge Mondelet; the Dorions having a charge upon the property intervened with other creditors: the amount then due to them was settled and stated; they agreed to take payment in a certain way from Judge Mondelet out of the purchase money. The deed expressly states that they entered into

this engagement in order to take from Judge Mondelet any reasons he might have for abandoning the contract of purchase. By the deed also the Dorions give up to the Drummonds the additional security for the debt which they had given by the deed of the 7th May, 1853. These are new considerations moving from the Dorions sufficient to support the transaction of the 1st September 1855, as a new contract. Under that deed the Dorions received a large sum of money from Judge Mondelet, which made the payments to them greatly exceed the amount of principal and legal interest due upon the loan from Madame Cousineau. But the payment by Judge Mondelet cannot be said to have been in respect of the obligation of the 11th November, 1845, but of the new contract of 1855, to which the Drummonds, on whose account the money was paid, were parties. This being so, there was not even a taking of illegal interest upon the usurious contract itself, and the case of the appellant must have failed upon this ground.

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After the execution of this deed the amount due to the Dorions which was expressly stated in it, could not fairly be disputed. It is clear that the Drummonds were bound by the arrangement thus entered into, for the Dorions not only forbore to demand immediate payment of what was due to them, but relinquished a security which they held upon the lands of the Drummonds for their debt.

Their Lordships, therefore, are of opinion that if the appellant had proved a case of usury against the respondents, there would have been a good defence to the action upon the grounds stated, and they will, therefore, humbly recommend to Her Majesty to affirm the judgment of the Court of Queen's Bench, and to dismiss the appeal with costs.

R. & G. Laflamme, for the appellant.
Leblanc, Cassidy & Leblanc, for the respondents.
(J.K.)

Judgment confirmed.

COUR SUPERIEURE, 1868.

EN REVISION.

MONTREAL, 28 MARS, 1868.

Coram MONDELET, J., BERTHELOT, J., & MONK, J.

No. 186.

Gibeau vs. *Chef dit Vadeboncœur*.

JUGE:—Que dans une demande basée sur un prêt d'argent, un billet prescrit ne peut établir aucune preuve de ce prêt. (1)

Le jugement de la Cour est motivé comme suit:

La Cour Supérieure siégeant à Montréal, présentement en Cour de Révision, ayant entendu les parties par leurs avocats respectifs sur le jugement rendu le 28 février 1867, dans la Cour Supérieure du district de Montréal, ayant examiné le dossier et la procédure dans cette cause, et ayant pleinement délibéré;

(1) Vide Bagg vs. Wurtele, 6 L. C. Jurist p. 30.

Gibeau vs. Vadeboncœur.

Considérant que le demandeur n'a pas prouvé les allégués essentiels de sa déclaration, et nommément le prêt qu'il allègue en sa dite déclaration, avoir fait de la somme de cent dollars, à la défenderesse, le ou vers le 25 mai 1860;

Considérant que le billet en date du dit 25 mai 1860, par et au moyen duquel, le demandeur a prétendu avoir établi le prêt en question, n'a aucune valeur en loi, attendu que par le laps de six ans qui s'est écoulé depuis la date d'icelui jusqu'au temps où le demandeur l'invoque à l'appui de son allégué du prêt en question, et par la loi, le dit billet est censé avoir été absolument payé et satisfait;

Considérant que le susdit billet ne peut indirectement faire preuve, puisque directement il n'a aucune valeur quelconque;

Considérant que le jugement dont est appel, savoir le jugement rendu par la dite Cour Supérieure, le 28 février 1867, déboutant l'action du demandeur est bien fondé en lui-même, mais que cette Cour ne le confirme que d'après les considérants sus-exprimés; cette Cour confirme le dit jugement avec dépens contre le dit demandeur.

Jugement confirmé.

DeLorimier, avocat du demandeur.
Leblanc & Cassidy, avocats du défendeur.
(P. R. L.)

EN REVISION.

MONTREAL, 28 MARS, 1868.

Coram MONDELET, J., BERTHELOT, J., & MONK, J.

No. 811.

Beckett vs. *Bonnallie*.

JUGE:—Qu'après audition des parties en révision d'un jugement non susceptible de révision, la Cour n'ayant aucune juridiction, en mettant les parties hors de cour, condamne aux dépens la partie qui a inscrit la cause en révision. (1)

Le jugement est motivé comme suit:

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 of and for the district of St. Francis on the 23rd day of February 1867, having examined the record and proceedings had in this cause, and maturely deliberated; considering that this Court hath no jurisdiction to take cognizance of the matter which has been brought under its consideration, the action brought before the said Superior Court of the district of St. Francis, for the recovery of the sum of $39.80, not being of the class of actions which by law falls under the jurisdiction of this Court, the said parties are hereby sent out of Court, with costs however against the defendant who has without any right brought the case before this court. And it is ordered, that the record be remitted to the said Superior Court of the district of St. Francis.

Appeal rejected.

Ritchie, avocat du demandeur.
Sanborn, avocat du défendeur.
(P. R. L.)

(1) Sed vide, Rhéaume et Fortier, 4 L. C. R. p. 185.

EN REVISION.

MONTREAL, 24 NOVEMBRE, 1869.

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

No. 584.

Leprohon vs. *Crebassa.*

JUGE:—Que le protonotaire est tenu de mettre une cause sur le rôle pour audition en révision à la demande de la partie qui a payé tous les dépôts exigés d'elle par la loi et le tarif, nonobstant que l'autre partie est en défaut de payer ce que la loi et le tarif exigent d'elle.

Le 22 novembre, 1869, la demanderesse fit la motion suivante :

Motion de la demanderesse contestant :—Attendu qu'elle a fait le dépôt requis en cette cause et payé en timbres une somme de trois piastres sur son inscription.

Que la présente cause soit mise sur le rôle pour audition et qu'ordre soit donné au protonotaire à cet effet, et de plus que la présente cause soit plaidée par privilége et par droit de préséance.

Cette motion fut accordée comme suit :

Granted.—Respondent to pay his fee on appearance.

Barnard & Pagnuelo, avocats de la demanderesse.

W. H. Kerr, avocat du défendeur.

(P. R. L.)

MONTREAL, 30 OCTOBRE 1869.

Coram BERTHELOT, J.

No. 2731.

Hurteau vs. *Owens* et al., & *Halpin*, opposant.

JUGE:—Que le commandement de payer contenu dans le procès verbal de *nulla bona* signé par le défendeur, dispense d'aucun commandement de payer dans le procès verbal de saisie immobilière faite le même jour.

Le 29 avril 1869, le demandeur fit saisir les biens meubles et immeubles du défendeur John Halpin, un des défendeurs en cette cause.

Le défendeur Halpin signa le 29 avril 1869, un *retour de nulla bona* contenant un commandement de payer, et le même jour, l'huissier saisissant procéda à la saisie des immeubles du défendeur Halpin.

Le procès verbal de saisie immobilière ne contient aucun commandement de payer ; il ne contient que la demande exigée par le code de procédure, savoir : l'interpellation au défendeur de donner la désignation des terrains à être saisis. Art. 637.

Le 25 août 1869, le défendeur Halpin s'opposa par une opposition afin d'annuller à cette saisie de ses biens immeubles sur le principe que "le dit procès "verbal de saisie ne fait pas voir qu'aucun commandement de payer aucune "somme quelconque ait été fait au dit opposant avant ou lors de la dite saisie."

Le demandeur ayant contesté cette opposition et les parties ayant été entendues, la Cour a maintenu la saisie par son jugement qui est motivé comme suit :

La Cour, après avoir entendu l'opposant et le demandeur contestant par leurs avocats au mérite sur l'opposition *afin d'annuller* faite et produite par le dit opposant à l'encontre du bref *de fieri facias de bonis et de terris* émané contre le défendeur John Halpin le 16 avril 1869 et sur la contestation d'icelle par le dit demandeur, avoir examiné la procédure et la preuve et sur le tout avoir délibéré ;

Considérant que le procès-verbal de la saisie immobilière faite sur le dit défen-

Hartess vs. Owens.

deur et opposant Halpin a été signé par lui le 29 avril le même jour que lui, le dit défendeur et opposant, avait consenti, donné et souscrit un retour de *nulla bona* devant l'huissier J. Alfred Lepailleur, chargé du mandat d'exécution sus-dit, et que le dit retour de *nulla bona* et le procès verbal de saisie tous deux ainsi souscrits et signés le même jour doivent être pris et considérés comme un seul et même document.

La Cour, pour ces raisons, maintient la dite contestation et renvoie la dite opposition avec dépens.

Opposition renvoyée.

Mongeau, avocat du demandeur.

Jetté & Archambault, avocats du défendeur et opposant.

(P. R. L.)

CIRCUIT COURT, 1869.

MONTREAL, 13TH OCTOBER, 1869.

Coram TORRANCE, J.

No. 5189.

Legault dit *Desloriers* vs. *Viau*.

HELD—1. That the answer of a party to a question put to him may be divided according to circumstances in the discretion of the Court, when the part of the answer objected to is improbable.

2. That entries made in a book by a creditor of a payment will not prove interruption of prescription.

The plaintiff brought his action to recover $45.39 balance of *lods et ventes et rentes seigneuriales* alleged to be due under a sale of land from one Michel Viau to defendant (9 January, 1818). The land was in the limits of the seigniory of Montreal. On the 7th June, 1824, the defendant sold the land to Jean Baptiste Groulx in whose rights plaintiff was as having married his widow and universal legatee, Eleonore St. Germain.

In May, 1866, plaintiff paid the *lods et ventes* and *rentes* to the seigniors, and his action was to recover them from the defendant as the *garant* of Groulx. The defendant pleaded prescription and the plaintiff answered that prescription had been interrupted by payments made by the defendant.

The plaintiff sought to prove the interruption 1st. by entries in the books of the seigniors. 2nd. By the answers of the defendant to interrogatories.

The defendant was examined *sur faits et articles*, and was asked the following question. "N'est-il pas vrai que vous avez payé différents à comptes sur les dites sommes à MM. les Ecclésiastiques du Séminaire de St. Sulpice de Montréal, et notamment cinquante livres ancien cours le 28 Mars 1845, et 25 livres le 14 Février 1849 ?"

The answer was "j'ai payé toutes ces sommes là, et elles étaient pour balance de tout ce que je devais aux dits MM. du Séminaire."

The Court stated that as to the proof by entries, plaintiff cited Troplong, Prescription, N. 621 on the old law of France, but our C.C. 1229 is against such proof. On the whole, under the circumstances of the case, by C. C. P. 231, the answer could be divided so as to prove interruption of prescription.

Judgment for plaintiff.

Dorion, Dorion & Geoffrion, for plaintiff.

J.E. Robidoux, for defendant.

(S.B.)

COUR SUPERIEURE.

MONTREAL, 28 AVRIL, 1868.

Coram BERTHELOT, J.

No. 914.

Quintal vs. *Roy & al.*

JUGE.—1. Qu'une partie qui a répondu sans aucune réserve, à une exception préliminaire non accompagnée du dépôt voulu par la loi, est forclose du droit de faire rejeter telle exception par motion.

2. Qu'un jugement interlocutoire entré par erreur peut être réformé.

Les défendeurs, Marie Roy et Albert Daigneau, ayant plaidé par exception, les délais que la loi accorde pour faire inventaire et pour délibérer, le demandeur y répondit en droit et spécialement.

Après les contestations liées entre les parties [illegible] et les articulations de faits et réponses produites, le demandeur [illegible] pour faire rejeter les exceptions préliminaires des défendeurs.

Cette motion est en ces termes : 17 Mars, 1868.

Motion de la part du demandeur qu'attendu que l'Exception plaidée par la défenderesse, Dame Marie Roy ès-qualité, par laquelle elle se prétend être encore dans les délais pour y compléter l'Inventaire des biens qui ont composé la communauté d'entr'elle et son mari, et pour délibérer sur son acceptation ou renonciation à la dite communauté, est de la nature d'une Exception préliminaire, savoir d'une Exception dilatoire, la dite Exception soit rejetée, déclarée irrégulière et non avenue et partant renvoyée et ce pour entr'autres raisons les suivantes :

1o. Parceque le Bref en cette cause a été rapporté devant cette cour le 18 février, 1868, et que la défenderesse, aux termes de l'article 107 du Code de Procédure Civile, était tenue et obligée de produire son Exception dilatoire (savoir la dite Exception par elle filée en cette cause) sous quatre jours à compter du rapport du Bref, et qu'elle n'a produit la dite Exception que le sept Mars courant.

2o. Parceque la dite défenderesse devait mais n'a pas accompagné le [illegible]doyer ou exception, contenant une exception préliminaire comme susdit, savoir la dite exception dilatoire, du dépôt de la somme de deniers fixée par la 32e règle de pratique de cette Cour, Chap. 7, savoir la somme de £2.1.8.

3o. Parceque la dite exception préliminaire a été illégalement et irrégulièrement introduite au dossier et doit en être rejetée.

Le jugement de la Cour rendu le 28 Mars 1868, Berthelot J., est comme suit :

" La Cour, ayant entendu les parties par leurs avocats sur les deux motions du demandeur du 17 Mars courant, aux fins que les exceptions plaidées par les défendeurs Marie Roy et Albert Daigneau, respectivement, soient pour les causes et raisons mentionnées et déduites en icelles dites motions, déclarées irrégulières et renvoyées, avec dépens, ayant examiné le dossier et la procédure, et ayant délibéré, a accordé les dites deux motions, et a renvoyé les dites exceptions avec dépens.

Le 25 Avril 1868, le demandeur fit la motion suivante :

Motion de la part de la défenderesse Marie Roy, que cette Cour revise le Jugement interlocutoire enregistré le vingt huit Mars dernier 1868, sur la motion du demandeur faite et produite le dix-sept Mars dernier, demandant le rejet de

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l'exception plaidée par la dite défenderesse Marie Roy, et que revisant le dit jugement interlocutoire, cette Honorable Cour casse, annulle et mette à néant le dit Jugement interlocutoire et rejette la dite motion du dit demandeur pour entr'autres raisons les suivantes:

Parceque le dit Jugement n'aurait pas dû être enregistré tel qu'il l'a été et que la dite motion du dit demandeur qui se trouve avoir été accordée par le dit Jugement est irrégulière, illégale et en violation à la loi et aux droits de la dite défenderesse.

Parceque la dite défenderesse Marie Roy a démontré, lors de l'audition de la dite motion, que le dit demandeur avait lié la contestation sur la dite exception du défendeur, que le demandeur demandait par la dite motion à faire rejeter, et qu'en conséquence, il avait abandonné et renoncé aux moyens invoqués dans sa dite motion, laquelle devait être renvoyée.

Parceque les moyens ou raisons invoqués par les demandeurs en sa dite motion ne pouvaient pas en loi faire rejeter la dite exception.

Parceque le dit Jugement interlocutoire accordant la dite motion du dit demandeur et enregistré comme susdit, n'est pas le Jugement qui a été rendu Cour tenante par l'Honorable Juge Berthelot, présidant cette Honorable Cour.

Parceque le Jugement interlocutoire qui a été rendu Cour tenante, le dit jour vingt-huit Mars dernier par le dit Honorable Juge Berthelot, présidant cette dite Honorable Cour sur la dite motion du dit demandeur a rejeté la dite motion et que c'est par erreur que le Jugement a été enregistré accordant icelle dite motion.

Cette motion ayant été prise en délibéré, le jugement de la cour fut rendu le 28 Avril 1868, comme suit:

La Cour, après avoir entendu les défendeurs Albert Daigneau et Marie Roy, ainsi que le demandeur par leurs avocats, sur la motion du 25 avril courant, pour faire réviser le jugement interlocutoire rendu en cette cause le 28 Mars dernier, accorde la motion des défendeurs et a renversé et cassé le dit jugement entré par erreur et a renvoyé les motions du demandeur en date du 17 Mars, 1868, attendu que les dites motions ont été faites par le demandeur après avoir répondu aux exceptions des dits défendeurs et sans aucune réserve, le tout sans frais tant sur ce jugement que sur le jugement du 28 mars.

Jugement interlocutoire infirmé.

Moreau, Ouimet & Lacoste, avocats du demandeur.

Cartier, Pominville & Bétournay, avocats des défendeurs.

(P. R. L.)

MONTREAL, 27 SEPTEMBRE, 1869.

Coram MACKAY, J.

No. 1521.

Homier vs. *Lemoine.*

JUGE.—Que les conclusions de l'action hypothécaire qui ont pour objet de faire condamner le détenteur à payer la créance, si mieux il n'aime délaisser, sont suffisantes en loi. (1)

Le 1er Juin 1869, action hypothécaire par le demandeur rapportée devant la Cour Supérieure à Montréal, le 15 Mars 1869.

(1) C. C. Art. 2061.

Les conclusions de cette action hypothécaire étaient dans les termes suivants:

A ces causes le dit demandeur conclut à ce que le dit défendeur soit assigné à comparaître devant cette Cour pour répondre à la présente demande en déclaration d'hypothèque, et voir, dire, adjuger et déclarer en conséquence que le dit immeuble ci-dessus désigné est affecté et hypothéqué au paiement de la dite somme de .. cours actuel de cette Province, tant en principal, intérêts que frais; à ce que le dit immeuble ci-dessus désigné soit déclaré affecté et hypothéqué au paiement de la dite somme de .. cours actuel susdit, avec intérêt et frais; et à ce que le dit défendeur comme propriétaire, possesseur et détenteur du dit immeuble ci-dessus désigné soit condamné à payer au dit demandeur pour les causes et raisons ci-dessus mentionnées, la dite somme de ... cours actuel de cette Province, avec intérêt jusqu'à l'actuel paiement, et ensemble les dépens des présentes; si mieux n'aime le dit défendeur délaisser en justice le dit immeuble pour être vendu 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 dit demandeur payé, sur et en déduction de son dû, tant en principal, intérêts que frais; ce que le dit défendeur sera tenu d'opter sous quinze jours de la signification du jugement à intervenir; sinon, et le dit délai passé, condamné purement et simplement au paiement de la dite somme de ... cours actuel, avec intérêt, comme dit est; et à ce que dans le cas de contestation de la présente demande par le dit défendeur, ce dernier soit condamné personnellement aux dépens.

Le défendeur rencontra cette action par une défense au fond en droit exposant les motifs suivants pour faire renvoyer la demande:

1o. Parceque la seule condamnation que le demandeur pouvait demander contre le défendeur aurait du être de délaisser l'immeuble prétendu hypothèqué et en la possession du défendeur au lieu d'une condamnation personnelle.

2o. Parceque le demandeur n'allègue aucun fait qui puisse rendre le défendeur son débiteur personnel.

MACKAY, J.—This is an action *hypothécaire* against a *tiers détenteur*.—The conclusions are objected to by the defendant who says he ought to have been asked to *délaisser*. What is the right of the *tiers-détenteur*?

That he cannot be held to délaisser if he prefers to pay.

What harm is done to him when he is told if you do not prefer to pay, I ask you to *délaisser*.

Loyseau liv. 3. C. 4 says that not only is the form of this declaration tolerated, but *accoutumée*.

I am of opinion that the two forms of *conclusions* although said to be different are really not so, but convertible terms.

En France, says *Loyseau*, Nous n'y regardons pas de si près.

The jurisprudence in Lower Canada has agreed with this form to this day.

The article 2169 C. N. says "sommation de payer ou délaisser" is to be made to the *tiers-détenteur* by the action against him; paying is mentioned firstly, and the code of Louisiana says the *tiers-détenteur* is bound to pay or to relinquish. I think that the conclusions are good and the demurrer bad.

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But another reason for holding the demurrer bad is that the conclusions are several and one of them is indisputably good, I allude to the first part of the conclusions; but the demurrer is general.

Défense en droit renvoyée.

Jetté & Archambault, avocats du demandeur.
Barnard & Pagnuelo, avocats du défendeur.
(P. R. L.)

(1) Autorités citées par le défendeur.
3. Vol. Troplong Hyp. No. 781, 782 sur l'art. 2167.
Persil Rég. hyp. art. 2167, No. 5.
Duranton No. 227-8.
Carrier No. 276.
7. Vol. Delvincourt No. 80 p. 197.
Tous ces auteurs sont cités dans l'Edition Belge de Troplong loc. Cit.

QUEBEC, 9 SEPTEMBRE, 1869.

Coram MEREDITH, J. C.

No. 933.

Atkinson vs. Walker & Sincennes et al., T. S.

Jugé:—Qu'un tiers-saisi qui a été condamné sur une fausse déclaration par lui faite par erreur, peut être relevé de ce jugement, et qu'il doit lui être permis de faire une nouvelle déclaration en payant les frais encourus depuis la déclaration fausse et erronée.

Le 14 octobre 1868, Wm. McNaughton, comme associé de la maison Sincennes et McNaughton, tiers-saisis en cette cause, déclara que la dite société avait en mains, appartenant au défendeur, la somme de $1879.13.

Jugement intervint sur cette déclaration le 2 décembre 1868 condamnant les Tiers-Saisis à payer au demandeur la dite somme, qui était moindre que le montant du jugement rendu contre le défendeur.

Après la signification du jugement contre les tiers-saisis et par pur accident, Wm. McNaughton trouva, plié dans une police d'assurance, un transport notarié par le défendeur en faveur de T. B. Prentiss, d'Aylmer, du montant que les tiers-saisis lui devaient comme cautions de son débiteur, ce transport ayant été signifié non personnellement, mais à leur bureau d'affaires, à Montréal, avant la signification de la saisie-arrêt.

La découverte de cette pièce conduit à une recherche minutieuse des causes compliquées qui avaient amené les Tiers-Saisis en dette avec le défendeur, et alors les Tiers-saisis s'aperçoivent encore qu'une autre erreur avait été commise dans leur déclaration, et qu'au lieu d'avoir été débiteurs du défendeur pour $1879.13 ils ne l'avaient été que pour environ $1200 en principal intérêt et frais, le Défendeur Walker ayant obtenu jugement à Aylmer contre son débiteur, pour le paiement duquel jugement les Tiers-saisis s'étaient portés cautions.

Ils s'adressèrent alors à un juge de la Cour Supérieure pour obtenir la suspension de l'exécution du jugement, ce qui fut accordé le 4 janvier 1869, et subséquemment ils demandèrent à la Cour en terme à Québec (la cause y étant pendante) de leur permettre de faire une nouvelle déclaration accompagnant leur Requête de leurs affidavits et de ceux de leurs commis, constatant les

dites erreurs et plus particulièrement l'ignorance du transport en question jusque vers la fin de décembre 1868 et après la signification du jugement sur les Tiers-saisis.

Le 15 février, la requête des Tiers-saisis fut admise par la Cour, et ordre fut donné au demandeur de plaider au fond.

Le demandeur a rencontré le mérite de la requête par une défense en droit, appuyée sur les raisons suivantes:

1. Because the judgment rendered against the said garnishees on the second day of December, one thousand eight hundred and sixty eight, was rendered against them upon their own declaration and in conformity thereto.

2. Because the judgment rendered against the said garnishees on the second day of December, 1868, was duly signified to them.

3. Because the judgment rendered as aforesaid against the said garnishees is a final and not an interlocutory judgment and is susceptible of being appealed from.

4. Because the said judgment being a final judgment cannot be reversed except through an Appeal or a Requête Civile.

5. Because it is not alleged in the said Petition that any fraud or artifice has been made use of by the plaintiff.

6. Because it is not alleged in the said Petition that the said judgment has been rendered upon any documents which have subsequently been discovered to be false, nor upon any unauthorized tender or consent disavowed after judgment.

7. Because it is not alleged in the said Petition that since the said judgment was rendered documents of a conclusive nature have been discovered which had been withheld or concealed by the plaintiff.

8. Because the said judgment has not been rendered by default but after appearance in this cause, upon the confession of the said garnishees.

9. Because errors even of calculation are no grounds for the reversal of a judgment rendered against a party who has appeared and made an erroneous declaration or calculation.

10. Because the garnishee who commits an error is subrogated to the rights of him to whom the erroneous payment is made.

11. Because this Court has no jurisdiction to repeal or reverse the said judgment.

12. Because the declaration made by the said garnishees upon which the said judgment was rendered against them was accepted by the said plaintiff.

13. Because the garnishees having made a declaration in this cause by which they acknowledged themselves to be indebted in a certain amount to the defendant, and judgment, at the instance of the plaintiff, having been rendered against them in conformity with such their declaration, they cannot be received to make a fresh declaration in the same cause to modify or contradict the declaration in conformity with which they have been condemned.

14. Because it was the duty of the garnishees to have duly informed themselves of the state of their position with regard to the defendant before making their said declaration, and that they are bound to suffer such loss as may be entailed upon them by their own fault and want of vigilance.

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15. Because when the said garnishees confessed to the plaintiff that they owed to the defendant the sum mentioned in their declaration, the said plaintiff represented *pro hâc vice* the defendant as regards the said garnishees and accepted their said confession, and obtained the said judgment thereon which is a final judgment and has been duly signified as required by law to the parties interested.

16. Because the said judgment has been duly registered and entered in the archives of this Court, and cannot be altered, disturbed or reversed except for some one or more of the causes and in the mode prescribed by law, and that in the said petition no cause sanctioned by law has been shown for the alteration or reversal of the same, nor has any mode indicated by the law been adopted by the garnishees for the reversal of the same.

17. Because the conclusions of the said Petition are not warranted by the premises, are contrary to law and cannot be granted by this Court.

Les parties furent entendues devant l'Honorable Juge en Chef Meredith.

Girouard, pour les Tiers-saisis, soumit le mémoire suivant :

Les Requérants demandent à être relevés des conséquences de la déclaration faite en cette cause par William McNaughton, l'un d'eux ; et pour motif de leur application ils allèguent que cette déclaration a été faite par erreur,—d'abord erreur sur le montant entre leurs mains réellement appartenant au défendeur, mais qu'explique la complication des procédures qui ont donné lieu à leur responsabilité vis-à-vis du défendeur, et en second lieu, ignorance totale d'un transport de ce montant, le tout tel qu'exposé au long dans leur Requête et les affidavits qui l'accompagnent.

Enfin, pour mieux faire voir leur bonne foi et leur volonté sincère de rencontrer les fins de la justice, ils ont produit une nouvelle déclaration et déposé la somme appartenant au défendeur ou à ses représentants, priant que cette déclaration, amendée suivant les faits, soit reçue.

La justice du cas présenté par les Requérants est incontestable et semble être admise par toutes les parties, mais on soutient qu'il est trop tard et que le tribunal ne peut venir à leur secours ; et c'est sur cet unique point que les requérants soumettent les propositions et les autorités suivantes.

Voyons d'abord qu'elle est la position des Tiers-Saisis vis-à-vis du demandeur puisqu'il s'agit d'un jugement rendu en sa faveur contre eux. Les Tiers-Saisis ne sont pas des débiteurs du saisissant, comme dans le cas d'une confession de jugement par un défendeur ; ils n'ont jamais contracté avec le demandeur, et ce n'est que comme gardien judiciaire, comme séquestre des biens du saisi, qu'ils sont responsables, tant après qu'avant jugement.

Ancien Pigeau, Proc. Civile, Vol. 2, p. 656.
Bourjon, Droit Commun de la France, vol. 2, p. 673.
Guyot, Vo. Saisie-arrêt.
Pothier, Proc. Civile, chap. 2, section 111, § 4, p. 199.
Code de Proc. Civile du B. C., art. 613, 616, 619, 625.

Suivant l'article 625, le jugement rendu sur la déclaration du tiers-saisi n'a pas d'autre effet que celui *d'une cession judiciaire en faveur du saisissant du titre de créance du saisi et il opère subrogation.*

Mais si cette déclaration est erronnée, si le saisi n'a aucun titre de créance, ou

encore si la chose saisie a péri depuis la déclaration, évidemment il ne peut y avoir ni cession ni subrogation. Décider qu'il ne sera pas permis au Tiers-saisi de corriger son erreur ou de faire connaître cette perte, même après jugement, serait agir non-seulement contre l'esprit de la loi, mais encore contre sa disposition expresse qui ne parait donner à un jugement contre un tiers-saisi que les effets d'un jugement contre un gardien, c'est-à-dire, d'une règle *nisi*. Aussi le législateur a-t-il eu le soin de définir la nature de la cession produite par un jugement sur une déclaration de tiers-saisi. Il déclare que cette cession est judiciaire, voulant dire par là même qu'elle ne peut avoir lieu que dans les termes de la loi. Or, nous l'avons dit, la condition *sine quâ non* de cette cession, c'est l'existence de biens appartenant au saisi. Conséquemment cette même loi non-seulement permet mais commande même aux tribunaux d'annuler un jugement qui est intervenu en dehors de ses prévisions. Il n'y a certainement rien dans notre Code de Procédure qui défende cet acte d'administration d'une bonne justice; et quand bien même il ne se trouverait *dans ce Code aucune règle applicable pour faire valoir le droit particulier des Requérants, toute procédure adoptée qui n'est pas incompatible avec les dispositions de la loi ou de ce Code, doit être accueillie et valoir.* (*Code de Proc. du B. C., art.* 21.) Les Tiers-Saisis en cette cause ont adopté la procédure de la requête qui non-seulement n'est pas incompatible avec la loi ou le code, mais est la forme la plus ordinaire et la plus naturelle d'une demande en justice. Comme nous l'avons vu, elle n'est pas non plus contraire à leur qualité de tiers-saisi.

C'est en vertu de ces principes de haute équité, que, longtemps avant le Code, nos tribunaux relevaient les tiers-saisis des conséquences d'une condamnation obtenue par défaut. *Taillaides vs. Talon et Fabrè, T. S., cité par les Codificateurs sur l'article* 624; *Andrews vs. Robertson*, 1 *Low. Can. Rep.*, 140; *Roy vs. Scott*, 3 *id., p.* 80. En effet, si la saisie-arrêt n'a pour but que d'arrêter les biens du saisi entre les mains d'un tiers, comment peut-on raisonnablement refuser la déclaration de ce tiers même après jugement rendu par défaut, en offrant de payer les dommages, savoir, les frais de la saisie-arrêt? Toutes ces décisions ne viennent-elles pas aussi au secours des Requérants qui dans cette cause ne demandent que l'application des mêmes principes.

Mais il y a plus; l'article 624 déclare: "Le tiers-saisi qui ne fait pas sa déclaration *de la manière ci-dessus prescrite*, est condamné comme débiteur personnel du saisissant au paiement de la créance de ce dernier.

"Il est néanmoins recevable en tout temps à faire sa déclaration, même après jugement, en payant tous les dépenses encourues sur la saisie-arrêt."

Remarquons bien qu'aux termes de cet article, non seulement le tiers-saisi qui n'a fait aucune déclaration peut la faire après jugement, mais peut pareillement la faire celui qui en a fait une contre les dispositions de la loi. "Le tiers-saisi" y est-il dit, "qui ne fait pas sa déclaration *de la manière ci-dessus prescrite*..... "Il est néanmoins recevable en tout temps à faire sa déclaration," c'est-à-dire "*en la manière ci-dessus prescrite.*" Il est clair que celui qui par erreur ou même par sa faute, déclare qu'il a des biens appartenant au Défendeur, tandis qu'il n'a rien en mains, ne fait pas une déclaration *en la manière indiquée par le Code de Procédure.* Le bref de saisie aussi bien que les articles 613, 619, ordon-

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nent aux tiers-saisis de *déclarer sous serment quels effets ils ont appartenant au Défendeur et quelles sommes de deniers ou autres choses ils lui doivent ou auront à lui payer.* En d'autres mots, la déclaration du tiers-saisi est la révélation exacte qu'il fait des sommes ou des objets dont il est débiteur envers le saisi. *Bioche, Dict. de Proc. Civile, Vo. Saisie-arrêt, No.* 154. La déclaration erronnée et fausse qu'il est dû au Défendeur est donc contre l'essence même d'une déclaration de tiers-saisi. Si le transport produit par les requérants est valable et si Mr. Aylen a distraction de frais, il n'est rien dû au Défendeur.

Le Code, art. 619, comme le Code Français de Procédure, veut que le tiers-saisi dénonce dans sa déclaration les autres saisies-arrêts existantes ; mais tous les deux gardent le silence à propos de la dénonciation des transports signifiés. Peut-on moins la jurisprudence française, d'accord sur ce point avec l'ancien droit, l'exige aussi rigoureusement que celle des saisies-arrêts, et la raison en est si claire qu'il est inutile de l'expliquer. *Pothier, Procédure Civile*, ch. 2, section 111, §3, p. 198 (éd. 1778). La déclaration a été faite [illegible] dispositions de la loi à l'égard de cette formalité, et aussi à l'égard de [illegible] la dette qu'elle ne revèle pas, (article 619) ce qui a été la cause de [illegible] sur le montant du jugement. Leur déclaration n'a donc pas été faite de la manière indiquée ci-dessus ; ils sont dans le cas prévu par l'article 1242, et cela est tellement vrai qu'ils ont été condamnés *au paiement de la créance du Demandeur*, c'est-à-dire, pour plus que le montant déclaré ; ils sont donc recevables aujourd'hui à faire leur déclaration *en la manière indiquée par la loi* ; et c'est ce qu'ils demandent par leur requête, suivant la pratique ordinairement suivie pour faire relever un tiers-saisi condamné par défaut, en offrant de payer les frais encourus sur la saisie-arrêt et en les consignant en justice, sauf à parfaire.

L'esprit comme le texte de notre Code paraissent aux requérants si concluants en leur faveur qu'il n'est peut-être pas nécessaire de recourir à des précédents sur le cas même ; mais pour mieux faire voir la justice de leur cause et la légalité de leur procédure, ils ont consulté non pas la jurisprudence du pays, (car il ne paraît pas que la question y ait jamais été soulevée,) mais celle de la France, sous un Code de Procédure ayant sur la matière qui nous occupe à peu près toutes les dispositions que l'on retrouve dans le nôtre (voir Code de Proc. Français, art. 572–577). En France donc, non-seulement le tiers saisi en défaut est toujours recevable à offrir sa déclaration, mais l'est encore celui qui a déclaré par erreur ; il lui est en tout temps permis d'amender et parfaire sa déclaration, en payant les frais du jugement sur la saisie-arrêt. En voici un exemple remarquable : Un tiers-saisi s'était borné à déclarer que loin d'être débiteur, il était créancier du saisi. Cette déclaration est jugée insuffisante, comme ne contenant pas les détails ordonnés par le Code de Procédure, et le tiers-saisi est condamné à payer la créance du demandeur. Appel de la part de ce dernier, qui offre en même temps une nouvelle déclaration suivant les faits ; et [illegible] offre est acceptée en payant les frais. "Attendu," dit l'arrêt, "que les déclarations affirmatives faites en première instance étaient incomplètes en ce que les tiers-saisis, ayant été en jouissance du domaine, devaient présenter un compte détaillé ; mais attendu que la déclaration du 5 juillet renferme les détails exigés par le Code de Procédure, *et que le tiers-saisi est toujours à temps de réparer ses omissions, sauf à supporter les dépens jusqu'au jour de la déclaration valable*, etc."

Cet arrêt de la Cour Impériale de Paris est en date du 12 mars 1811 et est rapporté dans *Denevers, an* 1811, *supplément, page* 72, *et Sirey, an* 1811, *partie* [illegible] 443. Sirey observe en note sur cet arrêt : " La jurisprudence s'est fixée dans ce sens que tant qu'il n'est pas intervenu de jugement définitif (c'est-à-dire [illegible] dernier ressort, non susceptible d'appel et ayant autorité de chose " jugée,) le tiers-saisi est admis à faire sa déclaration ou régulariser celle qu'il a précédemment faite. "

Dalloz, Vo. Saisie-arrêt, p. 638 *en note.*

St. [illegible] Proc. Civile, p. 520.

Bioche, Dict. de Droit et Proc., Vol. 2, *Vo. Saisie-arrêt, tableau* 633, *où un grand nombre d'autres arrêts sont aussi cités.*

Carré et Chauveau, Proc. Civile, Vol. 4, *p.* 638, *etc.*

Bioche, Journal de Proc. Civile, Vol. 14, *p.* 378, rapporte un arrêt de la Cour de Lyon du 3 avril 1848, où un tiers-saisi, condamné par défaut, fut autorisé en appel à faire sa déclaration, bien qu'il eût déjà fait opposition au jugement, qui le condamnait, sur son offre de déclarer, offre qui ne fut jamais exécutée, et qui fut par conséquent suivie du renvoi de l'opposition.

Bioche, Dict. de Droit et Proc. Vo. Saisie-arrêt, No. 156, *dit à ce sujet :* " La déchéance " de l'article 577 ne serait cependant pas prononcée contre le tiers-saisi qui ferait seule- " ment une déclaration inexacte ou incomplète; il ne serait condamné qu'à payer la " somme qu'il serait jugé devoir, plus des dommages-intérêts, le cas échéant. " Puis il cite un arrêt de Bordeaux, 6 avril 1830.

Roger, Traité de la Saisie-arrêt, page 336.—" Après que cette décision est rendue, soit " par défaut, soit contradictoirement, le tiers-saisi peut, même après le délai qu'elle lui " impose, faire sa déclaration, s'il fait opposition ou interjette appel de cette décision. " Tant qu'elle n'a pas acquis l'autorité de la chose jugée, sa déclaration est encore " recevable. En telle sorte qu'au moyen d'une opposition ou d'un appel, il peut produire " utilement sa déclaration et faire considérer comme non avenue la déchéance prononcée " contre lui. "

Comme notre Code, le Code Français, exige la dénonciation des saisies-arrêts signifiées au temps de la déclaration. Néanmoins les auteurs et la jurisprudence maintiennent qu'après jugement, le tiers-saisi qui a oublié ou négligé de révéler l'existence de ces saisies, est reçu à compléter et amender sa déclaration en payant les frais du jugement.

Carré et Chauveau, Proc. Civile, Vol. 4, *p.* 638, *no.* 197.

Thomine-Desmazures, Code de Proc. Civile, t. 2, *p.* 81.

Bruxelles, 16 *Novembre* 1826.

Si le tiers saisi est recevable, même après jugement, à dénoncer les saisies-arrêts existantes, comment peut-on légalement l'empêcher de révéler le fait de la signification d'un transport, surtout lorsque cette signification était inconnue de lui. La saisie-arrêt et le transport signifié n'ont-ils pas tous deux l'effet de déposséder le débiteur de la somme due, pour en saisir dans un cas la justice au profit du saisissant, et dans l'autre le cessionnaire.

Aussi les auteurs et la jurisprudence ont-ils assimilé le cas de défaut de dénonciation de transport à celui de dénonciation des saisies existantes.

Nouveau Pigeau, Vol. 2, *p.* 67.—" S'il y a eu des transports signifiés au Tiers-saisi " avant sa déclaration, il doit les faire connaître quoique le Code ne l'exige pas.

" En effet ou la signification est antérieure à la saisie ou elle est postérieure. Si elle est " antérieure, et qu'il n'en donnât pas connaissance, il reconnaîtrait qu'il doit toujours " directement au saisi ; que la saisie [illegible] ainsi ci est valable, *et s'il ne dénonçait ce* " *transport qu'après, il serait possible de* [illegible] *qu'aurait occasionnés son retard.*"

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Dans la Louisiane, où la saisie-arrêt est soumise aux mêmes règles qu'en France et en Bas-Canada, les tiers-saisis sont toujours relevés des jugements rendus sur des déclarations erronnées. Les *Louisiana Reports*, Vol. 13, p. 465 nous en offrent un cas remarquable. Les tiers-saisis avaient déclaré qu'ils avaient " 104 bales of cotton, " sans dénoncer les saisies antérieures. Jugement intervint sur cette déclaration, et il leur fut après permis de réparer leur oubli. Ce jugement est de la Cour d'Appel de la Nouvelle-Orléans. Le juge Eustis différa de la majorité de la Cour, parce que les tiers-saisis connaissaient les saisies existantes au moment de leur déclaration. " I do not wish ", a-t-il cependant dit entre autres choses, " to be understood that there may not be cases in which a garnishee would " not be relieved from the consequences of an erroneous answer; but in this case " I consider the garnishees have no claims whatever to relief as the matter stands " before us. If *error*, fraud or violence or the loss of the property attached *had " been urged on behalf of the garnishees*, a different case would have been presented, but the only fact for which they claim an exemption from the operation " of their judicial confession, they knew at the time of making it as they do now, " and neglected to disclose it in their answer. "

On a prétendu que la saisie-arrêt en mains tierces était inconnue en Angleterre. Elle y est inconnue sous le droit commun, mais elle y a été introduite en 1854, et là comme en Haut-Canada, qui en 1856 emprunta les dispositions du statut anglais, les cours de justices annullent les jugements sur *garnishment* pour les faire accorder avec les faits véritables de l'espèce: Strachan vs. McClain & al, et Bretty & al, Garnishees, cité au long dans le rapport de la cause de Sessions vs. Strachan, 23 Upper Canada Rep., p. 492 (1864) et Hirsh vs. Coates et Fountain & al., Garnishees, 18 Common Bench Rep., p. 758.

Enfin, supposons même que tout ce que nous venons de dire serait insuffisant pour faire relever les tiers-saisis de la condamnation prononcée contre eux. Comme on a dû le remarquer, toute la jurisprudence que nous venons d'indiquer consiste à permettre la réparation de purs oublis ou négligences de la part des tiers-saisis. Mais dans le cas actuel, il n'y a rien de cela. Le fait de la signification du transport aussi bien que le montant réellement appartenant à James Walker n'ont été connus que par accident, après la signification du jugement sur les tiers-saisis; il y a donc lieu à la Requête civile.

" *Les jugements*, " dit l'article 505 de notre Code, " *qui ne sont pas susceptibles d'appel ou d'opposition, tel qu'expliqué plus haut, peuvent être rétractés " sur requête présentée au tribunal*, " etc. Le jugement rendu contre les tiers-saisies n'est pas susceptible d'opposition aux termes des articles 483 et suivants, ni d'appel ou révision (par le mot " appel " l'article 505 entend l'appel à la Cour de Révision) dans le sens des articles 494 et suivants, compris dans l'article 505. Les articles 483 et suivants ne pourvoient pas au cas de saisie-arrêt signifiée personnellement sur les saisies-arrêts, et évidemment l'article 494 n'a rapport qu'à la révision des causes complètes dans lesquelles aucun fait nouveau ne peut être introduit.

Il y a lieu à la Requête civile " si le jugement a été rendu sur pièces dont la " fausseté a été découverte que depuis, ou sur des offres ou consentements non- " autorisés et qui ont été désavoués après. " (Art. 505.)

Le jugement contre les tiers-saisis a été rendu sur déclaration qui a été trouvée et prouvée fausse depuis la signification du jugement, par la découverte du transport de la même créance et la connaissance de la véritable position des tiers-saisis vis-à-vis du défendeur. Il semble aux requérants que c'est précisément l'un des cas de la Requête civile.

On pourrait peut-être ajouter ici que ce jugement a été rendu sur un consentement non autorisé et qui a été désavoué par la Requête. Mr. William McNaughton, comme membre de la maison Simcennes & McNaughton, avait-il autorisation suffisante pour faire la déclaration en cette cause? Cet acte n'est-il pas au-delà des pouvoirs que la loi suppose chez un associé? N'est-il pas en dehors du cour ordinaire des affaires pour lesquelles la société a été formée?

Les Requérants n'insistent pas plus longtemps sur ce que leur cas est un de ceux de la Requête civile; il vient certainement sous l'article 624; à tous événements ils ont confiance qu'ils obtiendront justice; et s'ils ne l'obtiennent pas, ce sera certainement le cas de dire, *summum jus summa injuria*; car il ne leur restera pas d'autre expédient que celui de payer deux fois le même montant, et encore dans une affaire où ils n'ont aucun intérêt personnel.

Colston représenta les tiers-saisis à l'argument, et cita en outre les autorités suivante:—

Code Civil, art. 1245.

1 *Rogron, p.* 452, *sur l'art.* 1336.

Arrêt du 28 *mai* 1841, 33 *Dalloz, Rép. de Jur. p.* 1133, *note*; 33 *Dalloz, p.* 1206, *No.* 3328.

Ross, pour le demandeur, soumit les propositions et autorités suivantes:—

Merlin, Rép. de Jur: Tome 6.

A l'égard des jugements définitifs la règle est qu'ils ne peuvent pas être reformés par les juges qui les ont rendus. *Judex postquam semel sententiam dixit postea judex esse desinit. Et hoc jure utimur ut judex qui semel vel pluris vel minoris condemnavit amplius corrigere sententiam suam non possit: semel enim male seu bene officio functus est.* Loi 55 *D. De re judicatâ.*

La jurisprudence des arrêts a toujours été conforme à ces lois.

Papon, liv. 6, tit. 2, no. 27, dit qu'un arrêt du Parlement de Paris du 17 décembre 1555 a jugé qu'après qu'une sentence est signée et mise au greffe le juge ne peut plus la retirer pour y ajouter ou diminuer, *qu'il a les mains liées.*

Bouvot, tome 2, au mot sentence, quest. 3, fait mention d'un arrêt du Parlement de Dijon du 17 Mai, 1605, qui décida que *le juge ne peut corriger une sentence définitive.* Part. 1, tit. 4, chap. 18, dit que par arrêt du Parlement de Paris du 26 Juillet, 1608, il a été "fait inhibitions et défenses aux lieutenant-généraux et autres juges des siéges de ce ressort de donner aucune sentence contraire à celles qui seraient intervenues sur les procès et différends pendants en leurs dits siéges, ni ordonner sur requêtes à eux présentée ou verbalement faite sur séance d'exécuter les dites sentences ou jugements v.... sauf aux parties à se pourvoir par appel à la Cour pour leur être fait droit ainsi que de raison."

Ord. de 1667, tit. 35, art. 1.—Les arrêts et jugements en dernier ressort ne pourront être rétractés que par lettres en forme de Requête civile à l'égard de ceux qui aient été parties ou duement appellés et de leurs héritiers, successeurs et ayant cause.

Répertoire de Jurisp. R. de la Combe *verbo* "erreur," No. 2.—"Erreur de

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calcul ne se couvre point, quoique l'on ait [illegible] plusieurs fois, s'il y a eu jugement ou transaction sur cette erreur [illegible] lisses, Tome I, Part. IV, Section 5 (No. 5, page 831), qui dit [illegible] la page, 2e colonne: Néanmoins l'erreur de calcul peut être [illegible] même après dix ou vingt ans, *Leg. calculi 8 ff. De administrat: rer: ad civit;* et dans 30 ans, *Accurse in dict. leg. 8 Quia veritatis errore non vitiatur, leg. 6 S. 1 ff. De off. Prasid. Sinon qu'il y ait un arrêt sur la dite erreur dict. leg: au code De error. calcul.*, car alors la chose jugée étant tenue pour vérité, *leg. Res. judicata, 20* [illegible] *diver. reg. Juris: on s'en doit tenir à ce qui est jugé.*

Bioche, Dic. de Proc., Vol. 6, page 41, No. 158, "le tiers-saisi qui, déclaré débiteur pur et simple, a payé plus qu'il ne devait ou qui s'étant indument dessaisi a été obligé de payer deux fois, est subrogé aux droits de celui qu'il a payé.

Dalloz, Répertoire de Jurisprudence, tom. 39 *verbo* saisie-arrêt, page 540, No. 339; "néanmoins une déclaration faite dans une autre forme que celle tracée par la loi, n'aura pas moins pour effet de lier le tiers-saisi vis-à-vis du saisissant, *surtout si elle était acceptée* par ce dernier." Aussi il a été jugé que lorsqu'un tiers-saisi fait sur le procès-verbal de saisie une déclaration qu'il signe et par laquelle il se reconnaît débiteur du saisi, il n'est plus recevable ensuite à contredire cet aveu en soutenant qu'il est libéré.

Ff. lib. 50, tit. XVII, No. 203.—*Quod quis ex culpâ suâ damnum sentit, non intelligitur damnum sentire.* Idem No. 207.—*Res judicata pro veritate accipitur.*

Ff. lib. 42, tit. 9, Lex. 24, *Jus civile vigilantibus scriptum est; ideo quoque non revocatum quod percepi. Vigilantibus non dormientibus subvenit lex.*

Le jugement est motivé comme suit:—

The Court, having examined the proceedings and evidence of record and heard the parties by their counsel respectively finally upon the merits of the petition of the said Garnishees praying relief from the judgment in this cause rendered against them on the second day of December last, and for leave to make a further déclaration, and further as in said Petition set forth:

Considering that Garnishees are not parties to the suit in which they are required to appear, but are compelled, under the authority of the court, and for the advantage of the suitors, in the case in which the Garnishees are summoned, to act as guardians of any property seized in their hands, and therefore that the rules of law which apply to judgments rendered between the parties to a suit do not apply as to orders or judgments made with respect to Garnishees, who are not such parties; and considering that the allegations as to matters of fact contained in the petition of the Garnishees are not denied by the said plaintiff and are proved by the affidavits filed in this cause, and that under the circumstances of the present case, it would be unreasonable and unjust to compel the Garnishees to pay the sum of eight hundred and eighty one dollars, with interest and costs, mentioned in the judgment in this cause, solely on account of an involuntary and blameless mistake on their part, in the course of proceedings forced upon them without their consent, at the instance and for the benefit of the party who now seeks to take advantage of the said mistake:

It is in consequence considered and adjudged that the said Garnishees may, within fifteen days from the service upon them of this judgment, make a new declaration in this cause according to the facts of the case; on this condition, however, that within eight days from the service upon the Garnishees of a copy of this judgment they pay to the Plaintiff all the costs to which he has been subjected by reason of the making of the declaration which the Garnishees now represent as erroneous; and in default of the said costs being paid by the said Garnishees within the delay aforesaid, then the permission hereby granted to them shall cease to have any force or effect.

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And the Court doth reserve to pronounce hereafter upon the remainder of the conclusions of the Petition of the said Garnishees.

D. Girouard, avocat des Tiers-Saisis.

Casault, Langlois, Augers & Colston, conseils.

Ross, avocat du Demandeur.

(D. G.)

MONTREAL, 17TH DECEMBER, 1869.

Coram MACKAY, J.

No. 2678.

Rolland v. *The North British and Mercantile Insurance Company.*

HELD:—1. That an insurance of goods described as being in Nos. 317, 319 St. Paul Street, does not cover goods in the premises No. 315 adjoining.

2. The verdict of a jury will be set aside for misdirection on the part of the Judge, or if contrary to the evidence adduced at the trial.

This was a motion for a new trial, in a case tried by a special jury before MONDELET, J., for the following reasons:—

1st. Because the verdict is contrary to the evidence.

3rd. Because plaintiff's total loss in the premises mentioned in the policy was proved to be only $1,346.13, whilst the verdict finds it at $35,102.90.

4th. Because the jury considered and valued the goods and effects in No. 315 St. Paul Street, the house adjoining the building described in the policy, plaintiff's exhibit No. 1.

5th. Because the learned judge presiding at the trial admitted illegal evidence, to wit, of the destruction of and value of goods of plaintiff in No. 315, and this was considered by the jury.

6th. Because the judge also instructed the jury, telling them that they might look at surrounding circumstances, in order to get at the intention of the parties to insure the goods in No. 315, the policy covering goods only in 317 and 319.

7th. Because the verdict is defective and incomplete, particularly the answer to the ninth question, the total losses not being stated, and no distinction being made between the loss of sewing machines and that of tools, &c.

MACKAY, J.—In October, 1868, plaintiff instituted an action against defendants for the recovery of $6,000, amount insured under a policy granted by them, covering $4,000 on boots, shoes, leather and findings, in a three-story stone and gravel roofed building, Nos. 317 and 319 St. Paul Street, Montreal,

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and $2,000 on sewing machines and tools therein. The insurance was from 20th February, 1868, to 20th February, 1869. On the 21st March, 1868, a fire happened, and the building mentioned in the policy was partly destroyed, and, says plaintiff's declaration, "the stock in trade, sewing machines and tools therein described and covered by said policy then contained in the said building, of great value, to wit, exceeding $35,000, were damaged and destroyed, whereby plaintiff sustained damage to an extent far exceeding $4,000 in boots, shoes, leather and findings, and exceeding $2,000 in sewing machines and tools likewise contained therein. All notices were given (it is said) and the defendants are liable." Conclusions for the whole sum insured, $6,000, and for a trial by jury.

The defendants pleaded, firstly, that before and at the date of the policy, plaintiff informed defendants, that he had, previous to date of said policy, insured the same articles for $6,000 in the Citizens' Insurance Company; for $12,000 in the Scottish Provincial Company, and for $4,000 in the Commercial Union; that the policy which plaintiff held was subject to the condition that, in case of other insurances, defendants should be liable only for a rateable proportion of any loss suffered by plaintiff.

The defendants recite the plaintiff's other insurances, for instance, for $4,000 with the Commercial Union; on stock, boots, shoes, leather and findings, including sewing machines, and so with the Scottish Provincial Company. The insurance with the Citizens' Company does not mention "sewing machines."

The plea goes on to say that all plaintiff's loss by fire in Nos. 317 and 319 St. Paul Street, was $1346.13. $331.07 was all that rateably, under the conditions of their policy, defendants had to pay, and that on the 18th June, 1868, this amount had been duly tendered and refused. The plea repeats this tender, and concludes for the dismissal of plaintiff's action for any amount beyond it.

This plea was followed by a *défense au fond en fait* or general issue. Plaintiff's answers were general.

From the evidence it appears that the insurance by plaintiff was effected through the defendants' agent, Fauteux. Fauteux seems to have been beating about for business, visiting frequently at Rolland's place on St. Paul Street. He solicited the insurance and gave the receipt for the premium, after which the policy was issued. The subjects insured were goods—boots, shoes, sewing machines, &c., contained in the building 317–19 St. Paul Street, (meaning 317 and 319 St. Paul Street). This building, the property of Rolland, had two doors of entrance on St. Paul Street, No. 317 being for plaintiff's office and warehouse, and 319 for the workmen's entrance. Next to this building (No. 315) was a house owned by one Jodoin and occupied by Coghlan. Rolland, in December, 1867, leased from Coghlan the third story of this No. 315, and pierced a door of communication between it and his establishment in the house No. 317 and 319. Rolland had no use of the entrance to 315 from St. Paul Street. Mr. Coghlan alone used it. Without going to the third story of Rolland's house nobody could see any communication between said 317 and 319 and the third story of said 315 that Rolland had leased from Coghlan. It is not proved that Fauteux knew of Rolland's having added these apartments to his establishment. "*Il aurait dû en avoir entendu parler,*" says the witness Laurin, yet it is not

proved that he did know, or that any person did speak to him of it. It is not proved that he ever was, after 1866, in the third story of Rolland's house 317 and 319. It is doubtful if he was even in the second after 1866, and then there was no opening at all communicating with apartments in No. 315.

The fire alleged in plaintiff's declaration originated in No. 315 (Coghlan's). What Rolland had in 317 and 319 was damaged only by water and smoke, caused by the fire in Coghlan's. The apartments in 315 are spoken of in various ways by plaintiff's witnesses, principally with a view to establish what is a fact, that they were part of the establishment of Rolland. Rolland was a dreadful loser by the fire of March, and we have, under his own hand, a statement of his loss exactly. He lost $1,346.13 in the building 317 and 319, he lost more than $33,000 in the part of the building leased from Coghlan, 315.

On 16th February, 1867, plaintiff had insured with the Citizens' Insurance Company on goods and stock in 317, and on 15th March he had insured with the Lancashire on goods in 317, but none of these policies mentioned 315 or any part of it.

The learned judge who presided at the trial reports that, in charging the jury, he told them that, with respect to the question whether the plaintiff had, or had not, insured the stock in two apartments on the third and fourth flats, connected with and forming part of his establishment, and which he proved he had been in possession of sometime previously to and at the time of the insurance effected with defendants, there were circumstances which the jury might call to their assistance, if required, to enable them to arrive at a conclusion one way or other; such as, for instance, the consideration whether the plaintiff would have been so imprudent or so insane as to neglect to insure the valuable stock he had in the two apartments over No. 315, if they, in fact, formed part of his establishment. I added (says the learned judge), that such circumstances did not prove that the defendants and the plaintiff had actually had the intention of effecting an insurance on the stock in those apartments. It was for the jury to decide whether those apartments were a part of the plaintiff's establishment, and for the jury alone."

In answer to the question: "Was the property of the plaintiff then being in the said premises and firstly mentioned in the said policy, consisting of boots, shoes, leather and findings, injured or destroyed by the said fire, and if so, of what value was the same, and at what amount do you estimate the damage and loss thereto caused by the said fire." The jury have found: "Yes, it was injured and destroyed, damage and loss $35,112.90."

In answer to the question: "Were the sewing machines and tools, the property of the plaintiff then being in the said premises, and secondly mentioned in the said policy, also injured or destroyed by the said fire, and if so, of what value were the sewing machines, and of what value the tools, and at what amount do you estimate the damage and loss caused by the said fire to the said sewing machines and to said tools." The jury find: "Yes, injured and destroyed, loss and damage, $230.55." One juror dissented from paying on goods in No. 315.

The defendants objected at the trial to part of the judge's charge, wherein

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(say defendants) the jury was referred to the surrounding circumstances, in order to explain the policy of insurance, and the intention of the parties (plaintiff and defendants), in insuring, and to ascertain whether the contents of the two apartments or flats above Coghlan's in No. 315, were insured under the said policy, plaintiff's exhibit No. 1.

Defendants now move to set aside the verdict rendered, and for a new trial for the following reasons:—

(The Hon. Judge here read the reasons already stated.)

At the argument on this motion, defendants complained that they were having fastened upon them obligations never assumed by them; that, whereas, plaintiff had not even declared upon any loss in No. 315, and had not insured any property in it, evidence was admitted as to loss by plaintiff there, and the jury was directed that they might consider what Rolland had there, if the things were part of his establishment; that the jury thereupon found Rolland's loss therein, and improperly returned it as loss in the premises mentioned in the defendants' policy granted to the plaintiff, making an untrue finding, indirectly condemning defendants to pay for a loss that they had never contracted to pay for. For the plaintiff it was said, that Fauteux, defendants' agent, knew all about Rolland's place in St. Paul Street; that all the stock in trade and property in Rolland's establishment there was meant to be insured; that the description was the defendants', and the policy ought to be interpreted against the defendants; that it might be interpreted, and in fact required interpretation to enable us to get at what was or is meant by the number "19" as the number of the building referred to in the policy (the policy reading 317,19 whereas the true numbers were 317 319; that the risk was not greater by Rolland's having had in use part of 315, &c.

The treatises say that it is of the essence of the contract of insurance of moveables, that the things and their position should be known and understood by both parties; that the place in which goods are is always a *motif déterminant* of or for the contract. It is never indifferent to the insurer to have it properly stated.

When goods are insured in a building, there ought to be communicated to the insurer all information to enable him to appreciate the risk; for instance of what materials the building is; its situation, distance from other buildings, whether connected with others and so forth.

There must be perfect understanding as to the subject insured, else there can be no true *convention*. *Correlation de volonté* is absolutely required to operate a contract. But if both parties have agreed upon the substance, if the insurer know what he is taking risk upon, a mere inaccuracy of description may not hurt. In the present case, for instance, the policy describes the goods insured as in building Nos. 317, 19 St. Paul street. This is an inaccuracy and so the building 317, 319 will be held to be meant. Rolland had but one building, the *volonté* of the parties was concerning it and not concerning "19" in which Rolland had no interest. But from this we must not go off to allow the plain words of a written contract, that in their strict sense can be carried into effect, to be explained away or extended by parole testimony. In the present case, for

instance, the building *locus in quo* of the goods insured is so plainly described that there is no doubt about it. It is Rolland's building not Jodoin's. Suppose Rolland had sold his building by the very same description, surely nothing would have passed of 315.

As said before, the Court does not see that Fauteux knew all about Rolland's establishment. It does not believe he ever saw or knew of the communication between 317, 315. When was he informed of it? Rolland seems to have been so imprudent as not to inform the other Insurance Companies of it. The communication had existed but for a short time before the insurance with defendants, perhaps two months. Is it proved that at any time after the communication was made Fauteux had been up-stairs at Rolland's? Would any man have supposed a communication such as described in this case to have been made in the *mitoyen* wall between Rolland and Jodoin? But suppose that Fauteux did know of the communication and that Rolland had rooms in Jodoin's house, 315, it would not follow that necessarily 315 was insured or meant to be so. Suppose that Fauteux and defendants knew where Rolland kept all his goods, and that some were in Jodoin's building, 315, does it follow that, therefore, those in 315 were insured; that the defendants insuring 317 and 319 are to pay also for the goods in 315? According to Rolland, though the fire had burned nothing but 315 and what was in it defendant would have to pay for it, under their covenant in this policy covering goods in a particular building named 317 and 319. But this would be to maltreat all principle and justice. "The subject insured was the establishment with its appurtenances," says Rolland's counsel. The policy reads not so, but that the goods, stock, machines, and tools in the building No. 317 and 319 are insured. This building was the property of Rolland, while 315 belonged to Jodoin. Between the two, the presumption of law is that a dead wall exists. The plaintiff's declaration recites cause of action from policy covering property in building No. 317 and 319. It states plaintiff's loss to be from destruction therein of his goods and machines; in respect of nothing else is the condemnation of the defendant sought. Not one word is there of No. 315, nor a word complaining of the policy as mis-describing or erroneously describing the place in which the goods insured were contained. It was said at the argument that the description in the policy was the defendants', and to be interpreted against them. Allow that the description is the defendants', it is not obscure; it cannot be interpretated to mean two buildings, mentioning only one. They wrote a plain limitation. It was lawful to do so. An Insurance Company may insure a flat of a house, or goods in it, or goods in a wing of a house. So if a man own a store comprised of three or ten houses upon a street, any one of these may be the subject of insurance. If he insured only one, in vain would he ask the insurers to pay for any of the others, if destroyed, and it would be quite indifferent that all were connected together and used in the one trade or made up the one establishment of the assured. There are not degrees of exclusiveness in insurance. The place described is insured. What is outside of it is excluded, and there is no difference between ten feet of distance and a mile from the place covered. Nothing is covered that is not included. If a man mean to insure his "establishment" let him do so *eo nomine*, and all that belongs to it will be covered.

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It was said that the risk was not greater from Rolland's using 315. The facts of the case refute this argument conclusively. But supposing that no increase of risk was present, it does not follow that therefore the goods lost in 315 were to be paid for by the defendants.

Let us refer again to the motion for a new trial. It is repeatedly said that the application for new trial is a direct appeal to the justice and laws of the country. Misdirection to the jury by the learned Judge, who presided at the trial, is the principal complaint of the defendants. That the verdict is contrary to the evidence is another. The learned Judge charged as already stated. I say it with some diffidence, but in my opinion the charge of the learned Judge ought not to be supported. There ought not to have been allowed questions, indirectly even, as to whether plaintiff had insured the stock in the two apartments in 315. It was not properly matter for consideration whether the plaintiff would have been so imprudent as to neglect insuring his stock in 315. It was not correct, in my opinion, to charge that it was for the jury to decide whether those apartments were part of the plaintiff's establishment. The jury had properly nothing to return about 315. It is clear that under the directions received by them they have valued the goods lost in 315. All the jurors but one are for making defendants pay for the goods in 315. The jury have found a verdict contrary to the evidence, namely that in the premises mentioned in defendants' policy, the plaintiff's loss was $35,112.00. The plaintiff, himself, in his claim writes this down as not the case. $33,766.77 is reported by him as lost in 315. Considering that there was misdirection of the jury on matters material; considering the verdict to be contrary to the evidence upon the points of loss and value; considering, further, some of the findings defective and unclear, for instance the ninth and the fourth findings, the Court has to grant defendants' motion. The verdict is set aside and motion for a new trial granted.

Verdict of jury set aside and new trial ordered.

Cartier, Pominville & Bétournay, for plaintiff.

Edward Carter, Q. C., Counsel.

Wm. H. Kerr, for defendant.

(S. B.)

COURT OF REVIEW, 1869.

MONTREAL, 30TH DECEMBER, 1869.

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

No. 188.

Miller vs. *Kemp*, and *J. C. Baker* et al., Tiers-saisis, and *Levi Kemp*, Contesting, and *Jesse Thayer*, Intervening; and *Linus O. Thayer* et al., Reprenants l'instance.

HELD:—That verbal evidence is inadmissible to prove payment of a debt due under a judgment, although the debt were originally of a commercial nature.

A *saisie-arrêt* was issued in this cause on the 16th September, 1864, upon a judgment rendered on the 18th February, 1843, and under it a considerable sum of

money was attached in the hands of the *Tiers-saisis*. The defendant appeared on the return of the writ, and afterwards contested the attachment, alleging, in effect, that the amount due under the judgment had been transferred by the plaintiff to Jesse Thayer, pending the suit, and that after the rendering of judgment the whole amount of debt, interest and costs had been paid to Thayer by defendant. Thayer intervened in the cause, praying to be declared proprietor of the judgment under the deed of transfer referred to. Issue was joined on defendant's contestation, Thayer specially denying the alleged fact of payment.

On a copy of the transfer being produced it was ascertained that the sum transferred was £88 7s. 7d., leaving a small balance of debt and the costs of suit not included in transfer. A retraxit was thereupon filed by Thayer, reducing his demand to the sum transferred, and interest.

At the *enquête Thayer* was examined as a witness on behalf of defendant. He denied positively that any part of the judgment had ever been paid to him.

G. L. Kemp, defendant's son, was also examined. He stated that he had been sent into town by his father a few days after the rendering of the judgment, and that he had then and there paid Thayer the amount transferred, and had paid the costs of suit and balance of debt and interest to the plaintiff or to his attorneys, Messrs. Fisher and Smith; that he had taken receipts from Thayer and from plaintiff or Fisher & Smith for the amounts paid to them respectively, and had given them to his father on his return home. A part of the amount required, he said, had been previously borrowed by his father on a joint promissory note for £100, signed by himself and one or two others as sureties.

The examination of this witness was objected to by Thayer on the ground that verbal evidence could not be adduced to prove payment of a debt due under a judgment.

A. L. Baker, defendant's brother-in-law, remembered that a sum of £100 had been borrowed by defendant for the purpose, as witness was informed, of paying off Miller's judgment. He had no personal knowledge of the payment.

After the closing of *G. L. Kemp's* deposition, two papers were produced by defendant as having been discovered in the interval,—one being a statement of debt, interest and costs, with £88 7s. 7d. deducted, as transferred to Thayer, and a receipt below by Fisher & Smith, dated 3rd April, 1843, for £22 10s. 0d. on account;—the other being a letter from Fisher & Smith to defendant, dated 12th February, 1845, acknowledging receipt of balance of £2 6s. 3½d.

Judge Smith, examined on behalf of Intervening party, proved the receipt and letter to be in the handwriting of his partner, the late *D. Fisher*, and that he and his partner had acted merely as the attorneys of *Miller*, and not of *Thayer*; he knew nothing as to any payment made to *Thayer*.

At the hearing of the cause before His Honor Mr. Justice Monk, the Intervening party moved to reject the evidence of *G. L. Kemp*. This motion was granted, and judgment rendered, dismissing the contestation filed by defendant.

At the hearing in review, *Robertson*, for defendant, contended that the question in this case was one of proof. From the receipt and letter produced, signed by Fisher & Smith, coupled with the depositions of G. L. Kemp and A. L. Baker, it sufficiently appeared that shortly after the rendering of the judgment of

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18th February, 1843, the amount of it was paid, less the balance of £2 6s. 3½d., acknowledged as paid by the letter of 12th February, 1845.

It was very unlikely, when the defendant was proved to have been always a man of considerable means, that from 1843 to 1864 no steps should have been taken to enforce payment of the judgment if it had remained due.

The receipt taken by G. L. Kemp from Thayer, it is true, was not forthcoming, but from the great lapse of time, it might fairly be presumed to have been lost.

The evidence by parol testimony, he submitted, was properly adduced, and the proof of payment, all that could reasonably be expected after the lapse of upwards of 20 years. The *cessionaire* Thayer would appear, without explanation of any kind, to have remained perfectly quiet during all this period, without troubling the defendant, or asking payment from him. This was easily explained, if *G. L. Kemp's* evidence be taken as true. The missing receipt, though sought for, could not be found. He submitted, however, that even though the Court should be of opinion to exclude parol evidence in proof of payment of a debt due under a judgment, yet the receipt and letter signed by *Fisher & Smith* formed a sufficient *commencement de preuve par écrit* to entitle the defendant to the benefit of *Kemp's* evidence, and the case would then be found to be fully made out.

The following authorities were cited in support of the argument: 2 *M. & W. p.* 206; 4 *Bingh. p.* 298; *Poth. Oblig. No.* 781; 9 *Toull. No.* 215; 10 *Dalloz, Jurisp. p.* 727, *sect.* 3; *Ibid verb. Oblign., note* 2.

Lunn, contra, said that by the operation of the transfer from Miller to Thayer the debt had been divided, and that no receipts signed by Miller or his attorneys could form any *commencement de preuve par écrit* as against Thayer: that the statement and receipts produced, and the evidence of Judge Smith shewed plainly that Fisher & Smith were acting in the matter as Miller's attorneys only, and had nothing to do with the amount transferred to Thayer. That the question of the admissibility of verbal evidence in a case of this kind must be decided according to French law, and that by that law such evidence was excluded. *Pardessus*, vol. 1, p. 530, No. 263; *Nouguier*, Trib. de Com. vol. 3, p. 66, § 47., *Toull. Preuve Test.*, vol. 9, No. 235. That there was no proof that the pretended missing receipt had been lost or destroyed by a *cas fortuit*: that the finding of the other two receipts afforded a strong presumption that the third would have been found too if it had ever existed.

MONDELET, J., in rendering judgment, said there could be no doubt that the rule of law was that verbal evidence could not be adduced to prove payment of a debt due under a judgment: that the receipts produced did not form a *commencement de preuve par écrit* against Thayer, inasmuch as Fisher & Smith were not acting as his attorneys. The evidence of G. L. Kemp was, therefore, properly rejected, and there being no evidence to support the allegation of payment, the judgment, dismissing defendant's contestation, must be confirmed. Judgment accordingly.

Judgment confirmed.

A. & W. Robertson, for defendant.

Cross & Lunn, for *Reprenants l'instance*.

(A. H. L.)

SUPERIOR COURT, 1869.

MONTREAL, 30th DECEMBER, 1869.

Coram MACKAY, J.

No. 2227.

Moore vs. The Home Insurance Company.

HELD:—1. That deposit by the insured of bills of sale, and documents requisite for showing ownership of a vessel, with the Collector of Customs for registration is sufficient to give an insurable interest, though actual registration be not made till after the destruction of the vessel by fire.
2. That if this be not so, the insured may fall back upon any *anterior* title registered, from which he can deduce insurable interest.
3. One of two trustees, part owners, can insure a vessel.

MACKAY, J. On the 14th of April, 1867, Owen Lynch procured to be insured the steamer Empress, tackle and furniture, valued at $14,000, to the extent of $5,500 for one year, by a marine policy, against the usual dangers of navigation and also against fire. The premium was a note for $385, given to defendants. Beyond $10,500 Lynch was not to make insurance on the vessel. On the 18th of March, 1868, at Kingston, the boat was destroyed by fire, with all its tackle and furniture. The plaintiff's declaration allegos these things, and that the values lost were $14,000, and that all the property lost was owned by Lynch; that the only other insurance was with the British America Insurance Company, of $5,000, of which the defendants had notice; that $1,145 was realized by the sale of the wreck; that all notices were given; and that afterwards Lynch assigned his rights of action to the plaintiff, of which defendants had notice. Conclusions for $5,500.

The defendants have pleaded that at the time of the fire Lynch had no interest in the said steamer, and had ceased to be owner, and afterwards could transfer no rights to plaintiff. By a second plea it is said that the representation made by Lynch at the time of insuring, that the subjects insured were worth $14,000 was false and fraudulent, the vessel being then only worth $8,000; that the defendants entered into said contract by reason of said representations, and believing Lynch to be his own insurer to the extent of $3,500, which would render him careful in the management of the boat, &c. That the policy of insurance ought to be annulled, and the transfer to plaintiff declared void.

By another plea the fire is alleged to have been caused by the culpable acts and gross negligence of said owner Lynch, or his servants, and the policy, it is said, so became avoided.

The fourth plea is as to a magistrate's certificate not having been produced. This issue is subsequently abandoned. The fifth plea says that any fraud or overcharge in the claim was and is to vitiate the policy; that the claim made by Lynch is fraudulent and exaggerated to the extent of $5,000, and the swearing thereto was false. Conclusions accordingly.

The plaintiff's answers were general. The defendants got leave to amend their first plea, by alleging that when the assurance was effected, and during the risk, Lynch was not the owner of the Empress, and was not registered as such according to the statute, in that case made and provided, and had no insurable interest therein; that at the time of the insurance the steamer was owned by

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the Beauharnois, Chateauguay and Huntingdon Navigation Company, and Lynch, so, had no right to transfer to plaintiff. On the 14th of April, 1869, the second and fifth pleas were formally abandoned by the defendants. The case went to a jury in November last. Upon the questions submitted to them the jury found (chiefly upon admissions signed by both parties) that the defendants had insured Lynch as alleged; that the boat was burned as alleged; that it was worth $14,000; that Lynch had an interest in the boat to the full extent of her value at the time of the fire; that he suffered the loss and damage mentioned in his declaration; that the fire was not caused by any gross negligence. In answer to the 4th and 5th questions: "was said Owen Lynch at the time of the fire, or at the time of the insurance, or during the risk, the owner of the steamer?" "Was he during the risk, or at any time, registered as such owner, according to the requirements of the Statute, in that case made and provided?" the jury found as follows:

"We find that on the 10th day of April, 1865, Charles F. Gildersleeve was the registered owner of the whole sixty-four shares of the steamer Empress. On that day the said Charles F. Gildersleeve executed the bill of sale fyled in this cause as plaintiff's Exhibit No. 6, Owen Lynch and Charles B. Dewitt, therein named, acting as Trustees for the Beauharnois, Chateauguay and Huntingdon Navigation Company, and the said instrument was duly enregistered on the 11th day of April, 1865. On the same day the said Owen Lynch and Charles B. Dewitt executed the instrument purporting to be a bill of sale by way of mortgage, fyled in this cause as plaintiff's exhibit No. 7, which was also enregistered on the 11th day of April, 1865.

"On the 3rd day of December, 1867, the said Charles F. Gildersleeve executed the instrument purporting to be a release and discharge of the last above-mentioned bill of sale by way of mortgage, forming part of the said last-mentioned exhibit No. 7.

"On the 19th of April, 1866, the said Owen Lynch and Charles B. Dewitt executed the instrument purporting to be a bill of sale of the steamer Empress, to the Beauharnois, Chateauguay and Huntingdon Navigation Company, fyled as plaintiff's exhibit No. 8.

"That on the 20th day of March, 1867, the said steamer Empress was adjudged to the said Owen Lynch, as the highest bidder at a sale of the said steamer at public auction, made by John J. Arnton, auctioneer, as mentioned in plaintiff's exhibit No. 5, and that from that date up to the burning of the said steamer, she was in the possession of the said Owen Lynch.

"On the 3rd day of July, 1867, the Beauharnois, Chateauguay and Huntingdon Navigation Company, executed the instrument purporting to be a bill of sale of the said steamer to the said Owen Lynch, fyled in this cause as plaintiff's exhibit No. 4.

"The third above-mentioned instrument, part of exhibit No. 7, together with the remainder of the said exhibit, was deposited with the Collector of Customs at Kingston, for registration, on the 3rd day of December, 1867.

"The two last-mentioned instruments, exhibits eight and four, were deposited with the said Collector of Customs, for registration, between the 8th and 19th

days of July, 1867, and remained so deposited until the 5th day of December, 1868.

"The three last-mentioned instruments, namely, part of exhibit 7 and exhibits 8 and 4, were not registered by the Collector till the 5th day of December, 1868, as appears by the copies of registry and of the certificate of ownership in this cause fyled, as papers eleven and twelve respectively, on the 13th day of April last; the reason given by the Collector for not registering them before being that the certificate of ownership was not produced."

What is the effect of the verdict?

The finding as to Lynch's interest in the boat to the full extent of her value at the time of the fire was made subject to the opinion of the Court, upon the legal effect of the findings upon the 4th and 5th questions. Each party claims to be entitled to judgment in his favor upon the verdict.

Nothing is moved by defendants but that plaintiff's action be dismissed upon the verdict and findings of the jury. The plaintiff moves, upon the same verdict, that defendant be condemned as prayed.

We have before us the certificate of ownership of the steamer Empress, from which it appears that Charles F. Gildersleeve was registered owner of it up to the 10th of April, 1865, when he sold it to Owen Lynch and C. B. Dewitt, who are *not* styled Trustees. On the same 10th of April they sold it by way of mortgage to C. F. Gildersleeve for securing $10,000 to him. Those deeds were duly registered at the Custom House at Kingston.

On the 3rd of December, 1867, Gildersleeve released that mortgage. On the 19th of April, 1866, Lynch and Dewitt sold the Empress to the Beauharnois, Chateauguay and Huntingdon Navigation Company. On the 3rd of July, 1867, that Company sold her to Owen Lynch individually. The release of Gildersleeve's mortgage, the sale to the Beauharnois, Chateauguay and Huntingdon Navigation Company, and the sale to Owen Lynch were actually registered duly on the 5th of December, 1868, that is after the fire. They had been deposited for registration in July, 1867.

We have on our statute book an Act for the Registration of Inland Vessels. Upon this the defendants build up their only real defence. It orders the collectors of customs to make registration of all vessels, &c., and whenever the property in any vessel is sold, the sale must contain a recital of the certificate of ownership or the principal contents thereof, otherwise such transfer shall not be valid for any purpose either in law or equity. By section 16 it orders that no bill of sale shall pass the property in any vessel after a certificate of ownership has been granted, or have any other effect, until it has been produced to the collector, nor until such collector has entered in the book of registry the name, &c., of the vendor, the number of shares transferred, &c. Lynch, before the time of the fire, had deposited at the Custom House all the bills of sales and documents requisite for shewing ownership of the Empress, but the collector had not actually entered them on the book. The certificate of ownership not having been produced to the officer, he thought that he was not bound to register. But it was not required to be produced, and without its being produced, the collector, later, but after the fire, did register all the papers.

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As to the discharge from Gildersleeve, I do not believe it required registration. (C. S. C. cap. 41, sec. 23.) The collector had never been asked by Lynch to certify anything by endorsement on the certificate of ownership, nor needed Lynch offer to him the certificate of ownership. The collector ought promptly to have registered the bills of sale presented to him for registration. Lynch's case, or plaintiff's as transferee of him, differs very much from those cited by the defendant from Espinasse, Durnford and East, Taunton and Vesey, where plaintiffs were held to have no insurable interest by reason of not having complied with the requirements of the Merchants' Shipping Acts. In all those cases the plaintiffs had neglected to do acts required to be done by them. Here plaintiff, or rather Lynch, having done all that he had to do, but act to be done by the public officer being undone, the defendants claim to go free, and that Lynch had no insurable interest. "The Ship Registry Acts, so far as they apply to defeat titles, are to be held strictly as penal, and not literally as remedial laws," says Dwarris.

All the English Acts before Victoria were peremptory, yet were not interpreted literally always; for instance, though a bill of sale on a mortgage of a ship was "utterly null to all intents and purposes," a mortgagor could be sued upon his covenant in the mortgage unregistered for the repayment of the money lent; for, said the Judges, "to go so far as to vacate the covenant for the payment of the money lent, would be beyond the reason and object of the Legislature and working injustice."

Lord Tenterden said "the instances in which fair and honest transactions are rendered unavailable through a negligent want of compliance with the forms directed by clauses of the statutes requiring a public registry of conveyance, make the expediency of all such regulations, considered as to private benefit only, a matter of question and controversy." Therefore it was in England that they struck off their statute book these said clauses. Unfortunately, we have them still existing.

Ad impossibile nemo tenetur.

"Suppose a collector to receive my deed for registration but to refuse to register, am I to have no property in my ship or no insurable interest in such case, says plaintiff, until after a tedious law suit or a *mandamus* followed by actual registration." There is much to be said for plaintiff—the maxim may help him with this other one: "*Censeri facta impossibilia quæ commode fieri non possunt.*"

Suppose the Registry Act had said that any vessel should be forfeited if the deed of sale, transferring it, was not produced to the collector and registered by him in the book of registry within ten days after the execution of it, &c.,—a vessel is sold, the deed taken on the day of sale to the collector for registration but not registered by him in fifteen days, could a forfeiture be obtained from the mere fact, though the public officer alone was in fault? Sir Wm. Scott says "the law must bend to necessity sometimes." "The law in its most peremptory injunctions is understood to disclaim all intention of compelling people to do impossibilities, and the administration of laws must adopt that general exception, in the consideration of all particular cases." Might we not hold that under the special

circumstances of this case Lynch had done all necessary and had, at the time of the fire, insurable interest, proceeding from the several deeds mentioned,—the last one to himself from the Navigation Company? But admitting the contrary (as contended for by the Insurance Company) may not Lynch fall back upon the last deed registered before the fire,—the one to Lynch and Dewitt? This deed reads to make them part owners, two owners of the vessel. Lynch does not in his declaration set up any particular title deed of ownership; he simply says he was owner, so he is not like a plaintiff who has to recover upon the particular title deed set up, or not at all.

But, say the Defendants, Lynch was only a trustee. It appears from the verdict that so he was. What kind of a trustee is not found. What powers had he and Dewitt? Was one under disability to act alone? We are not informed. No condition of his policy obliged Lynch to declare particularly his interest as that of a trustee or mortgagor. On 3rd December, 1867, Gildersleeve discharged Lynch and Dewitt from all indebtedness to him. This discharge did not require registration, and Lynch and Dewitt did not, by mortgaging cease to be owners of the Empress. If the deeds, not registered until December 5th, 1868, are to go for "null and void for any purpose either in law or equity," I still see a title registered and proofs made, which establish Lynch and Dewitt owners (trustees it is true) of the Empress, discharged from all encumbrances on and from 3rd December, 1867, long before the fire.

Our Registration of Vessels' Act, before mentioned, orders that the property in every vessel belonging to more than one owner shall be considered to be divided into sixty-four equal shares, and the proportion held by each owner shall be described in the certificate of ownership as being a certain number of sixty-fourth shares; and no person shall be entitled to be registered as an owner in respect of any shares which shall not be an integral sixty-fourth share, &c.

At the argument before me this clause was referred to as shewing another weakness in Lynch's title fatal to Plaintiff's case. In fact, Lynch and Dewitt are not registered each for 32-64ths.

Before registration there would have been more force in the defendant's objection.

But they *have been* registered as owners.

The law says the vessel is considered divided into sixty-four equal shares. In face of all this, and of the registration, I think defendants' objection, founded on Lynch's not having been registered literally for thirty-two sixty-fourth shares, weak. The law does not enact in this clause any *peine de nullité*. By division the property or number of shares of Lynch could be ascertained without difficulty. By division, between two, of a thing that is to be considered divided into sixty-four equal shares, does not each get thirty-two sixty-fourths? Is not this, too, an integral sixty-fourth share?

Registrations are often made of three-fourths of a ship, one-fourth or and other shares, as, for instance, fifteen-sixteenths, *not* any specified num of sixty-fourth shares.

I notice that by no plea is this objection of defendants specially made, that Lynch did not stand registered for a stated number of sixty-fourth shares.

Moore vs. The Home Insurance Co.

"Lynch had no insurable interest," say the defendants; "true, there is a deed to him, and he has had possession; nobody else has claimed title adversely to him, but he had no insurable interest." What is insurable interest? It would be extremely difficult to give any accurate definition. The interests of commerce and various and complicated rights which different persons may have in the same thing require that not only those who have an absolute property in ships, but those also who have a qualified property therein, may be at liberty to insure them. Possession of a ship, with an authority to manage it, confers an interest entitling to insure. (Marshall.)

"Can a trustee insure? There is no doubt that he may," says Lord Kenyon. Had Lynch insurable interest? I have no doubt he had. If he had not under the unregistered deeds, he had under the deed to him and Dewitt. Could the Navigation Company have taken the boat from them without their consent or judgment of law? Who else was to insure? Had the Navigation Company done so, the defendants might, after a loss, have opposed to them non-proprietorship for want of registration. Lynch, at the date of the policy, and at the time of the fire, had an interest in the conservation of this steamer Empress; he was exposed to lose it if it was destroyed. He had an insurable interest.

Non constat that he had not claims even against the Navigation Company.

The Jury find him to have been interested. As to the amount found, supposing that he had an insurable interest, I am not to say whether it be fair or excessive, for no motion for new trial [illegible]

I will presume some interest in Lynch. When two buy a ship we call them part owners. We say that one can't sell more than his share. In such a case, what do we mean by "his share?" In the absence of other information we mean his half or thirty-two sixty-fourths. Under the sale here to Lynch and Dewitt, registered as it was, any body would have taken deed, from either, for thirty-two-sixty-fourths, and could have gotten registration upon it accordingly.

It is opposed to plaintiff that Lynch was only one of two owners, and that they were acting as trustees for the Navigation Company. But he proves a loss that this money from defendants will not suffice to pay the half of.

He has not by the verdict been awarded beyond the extent of his interest. The Jury find him to have been interested. They fix his loss at all he stated. This part of the verdict is submitted to; subject only to the Court's rulings upon other points.

These rulings are against the defendants.

Seeing the proofs made by Lynch, the defendants ought to have made it clear upon this record that he had no insurable interest. Has a trustee, or one of two trustees, never an insurable interest?

The verdict ought to be interpreted in favor of plaintiff. The equities are, all, on his side.

What did it signify to this Insurance Company whether the Collector of Customs, after the deposit of the deeds with him for registry, took a month, or three months, to make the actual registration of them? Had express condition, upon the policy, ordered such actual registration (as condition precedent to

effective insurance) I *might* recognize some force in the argument that actual registration was required, and that, never mind what was the cause of its not having been performed, the insurers were to go free if it was not performed.

Moore vs. The Home Insurance Co.

But the present is a different case.

Upon the whole, I feel that the plaintiff, representing Lynch[illegible] benefit of a judgment in his favor.

The defendants' motion is rejected, and judgment for plaintiff u[illegible]

J. J. Day, Q.C., & R. Laflamme, Q.C., for Plaintiff.

H. Stuart, Q.C., & Hon. J. J. C. Abbott, Q.C., for Defendants.

(J. K.)

MONTREAL, 21 AVRIL, 1869.

Coram MONDELET J.

No. 1120.

Whyte, es-qualité, *vs. Cohen*, et le dit *Cohen*, Requérant,

JUGE:—Qu'un créancier qui a consenti à ce que son débiteur fasse une cession, autrement que de la manière prescrite par l'acte de Faillite, 1864, ne peut se prévaloir de cette cession pour assujettir les biens de ce débiteur à la liquidation forcée.

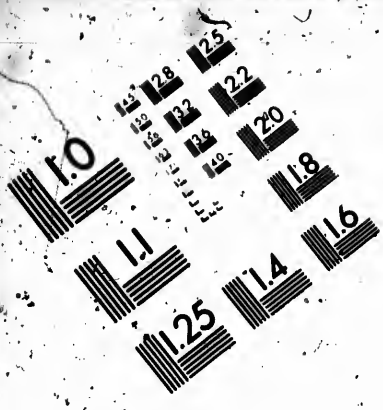
En octobre 1868, le défendeur fit une cession générale de ses biens à J. M. Dufresne : cette cession n'avait pas été précédée des avis requis par l'acte de faillite. Mais tous les créanciers en apparence y ont donné leur assentiment, et particulièrement, J. C. Franck, qui a signé le procès-verbal d'une assemblée des créanciers, qui a donné des instructions au Syndic Dufresne, sur le mode de disposer des biens de la faillite. En outre, ces mêmes créanciers, y compris le nommé Franck, accordèrent, le 17 novembre 1868, un acte de décharge au défendeur en considération de la cession qu'il avait faite à M. Dufresne.

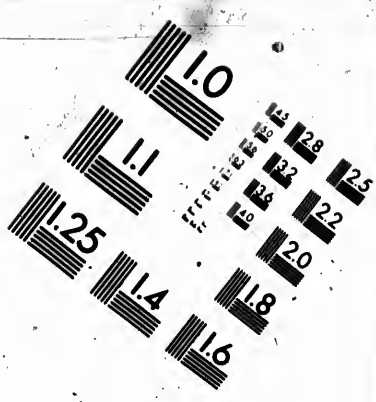
En janvier 1869, Franck devint insolvable et fit une cession en vertu de l'acte de faillite, à John Whyte, le demandeur. En cette qualité, M. Whyte fit émaner, contre le défendeur, un bref de Saisie-Arrêt en liquidation forcée, alléguant dans son affidavit la cession de Cohen à Dufresne, et s'appuyant sur la Sect. 3 § i. de l'acte de Faillite qui donne droit à un créancier, de mettre en liquidation forcée les biens de son débiteur, si ce dernier "a fait un transport ou une "cession générale de ses biens au profit de ses créanciers, autrement que de la "manière prescrite par le dit acte."

Le défendeur présenta une requête alléguant tous les faits ci-dessus et concluant à la cassation et annulation du bref de Saisie, vu que le nommé Franck avait ratifié son acte de cession et lui avait en conséquence accordé une décharge.

A l'audition, le Requérant cita à l'appui de sa prétention, Edwin James, Bankrupt Law, U. S. p. 249, sect. 39.

A la page 176, le même auteur s'exprime en ces termes : "Such an assignment "will only constitute an act of bankruptcy if all the creditors do not assent to "the deed : as no creditor who is either a party or privy to the assignment, "or has even acted under it, can afterwards set it up as an act of bankruptcy." Nevill & Manning's Rep. Vol. 1, p. 279.





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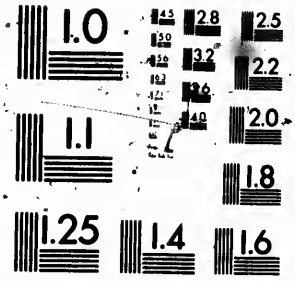

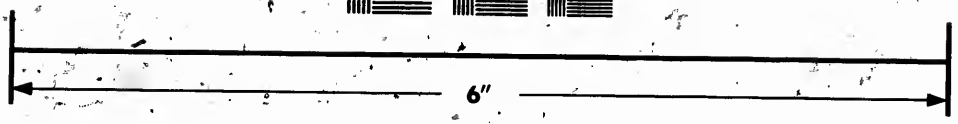

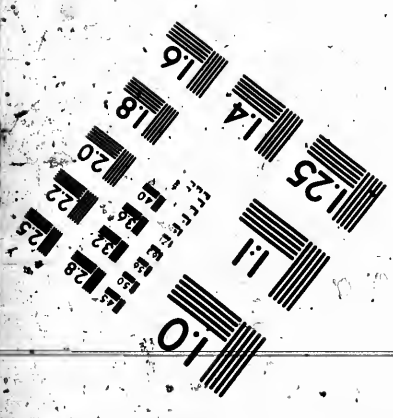

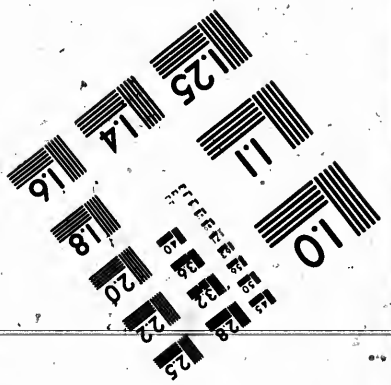

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Whyte vs. Cohen.

La jurisprudence en Angleterre, sous le Statut d'Elizabeth, qui avait sur cette matière, une disposition analogue au nôtre, était uniforme dans ce sens :

" Such a conveyance is good as against the party executing it, and also against " any other person privy and consenting to it.

Taunton's Rep., Vol. 1, p. 381.

Barnewall & Alderson's Rep., Vol. 2, p. 134.

PER CURIAM.—Franck, que le demandeur représente en qualité de Syndic, a ratifié l'acte de cession sur lequel le demandeur se base pour demander la liquidation forcée des biens du défendeur : cette ratification enlève au demandeur le droit de s'en plaindre. Bien plus, en considération de cette cession, Franck a accordé un acte de décharge au défendeur ; il n'était donc plus son créancier. Le demandeur ne peut pas avoir plus de droit que son auteur. Le bref de Saisie a donc été illégalement émané ; en conséquence il est cassé et le demandeur est débouté de sa demande.

Bref de Saisie annulé.

F. E. Gilman, pour le demandeur.
Chapleau & Rainville, pour le défendeur et Requérant.
(H. F. R.)

MONTREAL, 18TH SEPTEMBER, 1869.

Coram MACKAY, J.

No. 1972.

Meigs et al. vs. *Aikin* alias *Curtis*.

HELD :—That while the record in a cause is before the Court of Review for the purpose of obtaining the revision of a judgment of the Superior Court, no proceeding in the cause can be taken in the Superior Court.

Mr. Kerr, for the defendant, moved to quash the *capias* under which the defendant had been arrested.

Mr. Devlin, for the plaintiffs, said there was a preliminary objection to this motion. The record was not before the Court, the cause being then pending before the Court of Review on appeal from a judgment of the Superior Court quashing the *capias* on petition. He referred to *Beauvais* vs. *DeMontigny*, 12 L. C. Jurist, 343, in which TORRANCE, J., refused an application to examine a witness about to leave the Province, on the ground that the record was before the Court of Review.

MACKAY, J., stated on the following day, that he had taken time to confer with his brother judges, and they were all of opinion that the application could not be granted.

Motion rejected.

B. Devlin, for the plaintiffs.
W. H. Kerr, for the defendant.
(J. K.)

COUR SUPERIEURE, 1869.

MONTREAL, 31 AOUT 1869.

Coram MACKAY, J.

No. 1475.

Hutchins et al. vs. *Cohen*, et le dit *Cohen*, Requérant.

Juge:—1o. Qu'une cession faite autrement que de la manière prescrite par l'acte de faillite, n'assujettit les biens du débiteur à la liquidation forcée, que pendant les trois mois qui suivent telle cession, et non après.

2o. Que le porteur d'un billet, portant une date antérieure à la liquidation forcée, n'a pas besoin de prouver que ce billet a réellement été fait à la date qu'il porte : que le date fait preuve par elle-même.

3o. Que le porteur d'un billet, donné en garantie collatérale, (gage) a droit de prendre un bref de Saisie, sous l'acte de 1864, pour mettre les biens du faiseur de ce billet en liquidation forcée.

Le lendemain du jour où les demandeurs discontinuèrent leur première action (*Vide post.* p. 113) ils firent émaner, contre le défendeur, un second bref de Saisie-Arrêt basé sur les mêmes raisons, alléguant dans leur affidavit qu'ils étaient porteurs d'un billet de $200, en date du 27 mai 1868, fait par le défendeur et qui leur avait été transporté.

Pour l'intelligence de la cause, il faut remarquer que le billet, dont les demandeurs sont porteurs, leur avaient été transporté par J. C. Franck, en garantie collatérale d'une dette qu'il leur devait.

Le défendeur ignorait ce fait, car le nommé Franck lui avait fait donner un billet en renouvellement de celui de $200.00, mais sans lui remettre ce dernier.

Le défendeur, se fiant à Franck, croyait que son billet de $200.00 était toujours resté en la possession de ce dernier et ignorait entièrement que les demandeurs en fussent porteurs.

Le défendeur présenta, pour faire casser ce dernier bref, une requête basée sur deux raisons principales :

1o. Les demandeurs, lors de l'acte de cession du défendeur à Dufresne, acte sur l'illégalité duquel est basé leur demande, s'ils étaient porteurs du billet de $200.00, ne l'avaient qu'en garantie collatérale et comme gage, et n'avaient alors aucun droit d'action contre le défendeur.

2o. Les demandeurs, ayant laissé passer plus de trois mois sans attaquer l'acte de cession, n'étaient plus recevables à s'en plaindre.

A l'enquête, les demandeurs admirent que ce billet de $200.00 ne leur avait été donné que comme sureté collatérale d'une dette que leur devait Franck.

M. Rainville, pour le requérant, soumit à l'audition les propositions suivantes :

1ère. Proposition. La dette doit exister au moment de l'acte dont on se plaint.

The debt must have existed at the time of the act of bankruptcy relied upon. Edwin James, p. 264.

The petitioning creditor's debt must be in existence at the time the act of bankruptcy, upon which it is proposed that the adjudication shall proceed, is committed. It is not sufficient that it accrued before the issuing of the commission.

Hutchins vs. Cohen.

Doria & Macrae, Law of Bankruptcy, Vol. 1, p. 218.

Campbell's Rep., Vol. 1, p. 489.

Moody & Malkin's Rep. Vol. 1, p. 141.

2e. Proposition.—Les demandeurs, pour réussir dans leur demande, auraient dû établir que lors de l'acte de cession, ils avaient un droit d'action contre le défendeur.

The debt upon which to found an adjudication of bankruptcy must be, in its nature, provable under the bankrupt's Estate.

Edwin James, p. 264.

The debt must be of such a nature that an action at law might be brought for it by the petitioning creditor against the bankrupt.

Edwin James, p. 269.

Kinnear, Law of Bankruptcy, p. 197.

A l'enquête il a été prouver que, lors de l'acte de cession à Dufresne, les demandeurs, s'ils étaient porteurs du billet qui fait la base de leur demande, ne l'avaient qu'en garantie collatérale, pour une dette que leur devait J. C. Franck, et qu'ils n'en sont devenus véritables propriétaires qu'en avril 1869, par une résolution des créanciers de Franck qui le leur ont cédé par une résolution passée en vertu d'une disposition de l'acte de faillite.

Jusqu'en avril 1869, les demandeurs ne tenaient donc le billet en question qu'à titre de gage, et n'avaient aucun droit d'action contre le défendeur, car le créancier gagiste n'est pas propriétaire de l'effet donné en gage.

Le créancier gagiste, dit l'Art. 1971 de notre code, ne peut, à défaut de paiement de la dette, disposer du gage.

Le gage diffère essentiellement de la vente ou cession en ce qu'il ne transmet pas au créancier, même à défaut de payement, la propriété des choses données en gage ; il ne lui confère que le droit de se faire payer sur ces choses, par privilége ou préférence.

Sirey, Tab. Gen. Vo. Gage, No. 2.

Jugé, à cet égard, que la clause par laquelle un débiteur cède à son créancier, pour plus de sûreté de l'exécution de son obligation, une créance ou une action sur un tiers, constitue non une cession ou transport, mais un simple gage ou nantissement.

S. V. 39. 2. 537.

Dalloz, Périodique 40. 2. 51.

Mais il y a plus, si Franck avait payé les demandeurs, ces derniers auraient été obligés de lui remettre le billet du défendeur, et par là se seraient trouvés à n'avoir jamais eu aucun droit d'action contre le défendeur ; leur droit était donc conditionnel et, en conséquence, insuffisant pour leur permettre de prendre contre le défendeur un bref en liquidation forcée.

The debt must be a present existing debt, and not one depending on a contingency.

Edwin James, p. 269.

3e. Proposition.—Les demandeurs auraient dû prouver que le billet qui fait la base de leur action a été fait avant l'acte de cession dont ils se plaignent : la date apparente à la face du billet ne fesant pas preuve suffisante.

"The case where a bill or note is produced for the purpose of proving a good "petitioning creditor's debt is an exception to the general rule, that the date "of an instrument is a *prima facie* proof of the time of its execution, and it "may be taken to be now settled that some evidence is necessary beside the "date to show that the instrument produced for that purpose had its existence "before the act of bankruptcy took place; and for this reason, that a proceeding "in bankruptcy is retrospective to invalidate all transactions between the act of "bankruptcy and the fiat, and, therefore, it may be necessary to require more "proof than in ordinary cases."

Edwin James, p. 267.

Held.—That an I. O. U., bearing *date* before the act of bankruptcy of a trader, constitutes no evidence of a petitioning creditor's debt, *without some proof that it was in existence before the bankruptcy.*

Meeson & Welsby's Rep., Vol. 2, p. 738, No. 739.

Cette question a été décidée, dans le même sens, par rapport à un billet promissoire, dans une cause rapportée dans Meeson & Welsby, Vol. 12, p. 570, No. 571.

4e. Proposition.—Les demandeurs auraient dû établir qu'ils étaient porteurs du billet en question, lors de la date de la cession faite par le défendeur à Dufresne.

Il ne suffirait pas pour les demandeurs de prouver que ce billet a réellement été signé à la date qu'il porte: car cette preuve n'établirait qu'une chose, savoir que le défendeur était débiteur à une certaine date. Mais il ne s'en suivrait pas de là, qu'il était le débiteur des demandeurs, surtout lorsqu'il est en preuve qu'ils n'ont pas eu ce billet du défendeur, mais de tierces personnes, à qui le défendeur l'avait donné, et qu'ils ne jurent pas même dans leur affidavit, à quelle date, ils ont eu ce billet.

Le maintien de la doctrine contraire conduirait aux conséquences les plus désastreuses et mettrait à la merci d'un créancier malhonnête ou peu scrupuleux, la légalité de toutes les transactions qu'aurait fait le débiteur, dans les trente jours qui auraient précédé l'émanation du bref de saisie.

Et le cas actuel en est un exemple frappant: en effet, le défendeur croyait n'avoir d'autre créancier que Franck, par rapport au billet dont les demandeurs sont aujourd'hui les porteurs, l'ayant renouvellé avant son échéance.

Le défendeur a donc agi de bonne foi et n'a été que la victime de la fraude de Franck. Qui nous dit maintenant que Franck n'a pas transporté ce billet aux demandeurs, après l'acte de cession qu'il a ratifié et l'acte de décharge qu'il a accordé au défendeur? En vertu de quelle présomption légale va-t-on prétendre que, le porteur d'un billet l'a été depuis la date qu'il porte, surtout lorsque ce porteur admet qu'il l'a reçu de tierces personnes.

La position des demandeurs dans le cas actuel, et l'obligation où ils étaient de prouver que lors de l'acte de cession dont ils se plaignent ils étaient porteurs du billet en question, ne saurait être assimilée avec plus de raison qu'à celle du créancier qui veut mettre on faillite, l'endosseur d'un billet ou l'accepteur d'une lettre de change. Or sur ce point il n'y a pas, et il ne saurait y avoir deux opinions: on a décidé invariablement que le créancier devait prouver que l'endossement ou l'acceptation avaient eu lieu avant l'acte dont il se plaint.

Hutchins vs. Cohen.

Where a debt arises on the endorsement or acceptance of a bill, the indorsement of the bill or acceptance itself must be proved to have been made before the commission (of the act complained of), *no presumption arising from the date of the bill.*

Ainsi jugé par arrêt de 1827, rapporté dans Moody & Malkin, Vol. 1, p. 141, Cowie vs. Harris.

La question a même été jugée d'une manière directe, dans le sens du défendeur, dans une cause absolument analogue, rapportée dans Campbell, Vol. 4, p. 245, Ross vs. Rowcroft.

Held:—Where the petitioning creditor's debt set up to support a commission of bankruptcy is a bill of exchange drawn by the bankrupt, and indorsed to the petitioning creditor, evidence must be adduced that it was so indorsed before the suing out of the commission.

Voici le rapport de cette cause, en quelques mots:

The plaintiffs relied upon a bill of exchange, dated 23rd October, 1814, drawn by the bankrupt, payable to his own order (comme dans la cause actuelle) at three months, indorsed by the bankrupt to Waldron, and by him to the petitioning creditor.

The defendant's counsel made the objection that there was no evidence that it had been indorsed to the petitioning creditor before the commission was sued out.

Gibbs, C. J.—I think the petitioning creditor's debt is not sufficiently established, as *he has not shewn when the bill was indorsed to him.*

Judgment—Nonsuit.

5ème. Proposition.—Les demandeurs ne sont plus dans les délais, pour demander la mise en liquidation forcée des biens du défendeur, à raison de l'acte de cession fait par ce dernier à Dufresne: cet acte ayant été fait plus de trois mois avant l'émanation du bref de saisie.

Cette dernière proposition est basée sur la Sect. 3, § 5 de l'acte de faillite, 1864, qui dit:

"Mais nul acte ou omission, ne justifiera aucune procédure pour mettre les "biens d'un failli en liquidation forcée, à moins que de procédures ne soient "instituées en vertu du présent acte à cet effet, *dans les trois mois qui suivront* "*l'acte* ou l'omission sur laquelle on s'appuiera pour y soumettre ses biens..."

Le Statut Anglais 12 et 13 V., Ch. 106, Sect. 67, et la loi de faillite aux Etats-Unis, Sect. 39, ont des dispositions analogues à notre loi, si ce n'est que le délai est différent. Et sous l'opération de ces deux lois on a invariablement décidé que le délai était fatal et opérait en faveur du débiteur une fin de non recevoir et vis-à-vis le créancier une déchéance de ses droits.

En résumé le défendeur a quatre raisons pour une d'obtenir gain de cause: 1o. Les demandeurs ont failli de prouver que le billet qui fait la base de leur action existât à la date qu'il porte à sa face: 2o. Ils n'ont pas prouvé qu'ils en étaient les porteurs lors de l'acte de cession sur lequel est basée leur demande; 3o. L'auraient-ils prouvé, qu'il est établi en preuve que lors de l'acte de cession, ils ne pouvaient avoir ce billet qu'en garantie collatérale et n'avaient en conséquence aucun droit d'action contre le défendeur: 4o. Et quand même toutes ces raisons n'existeraient pas, les demandeurs ne sont plus dans les délais pour se plaindre de l'acte de cession en question.

Wotherspoon, pour les demandeurs, à l'audition, soumit que les demandeurs n'ayant eu connaissance de l'acte de cession fait par le défendeur à Dufresne, que depuis moins de trois mois, ils étaient encore dans les délais pour s'en plaindre.

L'enseigne portant le nom du défendeur, était toujours demeurée au-dessus de la porte de son magasin ; en apparence il n'y avait eu aucun changement et il était impossible pour les demandeurs de connaître l'existence de l'acte de cession. Aucun avis de la cession, illégale que le défendeur avait faite à Dufresne n'a jamais été publié dans aucun journal ; et la circonstance même que M. Dufresne est resté en possession des biens de Cohen jusqu'à l'émanation du bref de Saisie en cette cause, est un fait, qui, se renouvellant de jour en jour, donnait droit aux demandeurs de mettre en liquidation forcée les biens du défendeur. Le principe général de notre Code qui établit que la date d'un billet fait preuve par elle-même et qu'il n'est pas nécessaire de l'établir par aucune autre preuve, fait justice de la 3e proposition du défendeur. Les demandeurs ont donc une preuve, *primâ facie*, que le billet a été souscrit à la date qu'il porte : et c'est une autre présomption de notre droit, sujette à preuve contraire, que le porteur d'un billet est censé l'être depuis sa date.

Quant à la seconde proposition du défendeur, les demandeurs prétendent qu'ayant établi que Franck leur devait, ils avaient droit de poursuivre le défendeur.

Lors de la reddition du judgment, l'Hon. Juge n'a paru s'appuyer que sur la 5e proposition du défendeur sans rien dire des autres : Mais les mots suivants que l'on trouve dans les considérants de son jugement : "The plaintiffs whom I "find were really creditors of the said petitioner as they have alleged," nous portent à croire que le savant Juge a voulu, par là, rejeter les autres propositions du défendeur.

Jugement :

Considering that the cession made by the petitioner to Joseph M. Dufresne is, of itself, an act contrary to our bankrupt system, and that the discharge referred to under it cannot operate against the plaintiffs, *whom I find to be really creditors of the said petitioner as they have alleged ;* considering that the act of making that cession or assignment, supposing that it once might of itself have justified proceedings to place the estate of the said Lawrence Cohen in compulsory liquidation, cannot *now do so*, and does not suffice to found the attachment of Benjamin Hutchins *et al.* upon, because their proceedings in this case have not been commenced within three months next after the said act of session by Cohen to Dufresne, relied upon in part in this case by the plaintiffs, as subjecting the said Lawrence Cohen and his estate to the process in this cause ; I do grant the petition of the said Lawrence Cohen.

Attachment quashed.

J. J. C. Abbott, Q. C., pour les demandeurs.

Duhamel & Rainville, pour le défendeur et requérant.

(H. F. B.)

MONTREAL, 18TH NOVEMBER, 1869.

Coram TORRANCE, J.

No. 1036.

Redpath et al. vs. *The Sun Mutual Insurance Co.*, and *Redpath et al.*, Plaintiffs *par réprise d'instance.*

HELD:—1. That a contract of insurance alleged to have been made in Montreal by an agent there of an Insurance Company, incorporated by the laws of the State of New York, whose charter and by-laws provide that it can only contract in New York, and by its President or Vice-President, is null and void.

2nd. That the statements or admissions of an agent, made after the contract has been perfected, are inadmissible as evidence.

This was a trial before a special jury, in an action by the plaintiffs to recover from the defendants the sum of $9,450 cy., alleged to have been insured by the defendants, on a cargo of molasses of the value of $18,900 cy., shipped from Matanzas, in Cuba, on board a vessel called the "Thomas Connor."

The contract was alleged to have been made in Montreal with the defendants' agent here, and a record thereof made by him in a book which the plaintiffs produced.

The defendants pleaded, amongst other things, that under the charter and by-laws of the Company no such contract could have been legally entered into here, and that the Company could only legally make a contract of insurance in New York City, and by its President or Vice-President.

TORRANCE, J., charged the jury as follows:—

In reviewing the facts which have come before you, gentlemen of the jury, it is right that I should remind you of what are the respective duties and powers of the Court and jury. They are stated as follows in the two articles of our Code, C. C. P. 406, 7: It is the duty of the judge to declare whether evidence is legal, and it is the duty of the jury to say whether the evidence admitted is sufficient. The jury decides as to facts, but must be guided by the directions of the judge as regards the law. All questions of fact, therefore, gentlemen, are within your province, and matters of law are within the province of the Court; and it is your duty with regard to these matters of law to take the direction of the Court. The whole litigation between the parties may be summed up in the answers to five questions. The first, and not a material, question I think is, whether there was in existence, with regard to the Columbian Co., a valid policy of insurance at the time of the loss of the "Thomas Connor," and the application in this matter, in the Columbian Insurance Co., and if its existence prevented the alleged contract with the defendants from taking effect or being enforced. Now, no stress has been laid upon this point by the defendants, and I take it they do not rely upon it, and at any rate there is no difficulty in the case arising out of this point—the existence of the other policy with the Columbian Insurance Co. The next question is, if there was a contract of insurance effected on behalf of the Sun Co., through Mr. Hart, with the plaintiffs, Redpath & Son, was there concealment by the plaintiffs of the fact that the "Thomas Connor" was overdue, and had not been heard of? Was the fact material and fatal to the contract of insurance?

Was the concealment a material fact in this matter? The evidence with regard to the materiality of the concealment is before you. You will remember what the witnesses said on the one side and on the other. You have had the evidence of Mr. Anthony as to the reasons—and very excellent reasons they were—why they declined the risk. You have, on the other hand, the evidence of Mr. Fulkiner as to his notifying Mr. Hart that the vessel was due or overdue; and you have the evidence of Mr. W. D. B. Janes as to the time vessels often took in going from Matanzas to Portland, Maine. This is a matter peculiarly within your functions to decide with regard to the answer of this question, and I shall say nothing more about it. The next question is—Did Mr. Hart, on behalf of the Sun Mutual Insurance Co., make a contract of insurance with Messrs. Redpath & Son on the cargo of the "Thomas Conner?" Now, with regard to the meaning of the word "agent," a great deal of discussion has been had on one side and on the other according to the views of the counsel who are concerned here, and according to the interests of the parties in the matter. That the word "agent" has a very wide meaning, there is no doubt; but we have to see what the parties understood to be the meaning of the word. For example you may employ a house agent in the city to collect your rents, but that agency does not justify him in mortgaging your property and signing notes for you. That is not the meaning of the word. The question then comes up—what really was the agency in this matter; what was assumed by Mr. Hart. You have the evidence of Mr. Fulkiner on the one hand, and the evidence of Mr. Hart on the other. Mr. Fulkiner says very decidedly and positively that he was covered; that the plaintiffs were covered by the agreement which was entered into between Mr. Hart and the plaintiffs; that there was an agreement at the time, that the insurance should take effect and cover the risk in question. Mr. Hart, on the other hand, denies emphatically, that he was anything more than a medium of communication with the defendants, the Sun Insurance Company, and says all he did was to receive the application and send it to New York. You have heard the evidence on the one side and on the other; with regard to the statements of these witnesses it is a matter which is peculiarly within your functions; you have seen both of these witnesses give their evidence before you; you have heard the explanations given on the one side and on the other; and you are judges of the circumstances of the case; you can make up your minds for yourselves as to the truth of the story which is told on the one side or on the other. With regard to the statement of Mr. Henry Mackay as to what took place the following day, when he says he understood Mr. Hart to say that he had taken the risks of Mr. Redpath, the Court, upon reflection upon this matter and upon examination of authorities, thinks that it should not have permitted that question to be put to the witness. It was something that took place on the day following, and you will not regard this matter. If you can you will not regard the evidence of Mr. Henry Mackay with regard to what took place on the following day. I will just read four lines from one of our standard authors on the subject of evidence, "whether the declaration or admission of the agent in regard to a transaction already past"—the insurance of course in this case had been closed the day before, if the statement of witnesses in regard to date is true,—"but while his agency for similar business still continues, will bind the principal,

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does not appear to have been expressly decided; but the weight of authority is in the negative."* Any other books which I have looked into since do not make any qualification of the general rule that the admission of the agent must have been made at the time the transaction was going on; otherwise he is a mere witness, and ought to be put in the box before you and make oath with regard to his statements. I would remind you of what took place in connection with the transmission of the application for insurance to New York. The application being enclosed in a letter with the notice accompanying it to each of the defendants, would show plainly that Mr. Hart intended simply to be a medium of communication with the Insurance Company, and transmit the application of the plaintiffs to New York. There is this to be said—I think I cannot help making the remark in regard to the transaction of the business in this case—that from all I see of the narrative of the circumstances in this case, if Mr. Hart intended to bind the Company by his act upon this day it was done in a hurried way, with no particular care as to the nature of the risk which he assumed; and on the part of the plaintiffs, it was done without any conditions when making the agreement that Mr. Hart was an agent for the purpose of taking this risk. There is a striking contrast between the recklessness with which he makes the agreement, and the careful business-like manner in which the managers of the Company did the same thing in New York. In the one case there was no consideration whatever given to the matter; it is simply the reception of an application and hurrying it off to New York. In the other case, as Mr. Anthony told us, there was the most careful, most business-like estimate of the nature of the risk, and, after careful consideration and deliberation by the three agents of the three Companies, they came to the conclusion to reject the risk. That is a circumstance which is to be considered in this matter, in order to decide correctly whether Mr. Hart really was the agent of the Company, and intended to be the agent of the Company, to bind them at the time to receive the application. But at the same time, gentlemen, I merely throw out this suggestion and make this remark to you. You are the judges of this matter. The next question which comes up is whether Mr. Hart, on the 23rd January—the day of the insurance—was the agent of the Company, carrying on business for them at Montreal, with power to effect insurances on their behalf. Was he, on the 23rd day of January, the agent of the Company, empowered on their behalf to make this policy of insurance? The plaintiffs have considered this a very important point in the case, and they have displayed a great deal of ingenuity in the exhibition of circumstances and business transactions between Mr. Hart and persons insured in the Company, and have cited among other cases brought before you three cases—one, the Gas Company against the Sun Mutual Insurance Company, which was litigated in the year 1863; another, the case of Jones against the same Company, litigated in the year 1865; and the case of the Commercial Bank, litigated in the year 1868. I have carefully looked at the circumstances connected with these three cases, and I certainly do not see that they touch the question that is before the Court and jury at the present time. With regard to the Gas Company's case, it was a question with regard

* 1 Greenleaf, Evidence, § 113. See also Story on Agency, § 134.

to the classification of a vessel—if I remember rightly—quite a distinct matter. In the James case the question, the trouble between the parties, arose in this way: A judgment for a considerable amount had been obtained against the Company without serving them with process, without giving them a writ in the usual way by a service upon the defendants at their place of business or at the office of the Company's agent. They were advertised in the newspapers. Naturally they made an attempt to get rid of this judgment, and they did so; at least they attempted to do so by presenting a petition in Court representing that they had an office and place of business in Montreal, and that there was an agent there who could receive service for them, and these facts were sworn to by Mr. Hart. Now, I think unnecessary trouble has been made in this matter with regard to the nature of Mr. Hart's affidavit. Here I must consider with regard to the meaning of that affidavit what the object of the parties was; and the object simply was to shew to the Court, as distinctly as could be done, as plainly as words could make it, that the Company had an office here and a person here who was authorized on their behalf to receive process for them. With regard to the rules which should guide Courts and all persons with regard to agreements of parties,—these rules are familiar rules, they are all "as old as the hills"—a rule of this kind states with regard to the meaning of a contract, "however general the terms may be in which the contract is expressed, they extend only to the things concerning which it appears the principals intended to contract." This rule applies to contracts, but the same rule applies to everything in which the question is what was intended. You must look at what object the parties had in view. Bacon in one of his general maxims says, general words shall be aptly restrained according to the principle or person to which they relate, and in a book which we continually use with regard to the interpretation of contracts (Broom's Maxims) there is a commentary on the meaning of this very maxim, and looking at the statement of the Company in that case, and the affidavit which is made in support of it, it is impossible to come to any other conclusion than this, that the gist of that statement was simply to show to the satisfaction of the Court that there was a place where service of a writ or declaration could be made, and the defendants did not think of anything else; they did not trouble themselves about anything beyond that. They naturally, as all lawyers would do, made the words as large and comprehensive as would be sufficient to prevent the Court making any mistake as to what they meant. In the same paper there is an allegation that Mr. Watt made and effected insurances in the Company at Montreal. Now, that was an inaccurate expression, because, in point of fact, the policy that is produced here in this case of insurance was made at New York, and not at Montreal, though the application, doubtless, was sent to the Company through the office at Montreal. I shall now, in connection with this fourth heading as to the Company authorizing Mr. Hart to make contracts of insurance on their behalf in Montreal, refer to two of the letters of the Company. There is, first, the letter written from New York on the 17th January, 1864; and in the "P. S." it is intimated that they would be happy to open a business with Mr. Hart. The writer is Mr. Neilson; and, he adds, "any other risks offered to you for our consideration." What does that mean? It means it must be submitted to them and considered by

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them, and they could assume the risk or not as they considered would be for the interests of the shareholders whom they represented. "Any other risk offered to you for our consideration similar to those covered by the policies of Mr. Thomas and Mr. Urquhart, the latter of which gentlemen insures wholly with us, we shall be happy to entertain on the same terms." Then there is the letter of the 8th of January, 1865, which comes up, and the first part of which notices an abandonment which had been imprudently accepted by Mr. Hart. "There is no objection," they say, "to your being a medium of transmission, but nothing more; that is a point upon which we must be peremptory in all cases." Then there is the evidence of Mr. Anthony, which is very clear on the subject of Mr. Hart's powers. That they were of a very limited character; that he was authorized to accept service since 1861; that he was authorized specially in cases that came before the Company to make extensions of policy and to receive notices. The counsel for the defence made a point of the evidence of Mr. Thomas Ross and Mr. A. T. Patterson, who received from Mr. Hart certificates to the effect that they were insured; but Mr. Patterson explains this by saying that this was done, he supposes, upon an open policy which Mr. Hart held himself. "I understood," he says, "that Mr. Hart himself had an open policy in the Company upon which these certificates were insured, and understood from Mr. Hart that he had an open policy with the Company himself upon which he insured us." The Court here would make a remark which it should have made some time ago. You should carefully separate the acts of Mr. Hart from the acts of the Company; you can decide for yourselves what Mr. Hart actually did in this matter—in his interview with the Messrs. Redpath & Son; and it is another question how far he was authorized by the Company. And one other point to which I would call your attention is the question whether the defendants here may be bound in the case, whether the defendants can be bound to any contract of insurance effected elsewhere than at the place, and otherwise than in the manner, authorized by their charter and by-laws? In 1841 an Act is passed and it refers to another Act which incorporated a Company previously to insure—the United Insurance Company,—and that Company had power, by instrument or otherwise, to make marine insurances upon vessels, their goods, and so on, and all corporate powers of the said Company shall be exercised by a board of trustees and there are no less than thirty-two of these trustees, who shall have a President, a Vice-President, and so on. Then comes a very important clause in the Act, which says that the operations of this Corporation shall be carried on in such a place in the city of New York as the trustees shall direct and not elsewhere—in the city of New York, and there all contracts have to be made. And No. 9 of the by-laws says the President and Vice-President, and second Vice-President if there be one, shall have power to make and execute contracts of insurance upon behalf of the company, but none shall be made when two are present, if either dissent. There is the greatest care taken here to protect the shareholders. Their interests are of very great importance in a matter of this kind. This is a question of law which is exclusively within the province of the Court; and the Court on this question is against the plaintiffs; and it is therefore the duty of the Court to charge you that Theodore Hart was not empowered by them to effect insurances upon their

behalf that the plaintiffs here pretend were made; that defendants did not agree to insure, and did not insure the molasses of the plaintiffs. You will therefore answer the second and third questions in this sense in conformity with these directions of the Court. Reference has been made to the case of McGillivray against the Montreal Insurance Company. This is a case which is directly in point. It was there held by the Privy Council that the charter of the Company directed the way of making contracts—you should remember the evidence and principle here—that Mr. Murray, the manager, could not bind the Company in a different way. In that case the Court and jury deemed it a hard case for the plaintiff, Mrs. Reid,—Elizabeth McGillivray was her maiden name. She had empowered a Mr. Hays to go to the Insurance Company and effect an insurance with Mr. Murray. When the question came as to the payment of the premium,—it was a premium of some amount, and Mr. Hays, happening to be in need, was not prepared to pay the premium in good time,—he induced Mr. Murray to take his note. But the note was protested some time before the fire, and the premium, in fact, was never paid, the policy was never given to Mrs. Reid, and when the fire occurred subsequently, and a claim was made on the Company, they said—"We never made the contract with you; we never accepted the premium from you." Still the Court and jury took a different view of the case; it went to appeal, and a majority of the Court of Appeal decided the case could not be touched. Then it went to the Privy Council, and there it was decided,—and decided in a way which has met, as far as I have been able to observe, with the approbation of the Bar of this country. The case was decided against the plaintiff on this ground, that the Company could only be bound in the terms indicated by their charter, and not otherwise. That case was a very interesting case for lawyers, and throws a great deal of light upon such questions before our Courts. That question has come up again and again in the States, and has been decided in that sense. We possess the record in one of our law reports, and the information, valuable as it is, was procured at an expense of something like £1,000 to the unfortunate plaintiff, who learned only from the Privy Council that her agent did not procure a contract of insurance for her. I did not know whether any of you gentlemen have been interested in the Commercial Bank of Canada, but they were in trouble in a similar way. This case was litigated in Upper Canada, and went to the Privy Council two or three years ago, in which this bank was plaintiff against the Great Western Railway of Canada. The Great Western Railway was incorporated under a certain charter, and was interested in a western road, and it induced, or rather the officers of the Railway—the directors, I presume,—induced the Commercial Bank to advance for the construction of this foreign road, a very considerable sum of money, I think amounting to a million dollars; I don't remember the precise sum. Subsequently the Great Western R. Co. refused to pay this amount, and the question was litigated before the Courts here, how far the railway could be bound by the acts of their officers. The question came up as to the scope of their charter. It was decided in one sense in Upper Canada, but finally the bank lost a very great amount of money by the decision of the Privy Council; and probably it was that which made such a serious difference in the value of the shares of that bank subsequently. There is reasonableness in this rule. The

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Company consists of shareholders who, in fact, empower their managers and officers to act in the way and to the extent pointed out in their charter, and who might be ruined if their agents had power to bind them by exceeding their charter. Take the case of the Bank of Montreal for example. Suppose the Directors of the Bank of Montreal decide to transmit to Hong Kong, in China, say, one half of their capital,—three millions of the capital of the Bank,—for banking operations there, and suppose a suit, arising out of a breach of contract, was brought against the Bank here in Lower Canada, and the question was raised as to the liability of the Bank, the very first question that would come up would be, what is the scope of the charter? The Court would look at once to the charter to know what were the powers of the directors of the Bank; otherwise the shareholders might be ruined. Now, gentlemen, here is this Insurance Company, which in the most emphatic terms, in going to the legislature, ask that the charter should provide that its operations and offices shall be in the city of New York and at such place as the trustees shall direct, and not elsewhere, and would it be right for the President and Vice-President and directors to establish insurance offices all through the United States and all over the world, to bind the Company, without the shareholders knowing anything about it. The shareholders wish to keep the business entirely under the supervision of the head officers in New York, and that there shall be no contract which does not emanate from New York. It may be said it is hard for those who contract in ignorance of the inability of the agent to bind his principles beyond the limits of their charter. But we are bound to know the capacity of those with whom we contract. It is the same as in the case of married women and minors. He who makes a contract with a minor or a married woman is to blame himself and no one else. If we ignorantly contract with them we must take the consequences. It was a reasonable prayer for the promoters to ask a Legislature not to allow the Company to make a contract of insurance out of New York, and it is our duty to protect the Company in this respect. It was argued on the part of the plaintiffs that foreigners should not be protected in this requirement of their charter, but the Court here cannot respect persons and make a difference between foreigners and citizens. I know of no law of civilized society that would justify the application of a different rule to a foreign corporation and a Canadian Company, and in connection with this I would just refer to a clause in the Consolidated Statutes of Lower Canada which provides for the protection of foreign corporations. (Sec. 2, Chap. 91). "All joint stock or other companies or bodies politic and corporate who have a legal capacity in the jurisdiction wherein they are respectively erected or recognized, and all persons on whom by any properly constituted authority or law, whether of the heretofore province of Upper Canada, or of the Imperial Parliament of Great Britain and Ireland, or *of the United States of America*, or *of any of them*, or of any other foreign state, colony, or dominion, the right or power of sueing or being sued has been conferred, shall have a like capacity in Lower Canada, to *bring and defend* all actions, suits, plaints, bills and proceedings whatsoever,—and shall by and before all Courts, judges, and judicial authorities whatever in Lower Canada, be held in law to be capable of sueing *and being sued in the same name, manner and*

way as they could or might respectively be within the jurisdiction wherein such executors or administrators, or persons, bodies politic and corporate, etc., were respectively created, erected or recognised." I would merely, in conclusion, refer to the Civil Code (Art. 360), referring to officers of corporations: "These officers"—that is the President and Vice-Presidents, or whatever they may be—"represent a corporation in all acts, contracts, or suits, and bind it in all matters which do not exceed the limits of the powers conferred on them. These powers are either determined by law, by the by-laws of the Corporation, or by the nature of the duties imposed." If this were a Canadian corporation it would be impossible to say it could be bound by an insurance made by their agent who exceeds the authority given him to make contracts. And it is the duty of the Court to apply the same doctrine in the case of an American Company. The Court, therefore, charges you that the defendants could not make and cannot be bound by the contram assuming, It, cercly say assuming, there is a contract here, but it is for you to say whether there was a contract made in the matter; assuming that Mr. Hart in their name made a contract which is sought to be fastened upon them. On one side it may be said that this is a hard case, but there is a maxim of our law which says that "hard cases make bad law." In this sense we are very apt to be carried away—I admit judges as well as juries are very apt to be carried away—by what are called hard cases, and come to decisions which, upon calmer reflection, are not sanctioned by our Courts. Take the plaintiff in the case of McGillivray against the Montreal Insurance Company. It was considered a hard case, and was so held in the Courts here; and what was the final result? After bitter litigation on both sides, and litigation that lasted years, it ended in the plaintiff being turned out of Court, or at any rate refused judgment on a verdict at very heavy costs. I shall only say in conclusion that a verdict of nine is sufficient to settle the question. It is not necessary for you to be all agreed; and if you wish the assistance of the Court with regard to anything, it is the duty of the Court to give you all the assistance and information in its power.

The jury returned a verdict, in the shape of answers to special questions submitted to them, in accordance with the Judge's charge.

Verdict for defendants.

Bethune & Bethune, for plaintiffs *par réprise d'instance*.

Hon. J. J. C. Abbott, Q. C., for defendants.

(S.B.)

ST. JEAN, 19 NOVEMBRE 1869.

Coram SICOTTE, J.

No. 159.

Daudelin et ux., vs. *Valfroy Vincelette* et al., et *Daudelin* et ux., (Demandeurs en Faux), vs. *Valfroy Vincelette* et al., (Defendeurs en Faux.)

JUGE:—Que la maxime de l'ancienne jurisprudence "le criminel tient le civil en état" est encore la règle.

Une question toute nouvelle dans ce pays a surgi de cette cause. Il s'agit de l'influence du criminel sur le civil. Nous passerons rapidement sur les

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longs détails que cette cause a provoqués: et nous donnerons, dans presque leur entier, les observations du savant Juge qui a rendu le jugement.

L'action est intentée pour $300, en vertu d'une obligation contractée par Valfroy Vincelette, et continuée solidairement par Clément Vincelette et Alex. Dufresne. Les défendeurs offrent en compensation un billet pour à peu près le même montant, consenti (en apparence) pardevant le dit Valfroy Vincelette, en sa qualité de notaire, par le demandeur à un nommé Guertin, et transporté par celui-ci à Vincelette. Ce billet est en brevet et le prétendu débiteur a signé d'une croix.

Les demandeurs s'inscrivent en faux contre ce billet.

Presqu'en même temps une poursuite criminelle pour faux est intentée contre le nommé Valfroy Vincelette, par le demandeur.

Vincelette est trouvé coupable et condamné.

Procédant ensuite sur le faux incident, les demandeurs allèguent, comme moyens de faux, le fait de cette conviction qui, selon eux, compute nécessairement la fausseté de la pièce signée de faux, et à l'appui de leurs moyens de faux, ils produisent: 1o Copie de l'indictement avec le rapport des grands jurés: 2o Copie du procès verbal de toute la procédure en Cour criminelle y compris la conviction; 3o Copie de la sentence; 4o des admissions sur l'identité du billet et de la personne désignée dans les deux causes sous le nom de Valfroy Vincelette; et ils s'en tiennent à cette preuve de faux.

Les défendeurs en faux incident, dans leur reprise au moyens de faux, dénient l'autorité de la chose jugée au jugement rendu au criminel en matière civile; ils dénient même à ce jugement toute influence sur le civil, et ils prétendent que dans tous les cas, ce jugement n'a aucune valeur contre Clément Vincelette et Alexandre Dufresne, cautions, qui n'étaient pas représentés au procès criminel: et que si Vincelette convaincu de faux, ne peut invoquer la validité du billet fabriqué par lui, eux, ses cautions, peuvent se servir de ce billet comme s'il n'était jamais intervenu de conviction entre le débiteur principal.

Telles furent les prétentions des parties. Les demandeurs s'attachèrent à prouver, 1o que cette question ne devait pas être décidée d'après les principes de la jurisprudence anglaise, mais exclusivement d'après ceux de la jurisprudence française: 2o que cette dernière jurisprudence était depuis longtemps invariablement fixée sur ce point, et que la grande raison qui l'a déterminée, c'est le "scandale judiciaire" qui résulterait d'un fait déclaré faux au criminel, et déclaré vrai au civil; de deux Cours également souveraines dans les matières de leur compétence, dont l'une dirait "oui" et l'autre "non" sur le même fait; de la détention d'un individu dans un pénitencier pour fabrication de pièces et en même temps les gains et profits que ferait le coupable au moyen de la pièce fabriquée par lui.

Les autorités citées furent:

C.C., Art. 1207.

Dalloz, Jur. gén. du Roy, tom. 2, p. 625, vo. chose jugée, influence du criminel sur le civil.

Marcadé, vol. 5, sur l'Art. 1371, chose jugée, &c., p. 192.

Zacharie, § 589, vol. 3, p. 496, Oblig. et Contrats.

Merlin, Quest. de droit, vo. chose jugée.

Sourdat, sur l'Art. 1241.
Denizart, No. vo. chose jugée.
Gilbert on Evidence, 1 vol. No. 31.

Les défendeurs appuyèrent leurs prétentions presqu'entièrement sur la jurisprudence anglaise et citèrent entr'autres autorités, Starkie, 1 vol. "judicial instruments."

SICOTTE, J.—La principale différence entre l'ancienne procédure française et celle d'aujourd'hui est dans l'organisation de tribunaux distincts et spéciaux, pour juger le faux principal et le faux incident, le procès criminel et le procès civil.

Avant le Code Napoléon, sous l'empire des Ordonnances, les mêmes Cours jugeaient le criminel et le civil.

L'article 1, Titre 20, de l'ordonnance 1667, statue que les Juges pourront ordonner qu'un procès commencé par voie civil sera poursuivi extraordinairement, s'ils reconnaissent qu'il peut y avoir lieu à quelque peine corporelle.

C'est pour cela qu'on disait que le délit ne rendait pas la cause criminelle, mais seulement la manière de procéder.

Les Juges pouvaient recevoir les parties en procès ordinaire. On appelait cela civiliser la matière qui auparavant était criminelle, mais toutefois après cette civilisation on pouvait reprendre le procès criminel, et tout cela se faisait devant le même juge et devant le même tribunal. On reprenait celui qui avait été fait pour le joindre au civil, comme n'étant qu'un procès, et le civil dépendait du criminel, l'ordinaire considéré comme accessoire de l'extraordinaire; et le Juge avait égard à ces deux voies d'instruction lors du jugement définitif.

La jurisdiction de nos tribunaux est distincte et séparée quant aux matières civiles et criminelles; mais chaque tribunal est juge souverain et indépendant dans les matières de sa compétence, et leurs décisions sont finales, quant aux choses qui leur sont spécialement attribuées. Le civil ne peut intervenir dans le criminel, ni le criminel dans le civil; mais la décision de chaque tribunal sur les matières de leurs attributions spéciales, est finale, absolue; et pour les autres tribunaux, cette décision est chose jugée, sur toute son autorité, quant à toutes fins.

La maxime de l'ancienne jurisprudence, "que le criminel tient le civil en état" est encore la règle. Le code français l'a reproduit par une disposition expresse Cette maxime est juste et découle de la nature des choses, et de leurs conséquences nécessaires et forcées.

Merlin pose cette question: Pourquoi l'action publique, lorsqu'elle est intentée avant ou pendant la poursuite séparée de l'action civile, doit-elle tenir l'action civile en état? Il ne peut y avoir qu'une raison; c'est que l'action publique est préjudiciable à l'action civile; c'est par conséquent que l'action civile est subordonnée au sort de l'action publique; c'est que le jugement à rendre sur l'action publique, recevra de l'action civile une applicatien nécessaire et forcée.

Les jugements civils ont l'autorité de la chose jugé, quant à la vérité du fait criminel, quant à la contestation du crime et de sa punition.

Il est hors de doute qu'après le procès en faux principal commencé, le sursis au jugement du procès civil d'où il a surgi, peut et doit être ordonné. Le faux principal est alors préjudiciable au faux incident.

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Quel serait la raison du sursis du procès au civil, si après le jugement de condamnation ou d'acquittement au criminel, il y avait encore lieu de faire le même procès au civil.

La règle que le criminel tient le civil en état, s'appliquera, parce que de fait le procès criminel est une instruction dans le procès civil, mais qui, attendu la punition corporelle qui peut découler comme conséquence de cette instruction, ne peut se faire par notre organisation judiciaire, que dans un tribunal criminel.

La vérité ou la fausseté de la pièce invoquée au civil, est un fait qui est examinée et déterminé, s'il y a lieu à une condamnation corporelle, par un tribunal autre que le tribunal civil, mais dont les décisions seront aussi conclusives, sur le procès civil, que si elles émanent du tribunal civil.

Ce dernier est tenu en état jusqu'à cette décision. Le faux principal, s'il surgit à propos en pièces produites dans le cours d'une instance civile, est préjudiciel au faux incident.

Dans l'espèce le procès en faux principal a été provoqué à l'occasion d'un procès civil, dans lequel les demandeurs et les défendeurs étaient les seules parties. La plainte en faux principal est sortie du débat engagé entre les parties, relativement à la même pièce. C'était une pièce commune à tous les défendeurs, elle était invoquée par tous, conjointement, de la même manière et pour leur valoir identiquement et au même degré.

Le faux principal reprochait à l'un d'eux seulement la fabrication de la pièce, et il a été déclaré coupable de l'avoir fabriqué. La condamnation emporte nécessairement, essentiellement, forcément, la fausseté même de la pièce.

Cet accusé, déclaré coupable, est la même personne que le défendeur à l'inscription en faux incident. Il demande qu'on fasse un nouveau procès tant à la pièce qu'à lui-même, car dans l'instance criminelle, tout le procès dépendait de la vérité ou de la fausseté de la pièce: il n'a été condamné et puni que parce qu'elle a été déclarée fausse et que c'était lui qui l'avait fabriquée.

Il faut dire que la fausseté de la pièce quant à lui, et pour toutes les fins du procès civil où il l'a invoquée, est irrévocable, comme le fait de la conviction et de la punition. Cette fausseté est conséquence légale, suite essentielle du jugement criminel.

S'il n'en était pas ainsi, il pourrait arriver que la personne convaincue du faux et de la fabrication, aurait tout le profit et avantage de son crime, quand des tiers liés avec lui dans le même procès, n'ayant que des droits communs et identiques, avec le coupable du faux, n'auraient pas toutefois participé dans sa criminalité dès le commencement, et en deviendraient solidaires toutefois sans les risques de la punition, en fesant obtenir au coupable non pas le pardon, mais le bénéfice matériel de son crime.

Une conviction de parjure détruit la vérité de l'homme comme témoin, parce qu'elle a constaté sa fausseté. Cette disqualification est absolue, elle frappe le témoin parjure partout et toujours, c'est conséquence légale, c'est l'effet nécessaire, c'est l'exécution du jugement.

La pièce convaincue de fausseté est également disqualifiée, parce qu'elle est parjure, *faussaire*.

Cette fausseté la disqualifie partout, à l'encontre de tous ceux qui l'invoquent au même titre, aux mêmes fins, contre et entre les même parties. C'est égale-

ment conséquence légale, exécution du jugement. Le jugement en la déclarant fausse, fabriquée, a, par là même, déclaré que la partie contre laquelle on l'invoquait n'y a jamais participé ; que de fait elle n'existait pas, autrement que comme fait mensonger. Déclarer sa fausseté entière, était ordonner sa suppression pour empêcher qu'on pût l'invoquer de nouveau.

Les défendeurs Clément Vincelette et Alexandre Dufresne n'ont pas de droits dans cette pièce autres que ceux de Valfroy Vincelette, l'autre défendeur, et qui l'a fabriquée. Ils l'invoquent aux mêmes fins, et de la même manière, comme lui, pour lui, par lui, pour un intérêt commun, dans le même procès. Ils tirent leur droits du condamné. Valfroy Vincelette, condamné comme faussaire et coupable de la fabrication, n'a pas droit de prétendre que la pièce est vraie.

On ne peut faire qu'un procès à la pièce comme à l'individu.

La réhabilitation de la pièce ou de l'individu, ne peut se faire sur le faux incident, après le procès en faux principal, dont il ne peut y avoir d'appel.

Le tribunal criminel avait jurisdiction spéciale pour déclarer fausse la pièce, dont il s'agit, et jurisdiction inclusive pour punir le faussaire. Il a été solennellement décidé par ce tribunal, que la pièce présentée et arguée de faux était fausse, et que le faussaire était Valfroy Vincelette.

La sentence de ce tribunal est absolue, obligatoire, pour tous les autres tribunaux, chaque fois que la même chose sera controversée.

Le fait invoqué comme moyen de faux, découlant de l'arrêt criminel est donc admissible et pertinent : il est comme on le disait autrefois l'extraordinaire qui se joint à l'ordinaire qui est le procès civil. Dans le jugement définitif, il faut, comme autrefois, avoir égard à l'instruction sur l'extraordinaire, lorsqu'il y a lieu de rendre le jugement définitif.

L'inscription de faux est donc bien fondée ; et il faut ordonner que la pièce soit rejetée du procès comme fausse et fabriquée.

Inscription en faux maintenue.

Chagnon, Sicotte & Lanctot, avocats du demandeur.

C. J. Laberge, Q.C., avocat du défendeur.

(M. L.)

MONTREAL, 27TH OCTOBER, 1869.

Coram TORRANCE, J.

No. 1021.

Ex parte *Marry*, applicant for *certiorari*, and *John P. Sexton*, Esq., recorder.

HELD :—That the merits of a *certiorari* may be heard on a rule to quash, without inscription for hearing.

TORRANCE, J. :—This case is before the Court on a rule to quash the conviction. The Recorder objects that the case has not been inscribed as required by C. C. P. 1231. The Court is of opinion that an inscription is unnecessary. The rule has been regularly issued and served, and cause must be shewn against it without an inscription.

S. B. Nagle, for petitioner.

E. Carter, Q.C., counsel.

R. Roy, Q.C., for recorder.

(J. K.)

MONTREAL, 30 DECEMBRE 1869.

Coram MACKAY, J.

No. 1264.

Renaud vs. *Arcand et al.*

JUGE:—Que par ces mots : " Promesse de vente avec tradition et possession actuelle équivaut à vente " il faut entendre qu'une telle promesse, tout en liant celui qui promet assez énergiquement pour que la vente s'ensuive forcément si l'autre partie remplit les conditions du contrat, ne signifie pas néanmoins que telle promesse de vente est, en droit, la même chose qu'une vente ; que telle promesse n'a pas l'effet de transporter le droit de propriété ou la personne du stipulant, lorsqu'il appert par les termes du contrat que telle n'a pas été l'intention des parties, mais qu'au contraire elles ont voulu réserver cet effet à un acte postérieur et conserver le droit de propriété en la personne du promettant.

2o. Que le droit de demander la résolution de la vente, faute de paiement du prix, appartient au vendeur, malgré qu'il ait stipulé comme remède à l'inexécution des conditions, de la part de celui qui a promis d'acheter, la revente ou reprise des biens vendus, surtout s'il a stipulé ce remède sans préjudice à tout autre droit.

3o. Que la clause par laquelle le vendeur se réserve le droit de " se faire remettre, reprendre et revendiquer " n'est rien autre que le pacte commissoire.

4o. Que la position du promettant n'est sous ce rapport nullement changée par la faillite de celui à qui il a promis de vendre.

Par acte intitulé " promesse de vente " passé à Montréal devant Seers notaire le 9 juin 1866, le demandeur promit de vendre dans 7 ans et 6 mois, savoir, le 8 novembre 1873, à Eucher et Rémi Alphé Arcand, commerçants à Stratford, faisant affaires en société sous la raison social de Arcand et frère, des lots de terre avec dépendances, animaux et agrès de ferme, situés au même lieu et dont les dits Arcand étaient déjà en possession depuis plusieurs années en qualité de fermiers. Les dits Arcand devaient prendre la *jouissance* des dits immeubles immédiatement jusqu'au jour de l'expiration de période ci-dessus.

Cette promesse de vente était faite pour $3000.00 payable en 30 paiements de $100.00 devant se faire de 3 mois en 3 mois, avec intérêt de 7 par 100 ; de plus à la charge de l'entretien des chemins publics, du paiement des taxes municipales d'école. L'acte contenait de plus la clause suivante : " Il est bien entendue " entre les dites parties que si les dits Arcand cessaient ou négligeaint de faire " chacun des dits paiements exactement aux termes ci-dessus stipulés, en n'exécutaient toutes et chacune des clauses et conditions ci-dessus stipulées, ou se dépossédaient d'aucune partie des dits biens meubles ou immeubles sans le consentement du dit Hon. Louis Renaud, ce dernier aura droit d'exiger immédiatement, *sans préjudice à tous autres droits*, ou la vente à l'enchère publique en " la manière et forme suivie dans les licitations et partages de biens, de tous les " immeubles et bien meubles, etc., jusqu'à concurrence de la balance lui restant " due sur la somme de $3000.00 ci-dessus, avec intérêts tels que stipulés, " ou s'il, le dit Honorable L. Renaud, le préfère, reprendre des dits Arcand et " frère, et se faire remettre et revendiquer immédiatement, telle portion des dits " biens meubles et immeubles qui sera nécessaire pour compléter la balance restant " alors due sur les dits $3000.00 et intérêts, en faisant faire l'estimation du prix " qu'elle pourait se vendre argent comptant par trois experts dont un nommés " par un juge et les deux autres par les parties.....Il est bien entendu que le

" dit Renaud aura le droit de choisir et revendiquer ceux des dits biens qu'il " jugera à propos jusqu'à concurrence des dites $3000.00 et intérêts."

Cet acte ne fut pas enrégistré.

La société Arcand et frère s'étant peu après dissoute, R. Arcand, l'un des associés, continua seul les affaires, fit des dettes considérables et devint insolvable après que 3 des paiements stipulés à la promesse de vente furent devenus échus, mais sans qu'un seul eut été payé. Le failli fit une cession entre les mains de T. Sauvageau, syndic officiel, sans y comprendre néanmoins les biens qui avaient fait l'objet de la promesse de vente.

Une majorité des créanciers du failli ayant ordonné au syndic de prendre possession de ces derniers biens et d'en opérer la liquidation, le demandeur intenta la présente action contre Eucher Arcand, frère du failli, et T. Sauvageau, en sa qualité de syndic à la faillite de ce dernier, pour obtenir la résolution de la promesse de vente et rentrer en possession des dits biens.

Par ses conclusions, le demandeur, après avoir demandé acte de la déclaration qu'il faisait qu'il se prévalait du droit de reprendre les dit biens, concluait à ce que la dite promesse de vente fut déclarée résolue par défaut d'accomplissement des conditions stipulées; que les défendeurs fussent condamnés à remettre les dits biens aux demandeurs, si mieux ils n'aimaient payer au dit demandeur les dites $3000.00 et intérêt tel que stipulé, ou de consentir à la nomination d'experts sur la manière pourvue au dit acte pour estimer la proportion des dits biens que le demandeur devait reprendre sur estimation de leur valeur argent comptant, pour se payer de la somme ci-dessus et des intérêts.

Le défendeur Sauvageau plaida sur cette action par une défense en droit et une exception péremptoire. Il est allégué dans la défense en droit:

1o. Qu'il appert à l'action que le demandeur n'a pas le droit de demander la résolution de la promesse de vente suivie de tradition, mais seulement d'exiger la mise en vente et la dation en payement de tout ou parties des dits biens à dire d'experts;

2o. Que le demandeur allègue qu'il n'a stipulé qu'un privilége différent du pacte commissoire.

3o. Que le demandeur ne pouvait en loi demander la résolution de la vente, la convention relatée constituant une vente irrévocable, transportant la propriété des dits biens d'une manière absolue;

Par l'exception péremptoire il est allégué:

Que l'acte en question est réellement une vente des dits biens lesquels sont la propriété des acquéreurs; qu'il a été suivi de possession par les Arcand;

Que le demandeur n'a stipulé et n'a qu'un droit de provoquer la vente des dits biens à défaut par les Arcand d'en payer le prix, et n'ayant faculté de reprendre les dit biens ou portion d'iceux que sur estimation par expertise, en payement de son dû, admettant par là avoir transmis la propriété des dits biens irrévocablement, a exclu par là toute idée de pacte commissoire, qui eut seul donné droit d'action, mais qui ne peut exister sans convention formelle;

Que le demandeur ne pouvait avoir que privilège du vendeur, lequel, en droit, n'existe pas sur les meubles vendus à terme et n'existe sur les immeubles que par hypothèque et ne peut être conservé que par l'enrégistrement.

Renaud vs. Arcand.

Le demandeur répondit :

Que la promesse de vente ne fut suivie que de *jouissance* à titre précaire pour 7 ans et 6 mois; que les Arcand n'ont jamais reçu tradition des dits biens, vu qu'ils en étaient déjà en possession comme fermiers, laquelle possession stipulée ne leur fut continuée que pour leur procurer les moyens de remplir les conditions a l'acte, et nullement dans le but de parfaire le contrat; que soit le demandeur, soit les Arcand, soit les créanciers eux mêmes avaient toujours donné au dit acte cette interprétation; que si ce contrat pouvait être appelé vente, ce ne pouvait dans tous les cas être qu'une vente faite avec condition suspensive, et comportant condition résolutoire, laquelle n'est rien autre que le *pacte commissoire;*

Que le droit stipulé en faveur du demandeur n'était pas de recevoir en payement portion des dits biens, mais le droit de les *reprendre et revendiquer* à titre de propriétaire;

Que dans tous les cas cette clause était stipulé *sans préjudice à tous autres droits*, ce qui conservait au demandeur le bénéfice du droit de demander résolution pour faute de payement du prix, lequel droit était de droit commun et existait indépendamment de toute stipulation.

Que l'acte en question ayant été passé avant la mise en force du code ne pouvait être affecté par les dispositions y contenues lesquelles n'avaient pas de rétroactivité. Le demandeur fit preuve que les Arcand possédaient les dits biens en qualité de fermiers longtemps avant l'acte en question, et que même sous l'empire de cet acte, ils avaient toujours considéré cette possession comme précaire.

Les remarques de l'hon. Juge siégeant peuvent se résumer comme suit :

Bien que l'art. 1478 du Code Civil du Bas-Canada, d'accord en cela avec le sentiment de presque tous les auteurs, établisse que " la promesse de vente avec " tradition et possession actuelle équivaut à vente," cependant il ne faut pas donner à cette disposition plus d'étendue que n'a voulu lui en donner le législateur. Qu'un semblable acte ait plusieurs des caractères de la vente, et soit effectif en ce sens que le vendeur se trouve lié par cet acte à passer titre si l'acheteur remplit toutes les conditions stipulées, et ne puisse vendre à une autre, cela est incontestable. C'est ce qu'on voulu exprimer tous les auteurs et après eux notre code civil. Mais que les effets d'un tel acte soient tellement absolus qu'ils dépouillent le promettéur d'acheter une propriété parfaite, c'est ce qui ne peut pas se supposer. Il ne faut pas donner à un tel acte des effets plus étendus que les parties n'ont voulu lui en donner. Les contrats sont la loi des parties.

Je trouve dans Marcadé une dissertation qui me paraît comporter la vraie interprétation qu'il faut donner à l'énonciation de la règle ci-dessus par les auteurs, laquelle a été posée en principe par le Napoléon et le code Canadien :.....

" Quand on entre au fond des choses, quand on cherche dans les explications " qui en ont été données à toutes les époques, le vrai sens de cette règle (*promesse*, " de vente vaut vente) on voit bientôt que ni nos vieux auteurs, ni les rédacteurs " du code n'ont entendu prendre ses énergiques expressions au pieds de la lettre, " que jamais il n'ont songé à nier la différence que la nature même des choses " établit entre une vente actuelle et une simple promesse de vente. La grande " dispute qui existait autrefois et que le code est venu trancher n'a jamais été de

" savoir si, en droit et légalement, une promesse de vente devait être rigoureuse-
" ment, la même chose qu'une vente. Personne, ni dans les siècles précédents, ni
" en 1804, n'a jamais imaginé une pareille idée. La *dispute* était de savoir si
" la promesse de vente liait le promettant assez énergiquement pour que la vente
" s'ensuivit forcément, et quelle fût ainsi rendue certaine par la promesse." 6 Marcadé, sur art. 1589, p. 166 et 167. Cette interprétation décide la question de savoir si le défaut d'enrégistrement prive le demandeur de ses droits, car ayant toujours été propriétaire il n'avait pas à conserver par enrégistrement son privilége de vendeur.

En second lieu, supposant même que cet acte soit une vente, il contient une stipulation qui n'est rien autre que le pacte commissoire.

D'ailleurs, cette stipulation était faite: " sans préjudice à tous autres droits," le demandeur s'est réservé par là le bénéfice du droit de demander la résolution du contrat faute de payement du prix, droit qui est formellement reconnu par les auteurs qui ont écrit tant sous l'ancien droit français que sous le nouveau et qui a été sanctionné par la jurisprudence de ce pays. La faillite du nommé R. A. Arcand n'a rien changé de la position du demandeur. Le demandeur doit donc obtenir les conclusions de son action.

Autorités citées par le demandeur.
9 Toullier, Droit Civil Français, No. 91, p. 161.
1 Troplong, Priv. et Hyp., p. 278.
1 " Vente, p. 129.
1 " " No. 130, p. 197.
2 " Priv. et Hyp., p. 331.
1 " " No. 471, p. 205.
1 " " No. 198, p. 289.
1 " " No. 193, p. 283.
2 " Vente, No. 645, p. 152, et suiv.
Code Napoléon, art. 1654.
Journal du Palais de 1825–36, p. 182.
12 Dalloz Jurisp. du Royaume Vo. Vente, p. 899, note 6.
Pothier, Vente, p. 635.
Pattenaude *vs.* Lerigé dit Laplante, 1 L. C. Jurist, p. 112.
Rupp. des Codif. Canadiens sur la vente, arts. 58, 59, 60.
Code Civil du Bas-Canada, art. 1543.
Coutume de Paris, arts. 170, 176, 177.
Acte concernant la faillite, 1864.
Thifaut *vs.* Racine. Jugement de la Cour de Révision du 30 Octobre 1868.
F. X. A. Trudel, pour le demandeur.
R. et G. Laflamme, pour le défendeur Sauvageau, *esqual.*
(F. X. A. T.)

COUR DU BANC DE LA REINE, 1869.

MONTREAL, 9 DECEMBRE 1869.

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

No. 30.

JOHN DONEGANI,

APPELANT;

ET

ANDREA MOLINELLI,

INTIMÉ.

JUGE:—1o. Que le statut des fraudes ne s'applique qu'aux ventes commerciales pures et simples, et non aux contrats d'ouvrages pour objets non encore confectionnés.

2o. Que l'article 1235 du Code Civil, ne s'applique qu'aux cas où le marchand qui trafique sur un article de commerce qu'il ne confectionne pas lui-même, le fait confectionner, ou l'achète de l'ouvrier ou d'autres négotiants pour le revendre.

3o. Que dans l'espèce actuelle le contrat a été pour un objet particulier en dehors du commerce ordinaire de l'intimé, et que ce n'est pas une vente-pure et simple, mais un louage d'ouvrage qui ne tombe pas sous le statut des fraudes.

L'appelant réclame de l'intimé la somme de $395 qu'il dit lui avoir prêtée. L'intimé a plaidé qu'il n'avait reçu que $186.25, et que cette somme ne lui avait pas été prêtée, mais payée et avancée sur certains ouvrages consistant en réparations de meubles, qu'il avait faits pour l'appelant, et sur le prix d'un buffet d'une grande valeur qu'il lui avait commandé. Ces meubles et ce buffet étaient depuis longtemps à la dispositions de l'appelant qui avait toujours refusé de les accepter, malgré les mises en demeure réitérées qui lui en furent faites. La valeur des réparations faites aux meubles de l'appelant est estimée à $110.50, et celle du buffet en question à $650.00, de sorte que l'intimé a plaidé compensation pour une partie, et s'est porté demandeur incident pour le surplus.

L'enquête a dévoilé les faits suivants: L'appelant aurait, dans le cours du mois d'avril 1865, requis l'intimé de lui faire un buffet d'une valeur ordinaire, dont le prix ne fut point fixé. Plus tard, voulant avoir un meuble plus riche, il fait la commande d'un buffet ornementé, permettant à l'intimé de l'exposer à l'Exposition qui devait avoir lieu dans le mois de septembre suivant. Les ordres de l'appelant furent exécutés, et le buffet fut fait à boutique de l'intimé qui avait pour cet objet requis les services des ouvriers les plus capables. L'appelant, pendant que le buffet se faisait, en surveillait lui-même les progrès, venant presque chaque jour à la boutique de l'intimé, faisant des suggestions, changeant même à plusieurs reprises le dessein qui avait été préparé d'après les mesures et suivant les dimensions prises par l'intimé lui-même, dans la salle à dîner de l'appelant. Le buffet fut mis à l'Exposition et offert ensuite à l'appelant qui refusa de l'accepter, donnant pour prétexte qu'il était trop grand pour sa salle à dîner.

La preuve de la commande de ce meuble fut faite par témoins, mais sous réserve d'objection, l'appelant s'y étant opposé, "*attendu que ce buffet valait plus de* £10 *sterling, qu'il n'y avait pas eu de livraison, que l'intimé n'avait point reçu d'arrhes, et n'avait produit aucun écrit quant à la commande.*" Un premier jugement fut rendu en Cour Supérieure par Son Honneur M. le Juge Monk, déclarant que la preuve qui avait été faite était illégale, et l'exception ainsi que la

demande incidente de l'intimé furent renvoyées, et l'action de l'appelant maintenue pour $192.25. L'intimé inscrivit en Révision, et le 28 avril 1868 ce jugement fut infirmé par les Honorables Juges Mondelet et Berthelot, Son Honneur le Juge Monk *dissentiens*. C'est de ce dernier jugement dont l'appelant se plaint en Cour du Banc de la Reine.

Toute la question est donc de savoir si le statut des fraudes est applicable à la présente cause.

L'intimé avait prétendu en Cour Inférieure que le statut des fraudes n'était pas applicable au contrat intervenu entre l'appelant et lui, attendu que ce n'était point une vente, mais bien un louage d'ouvrages; que si d'un côté il y avait vente des matériaux qui avaient servi à la confection du buffet en question, d'un autre côté il avait aussi louage de son travail et de son industrie. Que le contrat avait été fait pour un objet particulier, et en dehors des affaires ordinaires de son commerce. Mais qu'en supposant que l'on pût dire que la preuve de ce contrat dût être soumise aux dispositions du statut des fraudes, il avait un commencement de preuve par écrit suffisante, pour lui permettre de faire la preuve testimoniale de la commande du buffet en question. Ce commencement de preuve, l'intimé le trouvait dans les aveux de Donegani, qui après avoir nié la commande de ce meuble, finit par admettre *qu'il savait que Molinelli le faisait pour lui, mais qu'il avait toujours cru que c'était un cadeau qu'il voulait lui faire.*

La Cour d'Appel a confirmé le jugement de la Cour de Révision, mais sans égard à la prétention de l'intimé, quant au *commencement de la preuve par écrit*, déclarant que le statut des fraudes n'était pas applicable à la présente cause. Trois des Honorables Juges présents partageaient cette opinion, contre laquelle l'Honorable Juge Caron fit enrégistrer son dissentiment, après avoir dit que l'Honorable Juge-en-Chef l'avait prié d'exprimer aussi le sien.

On trouvera dans les remarques des Honorables Juges Badgley et Loranger la manière dont la majorité de la Cour a envisagé la question, et dans quelles conditions et à quels espèces de contrats le statut des fraudes est applicable.

BADGLEY, J.—The difference between the two judgments arises out of the sideboard and the testimonial mode of proof required to support Molinelli's exception and his demand, which claimed the value of it. Mr. Donegani maintains that the transaction was a sale governed for its proof by the requirements of the Statute of Frauds, which allowed no action nor exception without a writing, whilst Molinelli avers that the transaction was not a sale and, therefore, not within the Statute. The contention rests upon this question chiefly.

In order to appreciate distinctly the technical difficulty in question, it is necessary to give a brief statement of the facts and circumstances connected with the case.

(Ici le savant Juge fait un exposé circonstancié des faits, puis en leur appliquant le droit de la cause, s'exprime comme suit:)

Mr. Donegani had already directed Molinelli to prepare a common sideboard for him, but at once abandoned that idea, and suggested that he should build a showy one, fully ornamented, which he, Mr. Donegani, would take off his hands after the Exhibition. It is quite manifest that the sideboard in question would not have been put together but for the Exhibition; that it was a show article for-

Donegani et Molinelli.

a special purpose; that it was put together at Donegani's suggestion, to be for him after the Exhibition; that it was not an ordinary article of goods for sale in Molinelli's workshop, or one which he would ordinarily have made; that it was not existing at the time when Mr. Donegani ordered it, and that it was the mere work and labour which were ordered and not the mere production. It was a show article to be built and not a sale article, and therefore not within the Statute of Frauds. The authorities are very precise upon this point, and lay down the distinction broadly between articles regularly manufactured by the vendor from time to time, and those which are to be manufactured to order from the materials in his possession. This is established by Roberts, in his Treatise on the Statute of Frauds. He says: "The Statute does not apply if the contract is for the manu- "facture, work and labour in producing the article. If the vendor has not the "article for sale in the ordinary course of business, that is, not an ordinary article "of traffic, the contract for its production shews the attention of the party to "get it by skill and labour, and another indication of such intention is, if the "article be of a peculiar kind or for peculiar use." 3 East 203, as a suit of clothes, 12 M. and W. 33. Roberts sec. 304, 308. In Smith *vs.* Sorman, 9 Barnewall & Cresawell 561, Littledale, Judge, lays it down as follows: "Another class of "cases, Tower & Usborne, 1 St. 506, Clayton & Andrews, 3 M. & S. 178, Groves "& Bush, 1 East 192, is when the article contracted for has not existed at the "time of the contract, but is to be produced by work and labour in the interval "by the vendor, as when the contract was for a quantity of oak pines, which "had not been made, but were to be cut off slabs, or for a chariot to be built." In these cases the contract has been considered rather as a contract for work and labour than for the sale of goods, wares and merchandizes, and not within the Statute. So also in 5 B. & Ald. 613, cited by Roberts. So also in Lambe & Crafts, 12 Metcalf 356.————The contract is not within the Statute. The distinction we believe is now well understood. When a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale, and not a contract of labour; but otherwise when the article was made pursuant to the agreement. So also 21 Pickering 207: "it is very clear that by this contract (in this case no pro- "perty passed to the defendant) the carriage contemplated to be sold by the plain- "tiff to the defendant did not exist. It was to be constructed from the ma- "terials partly rough indeed, but not put together; it was therefore essentially "an agreement by defendant with plaintiff to build a carriage for him; and on "the defendant's part to take it when finished and pay for it at an agreed or "at the reasonable value. This is a valid contract and made on good considera- "tions, and therefore binding on the defendant, but it is not a contract of sale "within the meaning of the Statute of Frauds, and therefore need not be proved "by note in writing." When it is a contract of sale either of an article then existing, or of an article which the vendor usually has for sale in the course of his business, the Statute [illegible] well where the contract is to be executed at a future time as where it [illegible] immediately. But when it is an agreement with a workman to put [illegible] together, or construct an article for the employer, whether at an agreed price or not, though it may be called a purchase

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and sale of the article to be completed in future, it is not a sale until an actual or constructive delivery or acceptance, and the remedy for not accepting it is on the agreement. See also Gardner & Joy, 9 Metcalf 178. It is there said the difficulty arises, not so much from any uncertainty on the rule, as from the varied shades of contracts. If it is a contract to sell and deliver goods, whether they are then completed or not, it is within the Statute; but if it is a contract to make or deliver an article or quantity of goods, it is not within the Statute. See Spencer & Coxe, 1 Mer. 283; Dove & Simpson, 21 Fish, 384; Saunders & Wakefield, Barnewall & Ald. 353.

In this case the sideboard was perfected and built as directed and agreed with Mr. Donegani, and allowed Molinelli to be sent to the Exhibition. Mr. Donegani was called by Molinelli to remove it as his own property. The contract was completed by Molinelli, and it is a principle of law that when a verbal contract is completely executed by one party the consideration can be recovered from the other notwithstanding the Statute of Frauds.

The price or consideration was not of the essence of the contract, because it was uncertain at the time of the contract, and was only fixed by the final production or completion of the article.

The case has been treated so far, upon the applicability of the Statute of Frauds in controlling Molinelli's proof as to the sideboard. The authorities clearly show that the case is not within the Statute, and therefore is to be governed by the common law rule of proof in commercial matters; and it is impossible to doubt that the sideboard was put together by the order of Mr. Donegani. He admits, in his own evidence and examination as Molinelli's witness, that his words might have been assumed to be an order, and that *he knew* Molinelli was making the sideboard for him, but he adds, *he thought it was to be a present, cadeau*, for him. The question of *commencement de preuve* does not come up in this commercial case; if it was required it would be difficult not to find its legal sufficiency in Mr. Donegani's own avowals as above, which are sufficient to allow the oral proof to be adduced. Bédarride, De la Fraude, 2e vol. Nos. 738, 739, 740.

Under the circumstances of the case, the judgment of the Court of Revision is correct and should be confirmed.

LORANGER, J.—Je ne puis me rallier à l'opinion du savant Juge qui considère que le statut des fraudes s'applique à la présente espèce.

Donegani fait confectionner par Molinelli un buffet dont le prix est indéterminé, mais qui sera fixé à la valeur du meuble quand il sera terminé. Ce meuble doit être d'une valeur moindre que le prix auquel il a été évalué, mais eu égard à l'ornementation exigée par l'appelant pendant le progrès de l'ouvrage, il a coûté une somme d'argent considérable.

Suivant moi, le contrat originaire intervenu entre les parties à l'égard de la confection de ce buffet, n'a pas été un contrat pur et simple de vente. Molinelli n'a pas vendu purement et simplement à Donegani le buffet en question, pour un prix déterminé, ou à être déterminé plus tard. Ce fut un contrat mixte dans lequel la vente peut être entrée pour partie, mais dont le louage d'ouvrage et d'industrie forme un élément considérable. Par ce contrat, Molinelli a sans doute rendu à Donegani les matériaux nécessaires à la confection du meuble, mais il a

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aussi livré son travail et son industrie. Et la proportion entre la valeur de la matière et le prix du travail, ne peut pas entrer en compte pour faire prédominer la vente sur le louage, suivant l'excédant de valeur de la matière sur le prix de l'ouvrage. Car cette valeur respective des deux éléments du contrat, peut et doit varier suivant la nature de l'entreprise. Ici il est possible que la valeur des matériaux eût excédé le prix du travail. Mais le contraire peut arriver comme quand on fait la commande d'une statue en marbre à un sculpteur ou d'un tableau peint à l'huile à un peintre. Dans ces deux cas, nul doute que la valeur du travail ne soit supérieure à celle du marbre, de la peinture et de la toile. Le contrat serait cependant le même que dans la cause actuelle.

L'on ne peut donc prendre pour appréciation de la nature du contrat, la valeur proportionnelle de la matière et du travail. Ces contrats renferment incontestablement un louage d'ouvrage et d'industrie. Ce ne sont donc pas des ventes pures et simples, et ce sont ces ventes seules qui sont prohibées par le statut des fraudes, si elles ne sont constatées par écrit, suivies de livraison ou accompagnées d'arrhes.

En considérant le contrat comme prohibé par le statut des fraudes, cette cause offrirait une singulière anomalie. Donegani a commandé un meuble d'une valeur indéterminée. Ce meuble pouvait coûter moins de dix louis sterling ou d'avantage. S'il n'eût coûté que £10, le contrat eût été bon, et il a conservé sa validité tant que le meuble n'a pas excédé cette valeur. Mais au moment qu'il a excédé ce chiffre, il est devenu invalide. De sorte que nous avons un contrat valable pendant un temps, et ensuite frappé d'invalidité, c'est-à-dire, des parties obligées d'abord, et ensuite déliées de leur engagement sans rupture de contrat. Cette physionomie particulière de la convention serait suffisante à elle seule, pour démontrer que ce ne sont pas des cas semblables que le statut a contemplés.

D'ailleurs il faut prendre une société avec ses usages et ses mœurs particulières. Qui de nous a jamais pensé à faire des commandes par écrit chez les fournisseurs et les artisans; chez les marchands tailleurs par exemple. Si cependant la doctrine invoquée par l'appelant prévalait, après avoir commandé un habillement, l'on serait libre de ne pas l'accepter, quand il serait confectionné, si la valeur en excédait £10, et que la commande n'eût pas été donnée par écrit, ou accompagnée d'arrhes. Si l'habillement coûte moins de £10, celui qui l'a fait faire, serait cependant obligé de le prendre sans arrhes. Et il en serait de même de toutes les commandes d'ouvrages. Pour ma part, je ne puis convenir que le statut des fraudes ait été fait pour des cas semblables, qui sont pourtant strictement analogues à la présente espèce.

L'on objecte que l'article 1235 de notre code applique le statut des fraudes au cas où lors de la vente l'article n'est pas encore propre à la livraison, c'est-à-dire pas encore confectionné. A mon sens, cette disposition ne s'applique encore qu'aux ventes pures et simples, comme quand le marchand qui trafique sur un article de commerce qu'il ne confectionne pas lui-même, le fait confectionner ou l'achète de l'ouvrier ou d'autres négociants pour le revendre. Encore une fois, c'est la vente verbale pure et simple qui est prohibée, l'opération seule qui, par sa nature est commerciale. Je dois remarquer que cette interprétation du statut des fraudes a de nombreux précédents anglais, même sous l'acte de lord

Tenderden qui a étendue le statut à ce que l'on appelle en Angleterre, les *Executory contracts*.

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Bien que la question en soit une de stricte légalité, il ne peut être hors de propos de remarquer que l'équité de la cause, est suivant moi toute du côté de l'intimé, position qui ne peut que justifier l'interprétation favorable qui vient d'être faite du statut des fraudes.

Le jugement de la Cour de Révision est confirmé, DUVAL, C.J., et CARON, J., *diss.*

Moreau, Ouimet & Lacoste, pour l'appelant.

Loranger & Loranger, pour l'intimé.

Autorités citées par l'intimé :

Bonnier 1, pp. 221, 239.
Bédarride 2, pp. 98–99–100.
Pigeau 1er. pp. 221, 230.
Roscoe, p. 135.
Taylor 2, p. 1492.
Taylor 1, p. 602.
Philipps 1, p. 372.
6 L. C. Jurist, pp. 132, 183.

(L. O. L.)

SUPERIOR COURT, 1869.

MONTREAL, 18TH SEPTEMBER, 1869.

Coram MACKAY, J.

No. 2530.

Miller vs. *Darling et al.*

HELD :—That a motion to reject evidence taken at *enquete* under reserve of objections cannot be made till the final hearing of the cause.

A motion was made in term by the plaintiff to reject certain evidence taken under reserve of objection. The plaintiff's counsel referred to a decision of Mr. Justice Beaudry in *Morland* vs. *Torrance*, 13 L. C. Jurist, p. 197, in support of his pretension that the motion was properly made before the final hearing of the cause.

MACKAY, J. :—This case comes before me on a motion of plaintiff to reject portions of certain depositions taken at *enquête*, under reserve of objections. While certain witnesses were under examination, the plaintiff's counsel objected to questions put by the counsel for the defendants, and the objections were reserved by the judge presiding at *enquête*. I am now asked to pronounce upon these objections, the defendants' *enquête* not being yet closed. I have consulted my brother judges on the subject, and we are of opinion that where a judge reserves objections at *enquête*, it is for the Court to pass upon the questions raised at the final hearing of the case. This motion is, therefore, premature, and must be dismissed.

Motion rejected.

Ritchie, Morris & Rose, for the plaintiff.
J. J. C. Abbott, Q.C., for the defendants.

(J. K.)

MONTREAL, 30TH OCTOBER, 1869.

Coram TORRANCE, J.

No. 2558.

Coates et al. vs. *The Glen Brick Company*, and *Welch*, Intervening party.

HELD :—That an intervention may, in the discretion of the Court, be allowed, without being supported by affidavit.

TORRANCE, J.—William Welch made an application to Mr. Justice MACKAY in Chambers, to be permitted to file an intervention. This was granted. A motion is now made by the plaintiffs to reject the intervention on the ground that it is not supported by affidavit. There is nothing in the law requiring affidavits in support of interventions: they are sometimes made, but it appears to be a matter in the discretion of the Court whether they shall be required. For my own part, I would prefer to see an affidavit before allowing an intervention, but it is not the practice of the Court to insist on them, and seeing that the intervention has already been allowed by a Judge, I will not reject it because no affidavit has been produced.

Motion rejected.

Carter & Hatton, for the plaintiffs.

Perkins & Ramsay, for the intervening party.

(J. K.)

MONTREAL, 30 OCTOBRE 1869.

Coram MACKAY, J.

No. 1707.

Beaudry vs. *Raymond*.

JUGE :—Que par suite d'une erreur cléricale commise dans une saisie immobilière faite par le shérif, la requête en nullité de décret présentée de la part du saisi est maintenue avec dépens contre le shérif. (1)

Le demandeur fit saisir et vendre par décrêt les immeubles de la défenderesse dans le district d'Arthabaska pour la satisfaction du jugement rendu contre elle devant la Cour de Circuit. Le 17 septembre 1869, la défenderesse Dame Marie Louise Raymond présenta à la Cour Supérieure à Montréal une requête en nullité de décrêt pour faire casser la vente de ses biens immeubles vendus par le shérif du district d'Arthabaska le 15 octobre 1868, à la poursuite du demandeur.

Entr'autres moyens de nullité elle alléguait par sa requête ce qui suit :

" Que la dite saisie a été faite illégalement en vertu d'un jugement qui n'existe pas, en autant que le dit *procès-verbal* de saisie mentionne que la dite saisie est faite en exécution d'un jugement en date du 31 mars 1868, tandis que le jugement en cette cause a été rendu le six avril 1868."

Cette requête fut duement signifiée.

Toutes les parties intéressées au décrêt ayant été dument notifiées, et ayant fait défaut, le jugement de la Cour a maintenu les conclusions de la requête sur le motif spécial ci-dessus exposé par la défenderesse en sa requête et lui a accordé ses frais en nullité de décrêt contre le shérif.

Décrêt annulé avec dépens contre le shérif.

D. D. Bondy, avocat de la défenderesse.

(P. R. L.)

(1) Art. 714, C. P. C.

COUR SUPERIEURE, 1869.

MONTREAL, 21 MAI, 1869.

Coram MONDELET, J.

No. 1265.

Hutchins et al. vs. *Cohen*, et le dit *Cohen*, Requérant.

JUGE:—Qu'un débiteur qui a fait cession de ses biens, autrement que de la manière prescrite par l'acte de faillite, 1864, ne peut être légalement assigné à son ancienne place d'affaires, sur un bref de Saisie basé sur l'illégalité de cette cession, quand même le Syndic de ce débiteur aurait continué les affaires.

Après la cassation du précédent bref de Saisie, (p. 83,) les demandeurs en firent émaner un second, se plaignant également de la cession faite à Monsieur Dufresne : ils firent assigner le défendeur à son ancienne place d'affaires, "en laissant " une copie du bref," dit le rapport du Shérif, "à une personne en charge du " bureau du défendeur, ce dernier n'ayant pas de domicile régulier dans le Dis- " trict de Montréal."

Le défendeur présenta une requête dans laquelle, sous forme d'exception, il se plaignait de l'illégalité et même du défaut entier d'assignation. Il alléguait que, depuis l'acte de cession dont se plaignaient les demandeurs, il n'était plus en possession du magasin ou place d'affaires où avait été laissé la copie du bref: que cette place d'affaires était, depuis cette date, tenue par son Syndic Mr. Dufresne, et que lui-même avait depuis toujours demeuré à Québec avec sa famille.

Les demandeurs présentèrent une Requête pour amender le rapport du Sherif, prétendant qu'ils étaient justifiables d'avoir assigné le défendeur à son ancienne place d'affaires, vu que par leur action ils demandaient la nullité de cette cession, et qu'en loi, le défendeur était censé en être encore en possession.

M. Rainville, pour le requérant, répondit à l'audition que, légalement ou non, il n'en était pas moins vrai qu'en fait le défendeur n'avait plus de place d'affaires à Montréal, et que pour faire décider la légalité de la cession à M. Dufresne, il fallait qu'il fut assigné légalement.

Il y a même une contradiction palpable dans les procédés des demandeurs, d'assigner le défendeur à son ancienne place d'affaires lorsque leur bref de Saisie n'est basé que sur le seul fait qu'il l'a cédée et qu'il n'en a plus.

La Cour maintint la prétention du Requérant et renvoya la Requête.

Requête renvoyée.

Les demandeurs discontinuèrent leur action.

J. J. C. Abbott, Q. C., pour les demandeurs.

Chapleau & Rainville, pour le défendeur et requérant.

(H. F. R.)

COURT OF QUEEN'S BENCH, 1869.

MONTREAL, 9th SEPTEMBER, 1869.

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

No. 62.

BROWN ET AL.,

APPELLANTS;

AND

HAWKSWORTH ET AL.,

RESPONDENTS.

HELD:—1. That the unpaid vendor could not legally, before the coming into force of the Civil Code of Lower Canada, revendicate goods, for the purchase of which credit had been given.

2. That the reception here of goods purchased in England, by their being deposited in a bonded warehouse, on an entry by the purchaser's custom house broker, is such a delivery as would defeat the vendor's remedy under the 176th and 177th articles of the Custom of Paris, if not exercised within 15 days from such delivery.

This was an Appeal from the judgment of the Superior Court at Montreal, reported at pp. 197 and 198 of the 10th Vol. of the Jurist.

CARON, J.—(*after stating facts*):

La question en dispute se résume à savoir quelle interprétation il faut donner au mot *delivery*, dans la 12e clause de l'acte des Banqueroutes de 1864. Le jugement de la cour inférieure a décidé que tant que les effets vendus étaient *in bond*, l'acheteur n'avait pas la vraie possession et que la *delivery* par le vendeur n'avait pas eu lieu, et que partant aux termes de la 12e clause susdite, les effets ainsi vendus et non payés pouvaient encore être revendiqués par le vendeur nonobstant la déclaration de la faillite des acheteurs. C'est une question importante et très bien traitée, des deux côtés, dans les factums.

Avant de traiter la question de droit, il faut regarder, comme prouvé et hors de doute, que lors de l'achat des marchandises en question, les acheteurs Elliot & Co., étaient en faillite, quoiqu'ils ne le sussent pas eux-mêmes, et que lors de l'arrivée à Montréal la faillite était connue et déclarée.

D'après quelle loi, doit être décidée cette question; est-ce la française ou l'anglaise, et quelle différence y a-t-il entre l'une et l'autre?

Si la livraison (*delivery*) doit être regardée comme ayant été faite et completée à Liverpool à l'égard des acheteurs, ou même à Montréal lorsque les effets y sont arrivés à l'adresse des acheteurs, par eux reçus, le fret payé, mais laissés *in Bond* pour l'acquit des droits de douane, le privilége des vendeurs dans l'un et l'autre cas, était périmé et perdu puisqu'il n'avait pas été exercé dans les quinze jours de la livraison des dits effets tel que voulu par la 12e clause susdite. *Vide* Abbott, p. 77—78.

D'après cette manière de voir, l'action des appelants aurait dû être renvoyée, et les effets saisis déclarés faire partie des biens de la faillite, de Elliott & Co., et cela sur l'intervention de Brown, qui aurait dû être admise au lieu d'être renvoyée comme elle l'a été par le jugement dont est appel.

Les faits ne font pas difficulté; tout dépend de l'interprétation donnée à la 12e clause du dit acte qui limite à quinze jours les priviléges accordés au ven-

deur non payé par les articles 176 et 177 de la coutume de Paris, lesquels restent les mêmes sous tous les autres rapports, C. B. C., 1998—2000.

Dans le factum des appelants se trouve une liste des autorités anglaises et aussi des autorités françaises, applicables au cas de la présente cause.

Il faut le répéter, la décision dépend de l'interprétation à donner au mot *delivery* employé dans la 12e clause.

Les références faites par cette clause à la coutume de Paris me font croire que c'est la loi française qui est applicable au cas ; or qu'entend-on par livraison, dans le droit français ?

Depuis que les notes ci-dessus ont été écrites, il m'est survenu une autre manière d'envisager le sujet qui aurait l'effet de faire décider la présente contestation à l'encontre des prétentions de l'intimé, et partant de faire infirmer le jugement dont est appel.

Nul doute, d'après la 12e clause de l'acte de faillite, que le droit de revendication est réglé suivant la disposition de la coutume de Paris, article 176 tel que modifié, et d'après tel article le droit de revendiquer n'existe que lorsque la vente a été faite sans jour et sans terme, c'est-à-dire pour argent comptant, et que s'il y a eu crédit accordé quelqu'il soit, le droit n'existe plus. Tel était la loi sous la coutume de Paris ; elle est restée la même quant au fond, seulement notre statut limite, à quinze jours de la livraison, le délai pour l'exercer, qui était indéterminé par le dit article. Il est donc vrai que ce n'est que sous ce rapport que l'ancien droit a été changé par la nouvelle législation, et qu'à présent comme ci-devant, ce n'est qu'au créancier qui vend sans terme et sans crédit que le droit de revendiquer est accordé. Or la question se résoudrait à savoir si dans l'espèce la vente a été faite à crédit ou pour argent comptant. Suivant la preuve, il me parait que c'est à crédit, puisque les effets sont par les vendeurs expédiés de Sheffield à Liverpool, à l'agent reconnu et admis des acheteurs, sans qu'on exige d'eux ni de personne autre le prix des dites marchandises, lesquelles sont expédiées de nouveau par le dit agent, aux acheteurs à Montréal, pour être livrées aux acheteurs eux-mêmes, sans qu'il y ait aucune preuve que les vendeurs eussent, sur les lieux à Montréal, qui que ce soit pour retenir les effets jusqu'au paiement ; au contraire, c'est à eux qu'ils sont adressés et c'est par eux et en leur nom qu'ils sont déposés à l'entrepôt, non pour la sûreté du prix des dites marchandises, mais bien et uniquement pour la sûreté des droits de douane. Si tous les faits et cette manière d'agir ne constitue pas une vente *à crédit* je ne sais pas vraiment ce qu'il faut pour en faire une. Si je suis fondé dans cette appréciation des faits et de la loi sur le sujet, la conséquence est que dès l'instant que les vendeurs se sont désaisis de leurs marchandises en les expédiant à Liverpool sans exiger le paiement, ils ont pour toujours perdu le droit de revendication ; pour cette raison leur action aurait dû être renvoyée, l'intervention de Brown admise et les effets déclarés faire partie de la faillite de Elliott & Co.

Le Juge Duval parait partager cette manière de voir et les conséquences ; j'ai préparé et je lui ai soumis un projet de jugement pour rencontrer ces vues.

Si je me trompe quant à la manière d'envisager la question telle que je viens de l'exposer, je serais disposé à partager l'opinion du Juge Duval, qui prétend que la livraison a été faite à Liverpool aux agents des acheteurs Strang & Co.,

Brown and Hawksworth.

si non que sûrement elle l'a été lorsque les marchandises ont été remises, à Montréal, à Elliott & Co., à qui elles étaient adressées, qui ont fait en leur nom les entrées à la douane (Handyside), qui ont payé le fret et qui prouvent que les marchandises étaient à leur risque à partir de Liverpool, qu'elles étaient assurées à leur nom, et enfin que le 18 de mars 1865, elles ont été déposées en leur nom et comme leur appartenant, dans une des maisons d'entrepôt de la douane (dans leur maison même) où elles sont restées libres et comme la propriété des dits Elliott & Co., jusqu'au 5 d'avril suivant (15 à 18 jours), jour où la saisie a été faite. C'est Handyside qui les y a déposées en leur nom; pendant tout ce temps les marchandises étaient à leur disposition; en payant les droits, ils auraient pu les avoir et les vendre; ils pouvaient même les vendre quoique *in bond*. Pour cette dernière raison même le jugement devrait être infirmé de quelque manière que l'on envisage la question, quand même l'on serait d'avis que la vente a été faite sans jour et sans terme, toujours est-il que la saisie n'a pas été faite dans les quinze jours de la *livraison*, soit à Liverpool soit même à Montréal.

BADGLEY, J., *dissentiens*:

In February, 1865, the mercantile firm of Elliott & Company, at Montreal, by their order to the plaintiffs, traders at Sheffield, in England, purchased from them the cask of cutlery, the subject of this contention, valued at £112. 7s. 3d, sterling, which was sent by them to Strang and Company, general shipping agents, at Liverpool, to be shipped to the defendants at Montreal, and was forwarded by Canadian Steamer, *viâ* Portland, under the usual through Bill of Lading, in the shipper's name, by Strang and Company, acting in that behalf for the purchasers. The goods arrived at Montreal, to the defendants' address on the 18th March following, and were forthwith entered and stored in a bonded customs warehouse here under the following circumstances, which are set forth in the evidence of record and are particularly referred to by Mr. Elliott, the head of the defendant's firm, who has been examined as a witness for his assignee, the Intervenant. Mr. Elliott mentions the purchase of the goods, the shipment at Liverpool by their agents, Strang and Company acting for the firm, in that behalf, and then adds:

I know that we were insolvent when the goods in question in this cause were purchased, but I did not know it then.

It was in the month of March, one thousand eight hundred and sixty-five, say about the middle of the month, that I first became aware that we were actually insolvent. At this time we stopped payment.

When the said goods arrived here we were hopelessly insolvent, *and being anxious not to do anything which might injure the plaintiffs' right to the goods, I caused them to be entered in bond, and when called on by Mr. Alfred Brown, the plaintiffs' agent, to know what had become of the goods, I explained to him that they were in bond.*

The plaintiffs' agent, Alfred Brown, who is also a witness, corroborates the foregoing and adds:

The first intimation which I received of the insolvency of the defendants was on the fifth day of April last. I immediately called on the defendants to know what had become of the cask of cutlery in question, and was assured by Mr.

Elliott, one of the firm, that the cask had never been removed from the bonded warehouse, and should not be without due intimation to me, as agent for the plaintiffs.

The record further establishes, that the goods were entered and stored in the customs' warehouse, of course in the name of the defendants' firm as the consignees named in the Bill of Lading, that they were stored there instead of being taken into the defendants' store for sale and disposal, because of their insolvency and for the protection of the plaintiffs', the unpaid vendors', rights to the goods; that no duty has been paid upon the goods either by the defendants or their assignee; that the goods remained stored in warehouse and had never been actually received by the defendants or delivered into their possession; that the defendants' insolvency was publicly known on the 5th of April; that this revendication of the goods was made on the 21st of the same month, and that the assignee was appointed to the insolvent estate on the 29th May following.

Without particularizing the pleadings, it is sufficient to state that, in substance, the plaintiffs claim to hold the attached goods by their right of unpaid vendors and under the circumstances above detailed, and the claim is resisted by the insolvent assignee of the defendants, because of the alleged actual delivery of the goods to the defendants, the purchasers, and their thereby becoming their assets, under the operation of the insolvent law by the lapse of time limited by the Act from that delivery.

The insolvent provision applicable to this matter is as follows:

"In all cases of sales of merchandise to a trader in Lower Canada, subsequently "becoming insolvent, the exercise of the rights and privileges conferred upon "the unpaid vendor, by the 176th and 177th articles of the Coutume de Paris, is "hereby restricted to a period of fifteen days from the delivery of such merchan- "dise."

It is manifest therefore that the issue and contention between the parties, the unpaid vendors, and the assignee of the insolvent and unpaying purchasers, is based emphatically and exclusively upon the foregoing insolvent provision, which enacts a special limitation to those mentioned articles of the custom only as to the time in which the rights and privileges conferred by the articles might be exercised, after the delivery of the goods to the purchaser; beyond that restriction, the exceptional provision could have no operation. The terms of the provision moreover plainly require that actual delivery must be made to the purchasers, leaving the common law requirements of the articles, unaffected. Delivery, then, is the only fact in the issue, and it is, therefore, important to ascertain what constitutes a delivery under the law, and whether, as matter of fact, it has been effected in this case. In the interpretation of the term *delivery* the word must be taken in connection with the fact of the delivery *here* to the purchasers, and necessarily with the Articles which it is used to limi , and the provision must be construed in its entirety and integrity as a local provision applied under our local insolvent Act, without exceeding the articular enactments or the recognized jurisprudence explanatory of them.

Now it is common knowledge that the express intent of the Common Law of the custom was to protect the unpaid vendor, and to maintain his lien upon his unpaid goods as against not third persons only but against the purchaser himself.

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It is trite to say that the 176th Article referred to cash sales where a credit had not been agreed upon and given, and the 177th to credit sales. The Articles had different operations, but the first Article only will be considered as having any relation to this cause, because the sale here is evidently a cash sale, there being no tittle of evidence to be found in the record to qualify it as a credit sale, or a sale à *terme*, and for aught to the contrary it might be a solitary commercial transaction between the vendors and purchasers, the latter having ordered certain goods and the former having executed the order and sent them: that is all that is known about it, and this, Lacombe says, is not *une vente à terme*. He says, "quo le "vendeur est réputé avoir vendu sans jour et sans terme quoiqu'il eût pris obligation ou promesse payable à *volonté*. It is almost idle to state an admitted legal truism that a sale is always presumed to be for cash, unless the credit is proved by the agreement of the parties or by their course of trade, otherwise "la propriété ne passe à l'acheteur que par le payement, ainsi ce cas est une des "exceptions à la règle générale, meubles n'ont point de suite par hypothèque, "tel vendeur peut recouvrer et demeurer saisi jusqu'au payement." The only legal requisites of the Articles were the actual delivery of the goods into the possession and control of the purchaser, and their possible identification by the unpaid vendor, in case of his exercise of his rights and privileges under the revendication. Neither place nor time were essential, for "qui a vendu chose mobilière sans jour et sans terme espérant être promptement payé peut la chose poursuivre en quelque lieu qu'elle soit transportée pour être payé du prix qu'il l'a vendu, parceque quand il n'a pas donné terme, la propriété ne passe à l'acheteur que par le payement, et tel vendeur peut recouvrer et demeurer saisi jusqu'à ce qu'il soit payé." Lacombe, Rec. de Jurisp. p. 371.

The mere sale of goods then, with their mere possession by the unpaid purchaser, did not, under the common law, divest the proprietory right of the unpaid vendor or convert them into assets of the purchaser; something beyond either was required to complete that conversion, and that is well explained in 3 vol. Bédarride, No. 1148, des Faillites: "la vente est parfaite par le seul consentement, ainsi dès que le vendeur et l'acheteur sont d'accord sur la chose et sur le prix, la propriété de celle-ci est transférée sur la tête de l'acheteur, mais il faut un déssaisissement absolu de sa marchandise, que la livraison d'icelle eut été opérée, que cette livraison résulte non pas de cette tradition feinte que la perfection de la vente suppose, mais d'une tradition réelle et certaine et *prise a sa disposition*," that is the ownership of the purchaser, and this is forcibly supported as to the purchaser by Pardessus Droit commun 5 vol. p. 417, by the words "pour son compte et pour être mises à sa disposition." Lord Mansfield supplies a similar explanation which is still observed as law for commercial sales: "As between vendor and vendee, the law passes the property of the goods from the former to the latter by sale and delivery, but subject to the vendor's privilege to stop them notwithstanding, if they are unpaid, until their actual possession by the vendee, and to resume the possession so as to put himself, the vendor, in the same position as if he had not parted with the goods. This obviously rests on a broad principle of justice founded not only on principles of general equity, but upon the general and immutable laws of property" which Mr. Justice Bayley represents under the terms "ownership

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and dominion of the goods." By the English Common Law, the legal presumption of the continuing property in the vendor is only arrested by the fact of the actual delivery coupled with the possession of the purchaser as owner of the goods; until then, delivery is not complete and the goods are in transit, and for commercial matters this is required by the Statute of Frauds, expressed by these words, "there shall be an actual acceptance by the vendee with an intention of taking possession as owner," Chief-Justice Abbott, 3 B. & C., 513. The French Law establishes the same legal presumption accompanying the continuing property, which is only arrested at the store or shop shelves where the goods have been opened out and mixed up with others for sale by the purchaser.

The affirmative issue, tendered by the intervenant casts upon him the onus probandi of proving the actual delivery of the goods to the defendants, against the plaintiffs' right to hold the goods; and in support of the pretension two points were offered by the contestant in proof of his assertion of actual delivery. The first was the reception and forwarding of the goods by Strang & Co. at Liverpool, the second was the entry of the goods in bond here by the defendants. The former point is scarcely a serious one to lawyers, because it is clear that Strang & Company received and forwarded the goods only as mere forwarders or shipping agents of the defendants, and were nothing more than the medium through which, like the steamer or the rail cars, the goods reached Montreal. The insertion of the agents' names in the Bill of Lading was merely that of shippers of the goods received from the manufacturers the vendors, and they had no interest in them, the freight and charges being payable by the consignees here, to whom the goods were to be delivered. The second point, which ers the actual delivery as complete by the entry and storing of the goods in the customs warehouse, is met by the objection that, of itself, it was not the delivery of the article or as required by law, and moreover could not be so under the circumstances in which the entry and storage were directed to be made by Mr. Elliott, and, therefore, that the goods continued as it were in transit and legally undelivered to, as they were in fact unaccepted by, the defendants, and therefore by the presumption of law they have not been divested from the plaintiffs.

As a general principle of law, the vendor's right to be paid for his goods and his continuing proprietory lien upon them until he has been paid for them, were recognized long before the existence of the Articles of the custom or the establishment of stoppage *in transitu*: both systems of jurisprudence were indebted to the same source, the Roman Law, acting upon the still older law of buying and selling. *Stoppage in transitu* and the revendication of our Common Law proceed from the same source and were upheld and enforced by decisions and jurisprudence; and in modern times stoppage *in transitu* is applied and practised by both English and French Law. In this country it is notorious, that stoppage *in transitu* has practically existed for many years, altogether irrespective and independent of the Articles of the Custom, and cases frequently occur in which goods are withheld from delivery upon intimations or protests by interested persons to shipmasters and other carriers. Smith, in his Book on Mercantile Law, p. 678, gives the rationale of this rule of law: "When goods are consigned on credit, by one merchant to another, it sometimes happens that the consignee becomes

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bankrupt or insolvent, while the goods are on the way to him and before they are delivered. In that case, as it would be hard that the goods of the consignor should be applied in payment of the debts of the consignee, the power is allowed by law to resume possession of them if the vendor can succeed in doing so while they are on the way. This is called stoppage *in transitu*, which is nothing more than the extension of the right of lien which, by Common Law, the vendor has upon the goods for the price. The right may be exercised at any time before the goods reach their ultimate destination and come to the possession of the consignee": see also 4 Cush. Rep., p. 33. There is no diversity amongst the English authorities upon the right to stop *in transitu*, although, as might be anticipated, there are differences upon the state of facts of different cases to which the right of stoppage might apply. As relating to the question of delivery common to both laws, because the French revendication and the English stoppage *in transitu* had a common intent, the English authorities are very valuable for establishing what delivery is, and what, as between vendor and vendee, is included in the term transit of the goods. The general rule is that goods are deemed in transit so long as they remain in the possession of some middle man, such as the shipping agent, warehouseman, carrier, &c. and whilst they are in any place of deposit connected with their transmission or delivery to the purchaser as their owner; it is this ownership and dominion which constitute the delivery of both laws, and which is involved in the Insolvent provision. It is incorrect to say that the introduction of the new bonding law has changed the rulings of the customs law previous to the establishment of bonded warehouses, because the new system was for the convenience of consignees, relieving them from the payment of duties, only, until the time when the commodity was wanted. All goods are still required, as before, to be stored by the customs when the duties are not paid, and it was held by Lord Kenyon, in 1 East, 398,9, "that until the duties are paid, the goods were *in custodia legis* and that the consignor could stop them *in transitu* during their lodgement in the king's stores." It is unnecessary to discuss this point more particularly, which is still recognized law, or even to examine the argument urged by the intervenant, from special judgments rendered under the literal terms of the French Code, which make the public warehouse in France the *entrepot fictif* of the consignee or purchaser, because, in this case the real and only point at issue, is not the simple fact of having entered and stored the goods in bond, but the purpose and object of that act, or as laid down by Pardessus, 5 vol., "si les "marchandises seraient entrées dans un magasin de cette sorte, par l'ordre de "l'acheteur pour son compte et pour être mises à sa disposition." It is manifest that the question of the ownership of the goods by the purchaser for his own account and disposal of them, *pour être mises à sa disposition*, is involved in the intent and object with which they had been deposited and stored in the customs warehouse, namely Mr. Elliot *being anxious not to do anything which might injure the plaintiffs' right to the goods*, and then follows the corollary, the right of the purchaser to repudiate his purchase and to refuse delivery of the goods on his own account, because they had *then stopped payment and were insolvent, and unable to pay for the goods.* It is plain that a large commercial firm like that of the defendants would not have ordered the goods in question, and of that

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particular description, and of so limited an amount, at that season of the year, except they had intended them for prompt use and disposal, probably to fill up stock or fulfil orders from customers; plainly they would not have ordered the cask of cutlery merely to keep it in bond for purpose of speculative rise in the market. The defendants were not aware of their insolvent and financial position at the time of their order, and judging from their subsequent conduct probably would not have ordered them at all. Becoming aware of their insolvency, shortly before the arrival of the goods, instead of paying the duties, which, upon the invoice value, would be of small amount, and taking them into their own store for immediate disposal, they directed their entry in bond and storage in the customs warehouse because, as declared by Mr. Elliott, "we were hopelessly insolvent, and anxious not to do anything which might injure the plaintiffs' right to the goods." It has already been observed that the insolvent provision applied only to the time within which the rights and privileges under the article might be exercised, but did not interfere further with the Common Law. Now, there is nothing in the Law which prevents a purchaser from repudiating his purchase and honestly abstaining from appropriating unpaid goods, when he was aware that he could not pay for them, and hence, if the vendor, were willing to accept the purchasers' repudiation, third parties had no right to interfere, and much less the purchasers' subsequently appointed insolvent assignee, who could only be vested under the Insolvent Law with what had previously passed into the insolvent's ownership and become assets of the estate, and not with what had been previously legally repudiated by the purchaser: this principle prevails concurrently in the jurisprudence of England, Scotland and France. In a case decided in Q. B., and the judgment unanimously affirmed in the Exch. Ch. Heinecke *vs.* Carlo, *et al.*, assignees of Horn, 8 Ellis & Bl. 408, two points were made: The constructive transitus after the arrival of the goods at their destination, and the vesting of the property subject to the vendee's refusal to accept the goods on arrival. All the cases upon these points will be found collected in this reported case. Upon the first point Chief Justice Campbell, and the Court of Q. B. held that a mere delivery at the place of destination is not necessarily a termination of the transit, which remains until the goods have come into the possession of the consignee, and although they are landed at the place to which they are destined, unless the consignee has taken possession of them as his own, they are still in transit, and, the consignor on the insolvency of the consignee may still exercise his right to stop them *in transitu*. "It cannot be said that the goods ceased to be *in transitu*," said his Lordship, "merely because they were put upon the premises of Horn," the vendee. And this ruling the Court of Exch. Chamber approved, assuming that the vendor's contention was correct, and that there was constructive transitus after the actual arrival of the goods at their place of destination. In James *v.* Griffin 1 M. & W. p. 20, Lord Abinger remarks: "I can conceive a "case in which the receiving the goods into the vendee's own warehouse would "not be a receiving into his own possession, as where, knowing his bankruptcy to "be inevitable, he puts them apart from his other goods for the purpose of re-"storing them to the vendor, &c., he takes possession for the benefit of the vendor." So in Lett *vs.* Cowley, 7 Taunt. 169, where notice had been given by the vendor

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to the carrier not to deliver to the vendee, and, by mistake the carrier did deliver upon arrival at destination, the delivery was held not to perfect the sale and the vendor had his goods in consequence; so also, held by Lord Tenterden in Treatise Shipping p. 521, "the intention is not determined unless possession be "taken by the consignee *as owner;* he may receive the goods into the warehouse "of his agent for a limited purpose, as for the benefit of the consignor to restore "them to him, and the intention with which he so receives them is a question of "fact." It will be seen that Lord Tenterden puts the case beyond the mere delivery and extends it to the fact *quo intuitu* the possession was taken. A very recent text work on bankruptcy, Maule and Pollock, contains the same rule as well established: "the right to stop may still exist where the vendee has taken "possession in order to hold the goods for the vendor." The following case, being one of those cited in 8 Ellis & Bl., remains to be referred to in this matter, the case of James *et al.*, assignees *vs.* Griffin, 1 M. & W. 20, & 2 M. & W. 623, and it is cited because of its being on a bankrupt matter. This was an action by the assignees of Emerson, a trader in London, who had ordered from Stagg, a manufacturer at Stockton, a quantity of lead to be shipped to London. Upon the arrival of the vessels, being in embarrassed circumstances, he directed the captains of the vessels to unload the lead into the warehouse of Griffin, which Emerson had previously used for such shipments, the captains being desirous to be free of their cargo, and the lead was in consequence landed and stored in the warehouse; but Emerson expressed to his agent, to whom he had given the directions for unloading, &c., that his intention was not to receive the lead as owner, and that the vendor might have it. At the first trial Lord Abinger, C. B., not considering this expression of intention material, did not put it to the jury and in consequence a new trial was ordered with his concurrence, after his Lordship had declared that he had been in error. At the new trial, which is reported in 2 M. & W. 623, the Court of Exch. held that the declaration of intention, so made, was admissible in evidence, though it was not communicated to the vendor or to the wharfinger by Emerson himself or by his agent, to whom he had expressed it; that it expressed his intention, *quo intuitu*, he had acted, and shewed that he had not taken possession of the goods *as owner and therefore that the transitus had not determined.* The text writer, Lawes, in his book on Charter Parties, published very many years ago, maintained the same doctrine.

So much for the English authorities: going to those of Scotland the same principle is established there in a case reported in 2 Ross' Leading Cases, the facts of which are summarized by Lord Justice Blair in rendering the judgment. His Lordship says: "The puncheons which were ordered by the purchaser arrived "at Forfar in the morning of the 8th. Upon that day the purchaser was aware of "his bankrupt position and that it was impossible for him either to pay the price "or proceed with his trade. Before taking the goods into his cellar he consult-"ed with a friend who advised him to apply for a sequestration and to return "the goods, the only advice an honest man could give or follow. Accordingly "the goods were taken into the cellar, *custodiæ causa*, without any intention to "appropriate them but merely for their due care and preservation, and there-"fore were not delivered." The heading of the case is as follows: "A purchaser

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"who finds himself insolvent may refuse delivery of the goods purchased, and "if accepted by the seller the contract will thereby be rescinded." It is manifest from this case that the delivery was not legally complete, although the purchaser had taken mere possession of the goods, whilst it shews a parallel ruling with the principle of the English cases. Now as to French law, I shall refer to the authority from 3 Bédarride des Faillites pp. 194, 199, 200, 201, in which the author discusses the effect of possession upon the revendicatory right of the unpaid vendor, and after saying that if the goods received into possession required to be weighed or measured the possession would not be perfect, he proceeds as follows: *le banqueroutier, acheteur, n'en aurait pas eu jusque là, la libre et entière disposition*, and after saying that the revendication would be lost if the goods had been received into the *magasin* of the *failli* according to the literal and positive text of the 576th Article of the Code of Commerce which provides as follows: "pourront être revendiquées les marchandises expédiées au failli tant que la tra-"dition n'aura pas été effectuée *dans ses magasins*, ou dans ceux de commis-"saire chargé pour les vendre pour le compte du failli," then Bédarride adds: "Il existe un seul cas dans lequel l'entrée au magasin ne crée aucun obstacle "à la revendication : c'est lorsque à la réception des marchandises, l'acheteur a "déclaré les laisser pour le compte du vendeur; après une pareille déclaration, la "réception de fait qui suit, est censée faite à titre de dépôt seulement; il est de "plus certain que le failli n'en a jamais pris possession." The uniformity and coincidence upon this point of these three different systems of jurisprudence in all the particulars of which the American law also concurs, are remarkable and absolutely preclude the claim of the appellant. As already observed *delivery* is a word of relation *and divestment* in its nature, and means the actual passing of something from the possession of its owner into the possession of another, involving ownership in the latter as observed by Lord Tenterden. The evidence shews the good faith of the defendants; that seeing their insolvent position they were unwilling that the unpaid goods of the plaintiffs should be dishonestly and unfairly applied to pay their other creditors, and with that intent they had the goods bonded and warehoused for the protection of the vendors and on their account, where they were kept, *custodiæ causa*, for the plaintiffs and never became assets of the defendants, or were brought into their store to be mixed up with their other goods as part of their estate. It is proved that no actual delivery was received by the defendants, and no acceptance of the purchase by them as vendees under the Statute of Frauds, which requires "that "there shall be an actual acceptance by the vendee with an intention of taking possession as owner," as asserted by Chief Justice Abbott, 3 B. & C., 513. The defendants' declaration of intention being in relation to this commercial matter shews, *quo intuitu*, the bonding was made and that intention was communicated to the agent of the plaintiff, who subsequently acted upon it by taking out the writ of revendication. Under these circumstances it is evident, that no legal delivery of the goods was received by the defendants, the insolvents, and that therefore the 12th Section of the Insolvent Act does not apply and cannot be opposed to the plaintiffs in this cause; the contestation should therefore be rejected upon clear principles of law as well as of honesty and justice. It is unnecessary

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to advert to the French arrets cited by the contestant which rest upon the special literal code enactment, unlike any provision in our law, and moreover the facts of those cases shew, that acts of ownership had been exercised over the goods involved in them, either by the consignee or purchaser, after their storage in the public warehouse.

MONK, J., concurred in all that had fallen from MR. JUSTICE BADGLEY, and with him dissented from the judgment about to be rendered by the Court.

DUVAL, CH. J., said that the goods in question were effectually delivered to the defendants, through their agent at Liverpool. They were at the defendants' risk on the passage. They insured them and paid the premium. They paid the freight and all other charges. They were entered in their name in the customs warehouse, and although the duty was not paid it was the custom of merchants to leave goods in bond at the customs warehouse until they required them for their business. The cases cited by his learned colleague referred to a time when there were no such bonded warehouses. Elliot had delivery of the goods in the same way in which merchants are accustomed to get delivery, and his saying quietly to one of his clerks in a back room that he put the goods in the customs warehouse, being anxious that no act of his should prejudice the plaintiffs' right of revendication, should not operate to the disadvantage of the creditors. He could not think that it was a hard case. There were conflicting rights and interests. There were other creditors who were as much injured as plaintiffs; that the plaintiffs' right of revendication was made operative only in case the sale had been without term; that it was ridiculous to suppose this sale was intended to be without term, seeing the goods had to cross the Atlantic before reaching the purchaser; that the goods formed a part of the defendants' estate, and the judgment maintaining the plaintiff's *saisie conservatoire* should be and it was reversed.

The following was the judgment of the Court:—

"La Cour **** Considérant que l'acte des faillites de mil huit cent soixante quatre (1864) en décrétant que le privilége accordé par l'article cent soixante-quatorze (174)* de la coutume de Paris au vendeur de revendiquer les effets vendus et non payés, devra s'exercer dans les quinze jours (15) qui suivront la livraison, a par là déclaré que sous tous les autres rapports le dit Article restait en pleine force et vigueur.

Considérant que d'après cet Article il est formellement déclaré que le droit accordé au vendeur de revendiquer les effets qu'il a vendus, n'existe que dans le cas où la vente a été faite sans jour et sans terme, c'est-à-dire dans le cas seulement où il n'a pas été donné crédit pour le paiement.

Considérant que, dans l'espèce, les effets revendiqués n'ont pas été vendus sans jour et sans terme, mais ont au contraire été vendus à crédit, puisqu'ils ont été expédiés et livrés aux agents des acheteurs à Liverpool, sans que le paiement ait été exigé non plus qu'à Montréal, où ils ont été remis aux acheteurs eux-mêmes sans que personne de la part des vendeurs en exigeât le paiement.

Considérant que, pour ces raisons, lors de la saisie-revendication faite en cette cause des dits effets ou marchandises, les appelants ne se trouvaient pas dans les

* *Sic* [Reporter's note].

conditions voulues par la loi, pour qu'il leur fût permis de les revendiquer, et que partant la dite saisie a été faite illégalement et sans droit, par suite do quoi, dans le jugement, qui admet la dite saisie comme bonne et valable, il y a erreur, casse et annulle le dit Jugement.

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*** Les Honorables juges BADGLEY & MONK, *dissentientibus.*"

Judgment of S. C. reversed.

A. & W. Robertson, for appellants.

Strachan Bethune, Q. C., for respondents.

(S. B.)

EN APPEL.

MONTREAL, 9 DECEMBRE, 1869.

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

No. 95.

EDWARD MACDONALD *et al.*,

APPELANTS;

ET

THEOPHILE NOLIN,

INTIME.

JUGE:—1o. Que le tiers-détenteur poursuivi hypothécairement est tenu au paiement de tous les arrérages d'intérêt non prescrits, au-delà de deux ans et l'année courante; quoiqu'aucun enrégistrement spécial n'en ait été fait.

2o. Que la formalité de l'enrégistrement d'un bordereau d'arrérages d'intérêt non-prescrits, au-delà de deux années et l'année courante n'a l'effet de changer la loi commune que pour un cas particulier, savoir: pour le cas où, deux créanciers hypothécaires se présentent par concurrence à la distribution du produit d'un immeuble vendu en justice.

Une action hypothécaire a été intentée le 2 juillet 1868, dans le district d'Iberville par les appelants contre l'intimé pour $553.

Dans leur action, les appelants allèguent que le 20 février 1868, ils ont fait inscrire, suivant la loi, au bureau des hypothèques, à St. Jean, un sommaire des intérêts dus en vertu de leurs obligations à venir au 4 janvier 1868.

Par ce sommaire les appelants ont enregistré 4 ans 9 mois 4 jours d'intérêt sur la première obligation; 3 ans et 24 jours sur la 2de. et 2 ans 9 mois et 14 jours sur la 3e.

L'intimé, par une exception qu'il a produite à l'action, a allégué que dès mars 1867, Louis Molleur, son auteur, était propriétaire et possesseur de la terre qui avait été hypothéquée par Eloge Tremblay, et en vertu de titres enregistrés en mars 1867. Que cette terre se trouvait, le 7 avril 1868, hypothéquée pour une égale et même somme, en vertu des dits trois actes d'obligations, savoir, pour une somme de $553 de capital et en sus, pour $144 d'intérêts, pour deux années entières, et ce qui était dû sur l'année alors courante, formant $697, et qu'à cette date là, l'intimé et le nommé Boissonneau auraient offert cette somme de $697, aux appelants, à condition qu'ils donnassent main-levée des dites hypothèques, ce qui fut refusé par les appelants.

Puis l'intimé a réitéré ses offres devant la Cour, concluant à ce que jugement intervint contre lui pour cette somme seulement, et que les appelants fussent condamnés aux dépens.

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SICOTTE, J., résumant la question, fit valoir, en substance comme suit, les considérations et les principes qui lui paraissaient applicables dans l'espèce et découlent de la législation sur le régime hypothécaire :—

Les arrêts qui par leurs conséquences, affectent la constitution économique, ont une importance plus qu'actuelle ; car ils touchent à des intérêts, qui sont de toutes les classes et de tous les jours. L'universalité de ces intérêts, donne, aux décisions judiciaires, qui peuvent les contrôler par leur caractère de pénalité, une portée considérable.

Le présent jugement affecte grandement le mouvement de la propriété et les droits des acquéreurs.

La citation des motifs indiquera tout à la fois, les faits du litige, et l'interprétation qui doit être la seule véritable, donnée sur la matière.

Il est bon pour mieux faire comprendre toute la différence d'opinion qui pourrait résulter de l'étude de cette matière, d'indiquer de suite les motifs du présent jugement sur le fond du litige : " attendu en fait que la vente à Louis Molleur, l'auteur du défendeur, a été duement enrégistrée longtemps avant l'enrégistrement d'aucune demande ou bordereau pour des intérêts, de la part des demandeurs contre leur débiteur : considérant que par la loi, le créancier hypothécaire n'a de préférence que pour deux années d'intérêts et ceux de l'année courante; que le tiers détenteur ne peut être condamné à délaisser que s'il refuse de payer la créance en principal et les intérêts conservés par l'enrégistrement, et que le créancier n'a d'hypothèque pour le surplus d'intérêts que peut devoir le débiteur personnel, que par l'enrégistrement d'une demande spéciale pour intérêts."

La partie demanderesse en cette cause conclut à ce qu'il soit adjugé que le créancier par la seule inscription primitive de sa créance, a hypothéque à l'encontre de l'acquéreur qui prend inscription de son titre, avant l'enrégistrement d'aucune inscription nouvelle, pour les intérêts après les deux années, pour tous les intérêts accrus depuis le titre, et sans que le créancier soit tenu à prendre inscription nouvelle pour tel surplus d'intérêts.

Les demandeurs affirment comme doctrine, que les clauses 37 et 38 n'affectent que le cas particulier, où, deux créanciers hypothécaires se présentent par concurrence à la distribution du produit d'un immeuble qui leur est hypothéqué. On ne peut nier que si cette doctrine est exacte, il importe qu'elle soit bien comprise et généralement connue. Mais de l'autre côté, il importe également que cette doctrine soit examinée au point de vue de la législature et des principes.

Notre législation sur l'enrégistrement et la publicité des hypothèques fut une sage innovation, et une grave dérogation au droit commun. Mais cette innovation et la publicité des hypothèques sont devenus notre droit commun.

Quel est ce droit ? On en trouve les principes et les applications largement et clairement énoncés dans le code, qui a parfaitement résumé toute la législation. " Les causes de préférence sont les privilèges et les hypothèques." Art. 1982. L'hypothèque est un droit réel sur les immeubles affectés à l'acquittement d'une obligation, en vertu duquel le créancier peut les faire vendre, en quelques mains qu'ils soient, et être préférés sur le produit de la vente, suivant l'ordre tel que fixé dans le code. Art. 2015.

L'hypothèque assure outre le principal, les intérêts qu'il produit, sous les restrictions portées au titre de l'enrégistrement des droits réels. Art. 2016.

L'hypothèque n'a lieu que dans les cas et suivant les formes autorisées par la loi. Art. 2018.

Les créanciers exercent leur droit de suite par l'action hypothécaire. Art. 2056, 2057.

L'enrégistrement des droits réels leur donne effet et établit leur rang. Art. 2082.

L'avis donné ou la connaissance acquise d'un droit *non-enrégistré* appartenant à un tiers et soumis à la formalité de l'enrégistrement, *ne peut préjudicier aux droits de celui qui a acquis depuis pour valeur, en vertu d'un titre dûment enrégistré*, sauf les cas où l'acte procède d'un failli, 2085.

Les droits réels ont rang suivant la date de leur enrégistrement, 2130.

Le code est encore moins emphatique dans son langage que l'ordonnance promulguant l'innovation de la publicité des hypothèques. L'ordonnance disait: tout acte, droit, toute réclamation privilégiée et hypothécaire, s'il n'en a pas été fait d'enrégistrement, sont sans valeur et de nul effet à l'encontre des tiers, des créanciers ou des acquéreurs subséquents, qui ont pris inscription et enrégistrement.

Après avoir statué la nécessité absolue de l'enrégistrement, pour conserver l'hypothèque, l'ordonnance a réglé la même matière relativement aux intérêts qui pouvaient se rattacher à l'hypothèque comme accessoires. La clause 37 du chap. 37 est dans les termes suivants, sous le titre général "claims for interest."

"No creditor shall be entitled, by reason of the registration of a hypothec or "privilege, to a preference before others, for more than two years arrears of "interest and the interest for the current year, reckoning from the date of the "document under which the same may arise, unless his claim for arrears of "interest to a specific amount, beyond the arrears of two years, has been "separately registered as being due under such hypothec or privilege."

Cette clause est aussi générale que possible; elle s'applique à tout créancier réclamant des intérêts à l'encontre d'autres.

Pour ne laisser aucun doute sur l'universalité de la clause à toutes les circonstances, où des intérêts sont réclamés à l'encontre de tiers, la loi s'est expliqué dans la clause même. Le législateur continuant à régler l'enrégistrement, quant aux rentes constituées, aux prix de vente, accorde dans ces cas hypothèque pour cinq ans, et statue ensuite en ces termes: "et dans tous ces cas l'enrégistrement du titre du créancier, conservera son hypothèque ou privilége pour cinq années d'intérêts ou d'arrérages, mais pas au-delà."

Il est bien dit, bien ordonné que l'hypothèque est perdu, quant aux intérêts au-delà des deux ou cinq années, s'il n'a pas été fait d'enrégistrement.

La clause 38, par surabondance d'explication et d'interprétation donnée par le législateur même, s'exprime d'une manière générale, pour bien faire comprendre que l'hypothèque des intérêts au-delà des périodes indiquées n'existe pas, si on ne prend pas nouvelle inscription, et que les intérêts sont considérés et traités à l'égard des tiers, comme une nouvelle créance, subordonnée pour les mêmes raisons, à la publicité par l'enrégistrement. "The hypothec preserved by the

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registration of any claim to interest or arrears not preserved by the original registration, shall date only from the registration of such claim."

Le législateur a abondé d'interprétation sur la matière. On en trouve une autre dans le statut de 1843.

La 10e clause du chap. 22, 7 V. statut: "La 16e clause de l'ordonnance (4 V. chap. 30,) sera censée réserver au créancier, le droit de réclamer non-seulement les intérêts et arrérages de deux années, mais encore les intérêts de l'année courante, à compter de la date du titre en vertu duquel ils sont dus, et que l'hypothèque *créée* par l'enrégistrement de toute créance pour intérêts, qui n'auront pas été conservés par l'enrégistrement primitif, ne datera que du jour de *l'enrégistrement de telle créance.*"

Le droit du créancier, comme droit hypothécaire, est limité à réclamer deux ou cinq années d'intérêt, suivant la nature de la créance. L'hypothèque pour le surplus des intérêts est créée par le nouvel enrégistrement qui est prescrit; et comme tout autre droit réel, n'existe à l'encontre des créanciers ou des acquéreurs subséquents, que de la date de l'enrégistrement.

Le tiers détenteur a les mêmes droits que tout autre créancier pour opposer le défaut d'enrégistrement, c'est surtout quant à lui que le défaut d'inscription, quand elle est requise par la loi, est fatal et absolu. Car on ne peut oublier que c'est principalement dans l'intérêt du mouvement de la propriété, que représente l'acheteur, que la publicité de l'hypothèque a été ordonnée.

D'après le droit commun, le privilége et l'hypothèque n'existent à l'encontre des créanciers ou des acquéreurs subséquents, que par l'inscription. Cette règle s'applique aux intérêts après les deux ou les cinq premières années, comme au capital.

Il est impossible, sans faire erreur, de donner une autre interprétation, et dans tous les cas le législateur ayant ainsi interprété sa loi, les tribunaux ne peuvent mettre leur interprétation à la place de celle du législateur.

Les codificateurs ont également déclaré que telle était la loi avant la codification; et le code en fait des textes qui sont aussi clairs que précis, dans le même sens.

Art. 2122. L'enrégistrement d'un acte de vente conserve au vendeur, au même rang que le principal, les intérêts pour cinq années et ce qui est dû sur l'année courante.

Art. 2124. L'enrégistrement de tout autre titre de créance ne conserve le même droit de préférence que pour deux années d'intérêt et ceux échus sur l'année courante.

Art. 2125. Le créancier *n'a d'hypothèque* pour le surplus des arrérages d'intérêts, qu'à compter de l'enrégistrement d'une demande ou bordereau spécifiant le montant des arrérages échus et réclamés.

Voilà qui est bien clair. Le créancier n'a pas d'hypothèque pour les intérêts acorus après les deux ou cinq premières années, s'il ne prend pas inscription pour le surplus de ces intérêts.

Le droit de suite ne découle pas de l'hypothèque, mais de l'enrégistrement. C'est la conséquence du système de la publicité, et elle est écrite dans l'article 2056. "Les créanciers ayant privilége ou hypothèque *enrégistrée* sur un im-

meuble, le suivent en quelques mains qu'il passe." Ce droit de suite s'exerce par l'action hypothécaire. Le droit de suite est limité à l'hypothèque enrégistrée, dans tous les cas où la loi requiert la formalité de l'inscription pour accorder et faire apparaître l'hypothèque. L'action hypothécaire est donc limitée à la seule partie de la créance devenue hypothèque par l'enrégistrement. Pas d'hypothèque, pas d'action hypothécaire.

Or la loi déclare que les intérêts ne conservent leur caractère hypothécaire, ne constituent hypothèque, au-delà d'un certain nombre d'années, que sous la condition d'enrégistrement spécial; il faut bien dire qu'il n'y a pas d'hypothèque sans cette formalité. C'est la loi commune tant pour le principal que pour les intérêts.

L'article 2061 définit l'action hypothécaire: "L'objet de l'action hypothécaire est de faire condamner le détenteur à délaisser l'immeuble, si mieux il n'aime payer la créance en principal, les intérêts *conservés par l'enrégistrement* et les dépens."

Ainsi s'il paie le principal et les intérêts conservés par l'enrégistrement, il obtient main levée de l'action: car le droit de suite cesse par le paiement qui éteint l'hypothèque même, qui seule lui donnait force et valeur.

L'article 2125, qui résume parfaitement la lettre et le sens de la loi, n'accorde d'hypothèque que pour ce que le détenteur avait offert et consigné. L'article 2061 porte que s'il paie le capital et les intérêts conservés par l'enrégistrement, c'est tout ce que le créancier peut obtenir par son action hypothécaire.

Il est donc de toute évidence que le tiers détenteur ne doit que les intérêts inscrits et conservés par cette inscription. En payant ce qui est inscrit, il paie effectivement, comme s'il consignait dans le cas de confirmation de titre. Le créancier reçoit tout ce qu'il pouvait réclamer s'il venait à l'ordre, et sans contestation de la part d'autres créanciers.

Le système entier de notre régime hypothécaire serait attaqué, si la doctrine contraire était exacte. La publicité qui est la base du système serait illusoire si une inscription pouvait conserver une masse d'intérêts qui pourrait dépasser le capital, sans qu'il fut besoin de faire connaître ce fait aux acheteurs. La loi décrétant l'enrégistrement d'une demande d'intérêts après une certaine période, serait lettre-morte et sans utilité, si la première inscription du titre conservait cette masse d'intérêts contre les acquéreurs. La publicité de l'hypothèque n'est pas pour le prêteur seulement. Le mot créancier dans tout l'ordre hypothécaire, désigne toute personne ayant un droit, un intérêt contraire.

La transmission de la publicité est la base du crédit foncier, et si l'acquéreur ne peut acheter avec sûreté, à la face des hypothèques inscrites, l'hypothèque du prêteur deviendra bientôt illusoire, par le discrédit de la propriété même.

En offrant et payant la créance hypothécaire, le détenteur a droit de demander d'être subrogé aux droits du créancier contre tous ceux qui peuvent devoir la dette personnellement ou hypothécairement, et il doit être reçu dans ses offres, même si le paiement ne paie pas tout ce que le débiteur peut devoir; mais pourvu qu'il éteigne la créance, telle qu'elle est d'après les inscriptions requises par la loi. Car la loi est précise, faute de l'enrégistrement requis dans les cas indiqués et de la manière prescrite, l'hypothèque est sans valeur et de nul effet à l'encontre de créanciers et d'acquéreurs subséquents, qui ont pris inscription. En effet, dit

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Troplong, la loi ayant exigé que l'hypothèque soit inscrite, toute hypothèque non inscrite est réduite *ad non esse*, à l'encontre des tiers.

Pour démontrer ce qu'il y a d'illogique et de contradictoire dans la doctrine de la demande, il suffit d'en suivre l'exécution. Le tiers détenteur délaisse; l'immeuble est vendu. D'après cette doctrine, le créancier poursuivant, venant à l'ordre, ne sera colloqué que pour deux années d'intérêts. Cependant l'arrêt qui serait rendu, déclarerait l'immeuble grevé nonseulement pour ces deux années, mais pour toutes les années depuis la date du titre. Pourquoi le créancier ne sera-t-il pas colloqué pour le montant que cet arrêt aurait déclaré grever l'immeuble; c'est parceque faute d'inscription pour le surplus des intérêts, il n'a pas d'hypothèque pour tel surplus; et qu'à l'encontre des tiers sa dette pour ces intérêts non inscrits, n'est que dette chirographaire.

Si le créancier n'a pas inscrit, n'a pas enrégistré, il n'a pas droit de suite contre l'immeuble sur lequel il a pris hypothèque, quand son débiteur a vendu cet immeuble et que l'acquéreur a pris inscription et enrégistrement de son titre d'acquisition.

La loi déclare la même déchéance dans le cas d'intérêts au-delà des deux ou des cinq années, et pour lesquels on n'a pas pris l'inscription requise.

La loi ne fait pas de différence, ni d'exception. Le droit de suite, il a déjà été remarqué, ne s'attache pas à l'hypothèque proprement dite, il découle essentiellement et uniquement de l'enrégistrement. C'est le droit commun, dans tous les cas.

Le présent jugement est fondé non pas sur les clauses 37 et 38, mais il repose sur le régime hypothécaire, dont le principe est consacré dans son universalité et dans sa plus large expression dans la première clause de l'ordonnance, les motifs découlent de ce principe souverain, bien défini, parfaitement formulé, que toute préférence est refusée à l'encontre de tiers inscrits, soit créanciers, soit acquéreurs, pour tout droit hypothécaire soumis à la nécessité et aux formalités de l'enrégistrement, quand cet enrégistrement n'a pas été fait, de cette règle, exprimée dans les textes et dans l'esprit de la loi; que la transcription du contrat translatif de la propriété d'un immeuble entraîne la déchéance de toute hypothèque subordonnée à la formalité d'une inscription qui n'a pas été prise, et par conséquent, la déchéance du droit de suite.

Jugement de la Cour Supérieure d'Iberville, rendu le 20 novembre 1868.

PRESENT:

L'HONORABLE JUGE SICOTTE.

La Cour après avoir entendu les parties, par leurs avocats, sur le mérite de la cause, examiné les papiers au dossier, la preuve faite par les pièces produites.

Attendu en fait, que la demande est une action hypothécaire, dirigée contre le défendeur pour le faire condamner à délaisser en justice l'immeuble décrit dans les écritures des demandeurs, pour qu'il soit vendu, en justice, faute de paiement des créances hypothécaires réclamées.

Attendu en fait, qu'il est constant, que le défendeur est propriétaire et en possession de l'immeuble dont il s'agit et sur lequel repose l'hypothèque des demandeurs et qu'il l'était, lors de l'institution de l'action, pour l'avoir acquis comme il est expliqué dans les écritures des parties:

Attendu en fait, que le défendeur comme tiers détenteur de cet immeuble, a, le sept avril mil huit cent soixante et-huit, pour se faire libérer de l'hypothèque auquel il était assujetti au profit des demandeurs, fait à ces derniers des offres réelles de la somme de $697\frac{00}{100}$, comme la somme alors due hypothécairement tant en principal qu'intérêts, et que le défendeur a renouvelé ses offres par ses plaidoiries, a fait consignation de cette somme au Greffe de cette Cour et demandé que les offres fussent déclarées valables et suffisantes:

Attendu en fait, que la vente à Louis Molleur l'auteur du défendeur du même immeuble par Eloge Tremblay qui avait accordé et consenti ces hypothèques, a été duement enrégistré longtemps avant l'enrégistrement d'aucune demande ou bordereau pour des intérêts de la part des demandeurs contre leur débiteur Tremblay:

Considérant, que par la loi, le créancier hypothécaire n'a de préférence que pour deux années d'intérêts et ceux échus sur l'année courante, que le tiers détenteur ne peut être condamné à délaisser que s'il refuse de payer la créance en principal et les intérêts conservés par l'enrégistrement; et que le créancier n'a d'hypothèque pour le surplus d'intérêts que peut devoir le débiteur personnel que par l'enrégistrement d'une demande spéciale pour intérêts:

Considérant, que le défendeur avait intérêt et droit pour éviter procès et vider ses mains de demander la libération et décharge de l'hypothèque dont son héritage était grevé et de faire le paiement de la dette dont l'héritage était grevé au créancier de cette dette:

Considérant, que la somme de six cent quatre-vingt-dix-sept piastres, offerte avant l'action et consignée sur le refus du créancier, était toute la somme pour laquelle le défendeur comme le tiers détenteur était légalement obligé hypothécairement, et la somme que les demandeurs pouvaient seulement réclamer de lui comme tiers détenteur, par leur action hypothécaire.

Considérant, que ces offres étaient valables et suffisantes, et que le défendeur en les renouvellant et en les consignant a mis les demandeurs en demeure de recevoir tout ce qu'ils pouvaient réclamer hypothécairement contre le défendeur comme tiers détenteur, déclare les offres valables et suffisantes, en donne acte au défendeur et de leur consignation comme équivalant quant au défendeur à paiement fait du jour des premières offres.

Ordonne au prothonotaire de payer les deniers et somme consignés aux demandeurs en paiement et pour décharge de l'hypothèque, de ces derniers, sur l'immeuble en question, déboute les demandeurs de leur action, avec dépens distraits à M. Desplaines, avocat du défendeur.

Bethune, C. R., pour l'appelant disait:—

"The legality of this decision turns on the true interpretation of the 37th and 38th sections of ch. 37 of the Cons. Stat. of L. C. Section 37 enacts:—"No *creditor* shall be entitled, by reason of the registration of a hypothec or "privilege, to a *preference* before *others*, for more than two years' arrears of "interest and the interest for the current year,.....unless his claim for arrears "of interest to a specific amount, beyond the arrears of two years, has been "separately registered, &c."

Then section 38 enacts:—"The hypothec preserved by the registration of any

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" claim to interest or arrears, *not* preserved by the *original* registration, *shall* " *date only from the registration of such claim, &c.*"

The doctrine enunciated in the judgment is, that the Plaintiffs can have *no hypothec at all* for any arrears of interest beyond the two years and the current year, unless a separate claim therefor be registered.

Now it is most respectfully submitted, that such a doctrine can in no way be deduced from the terms of the statute, which are *limited* to the regulation of the *rank* or *priority* of hypothec amongst *rival creditors*. When the 38th section provides that the hypothec shall *date* only from the time that the claim for arrears of interest is registered, it clearly admits, that the hypothec itself *exists, irrespective of any registration*, and that the effect of registration is merely to give the hypothec a specific *rank or preference*.

The object of the legislation in question was manifestly not intended to affect the mere hypothec of the creditor, but simply to confine its preferential character, as regards arrears of interest to two years and the current year. And although the law as laid down in the Consolidated Statutes seems sufficiently plain in this respect, yet a reference to the language of the original registry ordinance itself, places the matter, if possible, in a still clearer light. The enactment is in the 16th section of the 4th Vic., ch. 30, and declares, that for the unregistered arrears of interest, the creditor shall not have any " preference or priority before the *other creditors*." Thus clearly establishing, that it is only as *between contending creditors*, any question can be raised at all with regard to arrears of interest unprotected by specific registration thereof."

Le jugement de la Cour d'Appel renversant le jugement de la Cour de première instance est motivé comme suit:

La Cour après avoir entendu les parties par leurs avocats, sur le mérite, examiné le dossier de la procédure en Cour de première instance, les griefs d'appel et les réponses à iceux et sur le tout mûrement délibéré;

Considérant, que de droit commun, l'intérêt suit le rang de l'hypothèque ou privilége attaché au capital qui le produit; qu'il n'en est autrement que lorsqu'il en est ainsi ordonné par quelque loi particulière, spécialement décrétée à cet effet, et que cette loi, lorsqu'elle existe, doit être restreinte dans ses strictes limites et ne doit pas être étendue aux cas qu'elle n'a pas inclus;

Considérant, que les clauses trente-sept et trente-huit du chapitre 37 des Statuts Refondus du Bas-Canada, sur lesquels est fondé le jugement dont est appel, contiennent des dispositions de l'espèce sus-mentionnée, ayant pour effet et ayant l'effet de changer la loi commune, pour un cas particulier, savoir, pour le cas où deux créanciers hypothécaires se présentent, par concurrence à la distribution du produit d'un immeuble qui leur est hypothéqué, décrètent que le créancier antérieur n'aura sur celui qui lui est postérieur, préférence à l'encontre de ce dernier, que pour deux années seulement d'intérêt et pour l'année courante, à moins d'un enrégistrement spécial de la part de ce créancier antérieur;

Considérant, que ces dispositions ne sauraient, d'après leur nature, être étendues à d'autres cas qu'à celui qui est mentionné, ni être appliquées au cas du détenteur d'un immeuble poursuivi hypothécairement par un créancier;

Considérant, que pour ces raisons les demandeurs appelants, avaient droit de

faire déclarer hypothéqué en leur faveur l'immeuble possédé par le défendeur intimé, pour le montant des obligations produites, et aussi pour tous les intérêts, non prescrits, échus sur chacune d'elles, et non pour deux années seulement et la courante, tel que déclaré par le dit jugement, et que partant, les offres faites et consignées de la part du dit intimé, sont insuffisantes et doivent être déclarées telles.

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Considérant que pour ces raisons, il y a erreur et mal jugé dans le jugement dont est appel, savoir, dans le jugement rendu par la Cour Supérieure siégeant à Iberville, le vingtième jour de novembre mil huit cent soixante-et-huit, casse et infirme le sus dit jugement, et procédant à rendre celui qui aurait dû être rendu par la dite Cour, dit et déclare: que l'immeuble décrit en la déclaration et possédé par le défendeur intimé, est affecté et hypothéqué en faveur des dits demandeurs appelants, pour le montant des trois obligations sur lesquelles est portée l'action, formant la somme de cinq cent cinquante-trois piastres, ($553,) avec intérêt au taux de douze par cent sur la somme de cent cinquante piastres, montant de l'obligation du vingt-sept mai mil huit cent soixante-et-deux et à compter du premier avril mil huit cent soixante-et-trois, sur celle de deux cent trente-une piastres, montant de l'obligation du onze décembre mil huit cent soixante-et-trois, à compter du onze décembre mil huit cent soixante-et-quatre, et sur celle de cent soixante-et-douze piastres, montant de l'obligation du vingt-et-un mars mil huit cent soixante-et-quatre, à compter du vingt-et-un mars mil huit cent soixante-et-cinq, jusqu'à parfait paiement; qu'en conséquence le dit défendeur intimé sera tenu, sous quinze jours de la signification des présentes de délaisser le dit immeuble pour icelui être vendu sur le curateur qui sera créé au dit délaissement, à défaut de ce faire, sous le dit délai, que le dit immeuble sera saisi et vendu sur le dit défendeur en la forme ordinaire à moins que, sous le même délai, le dit défendeur intimé, ne paie le montant de la présente condamnation en principal et intérêt tel que plus haut mentionné. Et la Cour faisant droit sur les dépens, condamne l'intimé à les payer aux appelants, tant en Cour de première instance que sur le présent appel.

(L'Honorable M. le Juge Badgley, concourant dans le jugement, mais pas pour les motifs y mentionnés.)

Jugement renversé.

S. Bethune, C.R., avocat des appelants.
Leblanc & Cassidy, avocats des intimés.
(P.R.L.)

COUR DE CIRCUIT, 1869.

MONTREAL, 15 OCTOBRE 1869.

Coram TORRANCE, J.

No. 626.

Whyte vs. *DeBonald.*

JUGE:—Que depuis la passation de l'acte provincial, 32 Vict. ch. 32, amendant l'article 2260 du Code Civil, savoir, depuis le 5 avril 1869, un médecin a le droit de prouver la nature et la durée de ses soins durant cinq années pour tels soins rendus avant la passation du dit acte provincial.

Le demandeur, en sa qualité de syndic officiel à la faillite de J. C. Frank, poursuivit le défendeur pour une somme de $164, par une action rapportée le 2

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avril 1869. Le défendeur opposa en compensation à cette demande un compte pour visites, soins et médicaments, en sa qualité de médecin, rendus au failli et à sa famille.

Le défendeur établit par son serment comme témoin la nature et la durée des soins professionnels par lui rendus depuis le 8 février 1868 jusqu'au 2 décembre 1868 et en prouva la valeur par témoins.

La preuve faite par le défendeur en sa qualité de médecin en vertu des dispositions du statut 32 Vict. Ch. 32 sanctionné le 5 avril 1869, subséquemment à cette transaction, fut déclarée valable, attendu qu'en fait de preuve et de procédure, cette loi doit régler la manière d'administrer la preuve.

Le jugement de la Cour est motivé comme suit:

The Court having heard the parties by their counsel upon the merits of this cause, examined the proceedings, the evidence adduced and maturely deliberated. Considering that Plaintiff hath failed to prove the allegations of his declaration and that by the enactment of the 32d chapter of the statutes of the Province of Quebec passed in the 32d year of Her Majesty's Reign, amending the 2260th article of the Civil Code, it was competent to the Defendant since the 5th April 1869, to prove as he hath done by his own oath the nature and duration of the services rendered by him to the insolvent John C. Frank and his family and *employés;* Considering that Defendant hath proved by legal evidence the allegations of his pleas, and particularly that the claim of the said John C. Frank was exaggerated and exorbitant, and that the said John C. Frank was before and at the time of the institution of this action indebted to Defendant in the sum of $150 and upwards for medicines and services as a medical man and physician, doth maintain said plea and dismiss Plaintiff's action with costs.

Gilman, avocat du demandeur.

Lafrenaye & Armstrong, avocats du défendeur.

(P. R. L.)

COMTE D'YAMASKA.

ST. FRANÇOIS DU LAC, 1ER JUIN, 1869.

Coram LORANGER, J.

No. 2773.

Alie vs. *Pamelin.*

JUGE:—Que dans les causes au-dessous de $60, le plaidoyer contenant une exception préliminaire doit être reçu sans dépôt.

Le demandeur poursuivit le défendeur par une action d'*assumpsit*, pour la somme de onze chelins, et l'assigna comme résidant et domicilié en la paroisse St. Thomas de Pierreville.

Le défendeur pour défense à cette action, produisit, *sans dépôt*, une exception péremptoire à la forme, par laquelle il alléguait être domicilié à St. François du Lac, et non à St. Thomas de Pierreville, se disait mal assigné et concluait à être mis hors de Cour, avec dépens. Le défendeur avait payé seulement les honoraires du greffier sur une contestation.

Le demandeur répondit que l'exception du défendeur ne pouvait être maintenue, parce que, entre autres raisons, elle n'était pas accompagnée du dépôt requis

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par la loi et les règles de pratique, et nia les allégations de l'exception à la forme du défendeur.

La question du dépôt fut de suite écartée par Son Honneur le Juge qui déclara que les règles de pratique n'exigeaient tel dépôt que dans les causes au-dessus de $60. Dans le cas où l'on aurait exigé un dépôt de $4, dans les causes au-dessous de $60, les exceptions préliminaires auraient souvent rapporté aux procureurs des honoraires beaucoup plus élevés que n'en auraient donné les plaidoyers au fond dans les mêmes causes, ce qui paraissait à Son Honneur, un véritable contre-sens qu'il fallait éviter : d'ailleurs, aucune règle de pratique n'exigeait tel dépôt dans les causes au-dessous de $60, et le tarif n'y pourvoit pas.

La pratique constante dans le District de Québec est de n'exiger de dépôt sur les exceptions préliminaires, que dans les causes au-dessus de $60.

Et la question du dépôt décidé, le défendeur procéda à la preuve de son *exception* qui fut maintenue avec dépens.

Exception à la forme maintenue.

Onésime Caron, pour le demandeur.
J. G. D'Amour, pour le défendeur.
(J. G. D.)

COUR DU BANC DE LA REINE, 1869.

En Appel.

MONTREAL, LE 9 DECEMBRE 1869.

Coram Caron, J., Drummond, J., Badgley, J., Monk, J.

No. 51.

ALPHONSE CHARLEBOIS,
(*Défendeur en Cour Inférieure,*)
Appelant ;

et

JOHN B. FORSYTH *et al.*,
(*Demandeurs en Cour Inférieure,*)
Intimés ;

et

MICHEL LEFEBVRE,
(*Intervenant en Cour Inférieure.*)
Intimé.

Jugé :—Qu'un cessionnaire n'a pas droit d'action, tant que le transport n'a pas été signifié et qu'il n'en a pas été délivré copie au débiteur, à moins que le cessionnaire ne justifie de l'acceptation du transport, acceptation qui équivaut à signification.

L'appelant était poursuivi *personnellement* par les intimés Forsyth et al., en vertu d'un transport que leur avait fait l'autre intimé Lefebvre, le 23 décembre 1867, pour une somme de £50 et intérêts, installement dû sur le prix de vente d'une propriété de Lefebvre à l'appelant. Pour défense à cette action, ce dernier plaida :

1o. Défaut de signification du transport en vertu duquel il était poursuivi.

Charlebois et Forsyth et Lefebvre.

2o. Paiement avant l'institution de l'action à l'intimé Lefebvre, du montant réclamé, moins une somme de $15.38, seule balance due à l'intimé Lefebvre, qu'il déposait en Cour.

Les intimés Forsyth et al., craignant les conséquences du plaidoyer de paiement de l'appelant, instituèrent une action en garantie contre leur cédant Lefebvre. Ce dernier intervint, contesta les plaidoyers de l'appelant, et répondit spécialement:

1o. Que l'appelant étant débiteur personnel, la signification de l'action équivalait vis-à-vis de lui, à la signification du transport.

2o. Que d'ailleurs, le plaidoyer de paiement et le dépôt en Cour de la balance dûe, était une acceptation du transport.

3o. Négation de paiement.

Le 31 décembre 1868, (Torrance, J.,) jugement fut rendu en faveur des demandeurs et de l'intervenant.

Ce jugement fut porté en appel et fut renversé le 9 décembre 1869, pour la seule raison suivante, qui est mentionnée dans le jugement, dont voici la teneur:

Considérant que l'acheteur de créances n'a pas de recours utile contre les tiers, tant que l'acte de vente n'a pas été signifié et qu'il n'en a pas été délivré copie au débiteur, à moins que ce débiteur n'ait accepté le transport, acceptation qui équivaut à signification, et que partant, le cessionnaire n'a pas d'action, à moins qu'il ne justifie de la signification accompagnée de copie ou de l'acceptation du transport.

Considérant que dans l'espèce, les demandeurs intimés ne font apparaître ni de signification et délivrance de copie, ni d'acceptation du transport sur lequel est basée leur action, et que partant, ils ne montrent pas un droit de poursuivre le défendeur appelant.

Considérant que pour cette raison seule, sans entrer dans les autres motifs y contenus, le jugement dont est appel, savoir, le jugement rendu par la Cour Supérieure, siégeant à Montréal, en date du 31 décembre 1868, contient erreur et mal jugé, casse et annulle le dit jugement, et procédant à rendre le jugement qu'aurait dû rendre la dite Cour, renvoie l'action des intimés, etc., etc., etc.

Jugement renversé.

Autorités de l'appelant.
Articles 1570-71, C. C. B. C.
Autorités des intimés.
Martin vs. Côté, 1 L. C. Reports, p. 239.
Quinn vs. Atcheson, 4 L. C. Reports, p. 378.
Paré et Derousselle, 8 L. C. Reports, p. 411.
Lamothe et Fontaine, 7 L. C. Reports, p. 49.
Lamothe et al., et Talon dit Lespérance, 1 L. C. Jurist, p. 101.

Barnard & Pagnuelo, pour l'appelant.
Perkins & Ramsay, pour les intimés Forsyth et al.
J. O. Joseph, pour l'intimé Lefebvre.

(J. O. J.)

COUR SUPERIEURE, 1869.

EN REVISION.

MONTREAL, 30 NOVEMBRE 1869.

Coram MONDELET, J., BERTHELOT, J., TORRANCE, J.

Nos. 24 et 104.

McDonald et al., vs. *Goyette, & McDonald* et al., demandeurs en garantie, *vs. Henry Thomas* et al., défendeurs en garantie.

JUGE:—Que le débiteur qui a accepté la signification d'un transport n'est plus recevable à plaider erreur quant au montant dû par lui au cédant.

Le jugement de la Cour est motivé comme suit:

La Cour Supérieure, siégeant à Montréal, présentement comme Cour de Révision, ayant entendu les parties par leurs avocats respectifs, sur le jugement rendu et prononcé le 20 juin 1868, dans et par la Cour Supérieure du district d'Iberville, ayant examiné le dossier, et la procédure dans cette cause et ayant pleinement délibéré:

Considérant que le défendeur Dominique Goyette, est mal fondé en son exception à l'encontre de la demande des demandeurs principaux, attendu qu'ayant accepté les transports dont il est question en cette cause et reconnu la dette comme sienne et s'étant obligé de la payer comme y appert, n'est plus recevable à plaider erreur quant au montant dû par lui aux cédants;

Considérant que les dits demandeurs principaux ont fait preuve des allégués de leur déclaration;

Considérant qu'il y a erreur dans le jugement dont est appel, savoir, le jugement du dit 20 juin 1868, cette Cour casse, annulle et met au néant le dit jugement et rendant celui qu'aurait dû rendre la dite Cour, déboute la dite exception du dit Dominique Goyette, avec dépens tant de la demande principale, que de la demande en garantie, à laquelle la mauvaise contestation du dit Goyette a donné lieu, et condamne le dit Dominique Goyette à payer aux demandeurs *principaux* la somme de $1556.80, cours actuel du Canada, avec intérêt sur icelle au taux de dix par cent, à compter du 12 mai 1866, jusqu'à paiement, et les dépens tant ceux de la dite Cour Supérieure distraits à M. J. G. Macdonald, procureur des demandeurs principaux en garantie, que ceux de cette Cour de Révision, distraits à M. Delagrave, procureur des défendeurs en garantie.

Action maintenue.

J. G. Macdonald, avocat des demandeurs principaux.

Delagrave, avocat des défendeurs en garantie.

(P. R. L.)

EN REVISION,

MONTREAL, 28 FEVRIER 1870.

No. 207.

Belleisle vs. *Lyman* et al.

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

JUGE:—Que la Cour de Révision n'a pas juridiction pour réviser la taxe d'un mémoire de frais de révision.

Doutre, Doutre & Doutre, pour le demandeur.

Perkins & Ramsay, pour les défendeurs.

(J. D.)

MONTREAL, 23RD FEBRUARY, 1870.

Coram BEAUDRY, J.

No. 337.

Matthews vs. *The Northern Assurance Company.*

HELD:—That option of trial by jury made in the plaintiff's answer can only avail him as a notice to the opposite party, and must be followed by a special application to the Court within four days after issue joined or not later than the first day of next term. C. C. P., 350.

BEAUDRY, J. The plaintiff makes application for a jury trial, and the motion is resisted on the part of the defendants on the ground that option of a jury trial was not made in the declaration or pleas, nor within four days after issue joined, as required by Art. 350, C. C. P. The plaintiff meets this objection by saying that he made option of a jury trial in his answer, and thus complied with the law which allows the option to be made within four days after issue joined. I am of opinion that the making option of a jury trial in the answer was a sufficient notice to the opposite party, but the motion should have been made within four days after issue joined, or, if the four days expired out of term, on the first day of the next term. The plaintiff in the present case has not made his motion till the fourth or fifth day of the next term, and I hold that the application comes too late.

Motion rejected.

Perkins & Ramsay, for the plaintiff.
Cushing & Trenholme, for the defendants.
(J.K.)

MONTREAL, 23RD FEBRUARY, 1870.

Coram BEAUDRY, J.

No. 2602.

Donovan vs. *Smith.*

HELD:—That when the defendant is served personally at a place other than his domicile, the delay is computed according to the distance from his domicile (and not according to the distance from the place of such service) to the place where the Court is held.

The writ of summons in this cause was issued in the Superior Court at Montreal. The defendant, Smith, was described as being of Onslow, in the District of Ottawa, admitted to be about 160 miles from Montreal. The service was made upon the defendant personally at Montreal, and the delay between service and return was only eleven days.

The defendant fyled an *exception à la forme* on the ground that the delay was insufficient, and should have been computed according to the distance from the defendant's domicile to the city of Montreal.

The plaintiff's counsel relied upon the decision of the majority of the Court of Review in *Currier* v. *Lafrance*, 13 L. C. Jurist, p. 329, which was directly in point.

BEAUDRY, J., in rendering judgment said the case came under Article 75, C. C. P. "In ordinary cases the delay upon summons is ten intermediate days between the day of service and the day fixed for the appearance, when the dis-

tance from the domicile of the defendant to the place where the Court is held does not exceed five leagues. When the distance exceeds five leagues the delay is increased one day for each additional five leagues." His Honour believed it was the intention of the codifiers that this article should also apply to cases where the service is made at a place other than the defendant's domicile. The exception must therefore be maintained. The judgment is *motivé* as follows:

The Court, etc.... Considering that under Art. 75 of the C. C. P. the delay upon summons in ordinary cases is ten intermediate days between the day of service and the day fixed for the appearance, when the distance from the domicile of the defendant to the place where the Court is held does not exceed five leagues, and when the distance exceeds five leagues the delay is increased one day for each additional five leagues; and considering that it is admitted by the plaintiff that the distance from the domicile of the defendant to the city of Montreal is about 160 miles, and that only eleven days elapsed between the day of service of the writ of summons in this cause and that of its return, which delay is insufficient, doth maintain the said *exception à la forme*.

Exception à la forme maintained.

Kelly & Dorion, for the plaintiff.

Perkins & Ramsay, for the defendant.

(J. K.)

COUR DU BANC DE LA REINE.

EN APPEL.

MONTREAL, 4 MARS 1870.

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

No. 60.

THOMAS LARIVIÈRE, APPELANT;

ET

TANCRÈDE SAUVAGEAU, INTIMÉ.

JUGE:—Que le paiement fait dans les trente jours précédant l'exécution d'un acte de cession par suite de l'émanation d'un writ de *capias* contre le failli, n'est nul que dans le cas seulement où le créancier qui reçoit tel paiement connaissait cette incapacité, ou avait raison probable de croire qu'elle existait.

Le jugement final rendu par la Cour Inférieure à Montréal, le 30 septembre 1868, et confirmé en révision le 29 janvier 1869, a déjà été rapporté au 13 vol. du L. C. Jurist, p. 210.

Ce jugement a été infirmé par la cour d'appel qui a motivé son jugement comme suit:

La Cour, après avoir entendu les parties, par leurs avocats, sur le mérite, examiné le dossier de la procédure en Cour de première instance, la requête d'appel produite par l'appelant en cette cause, et sur le tout mûrement délibéré:

Considérant en droit que le paiement fait dans les trente jours qui précèdent l'exécution d'un acte de cession ou l'émanation d'un bref de saisie, en vertu des lois de faillite, par un débiteur incapable de rencontrer ses engagements, n'est nul que dans le cas seulement où le créancier, qui reçoit tel paiement connaissait cette incapacité ou avait raison probable de croire qu'elle existait;

Lariviere et Sauvageau.

Considérant en fait que rien n'établit dans la cause que l'appelant savait ou avait raison probable de croire que son débiteur St. Laurent, lorsqu'il lui faisait le paiement dont se plaint l'intimé, était incapable de rencontrer ses engagements;

Considérant qu'au contraire, il résulte de la preuve, que le dit appelant avait raison de croire que le dit St. Laurent, quoique solvable et capable de rencontrer ses engagements, avait l'intention de laisser le pays sans acquitter ce qu'il devait au dit demandeur appelant;

Considérant que du fait il a été juré de la part du dit appelant que son débiteur St. Laurent, était sur le point de laisser la province avec l'intention de le frauder, il ne s'ensuit nullement que le dit appelant savait que le débiteur était dans un état d'insolvabilité, ni même que cette insolvabilité existait;

Considérant que c'était au demandeur intimé, à faire cette preuve, ce qu'il n'a pas fait;

Considérant que de ce qui précède, il résulte que le paiement reçu par l'appelant, et dont se plaint l'intimé, n'est pas contraire à la loi, entaché de fraude, nul et de nul effet, comme déclaré au jugement dont est appel, mais que le dit paiement a été accepté et reçu de bonne foi et sans fraude, et que sous ce rapport, les jugements dont est appel, sont injustes et illégaux en ce qu'ils décident le contraire;

Considérant que par la déclaration du demandeur il est allégué, et que par la preuve il est établi, qu'avant l'émanation du bref de *Capias* susmentionné, il avait été payé sur la somme réclamée par l'appelant celle de cinquante piastres, qui aurait dû être déduite sur sa demande, ce qui n'a pas été fait, le montant entier porté au bref de *Capias* ayant été payé à l'appelant; qui par là se trouve avoir reçu cinquante piastres de plus qu'il ne lui était dû.

Considérant que pour ces raisons, le jugement de première instance, au lieu d'être pour la somme de $154.73 ainsi qu'il a été rendu, aurait dû être pour $50.00 seulement, et que partant dans le dit jugement, savoir, le jugement de la Cour de Circuit, siégeant à Montréal, en date du 30 septembre 1868, et aussi dans celui de la Cour de Révision, siégeant au même lieu, le 29 janvier 1869, confirmant le premier, il y a erreur et mal jugé, casse, annulle et met au néant les susdits deux jugements; et procédant à juger comme aurait dû faire les dites deux cours, condamne le dit Thomas Larivière, défendeur en Cour Inférieure et appelant, à payer au dit T. Sauvageau, en sa qualité susdite, la somme de cinquante piastres, avec intérêt à compter du 11 décembre 1867, avec dépens contre le dit Thomas Larivière dans la Cour de Circuit, à être taxée comme dans une cause portée pour la somme de cinquante piastres. Et de plus la Cour déboute le dit demandeur, intimé, du reste de sa demande avec dépens contre lui, en sa dite qualité, tant en appel que dans la Cour de Révision, et ordonne que le dossier soit remis à la dite Cour de Circuit.

BADGLEY, J., *différant.*

Jugement renversé.

Barnard & Pagnuelo, avocats de l'appelant.

Dorion, Dorion & Geoffrion, avocats de l'intimé.

(P.B.L.)

COURT OF QUEEN'S BENCH, 1869.

(APPEAL SIDE)

MONTREAL, 9TH SEPTEMBER, 1869.

Coram DUVAL, C.J., CARON, J., DRUMMOND, J., BADGLEY, J., & LORANGER, J., *ad hoc*.

No. 3.

DAME EULALIE MALO ET VIR,

(*Defendants in Court below,*)
APPELLANTS;

AND

DAME LOUISE MIGNEAULT,

(*Plaintiff in Court below,*)
RESPONDENT.

HELD:—That a disposition dictated by the testator to a notary, in the presence of two witnesses, to be reduced to writing and executed as an authentic will; but not completed by the notary, or signed by the testator, in consequence of his sudden death while the will was being reduced to writing, is null and void, and cannot avail even as a nuncupative or verbal will in English form.

This was an appeal from a judg[illegible] the Court of Review, maintaining the plaintiff's action.

The facts of the case appear in the following remarks of the judges:

CARON, J.—L'action est par l'intimée contre les appelants pour une annéc de pension qu'elle prétend lui avoir été léguée par le père de l'appelant, feu P. Malo, en vertu d'un testament fait sous des circonstances peu ordinaires, et qui créent les difficultés dans la cause. Ces circonstances relatées au long aux factums, se résumant comme suit:

Malo, malade depuis quelques jours, informé par son médecin qu'il était en danger et qu'il était temps de régler ses affaires, fait venir un notaire et deux témoins qu'il désigne lui-même, et enfermé dans sa chambre avec eux trois, il leur déclare plusieurs dispositions, qu'il dit vouloir être incluses dans son testament, qu'il désire faire, et requiert le notaire d'écrire ce testament et d'y insérer les dispositions qu'il vient de déclarer, parmi lesquelles se trouvait celle par laquelle il léguait à la dite appelante pour les bons services qu'elle lui avait rendus, une rente et pension viagère de vingt-cinq livres, tant qu'elle ne se marierait pas. Le notaire, après s'être assuré que lui et les témoins comprenaient bien les intentions du testateur, se met en devoir de rédiger le susdit testament, et il en avait ainsi écrit plusieurs clauses et entre autres celle rapportée plus haut en faveur de la dite intimé, lorsque soudainement le testateur expira, avant que le testament fut terminé, et que même le notaire eut eu le temps de lui communiquer la partie qu'il avait rédigée. Ce travail, ainsi interrompu, a été gardé par le notaire et copie en est produite dans l'appendice du factum de l'intimée. De leur côte les deux témoins ont d'eux mêmes dressé par écrit un mémorandum de ce qui s'était passé entre eux, le notaire et Malo, l'ont signé peu de temps après le décès de ce dernier, et l'ont produit avec la déposition qu'ils ont donné dans la cause.

Malo and Migneault.

Ces deux papiers ont depuis, à la diligence de l'intimée, été produits devant un des juges de la Cour Supérieure avec requête demandant que preuve fut faite de ces papiers comme contenant les intentions et constituant l'acte des dernières volontés et le testament du dit défunt. Les appelants appelés à répondre à cette demande l'ont contestée, prétendant que les papiers produits, dont on demandait à faire preuve, n'étaient pas et ne constituaient pas un testament valable, mais seulement un commencement de dispositions, qui n'ayant pu être complétées par le décès subit du testateur, étaient restées imparfaites, incomplètes et partant nulles et de nul effet. Cependant par jugement rendu par le juge annuel cette demande de l'intimée a été soumise, en date du 27 décembre, 1867, il a été déclaré que les dites deux pièces produites et marquées A. B. étaient dûment prouvées, contenant les dernières volontés du dit P. Malo, que le *probate* en était accordé et que les dits deux papiers seront inscrits au régistre tenu à cet effet.

C'est sur ces papiers ainsi prouvés et sur le jugement déclarant cette preuve (*probate*), que la présente action a été portée a une année de la dite rente et aussi pour les frais encourus par l'intimée pour obtenir la dite preuve, (*probate.*)

Les appelants ont contesté cette demande pour les mêmes motifs qu'ils avaient fait valoir en opposition à la preuve demandé des papiers en question. Cette contestation a été sans succès, les faits principaux ayant été admis, est intervenu jugement en date du 31 mai 1867, qui condamne les appelants à payer à l'intimée £25 pour une année de rente et aussi £18.15 pour frais sur la demande de *probate*; en toute £43.15. Ce jugement soumis à la Cour de Révision, a été confirmé. Le premier jugement étant uniquement fondé sur ce que le *probate* ayant été accordé, la validité du testament se trouvait établie et ne pouvait plus être contestée.

En Révision deux des juges ont été d'avis que l'intention du testateur Malo était apparente et prouvée de façon à ne laisser aucun doute qu'il voulait léguer à la demanderesse la rente qu'elle réclamait, et que la justice et l'équité exigeaient qu'elle lui fut accordée.

Ces raison d'équité ont bien leur valeur lorsque la loi se prête à leur donner suite, mais cette doctrine est très dangereuse surtout lorsqu'il s'agit de testament.

Pour moi, je crois bien en effet que M. Malo voulait léguer la rente en question, mais je ne plus l'accorder à la demanderesse qu'en autant qu'elle aurait établi qu'elle lui a été léguée par un acte valable et revêtu de toutes les formalités voulues par loi.

Les papiers produits et qu'elle a fait déclarer prouvés, sont-ils de nature à pouvoir être regardés comme testament valable, soit comme fait verbalement, soit comme contenu dans l'un ou l'autre des écrits produits, ou dans tous les deux?

Le jugement qui accorde le *probate* ne reconnait pas le legs verbal que l'on invoque, ce sont les deux écrits qui sont reconnus comme le testament; il n'est pas dit lequel, ou si de fait l'un et l'autre constituent un seul et même testament ou s'il y en a deux. Mais toujours, il n'est nullement question du legs verbal, et c'est aussi bien, car de fait, ce legs n'est pas légalement prouvé, et l'eut-il été qu'il n'en serait pas plus valable, soit d'après la loi française, soit d'après la loi anglaise.

Quant à la question de savoir si les deux écrits ou l'un d'eux constituent un testament valable, d'après la loi anglaise comme la chose est prétendu de la part de l'intimée, je ne crois pas nécessaire de discuter ce point, car je suis d'avis que le fait que le testateur est mort avant d'avir completé ses dispositions, suffit pour frapper de nullité ce qui est contenu aux dits actes. Qui sait en effet, si dans ce qui restait à faire il ne se serait pas trouvé une clause qui aurait modifié ou même annulé tout à fait sous certaines contingences le legs fait à l'intimée.

Pour cette raison (le décès du testateur avant d'avoir completé ses dispositions) je crois que les jugements en Cour Supérieure et en Révision doivent être infirmés, ou l'action renvoyée.

BADGLEY, J.:—I should have confined myself to a simple acquiescence in the judgment rendered and in the reasons given in support of it by my colleague in giving the judgment of this Court, had it not been understood that the final decision of the cause would be prosecuted before a higher tribunal, and I am therefore compelled to state in some detail the main circumstances of fact and law which present themselves for consideration in the cause, and which induce my concurrence with my colleagues in the judgment. The features of the cause are, moreover, peculiar, because no such known cause of action has previously been submitted to our Courts of Justice in this Province, and under the provisions of our existing law none such can rise hereafter.

The plaintiff claims as legatee under a will of a peculiar character, and, although her action is apparently only for the recovery of a mere money legacy, it is really for the judicial establishment of the will under which she claims as legatee.

For about eight years previous, and up to the time of the decease of Mr. Prudent Malo, a merchant of Belœil, her alleged testator, she had been in his service as housekeeper, *ménagère*. At his death he left an only child, his heiress, the female defendant, then married to Brosseau, the male defendant.

Mr. Malo had been in bad health for several days, and early in the morning of the day of his death, having been advised by his physician to settle his worldly affairs, he at once sent for the notary Brillon, to whom he communicated his desire to have his will made, and expressed to him his last wishes as to the disposal of his property, including a bequest of a life annuity of £25 to the plaintiff, and explained his motives for making that bequest. The notary intimated to him that the law required the presence of two witnesses at the making of the will, when the two Blanchards were fixed upon for the purpose, and then the notary departed; soon afterwards the physician again visited his patient, and heard from him a repetition of the dispositions which he had stated to the notary. The notary returned to Mr. Malo in a couple of hours afterwards, about noon, accompanied by the Blanchards, whom he had invited to assist him as witnesses to his making of the will, and after they were all seated in Mr. Malo's chamber, he addressed the notary without noticing the others, and said to him: "*vous allez faire* [*or écrire*] *mon testament*," and without interruption declared his final intentions, including the bequest to the plaintiff.

After Mr. Malo had ceased speaking, the notary asked the Blanchards

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if they had heard and understood what was said, and upon their affirmative reply he proceeded to write out the will in the known authentic form of a will executed before a notary and two witnesses, Mr. Malo in the mean-while conversing with one of the Blanchards upon subjects unconnected with the will. The notary had written a considerable portion of the will, including the bequest to the plaintiff of an annual life rent of £25, to be paid to her whilst unmarried, and was extending the residuary bequest and devise of the moveable and immoveable property, when Mr. Malo suddenly died, whereupon the notary stopped his writing, and the intended will was left incomplete and unexecuted, but remained in the possession of the notary. Within half an hour after the decease, the Blanchards made a memorandum in writing, which they both signed, of Mr. Malo's directions, as understood by them, and which was retained by one of them.

In the following July, upon the application by the plaintiff to a judge of the Superior Court, after due notice given to the defendants, alleging that *Mr. Malo had died after he had expressed his last wishes and made a will before three witnesses by which he had bequeathed to her, &c.*, she prayed for permission to prove the will, and for its enregistration in the Registry of Probates, &c., &c. Proof was made of the circumstances above mentioned, attending the making of the intended will, and of Mr. Malo's death; the two paper writings retained by the notary and the Blanchards were ordered to be produced by them respectively, and to be filed, and thereupon the objections of the defendants were overruled; the paper writings were adjudged to be entitled to probate as containing the testamentary dispositions of Mr. Malo, which were declared to be well and truly proved, and the paper writings, &c., were ordered to be deposited in the archives of the Court, and to be enregistered in the Register of Probates, &c., with costs of contestation.

The plaintiff's action followed; her declaration averring the death of Mr. Malo, *that he had made a will duly executed according to law for moveables*, by which he had bequeathed to her, &c., that the will was duly proved, and that probate thereof was granted, &c., &c., as by copy of probate produced.

The defendants pleaded that the alleged will was not a will, and could not establish the bequest claimed by the plaintiff, that the alleged probate was null and illegal, and did not prove the bequest, which could not be legally proved by witnesses, that the paper writings invoked by her as a will did not constitute a will, and that they were not liable for the costs adjudged by the probate judgment. The parties consented that the proof adduced upon the probate proceedings should stand as the proof in the action, and, finally, the plaintiff having obtained judgment in her favour from the Superior Court, this appeal has been taken by the defendants, now appellants, from that judgment.

The pretensions of the plaintiff, respondent, urged before this Court, require some explanatory observations. By the old French common law of this Province only two forms of solemn will were valid, the authentic or notarial, and the holographic. The former was executed before public officers—two notaries, or one notary and two witnesses—the testamentary dispositions were to be dictated by the testator to the instrumenting notary, who was to read the will to the te-

tator for his approval, and to be then signed by the testator and the two notaries, or the one notary and two witnesses, as the case might be; then it became an authentic *minute*, or notarial *acte*, having full authenticity in itself, without other proof of its execution. Without these requirements it was merely an imperfect will, and without legal effect. "Quand le testatur n'a pu achever "ce qu'il a commencé, etc., ou qu'il appert par la signature, la date ou autrement, "que le testament ne contient pas toute la volonté du testateur, tel testament "est nul. Testament non signé n'est valable même entre enfants." (1 Henrys No. 5, Quest. 8, Bretonnier Cod. Sect. 4, Dist. 1, No. 4) in conformity with the ordonnance de Blois which decrees: "Tous notaires, soit en pays coutumier, "soit de droit écrit; sont tenus de faire signer aux parties et témoins instrumen- "taires, s'ils savent signer, tous contrats et actes, soit testaments ou autres "qu'ils reçoivent, dont ils feront mention, tant dans leur minute qu'à la grosse "(copy) à peine de nullité."

The holographic form of will must be entirely written and signed by the testator, "écrit et signé de la main du testateur, sans autres formalités." Unlike the notarial *acte*, the holographic did not contain its own authenticity, and to give it legal effect it was required to be judicially *vérifié*. "Le testament et la souscrip- tion étant de mains privées, il ne fait foi qu'il n'ait été publié devant le juge, et que les témoins n'aient reconnus leurs signatures, les successeurs *ab intestat* et autres prétendans droit, appellés." (3 Desp. p. 72, Lacombe, Rec. de Jurisp. Vo. Testament, p. 323.) After verification and enregistration, official authentic exemplifications might be issued of the holographic will.

It is manifest that the will in contestation here does not come within the forms of the authentic or holographic wills.

By the Quebec Act of 1774, 14 Geo. III. ch. 83, it is provided "*that every owner of lands, goods, &c., in the Province, who had a right to alienate them in his life time, might devise or bequeath them by last will or testament, &c., such last will being executed either according to the forms prescribed by the law of Canada or according to the forms prescribed by the laws of England,*" thereby introducing a third form of will into the Province. Doubts having arisen about the proof of these wills before a judge of the Civil Courts, the Provincial Act of 1801, 41 Geo. III. ch. 4 removed the doubts and declared the civil judge to be authorized to grant probate on them as by a Court of Probate. Since that time probates have been granted by the judges of the Civil Courts, as before, in conformity with the common law of the Province, and according to the recognized and admitted legal maxim "that the law of the testator's domicil is the rule for probate." The *vérification* of the common law and the probate of the statute, similar in their legal result, have effect only upon the factum of the will to be proved, and the incidents of its deposit and enregistration. The jurisdiction of the provincial probate judges does not go beyond, and unlike that of the Courts of Probate in England, does not extend to the settlement of estates of deceased persons. The powers and attributes or practice of those English Courts have not been introduced into our jurisprudence either by positive enactment or by implication from the use of the word *probate* in the Provincial Act of 1801, whilst, at the same time, it is common knowledge that neither *vérification* nor probate is conclusive of the validity, either of the

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will or of any of its dispositions, nor prevents their contestation by interested parties; it is notorious that such contestations have been and are of frequent occurrence, and the Civil Code of the Province has an express article declaring that right of contestation to be the law in force.

The plaintiff's factum in this Court declares the will in question to have been *made according to the English law*, and admitting its invalidity in the French form, as an authentic will, maintains its validity in the English form, and adverts to the established rule of jurisprudence as also expressed in the 885th Article of the Code, that "wills purporting to be made in one form, which are void as such, in consequence of the observance of some formality, may be valid as made in another form, if they contain all the requirements of the latter." It may be observed upon this rule, that it is the judicial conclusion from adjudged cases, and adopted since the introduction of the English forms of will by the Act of 1774, and that it has modified the old law principle, that the will should be in the form in which the testator has chosen to make his testamentary dispositions. It is proved and indeed not denied by the plaintiff, that Mr. Malo intended to make an authentic will in French form, before a notary and two witnesses, and all the circumstances surrounding the matter are consistent only with that intention, and as according to the recognized forms of the French law, with which French Canadians of the respectable position of the deceased are perfectly conversant, and who know that by the French law, "un testament n'est pas une volonté présumée, mais une volonté écrite; sans la volonté, l'écriture est inutile, sans l'écriture, la volonté quoique présumée n'est point reconnue pour être la volonté du testateur." It is manifest that Mr. Malo's intention was to make a French notarial will, and it is not too much to assert, that he never contempated himself, nor did the notary and witnesses contemplate, the making of a will in the form prescribed by the law of England, whether written or nuncupative, forms of which it may be safely said, that neither he nor they had any knowledge whatever.

The rule of jurisprudence above referred to reposed upon the principle that the invalidity which deprived the will of legal effect in its original form from some informality, was independent of the execution of the will and signature by the testator, and that proposition is affirmed in all the cases from which the rule has been deduced, from the earliest reported case of May and Ruiter, in 1821, to the last case adjudged by this Court in 1868, including the case of Lambert *vs.* Gauvreau, cited by the plaintiff from 7 L. C. Rep. 277. They are all cases of notarial wills, signed and executed by the testators and two notaries, or one notary and two witnesses, the equivalent of the second notary, which were set aside as French authentic wills for technical informality but validated as wills in English form as containing the requirements of the [illegible] informality, *ex. gra.*, in the Lambert case being, that one of the witnesses had not quite attained his twenty-first year as required by the article of the custom; but the want of that perfect number of years not incapacitating the witness according to the law of England. It is scarcely necessary to add that the above mentioned rule does not apply to the converse of the given proposition, and could not convert an unsigned and imperfect will in

English form, into a valid authentic will in French form. The plaintiff has not strongly pressed the rule upon our consideration and, in fact, it has no application to her case, because she adds in her factum, after the averment of the will in question being in English form, *that the will was made before the promulgation of the Code, which has abolished nuncupative wills for the future, and it is sufficient to establish that the will possesses all the conditions necessary for a nuncupative will.* She therefore places the will in question before this Court in its technical nuncupative or verbal form, as prescribed by the law of England, and supports her pretension by references to English law and English authorities, averring that the legal requisites for such nuncupative will have been implemented by the various facts and circumstances attending the making of the imperfect will before referred to and the death of Mr. Malo.

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Nuncupative wills were not favored in England, and Blackstone, in his commentaries first published in 1764 or 1765, says that they had gone into disuse before that time; and it might fairly be made a question whether the Statute of 1774 ever contemplated the introduction of the nuncupative form at all, in the words of the enactment which gave the privilege of executing a will in the forms prescribed by the law of England, when under that law they had fallen into disuse even in England. Without stopping to discuss this question, it is well known that the nuncupative or verbal wills were abolished in England in 1838, they were not recognized or admitted customary in France at all, and were abolished in the civil law Districts of that Kingdom by the Royal Ordinance of 1735; they were neither recognized nor allowed in this Province under our common law of the Coutume de Paris, and, if introduced here by the Quebec Act, all doubts were removed by their final abolition by our Civil Code, which, although enacted some time before, was only promulgated to be in force in August, 1866. It is manifest that nuncupative wills have not been considered to deserve, nor did they receive, favorable consideration, and are, therefore, subject to strict scrutiny here where their existence at all is so doubtful. Such as they are, they have been defined by various English law writers, Perkins, Swinburne, Blackstone, Bacon, and others, and the following definition from Bacon's Abridgment, Title Wills, &c., D. p. 305, will be cited, as quite comprehensive and precise. "Nuncupative wills are such as are made by word, or without writing, which is where a man is sick, and for fear that death or want of memory or speech should surprise him, that he should be prevented if he stayed the writing of his testament, desires his neighbors and friends to bear witness of his last will, and then declares the same presently by word before them;" in other words, that the nuncupative will is made by the testator, when he is *in extremis*, and so conscious of the fact that he apprehends that he has not time sufficient to make a will in writing, and that he must declare his will in the present tense with a view to have the very words he then utters constitute his will, and without any purpose of further revision. It is manifest that the foregoing cannot apply to or have any connection with a written will. See Taylor *vs.* D'Egville, 3 Hagg. 202, Bragge *vs.* Dyer Id. 207; The King's Proctor *vs.* Davies Id. 218; 1 Redfield on Wills 198, 199, nor to the will in question here intended by the deceased to be a written will. It is proved that Mr. Malo did not intend to make a merely verbal

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will; on the contrary, his intention was and he actually set about making a deliberative written will in notarial form. He had no apprehension of want of sufficient time to make and complete a written will; on the contrary, he directed the notary to write out his will, in the full belief that the officer would have time to perfect it in notarial form. The witnesses, the Blanchards, did not attend to hear his merely verbal declaration as his will; on the contrary, they were present as the official witnesses of the law, to supply the place of the second notary, to oversee the correct performance of the instrumenting notary's duty in writing down the declared dispositions dictated to him. Mr. Malo had so little thought of being stayed in having his written will completed and executed by the notary, that, having briefly stated his intentions to the notary, to be extended formally and in writing by that officer, during the interval of the notary's writing the will, the deceased conversed with Elzéar Blanchard, one of the witnesses, upon matters entirely and altogether unconnected with the will and its dispositions. Mr. Malo plainly had no wish, and certainly had no probable immediate necessity, to declare his will by words only. None present, including himself, believed him to be so near death, and Vilbron Blanchard says: "*nous n'avions aucune idée qu'il était sur le point de mourir.*"

None of the constituents of the definition of a nuncupative will are to be found in the circumstances above referred to, and although the act of God did prevent the deceased from completing his written notarial will in French form, that preventive act did not in fact, nor could it by law, be construed to convert an incomplete written French will into an English nuncupative will. In this respect the constructions given by the English Probate Courts to such circumstances do not avail here as jurisprudence. In England, the policy of the law favored wills, whilst in this Province the law favours successions and not wills. By the Quebec Act power was given to make testaments executed in the forms prescribed by the law of England, namely, wills written or nuncupative and simply verbal, the one or the other, in their precise and actual form, but not a constructive hybrid from both forms, the effect of the construction of the English Ecclesiastical Courts of Probate, and by them judicially declared to be nuncupative, but in fact being in neither one form nor the other. The forms of the executed testament referred to in the Quebec Act are of course known and acknowledged by our law when they offer themselves before our tribunals, which, however, are not bound to recognize nor do they recognize as the law of the Province or as authority the decisions of the English Probate Courts, which do not regulate or govern such a case as this. Hence it seems that Mr. Malo's declarations were not technically a nuncupative will or in nuncupative form as a testament executed according to the form prescribed by the law of England.

Moreover, the Statute of Frauds has provided restrictions upon nuncupative wills: the 19th Section of the Statute enacts that no nuncupative will shall be good, when the estate thereby bequeathed shall exceed the value of £30, that is not proved by the oaths of three witnesses at the least, that were present at the making thereof, and bid by the testator to bear witness that such was his will, &c. The law writers hold that the requirements of the Statute shall receive very strict enforcement by the Courts, and these have in fact given a rigid and strict construc-

tion with regard to those requirements. The reasons given by our French Jurists are not inapplicable to this practice. "Lorsque la volonté du testateur est destituée de quelques formalités que la loi exige pour la rendre efficace, le pouvoir accordé par la loi lui impose la necessité d'observer certaines formalités qui sont autant de conditions qu'il doit remplir afin qu'il puisse mettre en usage ce pouvoir. La volonté seule du testateur ne peut prevaloir sur la puissance de la loi." Under the law as administered in England all the requirements of the existing law must appear to have been fully and precisely complied with; amongst these are, the presence of three witnesses at the time of the verbal declaration of the testator as his will, and their having according to the Statute been bid by the testator to be present, technically known as the *rogatio testium*, that is, their being called upon or bid by the testator to be witnesses to bear testimony to his words as his last will and testament. Both of these requirements are strictly essential, and have been strictly enforced in England. See Burnett *vs.* Jackson, 2 Phil. 191; Parsons *vs.* Miller Id. 125. *Testes rogati esse debent ut testamentum fiat* is the precise rule of the Roman law imported into the enactment of the Statute 1 Roberts on Wills, 200. This last statutory requirement is altogether wanting in this case. The instrumenting notary was not bid as a statutory witness of the verbal declarations of the intending testator; on the contrary, he says that he attended in his official capacity to make the notarial will, or, as our French law writers express it, *n'y faisant que la fonction d'officier public, pour donner à son acte la forme authentique, et n'était pas considéré comme temoin.* The Blanchards attended at the request of the notary as his official witnesses in the absence of the second notary, to oversee like him, as required by law, the correct making of the will by the instrumenting notary; they were not bid by Mr. Malo at all, nor were they called upon by him as witnesses to notice his words to constitute his will without writing, and indeed one of them says in his testimony, *il ne nous a fait aucune question sur le but de notre visite.* There is clearly no *rogatio testium* by Mr. Malo to his alleged verbal declaration as his will, before his declaration or when he was stating his last wishes to the notary, to be written down by that officer, and which Mr. Malo did not afterwards repeat. The statutory number of witnesses and their statutory qualifications are required not less for the formal execution of the will than for the proof of it, because the law exacts without distinction the number of witnesses and their being bidden at the time of speaking, both for formality and proof. No good nuncupative will can exist unless the statutory ceremonies are complete; without them, the Act is incomplete and inchoate. The want of the *rogatio testium* for a nuncupative will, where the bequest claimed exceeds £30, as it does in this cause, renders such will not good in the words of the Statute, and is therefore not a will in the form prescribed by the law of England as referred to in the Quebec Act.

It must be observed that there is no probate of this alleged verbal and nuncupative will; without probate, the declarations of Mr. Malo are merely verbal allegations on the record, words without writing or intended writing which cannot be taken as a nuncupative will. To give them the effect of a nuncupative will, they are required to be precisely probated as having been verbally declared

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as such will, without purpose of revision, and without that probate in support, the plaintiff's action must fail upon the averment of a nuncupative will, and this is so settled by the law: *La volonté nuncupative des personnes qui testent sans écriture ne pourroit valoir que quand il y en avait une preuve légale;* without that legal proof, *le testament devenait inutile.* The probate produced in this cause is not the probate of a verbal or nuncupative will, which is not supported by the probated writings A and B. Upon this subject of probate, it will be borne in mind that the law of the testator's domicil is the rule for probate, and therefore probate as a matter of proof is subject to the rules of our Provincial law. The 19th Section of the Statute of Frauds, which enacts the mode of proof of nuncupative wills, forms no part of our municipal law in that respect, either by positive legislation or by implication from the terms of the Quebec Act. The latter gives the privilege of using the forms prescribed by the law of England for the execution of a will, but has not introduced the statutory mode of proof for nuncupative wills. It is scarcely necessary to say that apart from the mere proof of what occurred at the time of the will, the English probate jurisprudence holds, that as the will could have no operation except through the testimony of the witnesses bid to be present, this testimony must extend beyond the mere fact of execution, and must include the opinion of the witnesses, that the testator was at the time of sound and disposing mind and memory and free from the influence of any extraneous compulsion or constraint, and this testamentary capacity is required to appear by the clearest and most indisputable testimony. None of this has been evidenced by the probate produced, or by the evidence of record. Some provisions of the Statute of Frauds relating to commercial matters and the proof of them have, by express legislation, been brought into our legal system, but the mode of proof for nuncupative wills under the 19th Section is not law in this Province. The law of Mr. Malo's domicil expressly prohibits the verification and proof of such wills by witnesses, as it prohibits the proof of all things in excess of a very limited fixed amount, much less than this bequest, without evidence in writing first produced. The ordinances of Moulins and of 1667 are precise in their terms and general application *pour toutes choses*, &c. See Danty de la preuve, by Boiceau. These provisions are too well known to need being cited at length. Under all these circumstances, the alleged nuncupative will in question is a nullity and without legal effect, besides being unproved as required by law; and hence the legal conclusion necessarily follows, *le legs d'un testament nul n'est dû* (2 Desp. p. 263, No. 8) and the plaintiff's action upon that ground is without support.

But the plaintiff by her factum insists upon the contradiction, that the will in question is not only nuncupative, but written also, made according to the law of England for personalty. For this alleged written will, she uses the probated paper writings above mentioned as sufficient, and supports their relevancy by reference to the authorities cited in the case of Flanagan and Colville, decided by this Court and reported in 8 L. C. Jurist, pp. 223 and seq. It has been already observed that mere probate in this Province is not conclusive of the validity of a will, or of its testamentary disposition, and it may be added, that the case cited offers no one particular of similarity with this case,

except the fact that the claim in both is for personalty, with regard to which the English probate Courts are not scrupulous. A mere memorandum or scrap of paper written by a person in contemplation of death and with a design to make it effective after the event, was admitted to probate by those Courts as testamentary dispositions; no ceremonies in the publication, and no subscription of witnesses in attestation were required. Death was the event which gave life and operation to the intended instrument. So, the mere instructions to one's solicitor giving specific directions to prepare a will of personalty were also admitted to probate, 2 Moore's P. C. Cases, p. 83, but this was done upon the ground that final instructions for a will were held by judicial construction of those Courts to be of the same validity as the will itself, when the final consummation of the act was hindered by the death of the testator, the decision resting upon the credibility of the verbal evidence, and established by judicial construction. Here again those decisions are of no binding authority here; they cannot [illegible] construction for the absolute forms of the enactment in the Que[illegible] could such verbal instructions be proved by oral evidence, under the law [illegible] Province, to constitute a written will in the English form. The Provincial law, which prohibits oral evidence in such matters, cannot recognise the probated paper writings A and B as the written will of Mr. Malo, by whom they had neither been approved nor seen, and whose dispositions might have received revision before his signature for their completion could have been required. Even in England where no particular formalities in the disposal of personalty are required, presumption is always against an imperfect paper operating as testamentary, 1 Williams Executors, pp. 91, 92. In this Province the law regards the form of the will to determine upon its required formalities and validity, and where the form is not satisfactory, its invalidity necessarily follows. Under all the circumstances of the plaintiff's case as presented to this Court by her counsel, and as shewn by the record, she has failed to establish a legal cause of action, and the appeal against the judgment in her favour must be maintained.*

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DUVAL, C. J., CARON, J., and DRUMMOND, J., concur in the notes of Judge BADGLEY.

The judgment is as follows:

La Cour, etc.

Considérant qu'aux termes du droit civil, celui qui fait un testament nul ou incomplet meurt intestat aussi bien que celui qui n'en fait aucun;

Considérant que tant que le testament authentique n'a pas été revêtu de la signature du testateur, et que les formes légales voulues pour lui donner validité n'ont pas été observées, la dictée qui en a été commencée, aussi bien que la rédaction qui en a été faite ne sont d'aucune valeur, tellement que le testateur qui meurt pendant telle dictée et rédaction, et avant d'avoir complété et signé son testament meurt intestat, et que les dispositions ainsi dictées et recueillies par le notaire sont à tous égards non avenues et doivent être considérées comme

* The above notes were furnished, as having been prepared by Judge Badgley, to be read at the rendering of judgment; but not read in consequence of being mislaid at the time.

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si elles n'avaient jamais été écrites ; et que la rédaction faite par le notaire n'est pas même un écrit qui puisse soustraire la preuve qu'on voudrait faire de ces dispositions, aux prohibitions de la loi qui repoussent le testament verbal, et prescrivent la preuve testimoniale des dispositions de dernière volonté.

Considérant que dans la présente espèce, feu Prudent Malo, le père de l'appelante, est mort avant d'avoir completé et signé son testament, et que le tribunal ne peut avoir d'égard aux dispositions qu'il avait dictées et qui avaient été rédigées par le notaire, et notamment ne peut reconnaitre le legs fait en faveur de l'intimée, et, lui donner effet, tel legs étant censé non écrit, et non avenu, et que le projet de testament produit n'est pas un écrit ainsi que ci-haut mentionné, et que cet écrit n'a pas changé la nature de la preuve que l'intimée à tenté de faire de ce legs, laquelle est une preuve testimoniale répudiée par le droit :

Considérant de plus qu'admettre la prétention soutenu par l'intimée que le testament en question peut valoir comme testament nuncupatif serait renverser les principes reçus sur la matière et sanctionner les dispositions verbales de dernière volonté, et que supposant que le testament en question put valoir comme testament nuncupatif, un testament nuncupatif interrompu surtout par la mort du testateur ne peut valoir :

Considérant enfin que quelles que soient les considérations équitables qui militent en faveur de l'intimée, ces considérations ne peuvent faire fléchir les dispositions rigoureuses du droit qui en matière de testament sont d'ordre public, et qu'il y a erreur et mal jugé dans les jugements qui ont maintenu la validité du dit testament, savoir le jugement rendu par la Cour Supérieure siégeant à Montréal le 31 de mai, 1867, et le jugement rendu par la dite Cour de Révision à Montreal le 28 de mars, 1868, a infirmé et infirme et casse les dits deux jugements, et faisant ce que les premiers juges auraient dû faire a débouté et déboute l'intimé de son action, etc. Judgment reversed.

R. & G. Laflamme, for the appellants.

E. Barnard, for the respondent.

(J. K.)

IN APPEAL.

MONTREAL, 8TH MARCH, 1870.

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

No. 37.

LÉANDRE FRANCHERE, APPELLANT ;

AND

THOMAS GORDON ET AL., RESPONDENTS.

HELD :—That the tender of the thing sold must be made at such an hour upon the last day as will give the vendee time to weigh and examine.

The plaintiff sued the defendants for the price and value of 59 tons of hay deliverable at the Town of St. John's, Province of Quebec, on the ten days following the date of the sale alleged to have taken place on the 29th May, 1867.

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The plaintiff alleged the delivery of the 59 tons of hay within the ten days and refusal of defendants to accept.

The defendants denied the contract such as plaintiff sets up, and that plaintiff was bound to deliver within a reasonable time before sunset so as to enable the defendants to have examined and weighed the hay which had been tendered on board a barge in the Richelieu River at 6.45 p.m., of the 8th June, not being such a time as was reasonable but dangerous to examine the hay by candle light.

The Superior Court at Montreal, Mondelet, J., delivered, on the 30th October, 1868, the following judgment:—

La Cour, après avoir entendu les parties par leurs avocats au mérite de cette cause, examiné la procédure, pièces produites et preuve, et sur le tout avoir pleinement délibéré; Considérant que le demandeur a prouvé les allégués essentiels de sa déclaration et nommément qu'il a bien et dûment livré aux défendeurs dans le port de la ville de St. Jean, dans le District d'Iberville, le huit juin 1867, cinquante-neuf tonnes ou tonneaux de foin de deux mille livres pesant chaque à raison de $17.75, par chaque tonne ou tonneau que lui dit demandeur avait le 29 mai 1867, vendus aux défendeurs à Montréal, dans le District de Montréal; Considérant que les défendeurs n'ont pas prouvé ni établi les allégués de leur plaidoyer, lequel doit être et il est par les présentes débouté avec dépens: Considérant qu'il est acquis en preuve que les défendeurs ont sans aucune raison mais à tort et injustement, refusé de recevoir la dite quantité de foin le huit de juin 1867: Considérant que par la vente qu'a dû faire et a faite de la dite quantité de foin au nommé Théophile Arpin pour le compte des défendeurs, le demandeur n'a pu former et n'a pas formé le prix entier et la valeur des dits cinquante-neuf tonnes tonneaux de foin, mais au contraire cette vente à Théophile Arpin a produit $472 de moins que n'aurait produit la dite quantité de foin si les défendeurs au lieu de refuser de la recevoir en avaient accepté la livraison et payé le prix: Considérant qu'à la dite somme de $472, il convient d'ajouter $24, savoir pour coût de deux protêts signifiés aux défendeurs à la réquisition du demandeur et $14, que le demandeur a payé pour deux jours de retard de la barge ou bateau sur lequel était chargé le dit foin, lesquelles sommes réunies à celle de $472 susmentionnée forment celle de $495 que le demandeur à droit de recouvrer des défendeurs; cette cour condamne les défendeurs conjointement et solidairement à payer au demandeur la somme de $495 cours actuel avec intérêt sur icelle à compter du 19 juin, jour de la signification de l'action aux défendeurs, le tout avec dépens.

The case was inscribed by the defendants for Review before three judges in Montreal, and the judgment rendered in Review on the 29th January, 1869, (Mondelet, J., Berthelot, J., and Beaudry, J.,) maintained the defendants' exception and dismissed the plaintiff's action, and is *motivé* as follows:—

La Cour Supérieure siégeant à Montréal, présentement en Cour de Révision, ayant entendu les parties par leurs avocats respectifs sur le jugement rendu le 30 octobre 1868 par la Cour Supérieure du District de Montréal, ayant examiné le dossier et la procédure dans cette cause et ayant pleinement délibéré:

Considérant que le demandeur n'a pas prouvé la convention par lui alléguée dans sa déclaration savoir, de la vente aux défendeurs de cinquante-neuf tonneaux de foin livrable à St. Jean, à $17.75 par tonneau:

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Considérant qu'il appert par le mémorandum sous seing privé produit à l'enquête par les défendeurs et par les réponses de James C. Sinton, l'un des défendeurs, que le demandeur s'est engagé le 29 de mai 1867, à leur livrer la quantité de soixante tonneaux de foin à $17.75 livrables à St. Jean, engagement que les défendeurs ont accepté pourvu que ce fut de bon mil livrable sous dix jours à St. Jean, à $17.95 payable comptant lors de la livraison : Considérant que suivant cette convention le demandeur était tenu de livres cette dernière quantité de foin au lieu indiqué et en temps opportun pour que les demandeurs pussent en recevoir la délivrance dans le délai stipulé conformément aux dispositions contenues dans les articles 1063, 1066, 1152 et 1424 du Code Civil :

Considérant qu'il appert par la preuve faite en cette cause que le demandeur n'a fait rendre à St. Jean la quantité de foin mentionnée en sa déclaration qu'après six heures du soir du dernier jour du délai stipulé pour l'exécution de la convention, et qu'il est également établi par la preuve que l'examen et le pesage de la dite quantité de foin ne pouvait se faire de nuit ni en moins d'un jour si toutefois on pouvait se procurer l'aide nécessaire :

Considérant que par le délai du demandeur les défendeurs ont été mis dans l'impossibilité de recevoir la délivrance du foin dans le délai fixé par la convention, que la vente n'a pu conséquement être parfaite et que les défendeurs ont par là été libérés de leur engagement :

Considérant que pour les motifs ci-dessus il y a erreur dans le susdit jugement du dit trentième jour d'octobre 1868, cette Cour infirme le dit jugement et déboute l'action du demandeur avec dépens.

L'Honorable Juge Mondelet ne concourt pas dans ce jugement.

Cette cause fut portée en appel par le demandeur.

Le jugement rendu par la Cour de Révision fut confirmé en appel et l'action du demandeur fut renvoyée avec dépens.

BADGLEY, J.—This was an action on a contract for sixty tons of merchantable hay. Fifty-nine tons only were delivered, and the judgment in revision annuls the contract on account of this difference of one ton. This is a very close calculation. The articles of the Code referred to are not to be construed so strictly as has been done by the Court of Review. This is the only *motif* of that judgment. I am against the plaintiff on other grounds. He sold merchantable hay to be delivered on a certain day at St. John's. The hay arrived on a barge at St. John's at half-past six o'clock in the evening of the last day limited for its delivery. The 1474 Article of the Code enacts that there can be no delivery of moveables sold by weight until weighed, and that could not be done either satisfactorily or at all before midnight of that day. The witnesses agree in saying that it would take two days to deliver and weigh.

Besides the hay was not of a merchantable quality. It was mixed up with swamp hay. There was only about one-third of it good Timothy hay. Some of the bundles had good hay on the outside and poor in the centre.

Again there is another important point. Franchère, the plaintiff, was not the owner. He was acting as Bazin's agent for the sale of the hay. Bazin afterwards sold the hay on his own account. Franchère had no interest, and could not bring the action. The judgment in Review should be maintained, but not on the *motif* given that one ton was lacking, but for the reasons above set forth.

Appellant's authorities: Startup *vs.* McDonald, 2 M. and C. 39, 56 M. and G. 593. Franchère and Gordon.

Respondents' authorities:
Code Civil, Art. 1163, § 3.
2 Parsons on Contracts, p. 151.
1 Parsons on p. 444.
2 Story on Contracts, No. 809.
1 Taylor on Ev., S. 29.

Judgment against plaintiff confirmed.

Jetté & Archambault, attorneys for appellant.
W. H. Kerr, attorney for respondents.
(P.R.L.)

SUPERIOR COURT, 1870.

In Review.

MONTREAL, 28th FEBRUARY, 1870.

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

No. 769.

Rooney vs. *Lewis, ès qual.*

HELD:—That under Consol. Stat. Can. Cap 17, Sec. 33, the only recourse against the first appraisement of the collector was an appraisement by two merchants as therein prescribed. An importer who preferred to pay the duties exacted by the collector had no action to recover them back.

MONDELET, J.—The plaintiff, a merchant and importer of this city, brought an action in 1866, in the Circuit Court for the District of Montreal, against defendant, the then acting collector, to recover $186.40, which he alleged was illegally exacted from him by the defendant, being an excess on the valuation of goods imported by plaintiff from Scotland. It is pretended that the fair value of these goods was $560.20, and not $746.40, and moreover, that the duty at the Custom House here should have been measured on the fair market price in the principal markets in Scotland at the time of the purchase. The defendant, on the contrary, maintains that it is to be determined by the fair value of the principal markets at the time of the exportation. It was, of course, necessary for the plaintiff to prove: 1st, the time of purchase; 2nd, the time of exportation; 3rd, the fair value of the principal markets of Scotland. Strange to say, none of these indisponsable proofs are to be found in the answers of the witnesses, who on a *Commission Rogatoire* were examined in Scotland on behalf of plaintiff. It appears by the evidence that Rooney had made an advance of £500 for the purpose of getting the goods, but at what time we do not know, nor is it shown when the goods were manufactured, delivered and exported. The invoice has not been subtantiated by proper evidence. The groundwork, or rather what should have been the groundwork of his claim, is therefore altogether wanting. I need not dilate upon the question as to whether the appraisement is to

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be made on the fair value of the goods at the time of the exportation or at that of the purchase. The law is clear; there can be no two opinions on that point. It is at the time of the exportation, and not at the time of the purchase. A difficulty was started at the hearing of the case with respect to the plaintiff, subsequent to the notice he gave of his intention of paying under protest, paying, instead of having the appraisement revised by two merchants, as he was invited by the acting collector to do. Is this a renunciation? Is the plaintiff deprived of his recourse? We find in our statute a word upon the interpretation of which turns the solution of the question as to whether Rooney, not having resorted to the mode of submitting his claim to appraisers, and choosing to pay rather than do it, has or has not waived his right of any recourse. A case which was decided by the Supreme Court of the United States, Rankin *et al vs.* Hoyt, in 1848, is cited against the pretensions of the plaintiff in the present case. By this decision it appears that "the importer had a right to appeal to another board of appraisers, differently constituted, and if he did not choose to resort to them, he cannot with much grace afterwards complain that an over-estimate existed." It has been argued that the word "may," to be found in our statute, confers no obligation upon the importer to refer the difficulty to appraisers, and that no other expression but "shall" could have such binding effect. The answer to this objection is that if the word "shall" had been used in the statute, nothing could have been done, no payment could legally have been received by the collector, as long as such reference to appraisers had not taken place, even when all parties were agreed, which would be absurd. The interpretation, and the only rational one, is that it is optional for the importer either to refer his case to appraisers, in order to save his recourse, or to pay the dues, and there the matter ends. For the above reasons, I am in favor of reversing the judgment appealed from (BERTHELOT, J.), Circuit Court, Montreal. Both on the want of evidence and on law the plaintiff's action should be dismissed.

MACKAY, J.—The appraisement in 1866 gave an advance of 33⅓ per cent. beyond invoice value. Rooney paid, although notified by defendant that if dissatisfied he could get a second appraisal by two merchants. McLellan, one of the witnesses examined, proves clearly that the $186.40 in dispute was paid only after such offer to Rooney. He preferred to pay rather than have recourse to the arbitration of merchants. The law referring to this case is found in Con. Stat. Can., cap. 17. It enacts that the collector, if doubting the truth of invoice valuations, may order a custom house appraiser to value the goods, and upon his appraisal the collector may insist on further duty, but the importer need not pay this unless he please. He may insist, before making any payment, upon a further appraisal by two merchants, upon whose report the duties are to be *finally settled*. Before this statute, the 10 and 11 Vic. (1847), cap. 31, ordered the duties to be finally determined upon merely one appraisement by two appraisers appointed by the Government. So, the later law afterwards put into the Consolidated Statutes was a liberty extra to importers. This law (by which this case and Joseph vs. Lewis are to be disposed of) is ordered by itself to be interpreted in favor of an efficient collection of the revenue. Section 33 says that if the importer is dissatisfied with the appraisement made as aforesaid, he *may* forth-

with give notice in writing to the collector, who *shall* select two discreet merchants, &c. But, plaintiff says, "the Act does not provide that it shall be final, if the importer fails to call for a second appraisement by merchants chosen by the Inspector." "The effect of the Act is to give the importer the right to apply to a tribunal of summary jurisdiction if he chooses." He "may forthwith," &c., but neither directly nor by implication is he *compelled* to do so. For his right to apply to the ordinary tribunals for redress from illegal exactions is nowhere taken from him." "The distinction observable in the use of the two words 'may' and 'shall' in sec. 33 of our Act as applicable to the individual and the public officer respectively is quite remarkable," says the plaintiff, and he adds: "there are nearly analogous cases in 9 Price, p. 310, and in 10 Price, p. 138. In one a landlord was authorized to lay a complaint before two justices on a certain subject, who were empowered to adjudge upon it. But it was held that he was not thereby prevented from applying to the Court if he chose."

As to the two words "may" and "shall" referred to, they are proper words in their places. Had "shall" been used where "may" is, the importer would have had one right less, and look at the absurdity it would have led to. The second appraisal in all cases would be necessitated, though the importer might be willing to submit to the first, though dissatisfied. The two words "may" and "shall" have occurred in like places in other Customs Acts, in all countries. Though the Act may not expressly make the first appraisal final, that first appraisement may be rendered a finality, that is, if the importer pay—preferring to do so rather than go into further appraisement. Standing as at the date of plaintiff's payment to defendant after the first appraisal, what right had plaintiff? Had he the right to elect to come here, or to go before the tribunal of the merchants? He might elect to come here, he says; but the Court holds the contrary. If the plaintiff prevailed the Dominion would not get the duties of the statute, but duties after the mode of the plaintiff resorting to this Court. The plaintiff's case is very different from that of the landlord in the case in Price; and very different from *Sharp* v. *Warren* cited, where a summary remedy was given by statute, and it was insisted that the parties could not have recourse to their previous right to sue by action at law. But the Court held the contrary, and that the objection could only have weight if the Statute had been imperative. Looking at the Customs Act of the Consolidated Statutes, at its object, and the tribunal of merchants it erects, we cannot doubt that the plaintiff had to resort to that tribunal if dissatisfied, and could resort to no other. That was and is a tribunal well fitted to dispose of such cases. The work to be done in such cases requires inspection of all manner of goods. How could this Court perform such work? Then the duties are to be *finally* those of that tribunal (Sec. 33), and very properly. It concerns the public that the revenue be promptly gotten in. But under plaintiff's system enormous sums of Customs Duties money might be put into the *limbo* of the ordinary law courts, and enormous amounts of Customs Duties money might have to be held by the Treasury as in suspense.

The plaintiff says that his views are correct, and that this may be established by a reference to the recent Act consolidating and amending the Customs laws'

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31 Vict. cap. 6, sec. 45. This Statute adds a new provision to the former one, namely that the decision of the proper officers shall be held to be final, unless the importer give notice of his dissatisfaction and appeal to the Minister of Customs whose decision shall thereupon be *final, unless suit be brought for the recovery back of the duties illegally exacted*, within thirty days after such decision; and it expressly enacts "that no suit shall be maintained in any Court for the recovery "of any duties alleged to have been erroneously or illegally exacted, until such "decision shall first be had on such appeal." But the recent Act is new, positive law, and more favorable to importers than the earlier Acts. The 10 and and 11 Vic. was very unfavorable to the importer; under it there was only one appraisement, and it was decisive and final, settling the true and real value of goods at what was so appraised. Then came the 12th Vic., the Act that these cases turn on. It allowed an appraisement beyond the first one, and such appraisement was evidently meant to be final. It does not read that the appraisement shall be final and conclusive, unless [illegible] as the new law, 31 Vic., referred to by the plaintiff, if it is still [illegible] to the importer; but it is not to control this case. [Hall, contra, cited Stuart in Moffatt v. Bouthillier, 5 L. C. Rep. p. 311, and 4 case to 4 Howard's R., to support the position that the plaintiff had no right to sue in this court, having refused to avail himself of the tribunal of merchants.] The reading of these cases with our statute law leads the Court to hold that plaintiff has no right of action against defendant. But plaintiff is doubly estopped for, from the evidence, he paid what he did under such circumstances, and with such knowledge as prevents him getting back what he paid. His goods had not been seized. The plaintiff was not in defendant's power. He had other rights and other remedy to use if he did not choose to pay defendant. But this other remedy was waived. Look at the case as at the time immediately before plaintiff paid. Could Rooney, for instance, after notice of the first appraisement, refusing to pay the duties asked of him, have sued defendant? Could he have revendicated these goods and dispossessed the Customs without paying? No; he could only have moved for the reference to the merchants. If, however, he preferred to make a finality of the first appraisement, he could, on paying (as in this case he did), obtain his goods, and if they were then refused, revendicate them. As to the value of the goods the Court is with the plaintiff.

TORRANCE, J., observed that his opinion was based mainly on the authority of the case cited from 4 Howard's Rep. 327-335. *Rankin & al. v. Hoyt.*

The judgment is *motive* as follows.

The Court here sitting as a Court of Review, having heard the parties by their respective counsel upon the judgment rendered in the Circuit Court, for the District of Montreal, the 30th June, 1869, having examined the record and proceedings had in this cause, and maturely deliberated;

Considering that there is error in the said judgment of the 30th of June 1869, revising said judgment doth reverse the same, and, proceeding to render the judgment that ought to have been rendered in the premises;

Considering that the duties upon such importations as the plaintiff referred to in his declaration were, at the time referred to, appointed to be ascertained,

finally adjusted, and determined, and levied in and by the mode prescribed by chapter 17 of the Consolidated Statutes of Canada;

Considering that the plaintiff, though at first dissatisfied with the appraisement that the defendant had caused to be made of the woollen goods of the plaintiff, and demanded in April, 1866, the amount of duty that the defendant asked and took from him, he, the plaintiff, declining to have or move towards the other or further appraisement, to wit, by two discreet and experienced merchants, according to section 33 of said chapter 17, C. S. C., and preferring to pay what he did to the defendant;

Considering that the plaintiff has not proved that the defendant wrongfully collected or took from him the money amount sought to be recovered by the present action;

Considering that, under the circumstances of this case, the defendant was justified in taking from the plaintiff the full amount for duty that the plaintiff paid him in April, 1866;

Considering the plaintiff's action in the Circuit Court unfounded for the reasons aforesaid, and under the law, the Court doth dismiss the same with costs to the defendant against the plaintiff in the Circuit Court, and with costs of this Court of Revision to said plaintiff in revision, etc.

Mr. Justice MONDELET concurs in the judgment, but is of opinion that the judgment should go further and decide that there is in this cause no evidence of the time at which the goods were exported from the place where they were bought, nor of the fair market value of such goods at the place whence they were exported.

Judgment reversed.*

Hon. J. J. C. Abbott, Q.C., for the plaintiff.

F. P. Pominville, Q.C., for John Lewis, *es qual.*, defendant.

(J.K.)

COUR SUPÉRIEURE.

EN REVISION.

MONTRÉAL, 30 DÉCEMBRE, 1869.

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

No. 584.

Leprohon vs *Crebassa*, et *Ouimet*, opposant, etc.

JUGE:—Que le défendeur peut se pourvoir contre un jugement rendu en conformité des dispositions des articles 89, 90, 91, 92, C. P. C., par simple opposition, la veille de la vente, sans aucun ordre d'un juge par suite de ce que le procès-verbal de carence n'a jamais été rapporté ni produit.†

Le demandeur ayant obtenu jugement contre le défendeur *en vacance par défaut*, conformément aux articles 89 et seq. du code de procédure civile; et ayant fait émaner un writ *de Bonis* et de *Terris*, fit faire un procès-verbal de carence qui

* A similar judgment was rendered the same day in *Joseph* vs. *Lewis es qual.*

† C. P. C. Art. 484.

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ne fut jamais rapporté ni produit en cour par le shérif, et fit saisir les biens immeubles du défendeur.

La vente fut annoncée par le shérif pour le 27 août 1869.

Le 26 août 1869 le défendeur produisit une opposition afin d'annuller au bureau du shérif sans aucun ordre d'un juge.

Le 18 septembre 1869 la demanderesse fit motion pour le rejet de cette opposition pour les raisons suivantes:

1o. Parce que la dite opposition n'a pas été produite en temps utile; mais au contraire longtemps après les délais accordés à cette fin par la loi. 2o. Parce que un procès-verbal de carence de biens meubles a été fait, signé et *produit*, (ceci est une erreur, il ne fut pas produit en cette cause,) savoir le quinze avril dernier et que la dite opposition au lieu d'être faite dans les dix jours qui l'ont suivi, ainsi que prescrit par la loi, ne l'a été que le vingt-six août suivant et la veille de la vente de l'immeuble saisi en cette cause. 3o. Parce que le dit opposant a acquiescé au jugement rendu en cette cause, après le dit procès-verbal de carence tant par son défaut de s'y opposer en temps opportun que par ses demandes de délai, et ses promesses de payer, ainsi qu'il appert des documents et affidavits produits avec les présentes. 4o. Parce que le dit opposant n'a pas produit avec sa dite opposition les actes et documents auxquels il réfère. 5o. Parce que le dépôt de quatre piastres fait en cette cause par le dit opposant est insuffisant, les dit frais s'élevant au moins à la somme de $13, ainsi que taxés. 6o. Parce que tous les procédés du dit opposant sont illégaux, irréguliers et nuls.

La Cour Supérieure à Montréal, (MACKAY, J.) rendit sur cette motion le 30 septembre 1869, le jugement suivant:

The Court having heard the parties by their Counsel upon the motion of the said plaintiff of the 18th of September instant that the opposition fyled by the said J. G. Crebassa on the 26th of August, 1869, to the judgment entered up by the prothonotary of this Court, and enregistered against him in vacation on the 3rd of April, 1868, for the reasons set forth in the said motion be declared illegal, null and void, and rejected from the record with costs; having examined the said motion, and having deliberated, doth order that the said plaintiff take nothing by his said motion except that the said opposant do and he is hereby ordered and required within eight days from this day to pay into the hands of the prothonotary of this Court the sum of $9, to complete *dépot* proper to be made with the said opposition *au jugement;* and in default of the said opposant to make and complete said *dépot* within the delay above granted, the said opposition is hereby rejected and declared null and void.

La demanderesse inscrivit cette cause pour révision devant trois juges à Montréal. La demanderesse invoquait l'article 652 du code de procédure civile.

Elle disait que le procès-verbal de carence avait été fait le 15 avril, et l'opposition n'avait été produite que le 26 août.

Le texte anglais du code de procédure dit: "within ten days from the date of a return of *nulla bona* if there is one," le mot return est la traduction du mot français "procès-verbal," et l'article anglais doit se lire comme s'il y avait "within ten days from the DATE of a procès-verbal of *nulla bona*." Le but de la loi est que le défendeur a connaissance du jugement pris en vacance, or

cette connaissance lui parvient par le procès-verbal de carence, et il a alors dix jours pour faire son opposition. Leprohon vs. Crebassa.

S'il y a divergence entre les deux textes du code, il faut recourir à la loi antérieure, suivant l'article 1361. Vide sec: 115 et 116 du ch. 83 S. R. B. C., ou 23 Vic. ch. 57 §§ 43, 46, or ces statuts disent que les délais de dix jours comptent de l'*exécution* du procès-verbal de carence.

Le jugement de la Cour de Révision a confirmé le premier jugement.

La Cour Supérieure siégeant à Montréal présentement comme Cour de Revision ayant entendu les parties par leurs avocats respectifs sur le jugement rendu le 30 septembre 1869, dans et par 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 de cette Cour de Révision contre la demanderesse contestante.

L'honorable juge BERTHELOT différant.

Motion renvoyée.

Bernard & Pagnuelo, avocats de la demanderesse.
W. H. Kerr, avocat de l'opposant.
(P. R. L.)

IN REVIEW.

MONTREAL, 31ST DECEMBER, 1869.

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

No. 316.

Jones vs. *Warminton*.

HELD:—That there is no *acquiescement* when the amount of the judgment tendered has been accepted through error.

On the 24th November, 1869, the plaintiff moved the Court of Review as follows:—

Motion on behalf of the said plaintiff, *ès-qualité*, that the inscription for revision be set aside, and that the record be transmitted to the Circuit Court for the District of Montreal, the whole with costs, for, amongst others, the following reasons: 1st. Because the said Richard Warminton has acquiesced in the judgment appealed from before the filing and service of the said inscription, he, the said Richard Warminton, having accepted the sum of one dollar and seventy-five cents due to him under the said judgment.

The defendant, in reply to the plaintiff's motion, fyled the following affidavit:

Richard Warminton, the defendant, being duly sworn, doth depose and say:

That on the day when he was served with the copy of judgment the bailiff serving the same induced deponent, who was somewhat unwilling and asked time to consult his attorneys, to receive the sum of one dollar and seventy-five cents, representing that whether deponent received it or not would not matter in the case; and deponent was also under the impression that, in default of his receiving it, execution might be issued against him for the amount named in the judgment, one hundred and ninety dollars, he being then ignorant of the real effect of the

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judgment and of the proceedings requisite in the case. That deponent handed the identical money to his attorneys forthwith after learning what was intended, and would not have received it at all if [illegible] cognizant of its effect. That deponent was never served with [illegible] re to his recollection.

The Court dismissed this motion after having heard the parties, and the judgment is in the following terms:

The Court now here sitting as a Court of Review, having heard the parties by their counsel upon the motion of plaintiff of the 24th day of November, 1869, that the inscription for revision in this cause be, for the reasons therein mentioned, set aside with costs, having examined the proceedings and deliberated, it is considered and adjudged that said plaintiff do take nothing by his said motion, which is dismissed with costs.

D. Girouard, attorney for plaintiff.

Perkins & Ramsay, attorneys for defendant.

(P. R. L.)

EN REVISION.

MONTREAL, 31 JANVIER 1870.

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

No. 1528.

Robert vs. *Rombert* dit *St. Martin* et vir.

JUGE:—Que la femme séparée de bien est tenue au paiement des articles nécessaire et indispensable à l'exitence et à l'entretien de sa famille et qui lui ont été fournies à sa demande. (1).

Le 30 avril 1869, la Cour de Circuit à Montréal, a condamné les défendeurs, le mari et la femme séparés de biens, à payer conjointement et solidairement au demandeur, la somme de $168.33, pour prix et valeur de divers effets et articles d'épiceries vendus et livrés par le demandeur aux défendeurs, (la défenderesse séparée de biens), à diverses dates et époques avant le 18 février 1868.

Le jugement est motivé comme suit:

La Cour, après avoir entendu le demandeur et la dite défenderesse par leurs avocats respectifs sur le mérite de cette cause, le défendeur ayant fait défaut, examiné la procédure, pièce produite et preuve:

Considérant que la dite défenderesse a fait défaut de comparaître et répondre aux interrogatoires sur faits et articles à elle soumis par le demandeur, déclare les dits faits et articles pour avérés et admis;

Et considérant que le demandeur a établi en preuve les faits essentiels de sa déclaration et que tous les effets mentionnés au compte produit et cette cause vendus et livrés à la dite défenderesse étaient des articles nécessaires et indispensables à l'existence et à l'entretien de la famille des défendeurs; la Cour déclare l'Exception Péremptoire plaidée par la dite défenderesse mal fondée en loi et la déboute; et, en conséquence, condamne les dits défendeurs conjointement et solidairement à payer au dit demandeur, la somme de $168.33 courant, comme prix

(1) Vide.—6 L. C. J., p. 81; 7 L. C. J., p. 39; 8 L. C. J., p. 103; 13 L. C. J., p. 82.

et valeur des divers effets et articles d'épiceries, et marchandises énumérés au compte produit en cette cause et vendus et livrés par le dit demandeur aux dits défendeurs à diverses dates et époques avant le 18 février 1868, avec intérêt sur la dite somme de $168.33, à compter du 20 mars 1868, jour de l'assignation en cette cause jusqu'à l'actuel paiement et aux dépens. Robert vs. Rombert.

La défenderesse porta cette cause en révision.

La défenderesse soumit devant la Cour de Révision la question de savoir : si un fournisseur, qui fait des avances au mari nécessaires à l'entretien de la famille, peut réclamer le montant de ces avances de la femme solidairement avec son mari. La femme séparée de biens n'est pas responsable vis-à-vis les tiers des avances faites au mari, même pour l'usage de la famille.

Chacun des époux doit contribuer aux charges du mariage dit l'art. 1423, de notre code ; mais cela ne regarde que les époux entre eux et ne donne aucun droit aux tiers. Poth. Communauté, No. 464. Le mari peut se charger seul des obligations du mariage, il a un droit contre la femme de la faire contribuer aux charges du ménage, mais il peut renoncer à ce droit, et si les tiers contractent avec lui sans faire engager la femme personnellement vis-à-vis eux, ils n'ont aucun recours contre elle.

Le jugement de la Cour de Circuit fut confirmé par la Cour de Révision comme suit :

La Cour Supérieure, siégeant à Montréal, présentement comme Cour de Révision, ayant entendu les parties par leurs avocats respectifs sur le jugement rendu le 30 avril 1869, dans et par la Cour de Circuit 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 les défendeurs.

Jugement confirmé.

R. Laflamme, C.R., avocat du demandeur.

J. Duhamel, avocat des défendeurs.

(P.R.L.)

MONTREAL, 18TH DECEMBER, 1869.

Coram TORRANCE, J.

No. 1021.

Ex parte *Marry*, petitioner for *certiorari*, & *John P. Sexton*, Esq., Recorder, & *the Mayor et al. of the City of Montreal*, prosecutors.

HELD:—1. That a By-law is bad which gives a discretion to the recorder or justice presiding in the Recorder's Court, where the Statutes upon which the By-law is based only allow a discretion to the Council making the By-law.

2. That a conviction is bad which orders imprisonment in default of immediate payment of a sum of money when the By-law upon which it is based is in the alternative, imposing a fine or imprisonment.

3. That a conviction is bad which gives costs when the By-law upon which it is based gives no jurisdiction as to costs.

PER CURIAM :—On the 6th August last, John P. Sexton, Esq., recorder, presiding in the Recorder's Court, of the City of Montreal, convicted the peti-

Ex parte Marry

tioner of an alleged offence as follows: for that he the said Thomas Marry, on the 27th July, 1869, at the said City, did sell diluted milk, to wit, one pint of the said diluted milk, the said milk being then and there diluted in the proportion of twelve gallons of water to one hundred gallons of pure milk contrary to the by-laws of the City of Montreal, in such case made and provided; "and the said Court did adjudge and condemn the said Thomas Marry for his said offence to forfeit and pay to the Mayor, Aldermen and Citizens of the City of Montreal, the sum of two dollars and fifty cents, and costs amounting to the further sum of seven shilling and six pence; and if the said several sums were not forthwith paid, the Court did adjudge the said Thomas Marry to be imprisoned in the common gaol of the district of Montreal, at the said City, and there kept for the space of thirty days unless the said several sums should be sooner paid. The conviction is before this Court on a writ of *certiorari*, and the petitioner has moved the Court to quash the conviction. By 23 Victoria, chap. 72, sect. 13 (A. D. 1860) the Council (of the City Corporation) may impose such fines not exceeding $20 *or* such imprisonment not exceeding 30 days, *or* both, as they may deem necessary, for enforcing their by-law. By 27-28 Vic. ch. 60, sec. 50, the Council has power in any by-law, &c., for enforcing the provisions thereof, to impose a fine not exceeding $20 and costs of prosecution, with imprisonment in the common gaol or in the house of correction, at hard labour, for a period not exceeding one calendar month. By 32 Vict., ch. 70, (Quebec) sec. 17, in addition to the power already accorded, it shall be lawful for the said Council to impose, in and by such by-laws, a fine not exceeding $20 and costs of prosecution, to be forthwith leviable on the goods and chattels of the defendant; or to enact that in default of immediate payment of the said fine and costs the defendant may be imprisoned in the common gaol, for a period not exceeding two months, the said imprisonment to cease upon payment of the said fine and costs; or to impose the said fine and costs in addition to the said imprisonment.

The by-law under which the petitioner had been convicted was passed on the 7th June, 1869, and section 7, upon which the conviction was based, is in the following words: "Any person who shall offend against any of the provisions "of this by-law, shall forfeit, and pay a fine, not exceeding $20, or be liable to "an imprisonment not exceeding 30 days for each and every offence." Has this by-law followed the directions of the Statutes? It has been urged against the by-law that it has given a discretion to the recorder, as regard the amount and character of the penalty, which the Statutes have only given to the Council itself. Further, it has been urged against the conviction itself that it does not conform to the by-law, inasmuch as the by-law is in the alternative imposing a fine *or* imprisonment, and the conviction orders imprisonment in default of immediate payment, inasmuch, also, as the by-law says nothing about costs, and the conviction condemns to costs. On all these grounds the Court is with the petitioner.

VIDE ex parte *Rudolph*, 1 L. C. J., p. 47.

The judgment is recorded as follows:—

The Court having heard the parties by their counsel on the rule of Court, granted on the motion of the applicant, Thomas Marry, that the conviction in this cause, rendered on the 6th August last by John P. Sexton, recorder of the recorder's

Court in the City of Montreal, be quashed, annulled and set aside *nisi causâ*, and also on the motion of the prosecutors, the Mayor, Aldermen and Citizens of the City of Montreal, that the writ of *certiorari* issued in the cause be quashed and set aside with costs. Ex parte Marry.

Considering that the By-law upon which the said conviction has been based gives a discretion to the Recorder or justice presiding in the said Recorder's Court, which the Statutes made and provided in this matter only allow to the council making the By-law;

Considering further that the conviction doth not conform to the By-law, inasmuch as the By-law is in the alternative, imposing a fine or imprisonment, and the conviction orders imprisonment in default of immediate payment;

Considering further that the By-law gives no jurisdiction as to costs, and the conviction condemns to costs, doth reject the motion of the prosecutors to quash the writ of *certiorari*, and doth make the said rule absolute, and doth in consequence quash, annul, and set aside the conviction of date the 6th August, 1869, in the cause No. 1288, wherein the Mayor, Aldermen and Citizens of the City of Montreal were prosecutors, and the applicant was defendant, and the Court doth condemn the said prosecutors, the Mayor, &c., to pay the costs."

Conviction quashed.

S. B. Nagle, for applicant.
E. Carter, Q. C., counsel.
R. Roy, Q. C., for prosecutors.
(J.K.)

MONTREAL, 5th APRIL, 1870.

Coram MACKAY, J.

No. 1958.

Davidson, Petitioner, and *Baker*, Respondent.

HELD:—1.—That when the certificate of election, granted to a lay delegate to "The Synod of the Diocese of Montreal" by the chairman of the Vestry meeting held for the election of lay delegates, is in form and found to be satisfactory by the committee appointed to examine the certificates of such lay delegates, it is not competent to the Synod to enquire into the validity of the proceedings at the Vestry meeting, or in any way to try the validity of the election certified to in the certificate.

2.—That the second clause of the constitution of said Synod was and is legal.

This was a writ of *quo warranto* for the purpose of ousting the defendant from exercising the office of lay delegate to "the Synod of the Diocese of Montreal."

The facts and questions raised are sufficiently shown in the following remarks of the Honorable Judge:—

PER CURIAM.—The *requête* of petitioner in this matter asks that Baker, the defendant, be held to have illegally usurped the office of lay delegate for Christ Church, Sweetsburg, in the Synod of the Diocese of Montreal, and to be guilty of unlawfully holding and exercising said office; that he be ousted from it; that the decision of the majority of the Synod against petitioner, Davidson, be declared illegal; that the petitioner be declared to have been duly elected as lay delegate

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to said Synod from said Church, and that the Synod be ordered to reinstate him as such lay delegate. The petition sets out with stating the Synod incorporation; it then proceeds to state an election in March, 1869, at the Easter meeting at Christ Church, Sweetsburg, at which election petitioner was duly elected a lay delegate to the Synod; that he received from the incumbent chairman at the meeting a certificate of his election; that he presented it at the Synod, in May, 1869, and claimed to take his seat; that the committee to report on certificates passed upon his and approved it, and put his name upon the roll of delegates; that thereafter a motion, supported by affidavits, was made by a lay delegate that the name of petitioner should be struck off the roll, and the name of Baker substituted for it; that the chairman ruled this to be out of order; but, upon an appeal from the chair, the majority of the Synod maintained the motion, and Baker then and there was admitted, and he petitioner excluded from the Synod, etc. The defendant, Baker, by his answer, defends the action of the Synod, and claims that at the Vestry meeting at Sweetsburg, he (Baker) was elected; that he had the majority of votes, and the chairman so declared at the time, but afterwards acted to the contrary and gave petitioner, his son, the certificate; that at the Synod the chairman could not prevent the Synod disposing of the question as to whether Davidson or Baker had the right to sit; that clause number two of the Synod constitution, relating to qualification of electors, was illegal and void, &c.

The 19 and 20 Vic., cap. 121, and 22 Vic., cap. 139, enable the members of the Church of England and Ireland to meet in Synod, the meeting of Synod and the adoption by it of a constitution, &c., followed this 22 Vic., and the second clause of such constitution states who may be lay representatives, and how elected.

2. The lay representatives shall be male communicants of at least one year's standing, of the full age of twenty-one years, and shall be elected annually at the Easter meetings, or at any Vestry meeting (specially called for such purpose by incumbents, after due notice on two Sundays), held by each minister having a separate cure of souls, and all laymen within the cure, of twenty-one years or upwards, entitled within such cure to vote at Vestry meetings, or who hold pews or sittings in the church, though not entitled so to vote who shall have declared themselves in writing to be "Members of the United Church of England and Ireland, and to belong to no other religious denomination," *shall* have the right of voting at the election.

And in clause 5 the certificate of election is given as follows:

"This is to certify that at a meeting held this day for the purpose of electing delegates to represent this congregation or parish in Synod, being the parish or mission of ———, ———, a communicant of one year's standing, and of the full age of twenty-one years, was elected by the laymen of this congregation, who have a right to vote at such election, by virtue of their having, in accordance with the second clause of the constitution of the Synod of this Diocese, declared themselves in writing in a book kept for that purpose, to be members of the United Church of England and Ireland, and to belong to no other denomination, and being qualified otherwise under the provisions of said clause.

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And such certificate of election shall be considered and taken as sufficient proof of the election; and such lay delegate shall continue in office till his successor is appointed."

And article 3 of the rules and order of proceeding reads as follows:—

3. After this prayer the clerical secretary shall call over the roll of the clergy, to be furnished by the Bishop, and mark the names of those in attendance, and the secretary shall call over the names of the several parishes, missions or cures, when the certificate of the representatives having been presented, shall be examined by the secretary and a committee of two to be named by the chairman for that purpose; and where found satisfactory the names shall be recorded and read by the secretary.

The petitioner received the formal certificate of election from the incumbent of Sweetsburg. Much should be presumed in favour of such certificate, and the Returning Officer's Act ought to be presumed true and honest; that certificate was such presumptive evidence of Davidson's right to the office of lay delegate that, upon it approved 11th of May, 1869, by the committee, and his name being recorded by the secretary, he ought to have been admitted to the Synod. The certificate so approved ought to have been held by the Synod then and there sufficient proof of Davidson's election. The decision of the chairman of the Synod was right; the overruling of it was wrong, and so was the erasing petitioner's name from the roll of delegates, and the inserting of Baker's instead of it.

The case has been presented not only on what was done in the Synod, but petitioner and defendant have also gone upon the merits of the election at Sweetsburg, and petitioner has to succeed upon this. We see exactly all that passed there 29th March, 1869. The meeting was a curious one, and the incumbent presiding at it became perplexed by what took place, and was unsettled a little as to what to judge and do. Six at the meeting voted for Baker (if we include himself); three voted for Davidson. Baker was qualified to vote or to be elected; so were the three who voted for Davidson. The other five were not holders of pews or sittings, and had no title to pews or sittings, and had no vote. The church is a proprietary one, Schufeldt explains it in his evidence in rebuttal, and has a title. How different it is with Abraham Pickle and the others! As to these, could any of them maintain action against anybody as for disturbance to their possession thereof—*i. e.*, of any pew or sitting (under the Temporalities Act)? I think not.

The chairman at the election, registered Thomas Cotton as a delegate to the Synod, and Baker as "elected by those who had no right to vote," and Davidson elected by those entitled to vote. (Two delegates were to be elected.) No proclamation or declaration of the result was made at the meeting, and none was necessary.

The certificate granted to Davidson by the chairman was so granted upon what he believed to be required by the Constitution, Article 2, above quoted. This article is said by defendant to be contrary to 22 Vic., cap. 139, and therefore illegal. But this must not control absolutely; it is to be taken with the 19 and 20 Vic., cap. 121; following the 22 Vic. is the Constitution of the Synod,

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and these three taken together control. The Temporalities Act, 14 and 15 Vic., cap. 176, has also to be considered to a certain extent, and it makes against defendant and his voters in a way, *e. g.*, as settling what is meant by holding a pew or sitting; the 2nd section of this Act enacts as follows: "That all pew holders in such churches or chapels whatever, holding the same by purchase or lease, and all persons holding sittings therein by the same being let to them * * * after the passing of this Act by the Corporation of such church or chapel, *and*, holding a certificate from such Corporation of such sitting, shall form a Vestry, &c." It is said, too, with some force, that the 31 Vict. has acknowledged the validity of the constitution of the Synod of Montreal, and so it has in enacting as follows: "Sec. 2. The said Incorporated Synod shall have power from time to time to amend, repeal or alter the present Constitution, Canons, Rules and Regulations of the aforesaid Synod, &c., * * * * but until so amended, repealed or altered, the Constitution, Canons, Rules and Regulations of the said Synod *presently* subsisting, and in force, shall be and continue to be the Constitution, Canons, Rules and Regulations of the Corporation aforesaid created by this Act." I think the Constitution valid and binding.

The act of the public officer, with his testimony and the other evidence of record that is in favour of petitioner, is stronger than the evidence for defendant, and makes a good case for petitioner, whose petition is, therefore, maintained; the defendant is declared guilty of the usurpation charged against him by Davidson, and must be ousted; the petitioner, Davidson, is declared to have been duly elected and entitled to his seat as delegate for Christ Church aforesaid; the Synod proceedings against Davidson, complained of, were unreasonable at the time they took place, and were and are illegal and are over-ruled, and order must go to the Synod to admit the petitioner, Davidson, as a lay delegate from Christ Church, Sweetsburg, and reinsert his name as such, in place of the defendant, Baker's, in the roll of delegates; the whole with costs against defendant.

Judgment for petitioner.

S. P. Davidson, for petitioner.
Strachan Bethune, Q. C., counsel.
Carter & Hatton, for defendant.
(S.B.)

COURT OF QUEEN'S BENCH.

MONTREAL, 4TH MARCH, 1870.

In Appeal from the Superior Court, District of Montreal.

Coram DRUMMOND, J., BADGLEY, J., MONK, J., POLETTE, J., *ad hoc*.

No. 61.

THE BANK OF MONTREAL,
(*Defendants in the Court below*);
APPELLANTS;

AND

WILLIAM GORDON HENDERSON *et al.*,
(*Plaintiffs in the Court below*),
RESPONDENTS.

A testatrix, by will, made a bequest in terms following:—

"And whereas I now have £2,000 stock in the Bank of Montreal, I give and bequeath £1,500 "thereof to my said sister Jemima Ermatinger, £1,000 whereof are to become, immediately upon my "decease, payable, assignable or transferable to my said sister by my executors hereinafter named, "but it is my will that the interest or dividends which may accrue and be paid from and out of £500 "of my said stock so bequeathed to my said sister shall be paid by my said executors to my husband, "Dr. Garrett, so long as he shall live, and that the principal of the said £500, part of the said £1,500 "so *bequeathed* to my said sister, shall not be *payable* or *transferable* to my said sister or her heirs or "legatees *until after* the decease of my said husband. But that upon the decease of my said husband "the said capital stock of £500, part of the said £1,500 so bequeathed to my said sister, shall immedi- "ately thereafter become payable, assignable and transferable to any person or persons to whom she "may have bequeathed the same, and until the death of my said husband shall continue vested in the "name and under the control of my said executors."

And modified the same, by her codicil, as follows:—

"I have seen fit to cancel and make void, and do hereby cancel, annul and revoke the said legacy "of £1,000 so made to my said sister Jemima in and by my said last will and testament, and in lieu "and place thereof I do hereby *give and bequeath* unto my said sister Jemima, to and for *her own use* "*and at her own disposal*, the sum of £500 currency, and I hereby further will and bequeath the "remaining sum of £500 currency unto my said husband, the said George Garrett, in trust for his "daughter Ann. It is also my will and desire that the *interest* and *revenues* arising from and out of "the said two legacies of £500 each, shall be received and enjoyed by my said husband during his "natural life, and the principal at his death only to be paid to the said Jemima Ermatinger and Ann "Garrett respectively, as hereinbefore bequeathed. And I do by these presents confirm my said last "will and testament in every other respect, declaring these presents to be a codicil thereto, and the "same together to be my last will and testament, and as such I do hereby publish and declare the "same."

HELD:—1. Under the terms of the will and codicil the shares of bank stock were so bequeathed as, at the death of the testatrix, to become absolutely and unconditionally vested in Jemima Ermatinger.

2. Jemima Ermatinger dying before Dr. Garrett, the *usufructier*, and by will, after several specific legacies, leaving the residue of her estate to certain legatees, the said shares formed part of such residue.

3. Any party having acquired transmission of the interest in any share of the capital stock of the Bank of Montreal, can transfer or sell such interest by notarial transfer or in any other lawful way; but transfers in the books of the Bank must be made according to Sections 16 and 17 of the Act 19 Vic., amending the Act of incorporation.

4. Any transferee, by notarial transfer or any other lawful means, of the interest in any share of such stock, may make the declaration in writing, mentioned in the 17th Section of said Act, and comply with the formalities therein prescribed, and thereupon shall be entitled to have his name duly recorded in the register of shareholders in lieu of the original shareholder from whom the share was transmitted.

This action was brought by William Gordon Henderson, of Montreal, and William Ermatinger, in his capacity of curator to the vacant estate and succession of the late Charles Oakes Ermatinger, deceased, in his lifetime of Montreal.

The declaration alleged as follows:—

That there are now, and have been for a long time, twenty shares of the capital stock of the said Bank of Montreal, of the par value of $1,000, standing in the name of the estate of Dame Anna Maria Ermatinger, deceased, in her lifetime of Montreal aforesaid, wife of George Garrett, of the same place, now deceased.

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That on the 21st of December, 1820, the said late Anna Maria Ermatinger, being possessed in her own right of the said twenty shares of the capital stock of the said defendants at Montreal aforesaid, made her last will and testament, and thereby bequeathed to Jemima Ermatinger, of the parish of Montreal, spinster, £1,500 of stock in said Bank of Montreal, including the said twenty shares above referred to, of which £1,000 were payable immediately after her decease, and £500 payable to her after the death of the said George Garrett, if the said Jemima Ermatinger should be then living, and, if not then living, then to whomsoever the said Jemima Ermatinger should appoint by her last will, the dividends meanwhile of the said £500 to her husband, the said George Garrett, during his lifetime.

That on the 3rd of October, 1834, by a codicil of that date, the said Anna Maria Ermatinger reduced the said legacy of £1,000 to the said Jemima Ermatinger to £500, and gave the usufruct to her husband, the said George Garrett, during his life.

That the said Anna Maria Ermatinger departed this life on or about the 28th of October, 1836. That probate of the said will and codicil was duly made on the 8th of June, 1838. That on the 23rd of March, 1839, the said Jemima Ermatinger made her last will and testament, by which she willed and bequeathed to her nieces, Anna Maria Ermatinger, and Jane Ermatinger, hereinafter mentioned, £200 each; to her nephew, Frederick William Ermatinger Cameron, hereinafter mentioned, £2,000, if he attained his majority, failing which, the said bequest went to the said Anna and Jane Ermatinger; to Elizabeth Wickstead, wife of Donald McKercher, £20; to the Montreal Orphan Asylum, £12; and to Charles Ermatinger, to wit, the said Charles Oakes Ermatinger, the said William Ermatinger, James Ermatinger, the said Anna and Jane Ermatinger, her nephews and nieces, the residue of her estate.

That the said Jemima Ermatinger departed this life in 1840.

That the said several legatees accepted the said legacies, and the said F. W. E. Cameron attained his majority before the dates hereinafter mentioned.

That at Montreal aforesaid, in the late Court of King's Bench, in a cause, bearing the number 110, wherein Thomas Cochrane Cameron (the father of the Frederick W. E. Cameron hereinafter mentioned) was plaintiff, and the said Charles Oakes Ermatinger was defendant, judgment was rendered against the defendant, individually as well as in other capacities, on the 20th of February, 1841, for £4,000 and interest from the 1st of June, 1837, which judgment has never been paid.

That the said Charles Oakes Ermatinger departed this life, without heirs of his body, and without having been married, on the 9th of January, 1857, intestate.

The declaration then set up a variety of transfers from four of the legatees (excepting Charles O. Ermatinger) to F. W. E. Cameron, of their interest in eight of the said twenty shares of bank stock, and finally a transfer to the respondent.

That William Ermatinger was appointed curator to the vacant estate and succession of the said Charles Oakes Ermatinger, and accepted of the said office on the 11th of April last.

That the said George Garrett departed this life on the 10th of May, 1864, when the said ten shares of capital stock in the said Bank of Montreal became absolutely vested in the parties then legally entitled to them under the will and codicil of the said Dame Anna Maria Ermatinger, wife of the said George Garrett.

That by reason of the premises, and by law, the said William Gordon Henderson is entitled to four-fifths of the said ten shares, and the said William Ermatinger to one-fifth of the said shares.

That on the 13th of November, 1868, the said William Gordon Henderson and William Ermatinger fyled a declaration, in writing, of transmission with said defendant, duly signed and acknowledged according to law, together with all the documents above referred to necessary to substantiate the essential averments in said declaration, which said declaration contained in effect the above averments of this declaration, and distinctly stated the manner in which, and the parties to whom, the transmission of the interest in the said ten shares of said bank had been made.

That thereupon the said William Gordon Henderson, and the said William Ermatinger in his said "capacity, were entitled to have their names duly recorded "in the register of the shareholders in said Bank of Montreal in lieu of the name "of the estate of the said Dame Anna Maria Ermatinger, to wit, the said Wil-"liam Gordon Henderson as holder of four-fifths or eight of said ten shares, and "the said William Ermatinger as holder of one-fifth or two of said ten shares, "together with all interests and dividends accrued thereon since the death of "the said George Garrett on the 10th of May, 1864."

The conclusions were in accordance with the allegations of the declaration, praying that it be adjudged that the said ten shares of bank stock standing in the name of the estate of said Anna Maria Ermatinger belong to said plaintiffs in the proportion of four-fifths or eight of said shares to said William Gordon Henderson, and one fifth or two of said shares to said William Ermatinger in his capacity of curator to the vacant estate of Charles O. Ermatinger, and the defendants to be ordered to record in the register of the shareholders in lieu of the name of the estate of Dame Anna Maria Ermatinger the names of the plaintiffs as holders of the said ten shares, to wit, William Gordon Henderson as holder of four-fifths or eight of said ten shares, and said William Ermatinger of one-fifth or two of said ten shares, with all interests and dividends accrued thereon since the death of said George Garrett on the 10th of May, 1864, and that defendants be ordered to account for and pay over to said plaintiffs, in their said capacities and in said proportions, all interests and dividends accrued on said ten shares since the death of said Dr. Garrett—the whole with costs.

The appellants pleaded to the action a peremptory exception, by which, after admitting to be true the making of the wills and the deaths of Mrs. Garrett and Jemima Ermatinger, Mrs. Garrett's ownership, in her own right, of twenty [part of forty] shares of the appellant's capital stock, the death of Charles Oakes Ermatinger, a bachelor and intestate, the signification to the appellants of the several notarial deeds mentioned in the declaration; the death, in Ireland, of Dr. Garrett, on the 10th of May, 1864, and the respondent's delivery to the

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appellants of a declaration of transmission, claiming, in the proportions aforesaid, ten of the twenty shares belonging to Mrs. Garrett's estate (and which declaration, with the supporting documents, the appellants fyled as their exhibits, No. 1 to 16 exclusively), the appellants alleged, in substance:—

That at her death, on the 28th of October, 1836, Mrs. Garrett owned, in her own right, forty shares of the par value of £50 currency each, of the appellants' capital stock, which forty shares she, by her will, bequeathed as follows:—And whereas I now have £2,000 stock in the Bank of Montreal, I give and bequeath £1,500 thereof to my said sister Jemima Ermatinger, £1,000 whereof are to become immediately on my decease payable, assignable or transferable to my said sister by my executors hereinafter named; but it is my will that the interest or dividends which may accrue and be paid from and out of £500 of the said stock so bequeathed to my said sister shall be paid by my said executors to my husband Dr. Garrett, so long as he shall live, and that the principal of the said £500, part of the £1,500 so bequeathed to my said sister, shall not be payable or transferable to my said sister or her heirs or legatees until after the death of my said husband, but that upon the decease of my said husband the said capital or stock of £500, part of the said £1,500 so bequeathed to my said sister, shall immediately thereafter become payable, assignable or transferable to my said sister, if she be then living, or, if she be not then living, shall be payable or assignable or transferable to any person or persons to whom she may have bequeathed the same and until the death of my said husband shall continue vested in the name and under the control of my said executors. And as to the remaining £500 of my stock in the Bank of Montreal aforesaid, I give and bequeath the same to Isabella Garrett, youngest daughter of my said husband.

That by her codicil, dated 3rd of October, 1834, Mrs. Garrett modified the above portion of her will as follows:—I have seen fit to cancel and make void, and I do hereby cancel, annul and revoke the said legacy of £1,000 so made to my said sister Jemima. And in lieu and place thereof I do hereby give and bequeath unto her, my said sister Jemima, to and for her own use and at her own disposal, the sum of £500 currency,—and I further will and bequeath the remaining sum of £500 currency unto my said husband, the said George Garrett, in trust for his daughter Ann. It is also my will and desire that the interest and revenue arising from and out of the said two legacies of £500 each shall be received and enjoyed by my said husband during his natural life, and the principal at his death only to be paid to the said Jemima Ermatinger and Ann Garrett as hereinbefore bequeathed. And I do by these presents confirm my said last will and testament in every other respect, declaring these presents to be a codicil thereto, and the same together to be my last will and testament, and as such I do hereby publish and declare the same.

That by her will, as modified by her codicil, Mrs. Garrett's forty shares of the appellants' capital stock were bequeathed as follows:—

Ten thereof, equal, at par value, to £500, to her said sister Jemima Ermatinger, the same to be transferable to her immediately after the death of the testatrix.

Ten others thereof, of like par value, to the said Jemima Ermatinger, but not

to be transferable to her until after the death of Dr. Garrett, to whom the dividends were in the meantime to be paid; and then if Jemima Ermatinger should not be then living, to be transferable to whomsoever she, Jemima, should, *by will*, have bequeathed the same.

Ten others thereof to Isabella Garrett; and the remaining ten to Dr. Garrett, in trust for his daughter Ann Garrett, but not to be transferable to her until after the death of her father, to whom, in the meanwhile, the dividends were to be paid.

That of the first ten and ten (together twenty) shares, ten were claimed, in the aforesaid proportions, by the respondents, plaintiffs in the present action, and the remaining ten were claimed in another and similar action, then pending in the Court below, by Henry Hogan and another, against the appellants.

That by Jemima Ermatinger's will, made on the 23rd of May, 1839, long after the death of Mrs. Garrett, no special bequest of the shares in question was made, but the residue of her estate was by her bequeathed to her nephews and nieces, the before-named Charles Oakes, William, James, Anna and Jane Ermatinger, and that the testatrix died in 1840.

That the residue of Mrs. Garrett's estate was, by her will, bequeathed as follows:—*And all the rest and residue of my estate and property, of whatsoever description, and wheresoever situate, I give and bequeath to my brother, Charles Oakes Ermatinger*, to wit, to Charles Oakes Ermatinger, *the elder*, father of the aforesaid five residuary legatees of Jemima Ermatinger, and also father of the late Jemima Ermatinger, *the younger*, mother of Frederick William Ermatinger Cameron, named in the proceedings.

That Charles Oakes Ermatinger, the elder, died before his sister, Mrs. Garrett, namely, in the year 1833; and that, as Mrs. Garrett had not, at the time of her death (1836), either by her will or by any codicil thereto, made any other or further disposition of the residue of her estate, the said residue, with the said twenty shares of the appellants' capital stock as part thereof, by law devolved to her heirs-at-law, and not either to her sister Jemima Ermatinger, or, as part of Jemima's residuary estate, to Jemima's before-named five residuary legatees, as claimed by the respondents.

That inasmuch as the said twenty shares were not specifically disposed of by the will of Jemima Ermatinger, and did not at her death form part of the residue of her estate, her said five residuary legatees never, under her will, derived any legal right, title or interest to or in the said shares; and, consequently, could not, and did not, legally convey them, or any portion of them, to F. W. E. Cameron, as by the respondents' declaration it was alleged four out of the five did, by the several notarial deeds therein cited.

That when F. W. E. Cameron assumed, by the notarial deed of the 23rd of November, 1861, the right of conveying ten of the said shares to William Ermatinger, he (Cameron) had no legal right, title or interest to or in the said shares.

And further, in reference more particularly to the respondents' claim to the "interest and dividends" accrued from and after the death of Dr. Garrett, on 10th of May, 1864, the appellants in their said exception, alleging in substance: that no "interest" was ever payable on shares of their capital stock, but that

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"dividends" of the profits arising from their capital stock were declared by the appellants' directors half-yearly (*see charter, s. XI.*), on or about the last days of April and October in each year, to be payable at the Bank on and after the subsequent first days of June and December; that as to the first of the said dividends that became payable after the death of Dr. Garrett, the same was declared payable *before* his death, to wit, on or about the 30th (afterwards admitted to have been on the 20th) of April preceding that event, and was so declared to be payable on the first day of June then next, and, when so declared, the dividend on the shares in question became, immediately on and from the date of its declaration, absolutely vested in Dr. Garrett and his legal representatives and assigns, and that shortly after the first of June (1864), when it became payable, the appellants, being then ignorant of the death of Dr. Garrett, remitted the said dividend (as they had, in the ordinary course, remitted the previous ones) to him in Ireland, where it was received by his executors.

And lastly, the appellants, by their said exception, alleged that they had no appreciable pecuniary or other interest in the matter in question, save that of seeing that the shares of their capital stock should not be either transmitted or transferred to any but a person or party legally entitled to such shares; and that, by reason of the premises in their said exception set forth, they, the appellants, were justified in their refusal to admit the claim made by the respondents' declaration of transmission to the ten shares in question.

The conclusions of the appellants' exception were: for the dismissal of the action with costs; or, if the action should be sustained, that the respondents should be declared to be not legally entitled to the dividend that became payable on the 1st of June, 1864, but only to the subsequent dividends, and that from such subsequent dividends the appellants should be given power to retain their costs.

The judgment of the Court below (Mondelet, J.) was rendered on the 30th of April, 1869, as follows:—

Considering, that the plaintiffs, to wit, the said William Gordon Henderson (in his own name) and William O'Brien (in his said capacity) have a right to, as belonging to them, in the following proportion, to wit, ten shares of the bank stock standing in the Bank of Montreal in the name of the estate of Anna Maria Ermatinger, in the proportion of four-fifths or eight of the said shares to the said William Gordon Henderson, and one-fifth or two of the said shares to the said William O'Brien in his said capacity;

Considering, that the said plaintiffs are entitled to obtain from this Court an order that the defendants do record in the register of the shareholders, of the Bank of Montreal the names of the said plaintiffs as holders of the said ten shares in lieu of the said estate of Anna Maria Ermatinger, in the following proportions, to wit, the said William Gordon Henderson as holder of four-fifths or eight of the said ten shares, with all interests and dividends accrued thereon since the death of George Garrett on the 30th of May, 1864; and the said William O'Brien, in his said capacity of curator to the vacant estate of the said late Charles Oakes Ermatinger, as holder of one-fifth or two of the said

ten shares, with all interests and dividends accrued thereon since the death of the said George Garrett on the said 10th of May, 1864;

Considering, that the defendants are bound to account for and pay over to plaintiffs, that is, to the said William Gordon Henderson, in his own name, and to the said William O'Brien, in his said capacity, and in the aforesaid proportions, all interests and dividends accrued on the said ten shares since the death of the said George Garrett on the said 10th of May, 1864;

Considering, that said plaintiffs have proved the material allegations of their declaration;

Considering, that the defendants are altogether unfounded in law and in fact in the allegations of their plea, this Court doth dismiss the said plea;

It is therefore ordered and adjudged by this Court, and it is declared, that the said ten shares of bank stock standing in the name of the estate of Anna Maria Ermatinger do belong to the said plaintiffs, in the proportion of four-fifths or eight of the said shares to the said William Gordon Henderson, and one-fifth or two of the said shares to the said William O'Brien, in his said capacity of curator to the vacant estate and succession of the said Charles Oakes Ermatinger;

It is further ordered that the defendants do forthwith record in the register of shareholders of the said Bank of Montreal the names of the said plaintiffs as holders of the said ten shares, in lieu of the said estate of the said Anna Maria Ermatinger, in the following proportions, to wit, said William Gordon Henderson, as holder of four-fifths or eight of the said ten shares, with all interests and dividends accrued thereon since the death, on the 10th of May, 1864, of the said George Garrett; and the said William O'Brien, in his said capacity of curator to the vacant estate of the said late Charles Oakes Ermatinger, as holder of one-fifth or two of the said ten shares, with all interests and dividends accrued thereon since the death aforesaid of the said George Garrett;

It is finally ordered that the defendants do forthwith account for and pay over to the said plaintiffs, in their said names and capacities respectively, and in the said proportions, all interests and dividends accrued on the said ten shares since the death, on the 10th of May, 1864, of the said George Garrett;

This Court doth condemn the defendants to the costs of this action, *distraits* to Messrs. Ritchie, Morris & Rose, attorneys for plaintiffs.

Griffin, Q. C., for the appellants cited the notes of Mr. Justice Mondelet as follows:—

"William Gordon Henderson in his own name, and William Ermatinger in his capacity of curator duly appointed to the vacant estate and succession of the late Charles Oakes Ermatinger, claim from the Bank of Montreal that, by the order and judgment of this Court, it be adjudged and declared that ten shares of bank stock standing in the said Bank of Montreal in the name of the estate of Anna Maria Ermatinger, belong to the plaintiffs in the proportion of four-fifths or eight of the said shares to the said William Gordon Henderson, and one-fifth or two of the said shares to the said William Ermatinger in his said capacity, and also that the defendants be ordered to record in the register of the shareholders of the said Bank of Montreal the names of the said plaintiffs, as [illegible]

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the said ten shares, in lieu of the said Anne Maria Ermatinger, in the full proportions, to wit, William Gordon Henderson, as holder of four-fifths or eight of the said ten shares, with all interests and dividends accrued thereon since the death of George Garrett on the 10th of May, 1864; and the said William Ermatinger, in his said capacity, &c., as holder of one-fifth or two of the said ten shares, with all interests and dividends accrued thereon since the death of the said George Garrett on, &c., and that the defendants be ordered to account for and pay over to plaintiffs, to the said William Gordon Henderson in his own name, and to William Ermatinger in his said capacity, and in the said proportions, all the interests and dividends accrued on the said ten shares since the death of the said George Garrett on, &c., together with costs.

"To this action the Bank pleaded, in substance, that there had been no regular transfer to plaintiffs of the shares they claim in the stock of the Bank, and that they (the plaintiffs) are not legally entitled. The defendants have further pretended that they are justified in refusing to admit the claim of the plaintiffs. The defendants conclude that the plaintiffs' action be dismissed, and they finally conclude that the plaintiffs, should they be by the Court declared to be entitled to the transmission to them of the said shares of the defendants' capital stock, they, at all events, be condemned to pay to defendants the costs in defending this action, with power to defendants to retain such costs from and out of the dividends accruing subsequently to the 1st of June, 1864, which the plaintiffs have no right to.

"Most of the facts, at least the material facts, of the case are admitted, and we have enough to determine the issue between the parties.

"At the argument it has been urged by the Bank that the transmissions or transfers have not been according to the conditions and rules of the Bank. Whether this be true or not is of no import. The Banks are at liberty to make their entries in their registers, such as they think best. But parties who assign or transfer to others their shares and rights in bank stock have a right to effect such transfer in the way they consider the most available, provided it be not done in an illegal way, and such is the case here.

"I, therefore, am of opinion that the plaintiffs are entitled to a judgment in their favor, according to the conclusions of their declaration."

The Court then, in accordance with the conclusions of the plaintiffs' declaration, pronounced the judgment from which the present appeal has been instituted.

Reading this judgment by the light of the remarks of the Court below, which preceded its announcement (and which remarks are given above from the learned Judge's own notes), it becomes manifest that the Court below considered the questions at issue between the parties to be resolved into one of whether "the transmissions or transfers of the shares claimed by the respondents had or had not been made according to the conditions and rules of the Bank," whereas the main questions submitted to the Court below, alike by the written pleadings and orally at the argument of the case on its merits, were:—

1st. Whether, by Mrs. Garrett's will and codicil, the shares in question were by her so bequeathed as, at her death, to become and be absolutely and unconditionally vested in her sister Jemima Ermatinger? If they were so bequeathed

they must (but if they were not, they *could not*) have subsequently devolved to the residuary legatees of Jemima Ermatinger under the general bequest of her residuary estate contained in her will.

2nd. Whether the restriction contained in Mrs. Garrett's codicil (to the effect that, in case the death of her sister, Jemima Ermatinger, should precede the death of Dr. Garrett, the shares should, at his death, be transferred to whomsoever Jemima Ermatinger should, by will, have bequeathed the same, the bequest to Jemima Ermatinger to a life interest, in succession to Dr. Garrett, in the shares,—with the addition, however, of power to be exercised specially to whomsoever she pleased, such bequest, of course, not to take effect unless Jemima Ermatinger should die before Dr. Garrett? And, if so, whether Jemima Ermatinger's general bequest to her residuary legatees could be held to be an exercise of the power, bequeathed to her by Mrs. Garrett, to bequeath the shares to whomsoever she chose? Or, in other words, from the death of Mrs. Garrett to her own death, had Jemima Ermatinger, under Mrs. Garrett's will and codicil, any other power over the shares in question than the power of bequeathing them to whomsoever she pleased, subject to Dr. Garrett's life interest in them? and

3rd. If, up to the moment of her death, Jemima Ermatinger had no other power, under Mrs. Garrett's will and codicil, over the shares in question than that of bequeathing them to whomsoever she pleased, did she, by her general bequest of the residue of her estate to her five residuary legatees, exercise that power? She, certainly, did not make any *specific* bequest of them.

The judgment of the Court below did not decide these questions, and therefore, if submitted to, it will not afford to the appellants any protection against the heirs-at-law of Mrs. Garrett, if those heirs should be (as the appellants have unquestionable reason to believe they are) other than Jemima Ermatinger's five residuary legatees, and should hereafter see fit to claim the shares from the appellants—hence this appeal.

But even if it should be held by this Court that the five residuary legatees of Jemima Ermatinger became, at her death and under her will, absolutely entitled to the ten shares of stock claimed by the respondents as being vested with the rights of those residuary legatees, there remain the further questions raised by the appellant's exception and submitted to the Court below at the argument of the case on its merits, but of which, apparently, the Court below took no notice, namely, whether the several notarial deeds, under which the respondents claim, were sufficient legal conveyances of eight out of the ten shares,—1st. From four out of the five residuary legatees of Jemima Ermatinger to F. W. E. Cameron, and next, from the latter to Henry Hogan, one of the respondents. The appellants contended and contend that the deed of the 1st of December, 1859, being manifestly intended to be a "settlement between a minor become of age and his tutor," and "relating to the administration and account of the latter," and not being, nor having been "preceded by a detailed account, and the delivery of vouchers in support thereof," as required by Article 311 of the Civil Code, and the authorities on which that article is based, is a nullity, and that, moreover, both it and the other notarial deeds adduced in support of the respondents'

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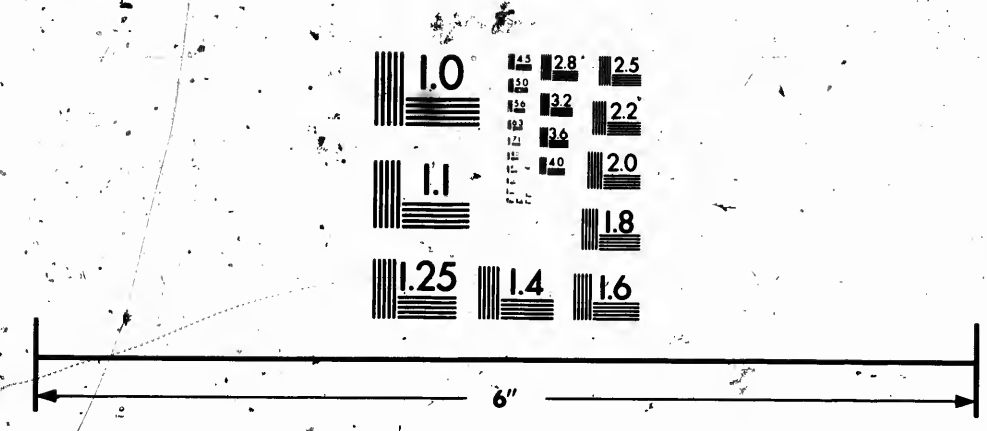

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pretensions are too loose and vague in their language, and too defective in the essential requirements of such documents, to admit of their application to any of the shares of the appellants' capital stock belonging to the estate of the late Mrs. Garrett.

The appellants would further submit to this Court, as they did to the Court below, an additional objection, more particularly applicable to the deed of the 31st of October, 1868, under which William Gordon Henderson, one of the respondents, claims that Alexander Henderson *transferred* to him the ten shares in question.

The 16th Section of the appellants' charter [19 Vic., cap. 76] declares every share of their capital stock to be personal estate, and to be transmissible accordingly; and also to be transferable "at the Bank, according to the form of Sche- "dule A, annexed to this Act; but no transfer shall be valid and effectual unless "it be made and registered in a book to be kept at the Bank for that purpose, "and be therein accepted by the party to whom the transfer shall be made, or "his lawful attorney; nor shall any transfer be made or allowed until the trans- "ferring party shall have previously discharged all his debts and liabilities to the "Bank exceeding in amount the value of his remaining shares, if any, unless "with the consent of the directors." The 17th Section provides that "the "transmission of the interest in any share of the capital stock, in consequence of "the death, bankruptcy or insolvency of a shareholder, or of the marriage of a "female shareholder, or by any other lawful means than an ordinary transfer "under the preceding section, shall be authenticated by a declaration in writing, "made and signed by the party claiming the transmission, or his lawful attorney, "or in such other manner as the directors shall require; every such declaration "shall distinctly state the manner in which, and the party to whom, the trans- "mission has been made; and shall be, by the party making and signing the "same, acknowledged before, &c.; and when so signed and acknowledged, shall "be left with the cashier, transfer clerk, or other officer of and at the Bank in "the city of Montreal, together with such original or officially authenticated "documents or extracts as shall be necessary to substantiate the essential aver- "ments in the declaration; and thereupon the party claiming and proving the "transmission shall be entitled to have his name duly recorded in the register of "shareholders in lieu of the name of the original shareholder from whom "the share was transmitted, &c." Now, Mrs. Garrett's will directed that those of her shares of the appellants' capital stock, the dividends arising from which she had bequeathed to her husband, Dr. Garrett, during his life, should "continue vested in the name and under the control of her executors" until his death, when they would become transferable to whomsoever should be then legally entitled to them. From the time of her death to the present day the shares have accordingly remained in the register of the appellants' shareholders as belonging to her estate, and they were not susceptible of either transfer or transmission until after the death of Dr. Garrett, on the 10th of May, 1864, at which date, according to the respondents' pretended claim of title, Alexander Henderson became entitled, under the deed from Mrs. Thomas to him of the 15th of July, 1863, to the ten shares now claimed by the respondents. If so, he should have claimed

them by a *declaration of transmission*, under the above-quoted 17th Section of the appellants' charter, when, if his claim had been admitted, the appellants would have substituted his name in their register of shareholders in lieu of the name of the estate of Mrs. Garrett; and he could then, if he had previously discharged all his debts and liabilities, if any, to the Bank, in the appellants' transfer-book, at the Bank in the city of Montreal, *and nowhere else, and in no other manner than in the form prescribed*, have legally transferred them to whomsoever he pleased. Instead of so doing, however, he, by the notarial deed of the 31st of October, 1868, assumed to transfer the ten shares in question to the present claimant of eight of them, namely, to William Gordon Henderson, one of the respondents. The appellants respectfully submit that this notarial transfer should have been held by the Court below to have been invalid and ineffectual, under the foregoing provisions of the appellants' charter, and, consequently, should have dismissed the action, in so far as it respected the said Henderson's claim to the eight out of the said ten shares, even if all his other pretensions had been found sustainable.

Under the foregoing view of the case, the appellants look with confidence for a reversal of the judgment appealed from.

Morris, J. L., for the respondent.—The first pretension raised by the appellants in the pleas and at argument was that the said twenty shares did not fall into the residue of Jemima Ermatinger's estate, and having made no special bequest of the said shares, that they did not devolve to her five residuary legatees under her will.

A glance at the terms of the will of Anna Maria Ermatinger will shew that this pretension is untenable. The words of the will are:—"I give and "bequeath £1,500 to my said sister Jemima Ermatinger, £1,000 whereof are to "become, immediately upon my decease, payable, assignable or transferable to "my said sister by my executors hereinafter named; but it is my will that the "interest or dividends which may accrue and be paid from and out of £500 of "my said stock so bequeathed to my said sister shall be paid by my said execu-"tors to my husband, Dr. Garrett, so long as he shall live, and that the principal "of the said £500, part of the said £1,500 *so bequeathed* to my said sister, shall "not be *payable* or *transferable* to my said sister or her heirs or legatees *until* "*after* the decease of my said husband. But that upon the decease of my said "husband, her said capital stock of £500, part of the said £1,500 so bequeathed "to my said sister, shall immediately thereafter become payable, assignable and "transferable to my said sister if she be then living; or, if she be not then living, "shall be payable, assignable or transferable to any person or persons to whom "she may have bequeathed the same, and until the death of my said husband "shall continue vested in the name and under the control of my said executors."

By a codicil to the will, the legacy of £1,000 so immediately payable to Jemima Ermatinger after the death of the testatrix, was reduced to £500, the interest of which to be paid to Dr. Garrett during his life, in the words following: "I have seen fit to cancel and make void, and do hereby cancel, annul "and revoke the said legacy of £1,000 so made to my said sister Jemima in and "by my said last will and testament, and in lieu and place thereof I do

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"hereby *give and bequeath* unto my said sister Jemima, to and for *her own use and* "*at her own disposal* the sum of £500 currency, and I hereby further will and "bequeath the remaining sum of £500 currency unto my said husband, the said "George Garrett, in trust for his daughter Ann. It is also my will and desire "that the *interest* and *revenues* arising from and out of the said two legacies of "£500 each shall be received and enjoyed by my said husband during "his natural life, and the principal at his death only to be paid to the said "Jemima Ermatinger and Ann Garrett respectively, as hereinbefore bequeathed. "And I do by these presents confirm my said last will and testament in every "other respect, declaring these presents to be a codicil thereto, and the same, "together, to be my last will and testament, and as such I do hereby publish "and declare the same."

The words of the will, "I give and bequeath to my sister,"—"The prin- "cipal of the said £500 so bequeathed to my said sister,"—"if she be not then "living [to wit, at the death of the testatrix] shall be payable, &c., to any "person or persons to whom she may have bequeathed the same," and the words of the codicil, "I do hereby give and bequeath unto my said sister Jemima, to "and for her own use *and at her own disposal*," all shew that the two sums of £500 each, mentioned in the will and codicil, were absolute bequests to Jemima, subject to a usufruct in favor of Dr. Garrett, the testatrix's husband; the principal during his lifetime to remain under the control of the executors, who were charged with seeing that the dividends were regularly paid to Dr. Garrett, and after his death to be paid to Jemima Ermatinger, or to whomsoever she might have bequeathed it.

It is evident that the testatrix intended to leave the £1,000 to some one. That person cannot have been Dr. Garrett, for he was only to get the interest; it must, therefore, have been Jemima Ermatinger, and to say that the above sum did not form part and parcel of her estate is a [redacted]traordinary pretension on the part of the appellants.

A vast amount of ingenuity seems to have been expended, on the part of the appellants, in drawing a very lengthy plea, all with the view of shewing that the five residuary legatees of Jemima Ermatinger were entitled to no part of the said £1,000, and winding up with the declaration that it belongs to persons unknown. As the appellants seem to have argued themselves into total darkness, the respondents have every confidence that the Court will dismiss their appeal and maintain the respondents in their rights, which, at great expense, they have established by a clear chain of title.

The next pretension of the appellants is contained in the following words of their plea:—"That by the aforesaid will of the late Anna Maria Ermatinger, "her aforesaid twenty shares of the defendants' capital stock, of which the said "ten shares formed a part, were declared to be non-transferable until after the "death of her husband, the said George Garrett, to whom the dividends, in the "meantime, were bequeathed.

"That the said George Garrett, as hereinbefore admitted and alleged, died on "or about the 10th of May, 1864; and if at that date the said Alexander Hen- "derson had any right, title or interest in or to the said ten shares, he

"was bound, by the provision in that behalf of the 17th section of the defend-
"ants' charter (19 Vic., cap. 76) to claim the transmission to him of the said
"shares, and to authenticate his claim of transmission by a declaration in
"writing, made and signed by him or his lawful attorney, and, after being duly
"acknowledged, as required by the said section, left with the cashier, transfer-
"clerk, or other officer, of the defendants, at their Bank in the city of Montreal,
"together with such original or officially authenticated documents or extracts as
"might be necessary to substantiate the essential averments in such declaration
"in writing contained, distinctly stating in writing the manner and means in
"and by which he the said Alexander Henderson, became entitled to the trans-
"mission to him of the said ten shares; that after the death of the said George
"Garrett, as aforesaid, the said Alexander Henderson never made any such
"declaration in writing, claiming the transmission to him of the said ten shares;
"and that, as by the 16th section of the defendants' said charter, it was and is
"required that every share of their capital stock shall be transferable at
"the defendants' Bank according to the form prescribed in and by the said sec-
"tion, and that no transfer of any share shall be valid and effectual unless it be
"made and registered in a book kept at the defendants' Bank for that purpose,
"and be therein accepted by the party to whom the transfer should be made, or
"his lawful attorney, it was not legally competent to the said Alexander Hen-
"derson, by the said notarial *acte* of the 31st of October, 1868, to transfer and
"convey to the said William Gordon Henderson, one of the plaintiffs, the said
"ten shares, or any of the said ten shares, or any share whatever, of the
"defendants' capital stock, and that the said notarial *acte* was and is, therefore,
"null, void, and of no effect."

The appellants then proceed, in their plea, to state that they have no other interest in the matter in question than that of seeing that the shares of their capital stock are neither transmitted nor transferred to any person not legally entitled to such transmission or transfer.

They conclude by asking that if, notwithstanding the premises pleaded, it should be held that the plaintiffs were entitled to their conclusions, they (the plaintiffs) be condemned to pay the defendants' costs.

In answer to these pretensions of the appellants, the respondents say that they are at a loss to imagine why the appellants have come into Court with such a plea. They say that they have no other interest than that of seeing that the shares of their capital stock are not transferred to any person not legally entitled to them. Why, then, do they urge grounds which are purely technical? Supposing William Gordon Henderson legally entitled to these shares, why is his claim resisted? Why brought before the Court upon a matter of form? Why is the first judgment not submitted to?

The appellants were aware, for a considerable time before the plaintiff (William Gordon Henderson) fyled his declaration of transmission, that he was about to make it, and were frequently consulted about the documents required to make the necessary proof.

These documents, which the Court will perceive are very numerous, were got together at great expense and trouble. The respondent, all this time, naturally

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supposed that he was acting in due form and taking the proper course to get possession of his property—the only question raised by the Bank being, Are you the legal owner? The appellants declared they were not satisfied with the plaintiff's title, and for the first time, in their plea, raised the hair-splitting argument that in case the Court should be against them on the merits, on the question of title, it should be held that the plaintiff had not made his claim in the legal way. That instead of transmission being claimed by him, it should have been done by his *auteur*, and then in a way unworthy of a corporation such as the Bank of Montreal, asked that in case they should fail upon every point, in case all their specious and hair-splitting arguments should be of no avail, that the party who succeeded should pay *their* costs—a logical conclusion, truly. If the appellants wanted merely to have a judgment confirming the title and to save the costs of litigation, they could have taken the benefit of the 4th Section (24 Vic., cap. 91) intituled, "An Act to Amend the Charter of the Bank of Montreal," which allows the directors of the Bank of Montreal, in case they entertain reasonable doubts as to the legality of any claim to any share, dividend or deposit of or in the said Bank, to present a declaration and petition to the Superior Court, setting forth the facts, and praying for an order or judgment adjudicating and awarding said shares, dividends or deposits to the party or parties legally entitled to the same, in which case the costs on obtaining such order or judgment will be payable by the party or parties to whom the shares, dividends or deposits are declared legally to belong. In the present case the appellants refused to resort to the inexpensive course pointed out by the said amendment, and having preferred to risk the expense of a contested suit, and to go into appeal, cannot, in reason or justice, expect to be let off the costs occasioned by their own rash acts.

But to take the objection of the appellants upon its merits.

The Act 19 Vic., cap. 76, was framed in the interest of the Bank of Montreal, and for their convenience. It in no way altered the common law under which any person has a right to sell his interest in his estate, personal or real, to any other person for valuable consideration.

It was not by virtue of the *fiat* contained in the 16th section of said Act that bank stock became personal estate; it was personal estate, and could be sold and transmitted, before that Act was passed.

The 16th section, by its terms, clearly shows that the Act has reference only to transactions had in relation to actual transfers *in their books*. The words are: "Every share of the capital stock shall be held to be personal estate, "and be transmissible accordingly, and also shall be transferable *at the Bank*, "according to the form of Schedule A, annexed to this Act."

The Act creates a distinction between "transmissible and transferable." It says: "Every share shall be held to be personal estate and be transmissible "accordingly, *i. e.*, in the way personal estate is transmissible by law, but shall "be transferable *at the Bank* according to the form of Schedule A."

It is only transfers at the Bank, in their books, which must be made in the form of Schedule A; but who has the right of saying to anybody, You cannot sell, or discount, or transfer, for valuable consideration, your just claims to Bank of Montreal stock, or to anything else?

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The respondents are confident that the Court of Appeals will never sanction such a doctrine. The transfer under which respondent claimed was also a "lawful means" of transmission within the meaning of the 17th Section, and it is permitted under said section, to such a transferee, to make the declaration of transmission.

What the Bank of Montreal can and is authorized to say is this, viz., that they will not make any transfer *in their books*, or recognize the right of any party claiming transmission of the interest in any share of their capital stock in consequence of the death of a shareholder, unless such transmission be authenticated by a declaration in writing, made and signed by the party claiming the transmission, &c., &c.

In the present case the respondent (William Gordon Henderson), claiming the transmission, has conformed himself to the Act and made the necessary declaration in writing, duly authenticated, with all authenticated documents necessary to prove the allegations thereof, and it requires the exercise of a considerable amount of ingenuity to discover what the appellants pretend to complain of.

DRUMMOND, J., rendering the judgment of the Court, said: This appeal has arisen out of the following circumstances:—

There are now, and have been for a long time past, twenty shares of the capital stock of the Bank of Montreal, of the par value of $4,000, standing in the name of Dame Anna Maria Ermatinger, deceased, in her lifetime wife of George Garrett, a retired army surgeon, also deceased.

The original plaintiffs, William Gordon Henderson, and William Ermatinger, in his capacity of curator to the vacant estate of the late Charles Oakes Ermatinger, having become proprietors, by several titles, of ten of these shares, and having been denied transmission of them, brought their action in December, 1868, against the Bank. Their declaration concludes by praying that the ten shares claimed by them should be declared to belong to them in the proportion of four-fifths or eight shares to William Gordon Henderson, and one-fifth or two shares to the curators of the vacant estate of the said late Charles Oakes Ermatinger, and that the appellants should be ordered to record the transmission thereof in their register of shareholders, and to pay to them (the plaintiffs) all the interests and dividends accrued thereon since the death of the said George Garrett, which occurred on the 10th of May, 1864. The appellants met this action by a peremptory exception, raising various objections to the right of the respondents in the shares claimed by them, which it is unnecessary to specify, as we consider them totally unfounded; while, on the other hand, we are of opinion that the chain of titles under which the respondents claim has been fully proved by admissions; and during the *litispendence* in the Court below William Ermatinger died, and in his stead William O'Brien was appointed curator to the vacant estate of the late Charles Oakes Ermatinger. The judgment appealed from was pronounced in this case on the 30th of April, 1869.

[His Honor read the *considérants* of the judgments given in the Court below.] In this judgment we concur; but, before proceeding to confirm it, it is right to allude to an objection urged in argument in the Court below, and in the printed factum fyled here, viz:—

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That the various transfers through which the plaintiffs claim are null, because they have not been made in the manner prescribed by the 16th Section of the Act 19th Vic., chap. 76. Now that this mode of transfer is requisite for the formal recognition of shareholders, is admitted; but a doctrine enunciated to the Court, to the effect that the substantial right in the shares of the Bank cannot be conveyed otherwise than by a document signed at their counter in Montreal, would not only be contrary to all principles of law, equity and justice, but would have a fearfully depreciatory influence on the stock of that great financial institution. The cause of this action was the refusal on the part of the Bank to acknowledge the respondents as shareholders in the form prescribed by the statute. Its object is to secure to them such recognition. His Honor would add a few words as to costs. The appellants, evidently conscious of the weakness of their objections, claimed that if it should be held by the Court that the plaintiffs were entitled to their conclusions, they (the plaintiffs) should be condemned to pay costs. This, in any case, would be a *non sequitur* but it is more surprising that it should appear in this than in any other suit; for had the appellants, instead of repelling the claim of the respondents, confined themselves to the intimation of doubts as to legality, and availed themselves of the very liberal provision made in their favor by the Act 24th Vic., chap. 91, sec. 4, they would have presented a petition to the Superior Court to remove such doubts, and whatever might have been the result they would have had no costs to pay. But having preferred boldly to deny the respondents' rights, and having dared them to an encounter in the forensic lists, the appellants must be mulcted in costs, *la peine du plaideur téméraire*. Therefore the unanimous opinion of this Court is that the judgment of the Court below should be, as it is hereby, confirmed, with full costs in both Courts against the appellants.

Judgment confirmed.

F. Griffin, Q.C., for appellants.
Ritchie, Morris & Rose, for respondents.
(J. L. M.)

SUPERIOR COURT, 1870.

MONTREAL, 21st FEBRUARY, 1870.

Coram BEAUDRY, J.

No. 820.

Thompson et al. vs. *Dessaint.*

HELD:—That when an order for goods has been given at Kamouraska to a travelling agent of a mercantile house in Montreal, on the exhibition of samples, and has been afterwards accepted by the Montreal house, and the goods forwarded by railway, according to the instructions of the purchaser who paid the freight, the right of action originated at Montreal.

This was a hearing on an *exception déclinatoire* which alleged that the *cause* of action originated at Kamouraska.

The action was brought against the defendant, described as residing at Kamouraska, to recover the price of certain goods, alleged in the declaration to have been sold and delivered by the plaintiffs at Montreal.

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The action was instituted at Montreal and served at the defendant's domicile in Kamouraska.

The defendant ordered the goods from a travelling agent of the plaintiffs (who carried on business in Montreal), on the exhibition of samples, with instructions from the defendant to have the goods forwarded by Grand Trunk Railway to St. Paschal station near Kamouraska.

The order having been accepted by the plaintiffs in Montreal, the goods were there packed and delivered to the Railway company, who delivered them at the St. Paschal station to the defendant, who paid the freight thereon.

Doutre, Q. C., for defendant, contended that, according to the well-settled jurisprudence of our Courts, the *cause* of action meant the *whole* cause of action, and that as a part of the cause of action was the giving of the order at Kamouraska, the suit clearly could not be brought in Montreal. He further contended, that the delivery was also at St. Paschal and not at Montreal.

Bethune, Q. C., for plaintiffs, argued that, inasmuch as the goods were sent by railway to St. Paschal by defendant's instructions, and that he paid the freight, the delivery of the goods (so far as the plaintiffs were concerned) was made at Montreal; in other words, that the delivery to the Railway company was, under the circumstances, a delivery to the defendant. He further contended, that the jurisprudence invoked had no application to the present case, which was governed by the 34th Article of the Code de Procédure, which said nothing about the *cause* of action, but provided for the bringing of the action "before the Court of the "place where the *right* of action *originated*." And he then argued, that the *right* of action *originated* in the acceptance of the order in Montreal, and the delivery there of the goods in accordance with such order.

The following was the judgment of the Court:—

"La Cour * * * considérant que la vente faite en cette cause l'a été sur l'ordre du défendeur d'après échantillons à lui montrés, et que les effets vendus au défendeur ont été comptés, pesés et mesurés en la cité de Montréal, où les demandeurs les ont remis aux soins de la compagnie du Grand Tronc[illegible] chemin de fer; vu les articles 1472 et 1474 du Code Civil, et considérant qu'en vertu des dispositions contenues dans ces deux articles la vente n'a été parfaite qu'après que les dits effets ont été comptés, pesés, et mesurés, et qu'après cette opération le droit d'action a pris naissance, en la dite cité de Montréal, indépendamment de la livraison, et qu'en conséquence, suivant les dispositions de l'article 34 du Code de Procédure, l'action pouvait être portée devant cette Cour; déclare la dite exception mal fondée et la renvoie avec dépens."

Exception déclinatoire dismissed.

Bethune & Bethune, for plaintiffs.

Doutre, Doutre & Doutre, for defendants.

(S. B.)

CIRCUIT COURT, 1870.

MONTREAL, 1st APRIL, 1870.

Coram TORRANCE, J.

No. 676.

Joseph et vir v. *Paquet.*

HELD:—That where a party in Quebec gave an agent of the plaintiff there an order for goods to be supplied by the plaintiffs in Montreal, according to a sample exhibited by the agent, and the order was filled, and the goods supplied at Montreal, the right of action arose in Montreal.

PER CURIAM. This case is before the Court on an *exception déclinatoire*, alleging that the right of action, C. C. P. 34, had not arisen in the district of Montreal, where the defendant had been summoned to appear. It appears in evidence that one Benjamin, acting as agent of the plaintiffs, offered the defendant at Quebec a sample of goods. The defendant agreed to buy, and the plaintiffs at Montreal accepted the terms and delivered the goods to the Railroad Company, at Montreal, for the defendant. It has been decided again and again in England, and also by our Court of Appeals, in *Senécal* vs. *Chenevert*, 6 L. C. J. 46, that the expression used by the statute, "cause of action," meant the whole cause of action. Has the Code of Procedure changed the rule by using the words "right of action?" I find that Mr. Justice Beaudry, in the case of *Thompson et al.* vs. *Dessaint*, C. Court, No. 320, has decided (21st February, 1870) that the defendant could be summoned to answer where the right of action has been perfected. I feel it to be my duty in the same Court in a non-appealable case to follow this decision, reserving to myself the right of reviewing the decision in an appealable case, if the case should present itself.—

Exception dismissed.

J. O. Joseph, for plaintiffs.
Brunet & Bertrand, for defendant.
(S.B.)

SUPERIOR COURT, 1870.

IN REVIEW.

MONTREAL, 31st JANUARY, 1870.

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

No. 1671.

The Bank of Toronto vs. *The European Assurance Society.*

HELD:—(Reversing the judgment of the Superior Court) That the allowing, by a bank manager, of overdrafts, without security, is an irregularity within the meaning of a policy guaranteeing the bank against such loss as might be occasioned to the bank by the want of integrity, honesty and fidelity, or by the negligence, defaults or irregularities of the manager, where, in the opinion of the Court, the evidence established that the manager concealed the fact of the overdrafts from the head office by fictitious returns, and acted in improper concert with the parties whom he allowed to overdraw.

This was an appeal by the Bank of Toronto from the judgment rendered in the cause by MONK, J., dismissing the action, a report of which will be found, 13 L. C. Jurist, 63.

The Court of Review unanimously reversed the judgment, being of opinion that, on the facts established in evidence, the defendants were liable.

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The remarks of the judges were as follows:—

MONDELET, J.: This is a case of considerable importance. It is one of no intricacy, no question of law arises: all turns upon the evidence.

It would appear that, on the 5th of October, 1864, a policy was entered into by the defendants, in favor of the Bank of Toronto, whereby they became bound to indemnify the said bank against any loss or damage which should be caused by reason of the want of integrity, honesty or fidelity, or by the negligence, default or irregularity of Alexander Munro, who then sought to be, and was subsequently, employed in the said bank, as agent or manager thereof, at Montreal.

During the time he occupied that position, Alexander Munro allowed the firm of Nichols & Robinson to overdraw their account at the bank to an amount much exceeding that for which the policy above mentioned was effected in favor of the bank. The guarantee is to the amount of $16,000, and the overdrafts are over $28,000. Nichols & Robinson having failed, the plaintiffs have suffered loss to an amount considerably exceeding the sum guaranteed. The question is whether the defendants are legally bound to indemnify the plaintiffs to the amount of $16,000, as prayed for by the declaration.

Before coming to the question of liability, we should be clear as to the facts made out in the case. They are of easy apprehension.

It is conclusively proved that Munro has, without authority, and in direct violation of instructions given by the authorities of the bank, and contrary to the rule followed in banking institutions, allowed Nichols & Robinson, a firm of brokers in Montreal, to draw from the funds of the said bank large sums of money, by way of overdrafts on current deposit accounts. From the 1st of March to the 13th of May, 1865, the overdrafts amounted to a sum exceeding $32,000. As already mentioned, Nichols & Robinson failed, and became insolvent. It is also in evidence that, in order to deceive the bank, Munro managed, by false returns at the end of each month, to make it appear that there was a balance at the credit side, and by such deceit and irregularities, Nichols & Robinson, instead of being reported with a balance against them, were falsely reported to be the other way. The bank was by this means kept in ignorance of the transactions. The insidious and dishonest course which Munro followed, in order better to deceive the bank authorities and prevent them from knowing what he was doing, consisted in obtaining from Nichols & Robinson, on the eve of making and forwarding the monthly returns, temporary deposits, either in gold, drafts, unaccepted cheques on banks where there were no funds, and other available paper, which were subsequently withdrawn, thereby leaving the balance on the debit side against Nichols & Robinson, until the same dishonest and dishonorable imposition was practised again by Munro, to give an apparent color of truth to his monthly reports. The bank was by this dishonest and fraudulent course kept in ignorance of the conduct of Munro, until it was found out by accident. Notice was at once given to the defendants by the bank, intimating, of course, that they would look

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to the defendants and hold them responsible. At the same time Munro was suspended.

There are no expressions which can adequately characterize such conduct on the part of Munro. A man of that stamp, who is audacious and cynical to such a point, should be branded with a mark of reprobation. How can honest men view in any other light the doings of any one who uses moneys which are not his own, as in this case, or deposits, or public funds? If this be not fraud, what does fraud mean?

The defendants' position is, mainly, that Munro had a right to allow such overdrafts, that he did it in good faith, and that plaintiffs were not ignorant of such course. With regard to the power or authority of Munro to allow such overdrafts, it is most conclusively established by the evidence that he had no such authority as an agent, that he was ordered not to allow such overdrafts, the instructions of the bank being of the strictest description. As to the usage of banks on this point, we have the best possible evidence. Mr. McCulloch, the cashier of the City Bank, a gentleman of great intelligence and experience, tells us that agents of banks in different parts of the country are not allowed that power unless they have special permission from the head office; that they are forbidden to allow overdrafts by their instructions. Mr. McCulloch adds, that a party who did it was at once dismissed. He, moreover, states that the discretion of their agents is limited entirely to the customers who have been approved by the head office.

Whether the defendants were aware of the course followed by Munro matters very little. They are his security, and all they had a right to was that the moment he was found out they should be informed of it: this was done. What renders more inexcusable the conduct of Munro is that he engaged in speculations in gold with Nichols & Robinson, out of the funds of the bank. Munro was examined as a witness. He, of course, tries to cover his guilt, but his evasive answers cannot much avail him.

Upon the whole I am clearly of opinion that Munro has been guilty, as complained of by the plaintiffs in their declaration, of want of integrity, honesty or fidelity, and negligence, defaults and irregularity, and that defendants are bound to indemnify plaintiffs to the extent of $16,000, the amount of the guarantee in question. It follows that there is error in the judgment appealed from, rendered by the Superior Court of the District of Montreal, on the 27th of February, 1869, affirming that such overdrafts were permitted by Munro in the exercise of his discretion as manager of the bank, and in the course of the business of the bank, without fraud, on his part, and that allowing the said overdrafts does not establish any want of integrity, honesty or fidelity, or any negligence, default or irregularity on the part of Munro. The very reverse of such *considérants* will have to be the *motifs* of the judgment of the Court of Review, which gives plaintiffs judgment for $16,000, with interest and costs, as in and by the conclusions of their declaration prayed for.

BERTHELOT, J., concurred in the opinion that the bank manager had greatly exceeded the bounds of his discretion as such, and that the defendants must be held liable.

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MACKAY, J. By policy of guarantee of 5th October, 1864, the European Assurance Society (defendants) assured the plaintiffs to the extent of $16,000, against loss by the "want of integrity, honesty, or fidelity, or by the negligence, default or irregularities," of Alexander Munro, as agent at Montreal, or in such other position as he might be put by the Bank of Toronto, plaintiffs.

The bank's proposal for the assurance referred to in the policy (in answer to questions by defendants), stated as to the office, the capacity in which the bank intended to employ Munro, and the nature of his duties and responsibilities, the amount that might be entrusted to him, the checks which would be used to secure accuracy in his accounts, and when and how often the accounts will be balanced, and whether the cash appearing in hand at cash balancing time will be examined and counted, and by whom—that Munro was to be agent; they added: "will have charge of our business in Montreal; cash in hand there amounts to about $100,000 more or less; has charge of notes discounted and collect ns; under constant supervision from head office; is subject to inspection at any moment."

The plaintiffs' declaration states Munro's appointment, the policy, the proposals; that Munro, whilst in the plaintiffs' employ during said policy, caused to plaintiffs by his want of integrity, honesty, fidelity, and by his negligence, defaults and irregularities, loss exceeding the guarantee amount of $16,000; that Munro, in violation of instructions and the rules of the bank, granted out of the funds entrusted to him, to Nichols & Robinson, overdrafts up to the 13th May, 1865, the balance against them, Nichols & Robinson, being on that day $28,160.29, exclusive of interest; that Nichols & Robinson are insolvent; that said advances to them were upon no security, and whilst they had nothing to their credit. The declaration goes on to allege judgment obtained against Nichols & Robinson for said amount, with interest and costs; that Munro acted fraudulently in allowing Nichols & Robinson to overdraw money from the bank; that each month Munro was bound to furnish a statement to the plaintiffs, showing truly the state of all accounts existing in the bank under his agency; that the statements he did furnish showed the account of Nichols & Robinson to be satisfactory, such statements never disclosing any overdraft to any amount, whilst in truth Nichols & Robinson during the whole time had obtained large sums, ten to thirty thousand dollars, without giving any security, and without having any amount to their credit, Munro fraudulently contriving with Nichols & Robinson, for the purpose of deceiving the bank directors at Toronto, to have a temporary and fictitious deposit made to cover overdrafts, in order to conceal the same, the account of said Nichols & Robinson resuming immediately afterwards the previous condition of indebtedness to the bank, which irregular course was carried on till discovered about the 8th of May, 1865; that Munro let Nichols & Robinson have monies in abuse of the trust reposed in him, for speculations of him, Munro, personally, &c. The declaration then alleges notices to defendants, and concludes for the $16,000 of the policy.

The defendants pleaded, by several pleas, that the business of Nichols & Robinson was very large, very profitable to the bank, and necessitated accommodation by overdrafts; that plaintiffs had been in the habit of allowing them,

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merely requiring Nichols & Robinson to make good all advances every month; that in the exercise of such discretion as is allowed agents of banks, Munro made short advances to them until, from unforeseen circumstances, they became unable to pay them; that all the advances were made openly, and appeared in the books of the bank, entered in them by the clerks, and never objected to by directors or inspectors; that the overdrafts were permitted by Munro in the exercise of his discretion as agent, and that such discretion is customarily allowed to cashiers and agents, and the fact of the advances being allowed by Munro does not establish any want of integrity or fidelity in him, nor can it be a basis for a claim against the defendants under their policy; that plaintiffs have always treated the debt of Nichols & Robinson as an ordinary debt, and have done business since with them. It is repeated in the pleas that the overdrafts permitted to Nichols & Robinson were well known to the plaintiffs long before the 1st of March, 1865, even in December, 1864, yet the plaintiffs did not notify the defendants, &c., &c.

The evidence establishes that in 1864 and 1865, Munro, plaintiffs' agent at Montreal, allowed Nichols & Robinson, customers of the bank, to overdraw their account at different times. At these times Munro had, personally, large transactions with Nichols & Robinson, consisting principally of purchases of gold and stocks in New York; purchases for Munro having been made by Nichols & Robinson in September, 1864, to the extent of $30,000, and in February, 1865, to the extent of $12,500 at least, (according to the broker's statement, to the extent of $25,000). Of course, these purchases could not be made but upon terms of a percentage paid up, called margin. This was ten per cent. on the amount of all purchases. Munro never furnished money of his own for margins, but Nichols & Robinson supplied all required for them out of their means, derived by overdrawing from the plaintiffs' bank. Their overdrafts in May, 1865, exceeded $28,000. The money required to cover margins for Munro, in a single month, was $10,000, which was advanced for him by Nichols & Robinson. No commission was charged by Nichols & Robinson to Munro on any of his operations through them. It appears, though not very clearly, that once at least Munro got profits on speculations and kept them. Terrible losses were suffered by Nichols & Robinson and Munro, particularly in April, 1865, and all margins were exhausted.

Two inspections of the agency at Montreal were made in 1864, the last one in December, and monthly statements were furnished before and after that by Munro to the bank at Toronto. These monthly statements, even the one showing the operations of April, 1865, always read favorably. At the time of the December (1864) inspection, one overdraft of Nichols & Robinson ($700) was noticed by the inspector, but, as it existed only a day, was not made subject of special remark. A new depositors' ledger had been opened in Montreal shortly before this December inspection, and the monthly statements sent in by Munro were confirmed by it. Munro lay under no suspicion at the time, and up to that December Nichols and Robinson's account at the bank was made right. The serious overdrafts which have given rise to the present action were made after that inspection and before any later one. After that December, as before, Munro sent regular monthly statements to Toronto, and in each of them represented

Nichols & Robinson's balance of account squared up at the end of each month. Yet Nichols & Robinson were largely in debt to the bank at the time of all these statements. The monthly statements of Munro were false. I have no doubt he knew as early as March, 1865, that Nichols & Robinson were bad. Nichols & Robinson were, by these monthly statements, made to appear as owing nothing to the bank, and this was done by Munro, at the end of the month, taking as gold or as good from Nichols & Robinson their checks on banks against no funds, or drafts on New York against no available funds. These checks figuring as gold at Toronto, were really worth nothing save in so far as made so later, by overdrafts by Nichols & Robinson on the same agency of plaintiffs bank at Montreal. Robinson describes the process in his evidence:—

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"*Question.*—Had you any conversation with the said Alexander Munro, previous to the first of April last, having reference to the necessity of making up the balance of your account? if so, state what he told you on such occasion.

"*Answer.*—In making up the monthly balances we deposited gold drafts on New York, which were usually held a day or two until we provided funds in New York, by overdrawing here and remitting, and this was done by his instructions and at his request, &c."

On the 29th of April, 1865, Nichols & Robinson drew a check on the Merchants Bank (where they had only $512.68) for $8,000. This was taken by Munro as cash, never presented at the Merchants' Bank, but a new check for $10,000 on Munro's agency is drawn by Nichols & Robinson on the 1st of May (after the monthly statement for April had been sent away). This new check is paid by Nichols & Robinson taking back their $8,000 Merchants' Bank check and receiving $2,000 cash, plaintiffs' funds. I accept Dallas' explanation of this affair, putting his statement and the other proof together.

On the 28th of February, 1865, a statement having to be sent off by Munro to Toronto, a check is drawn by Nichols & Robinson on the Merchants' Bank for $2,541.94 against no funds, but is taken by Munro as gold, and represented so to Toronto, making look good Nichols & Robinson's account at Montreal agency at the end of that February.

There were, it appears, two books containing the entries of Munro's affairs with Nichols & Robinson. In the one, which was for particular very private exchange transactions on time, Munro's name appeared at first; but he got this changed, and the name of McDonald was substituted for his own, as he did not wish his name to be exposed.

Till after the 9th of May, 1865, the head office of the bank at Toronto was ignorant of these transactions between Nichols & Robinson and Munro. Munro was himself the first to inform them of anything being wrong in Montreal. An inspection revealed everything, and on the 13th and 17th of May notices were given to the defendants, and claim announced by the plaintiffs to defendants upon their policy.

Nichols & Robinson are insolvent, and plaintiffs have lost far beyond the $16,000, amount of policy. The defendants contend that they are to be held discharged, and by the judgment of the Superior Court they have been held not liable.

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As to Munro's powers as agent, he must be held as regards third persons to have had, *ex officio*, all that usually such agents have. By the rules of the plaintiffs' bank, and his instructions, he seems not to have had power to allow overdrafts. Nevertheless, he did occasionally allow them; before December, 1864, even, and to Nichols & Robinson, but all of these were innocuous, fair, and made good regularly at the end of each month. That Munro had discretionary power to allow overdrafts is pleaded; the judgment appealed from finds so; Rawlings, defendants' agent, thought so; but, certainly, there was no rule granting Munro the power. For myself, I would say, an overdraft *per se* might be allowed; several might be; but does it follow that, never mind what kind of overdrawings Munro might allow, it could make no irregularity? The judgment appealed from does not go so far as this. The defendants' plea does not, but only claims that overdrawing might be in the discretion of Munro, he requiring the account to be made good every month. I suspect that the exigencies of business require overdrawings to be allowed in all banks sometimes. The argument that Munro might allow overdrafts in his discretion, helps the bank; for, if so, the mere allowing of them would not raise claim against defendants upon their policy, nor call for notice by the bank to defendants. Even Rawlings, after the notice given to him, seems not to have considered mere allowing of overdrafts irregularity, to give rise to claim against defendants. He had not at the time been informed, nor had the plaintiffs, of all the facts, nor of fraud by Munro, in connection with these overdrafts by Nichols & Robinson. He did not imagine that the overdrawings had been upon any dishonest concert between Munro and Nichols & Robinson, or for Munro's own use indirectly.

If Munro had discretionary power to allow overdrafts, ought not that power to have been exercised honestly? Was allowing them to Nichols & Robinson as he did, no irregularity, no infidelity? Munro was asked: "Do you believe the bank would have approved of the overdrafts if they had known of them?" and his reply was: "That is not a question for me to answer." After all his experience, if he had only done what was usually done by bank agents like himself, Munro might have made better answer. The Court holds that Munro's discretion had to be exercised honestly; that allowing overdrafts as he did to Nichols & Robinson, under the circumstances proved, was irregularity, infidelity, fraud.

The case turns upon this question of fraud. The judgment complained of finds no fraud against Munro, no fraudulent collusion between him and Nichols & Robinson. The Judge so finding, the judgment itself is logical, but we differ altogether from that judgment upon the facts. Look at Robinson's statement of what passed between Munro and him, previous to April, 1865, as to the making up of their account at the end of each month by worthless checks. Munro himself, instructing Nichols & Robinson about it, says, "he wants to show no overdrafts to Toronto." Does this involve no want of fidelity in Munro, no irregularity? Is there no collusion shown here between Nichols & Robinson and Munro? These monthly statements were also for the purposes of the public. Upon them were to be published the bank statements in the *Gazette*. Under the system of Munro, the public might be lulled into the greatest feeling of security, where there was none real. A bank might be represented as having

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half a million of gold when not having one guinea, but only worthless checks on banks or brokers. Munro says he considered he might allow overdrafts from day to day when such was in the interest of theb ank; but was it in the interest of the bank that advances should be made to persons like Nichols & Robinson upon no security, cashiers' fortunes leagued with theirs under disguises? Was such conduct of the agent Munro according to the usage of bank agents, or of banks? Quite the contrary. It was irregularity, infidelity. Can we doubt that Munro advanced the bank's money to enable Nichols & Robinson, out of it, to pay those immense margin amounts for him from time to time? Can we say, under all the circumstances, that the advances to Nichols & Robinson were ordinary advances for their business, authorized under the discretionary power possessed by Munro? Munro did not see to Nichols & Robinson making good each month their debt or balances, but knew them not to be able to, and yet concerted with them to represent falsely that they did. Surely this was infidelity, and is not some collusion to be seen hereabouts between Nichols & Robinson and Munro? "McCulloch," (says Munro, 1865,) "I have been a very bad man." Unreasonable speech, if he had done nothing but within the scope of his authority, nothing but according to usage! Nichols, even at this time (May, 1865), insists upon Munro not disclosing things to the chief office, and urges him to continue on the old path, and to trust to further gold operations to make things turn out right.

We blame Nichols & Robinson. Were they not put upon suspicion, after all Munro's declarations to them, and from the fact of his speculations, seeing the office in which he was, and his furnishing no money but the bank's to them, from his changing his name in accounts, assuming the name of McDonald? Munro did not wish his name exposed, so uses the name of McDonald. Exposure to whom would have been most fatal to Munro? To the bank, of course. Is the bank to blame? Has it violated obligations towards the defendants, so that the latter are to go free? It has not. The conditions of the proposals have not been violated. The bank founds upon systematic frauds by their agent: these were calculated to deceive and did deceive. The bank did not guarantee that its supervision should be such as that Munro's conduct would never lead to loss. The bank did not guarantee inspection at times particularly stated. No positive acts have been done by the bank to the prejudice of defendants. The bank called Munro to account according to their usage. The judgment appealed from cannot be supported; it is reversed, and judgment must go for the plaintiffs.

The judgment of the Court of Review is *motivé* as follows:—

The Court, here sitting as Court of Review, having heard the parties by their respective counsel upon the judgment rendered in the Superior Court of the District of Montreal, on the 27th of February, 1869; having examined the record and proceedings had in this cause and maturely deliberated; considering that there is error in that part of the judgment appealed from, to wit, the judgment rendered by the Superior Court of the District of Montreal, on the said 27th day of February, 1869, wherein it is asserted that the overdrafts allowed to take place in the said Bank of Toronto in favor of Nichols & Robinson, to an

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amount exceeding that mentioned in the policy of guarantee referred to in said judgment, were permitted by the said Alexander Munro, in the exercise of his discretion as manager of the said Bank of Toronto, and in the course of the business of the said bank, and without fraud, on the part of the said Alexander Munro, and that the allowing of the said overdrafts does not in the present case establish any want of integrity, honesty or fidelity in the said Alexander Munro, or any negligence, default or irregularity on the part of the said Alexander Munro, and that there is no such established by the evidence of record;

This Court doth reverse, annul and set aside the aforesaid mentioned part of the said judgment, and rendering the judgment which should have been rendered by the said Superior Court, it is adjudged that, in so allowing the overdrafts in favor of the said firm of Nichols & Robinson, the said Alexander Munro, acting in the premises as the manager of the said Bank of Toronto, has been guilty of a want of integrity, honesty and fidelity, and has also been guilty of negligence, default and irregularity, and in that respect hath, by such conduct of his, caused the European Assurance Society, the defendants, to become bound, and it is in consequence bound to indemnify the said Bank of Toronto, the plaintiffs, against the loss and damage occasioned to the said plaintiffs to the amount of $16,000, as in and by virtue of the undertaking and the obligation of defendants, contracted in and by the policy of guarantee in part set forth in plaintiffs' declaration;

Considering, finally, that the defendants have failed to prove and substantiate their pleas, the same are dismissed with costs; and considering that the plaintiffs have proved the material allegations of their declaration, it is hereby ordered and adjudged that the defendants do pay to the plaintiffs the said sum of $16,000, etc.

Judgment reversed and action maintained.

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

J. J. C. Abbott, Q. C., for the defendants.

(J.K.)

CIRCUIT COURT, 1869.

MONTREAL, 18TH DECEMBER, 1869.

Coram TORRANCE, J.

No. 1017.

Rocheleau vs. *Rocheleau et al.*

HELD:—That though a husband is not responsible in damages for the *délit* of his wife *commune en biens* with him unless he has personally participated in the *délit*, yet if he joins with her in a defence to the action, and the defence is overruled, he will be condemned jointly and severally with her.

TORRANCE, J. The plaintiff complains by his declaration that the defendant's wife, Mathilde Nadon, with the complicity of the defendant, Thomas Rocheleau, assaulted and beat the plaintiff and the plaintiff's wife. The defendants join in their defence, and deny the allegations of the declaration in manner and form as stated; and the defendant, Thomas Rocheleau, says further that if his wife did

assault and beat the plaintiff it was without his complicity, and that he is not responsible for her acts in the circumstances of the case. As to the facts, there is no doubt but that the defendant, Mathilde Nadon, assaulted and beat the plaintiff's wife, but it was without the participation of the defendant, Thomas Rocheleau, or his complicity. The rule of law generally applicable to these cases is that the husband is not responsible for the *délit* of the wife, C.C. 1294. But there is an exception where the husband has joined with the wife in the defence. Troplong says: "Si le mari intervient au procès intenté à sa femme pour délit, et y défend conjointement avec elle, il doit être condamné, comme commun aux dépens et dommages et intérêts; c'est ce qui a été jugé dans l'ancienne jurisprudence." Mariage, Tom. 2, n. 922: *vide* also authorities there cited.

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The judgment was recorded as follows:

The Court, &c.

Considering that the defendant, Mathilde Nadon, did on or about the 17th July, 1869, assault and beat the wife of the plaintiff;

Considering that the defendant's husband and wife have pleaded jointly to the action of the plaintiff;

Considering that the defendant, Thomas Rocheleau, although he did not personally participate in the said *délit* of the said Mathilde Nadon, nevertheless, not having severed in his defence from his said wife, must as *commun en biens* share her liability;

Doth overrule the plea of the defendants, and adjudge and condemn the defendants, jointly and severally, to pay and satisfy to the plaintiff the sum of ten dollars for the cause aforesaid with interest from this day, and costs; and the Court doth dismiss plaintiff's action for any greater sum.

Judgment for plaintiff.

Chagnon, for plaintiff.
Chapleau, for defendants.
(J.K.)

COUR SUPERIEURE.

MONTREAL, 19 MAI 1869.

Coram BEAUDRY, J.

No. 1711.

Paquette dit Lavallée vs. *Dansereau et ux.*

JUGE:—Que la coupe et dépouille d'un demi arpent de terre à bois de front sur quatorze arpents de profondeur vendue en 1813, ne donne pas à l'acquéreur et ses ayant-cause la coupe et dépouille à perpétuité du bois sur cet immeuble.

Le défendeur a intenté une action négatoire le 5 juin 1868, dans laquelle il alléguait que par un acte de vente reçu à Verchères, devant maître P. Vallée, N.P., le 28 décembre 1813, Charles Paquette dit Lavallée, avait vendu au nommé Jean-Baptiste Jacques, "la coupe et dépouille d'un demi arpent de terre à bois de front sur quatorze arpents, plus ou moins de profondeur," etc., etc., et après avoir exposé ses droits par suite de différents contrats, il prétendait que les défendeurs et leurs auteurs ont depuis longtemps abattu et enlevé la coupe et dépouille du bois qui existait sur le dit immeuble lors de la passation de l'acte du 28 décembre 1813, et que les défendeurs ont même depuis plusieurs années, malgré

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les défenses du demandeur, coupé, abattu et enlevé des quantités considérables de jeune bois, c'est-à-dire, du bois poussé depuis la passation de l'acte du 28 décembre 1813; et partant que la servitude est anéantie.

Le demandeur concluait à l'extinction de cette servitude et à ce que subsidiairement dans le cas où il existerait encore sur la dite terre du bois qui s'y trouvait lors de l'établissement de cette coupe de bois et que les défendeurs auraient le droit d'enlever, il fut par experts procédé à constater et marquer le nombre d'arbres que les défendeurs ont encore le droit de couper et d'enlever et que, sur leur rapport, les défendeurs fussent condamnés sous tel délai qu'il plairait à la cour de fixer, de couper et enlever les arbres en question, et ce délai expiré, la servitude éteinte.

Les défendeurs ont contesté cette action et ont prétendu que leur droit de coupe de bois n'est pas limité à la coupe et dépouille pour une fois du bois en question, mais qu'ils ont toujours le droit d'en couper tant qu'il y en aurait et qu'il y en pousserait.

Les parties ayant procédé à leur enquête et ayant été entendues au mérite, le jugement de la cour a ordonné une expertise, et il est motivé comme suit:

La Cour, après avoir entendu les parties en cette cause sur le mérite, examiné la procédure et en avoir délibéré:

Considérant que les défendeurs ne pouvaient réclamer la coupe et dépouille à perpétuité du bois sur l'immeuble décrit en la déclaration du demandeur en premier lieu, mais qu'ils ont droit seulement de couper les arbres qui existaient lors de l'acte de vente, consenti devant P. Vallée et confrère, notaires, le 28 décembre 1813, sur le dit immeuble;

Et considérant que le demandeur a droit de demander qu'ils soit fixé une époque et limite pour l'exercice de ce droit:

Ordonne, avant faire droit, que par experts à être nommés conformément aux dispositions du Code de Procédure, le 27 de mai courant, cour tenante, il soit procédé, les parties présentes ou dument appelées, à visiter les arbres qui se trouvent sur le dit immeuble, et que ceux qui seront, par les dits experts jugés avoir existés lors de la passation du susdit acte de vente, soient mesurés dans leur circonférence, numérotés au pied d'iceux et décrits suivant l'espèce et par ordre de numéros dans le rapport qui en sera fait par les dits experts, le ou avant le dix-sept septembre prochain, pour là et alors être ordonné ce que de droit, dépens réservés.

Dorion, Dorion & Geoffrion, avocats du demandeur.

Bélanger & Desnoyers, avocats des défendeurs. (1)

(P.R.L.)

(1) Le 30 décembre 1869, le jugement suivant, Mackay, J., fut rendu sur le rapport des experts:

"La Cour.....homologue le dit rapport d'experts pour être suivi et exécuté selon "sa forme et teneur, en conséquence ordonne et enjoint aux défendeurs sous le délai de "douze mois, à compter de ce jour, de couper et enlever les 70 arbres mentionnés au dit "rapport, etc., etc.,.....

"Et après que les dits défendeurs auront ainsi coupé et enlevé les susdits 70 arbres ou "après le délai expiré à défaut par eux de ce faire, la dite servitude de coupe et dépouille "de bois sera et est, par les présentes déclarée éteinte et anéantie, etc., etc., les frais de "l'expertise divisés entre les parties, chaque partie payant ses propres frais sur l'action."

SUPERIOR COURT, 1870.

MONTREAL, 28th FEBRUARY, 1870.

Coram TORRANCE, J.

No. 1919.

King vs. *Filiatrault* et al. and *Tunstall* et al., Defendants par reprise d'instance.

HELD:—1st. That from and after the passing of 14 Geo. 3, c. 83, a testator had capacity to devise or bequeath without reserve, restriction or limitation.
2nd. That from and after the passing of 41 Geo. 3, c. 4, a testator had a right to bequeath in favour of any person or persons whatsoever, without reserve, restriction or limitation.
3rd. That a bequest by a testator who died in 1799, in favour of an adulterine bastard, who only had a right to the bequest in 1835, is to be considered as regards its validity relatively to the time at which the right comes into effect.

PER CURIAM.—This is a petitory action brought to obtain possession of the seigniory of Lacolle or Beaujeu, with a demand for rents, issues and profits. The action was instituted in 1864. The plaintiff sets forth his title in three counts. The first count alleges that Gabriel Christie, in his lifetime a general in his then Majesty's army, was proprietor in possession of Lacolle or de Beaujeu, and died in or about the year 1799, leaving, as his sole heir-at-law, his son, Napier Christie, who had before then assumed the name of Burton, and was then known as Napier Christie Burton, and took possession of the said seigniory; that he made his will, dated 20th December, 1834, and codicil, dated 23rd December, 1834, whereby he devised his estates to George Burton Hamilton, William Henry King, and Edme Henry, their heirs and assigns upon certain trusts (which are set forth)—first in favour of Christiana (otherwise Amelia Christie) Harmar, the only child of the testator's natural daughter, Mary Harmar, and her issue, and failing them, then in favour of the plaintiff; that the testator died in the year 1835 without issue; that the said Christiana Harmar died on or about the 3rd April, 1847, without such issue, and the plaintiff then became entitled to the said real estate.

The second count sets forth that Gabriel Christie was proprietor in possession of the said seigniory of Lacolle or de Beaujeu; that he made his will, dated 13th May, 1789, whereby, inter alia, he devised his estates to his eldest son, Napier Christie, and the heirs male of his body, and for default of such issue to the use of the heirs male of the body of him the testator, and failing them, to the use of the testator's natural son, James Christie, and the heirs male of his body, and failing them, there was a similar bequest to Gabriel Plenderleath, and the heirs male of his body, to George Plenderleath, and the heirs male of his body, to William Plenderleath, and the heirs male of his body successively, and failing them, then to the use of the testator's brother, William Christie, and his heirs forever; that William Christie died about 1794, and James Christie, Gabriel Plenderleath, George Plenderleath, also died in the lifetime of the testator without issue or heirs. There follows an allegation which raises the chief contestation in this case, "that the said will of the said late Gabriel Christie, as well "by the laws of England as by the laws of Lower Canada, was and is inopera- "tive, null and void, in so far only as the same relates to James Christie,

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"Gabriel Plenderleath, George Plenderleath, and William Plenderleath, who "were, and each and every of them being, as the plaintiff avers, adulterine "bastards, children of the said late Gabriel Christie, and the offspring of the "adulterine intercourse and co-habitation of the said late Gabriel Christie, "had with one Rachel Plenderleath, whilst he, the said Gabriel Christie, was "joined in matrimony with his said wife, Sarah Christie;" that the testator died on or about the 20th January, 1799, and the said Napier Christie Burton then became proprietor in possession of the said estates. The second count then recites the will of Napier Christie Burton, and concludes like the first count.

The third count sets forth the will of Gabriel Christie; then that William Christie died in or about 1794; that James Christie, Gabriel Plenderleath, and George Plenderleath died without issue in the lifetime of Gabriel Christie; that Gabriel Christie died on or about the 20th January, 1799, without heir male, except Napier Christie Burton, and that William Plenderleath died without issue in 1845; that Napier Christie Burton was sole heir-at-law of William Christie at the time of his death. The third count then recites the will of Napier Christie Burton and the codicil already referred to, and alleges the deaths of Napier Christie Burton in 1835, and Christiana Harmar in 1847, without having married, and without having exercised the power of sale given by said will, "and whereas by the events aforesaid, the said Napier Christie Burton "became entitled, as the sole heir-at-law of the said William Christie deceased, "to the remainder in fee simple or absolutely to his residuary real estate; and "the said plaintiff, Henry John Styring King, is now entitled in fee simple or "absolutely under the will of the said Napier Christie Burton to the estate and "property thereby devised and bequeathed;" that the said fief is comprised in this estate; that the *rentes constituées* of the said seigniory, representing *lods et ventes* and casual dues, represent the capital sum of $19,273.58c.; the annual rent being $1,156.41, payable 2nd January, and 1st July, of each year, and *rentes constituées* representing *cens et rentes*, represent the capital sum of $56,628.75, the annual rente being $3,397.72½, payable on the 2nd January and 1st July; that defendants, in 1845, took possession of the said seigniory, and have since received and converted to their own use the rents, issues and profits, to plaintiff's damage, of £100,000 cy. The conclusions are the ordinary conclusions of an action *au pétitoire*.

The defendants have met the action by several pleas. The first is a *défense au fond en droit* to the whole declaration, alleging in effect that the allegations are inconsistent and irreconcilable with one another, the allegations of the first count stating a condition of things which, according to the allegations of the second and third count was not, and did not exist, and the second count alleging nullities of substitutions, which substitutions the third count admits the validity of. The second plea is a *défense en droit* to the second count and in effect takes issue on the proposition of law of the plaintiff that a bequest to an adulterine bastard is null and void. The third plea is a *défense en droit* to the third count as alleging that Napier Christie Burton could be heir of his uncle, living his father.

The fourth plea alleges that by the codicil to the will of Napier Christie Burton, the bequest to the plaintiff was conditional, and to take effect only on and after the plaintiff taking the name of Christie, and using the arms of Christie and no other, and that plaintiff had never done so. The fifth plea raised the same objection, and alleged that the taking of the name, and using the arms, were a condition precedent to the plaintiff making his claim, and that he had not fulfilled the condition. The sixth plea, after invoking the wills of Gabriel Christie and Napier Christie Burton, sets forth a deed or transaction between Napier Christie Burton and Sarah Christie, the widow of Gabriel Christie, whereby she renounced in favor of Napier Christie Burton certain claims which she had upon the estate of the testator, and the plea said that Napier Christie Burton held and possessed the said estate, not as heir-at-law of the testator, but as his devisee and under the said transaction, and subject to their terms and words under the substitutions and *charge de rendre* set forth in them; that Napier Christie Burton died without an heir male; that William Plenderleath Christie then took the said estate under his father's will, and was in possession until his death in 1845, when he died childless, leaving a will and codicil and bequest in favour of the Reverend James Tunstall, the ancestor of the defendant Tunstall. The seventh and eighth pleas also invoke the deed or transaction of date 8th August, 1800, and the 7th plea specially denies that Gabriel Christie Burton was heir-at-law of William Christie. The ninth plea invokes the prescription of possession in defendants and their *auteurs* of twenty years, and the tenth plea invokes a similar prescription of ten years. The eleventh plea alleges the good faith of the defendants, and that they cannot therefore be liable for the rents, issues and profits before institution of the action, and alleges *impenses déboursées* to the amount of £5,000 cy. The last plea is the general issue or *défense en fait*.

The plaintiffs' answers are general, except that he demurs to the fourth and fifth pleas, which invoke the condition in the will of Napier Christie Burton, that the plaintiff should take the name and use the arms of Christie.

With respect to the proof there is no difficulty, but important questions of law have been submitted to the judgment of the Court. The Court would first dispose of the *défense en droit* to the whole declaration, and the three counts thereof, by saying that it is of opinion that the matters set up by this demurrer are rather matters for a preliminary plea or exception *de cumul* under C.C.P., art. 15, and 120, s.s. 6. The first demurrer of the defendants is, therefore, dismissed. On the other hand the Court is of opinion to maintain the demurrer of the defendants to the third count of the declaration. The Court also dismisses the answers in law of the plaintiff to the 4th and 5th pleas, because the answers rather allege matters which are proved by the will than shewn by the pleading demurred to. Reviewing next the remaining pleas of the defendants, the Court is of opinion to overrule the pleas which invoke the deed or transaction of the 8th August, 1800, and the pleas of prescription as not proved.

The important question remains, upon which the plaintiff has laid most stress, and which is raised by the second count of the declaration and by the defense *au fond en droit* to that count:—namely, whether the bequest made by the will of

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the late General Gabriel Christie, in favour of his natural son, William Plenderleath, being an adulterine bastard, born of the illicit intercourse of his father with Rachel Plenderleath, during his marriage with Sarah Christie, was inoperative and null and void. There is no doubt whatever that by the old law of Lower Canada at the time of the conquest in 1759, such a bequest was void, except as to aliments, and the testator and the legatee were alike incapable, the one to bequeath and the other to receive. Pothier, Donations Testamentaires, p. 341, &c., Entre Vifs, p. 449.

We have next the important provision of the Quebec Act, so familiar to the bar, 14 Geo. 3, chap. 83, s. 10, in these words: "It shall and may be lawful for every person that is owner of any lands, goods or credits in the said Province, and that has a right to alienate the said lands, goods or credits, in his or her lifetime, by deed of sale, gift or otherwise, to devise or bequeath the same at his or her death, by his or her last will and testament, any law, usage or custom heretofore or now prevailing in the Province to the contrary hereof in anywise notwithstanding, &c."

Did that clause remove the previous incapacity of a testator to make such a bequest? It is large and unlimited in its expressions. But the plaintiff contends that the previous law was a law of public order and morality and could not be repealed, except by language showing that the legislator intended to innovate upon and depart from its wise provisions in the matter of adulterous children.

Mailher de Chassat, Interprétation des Lois, pp. 197, 200, 210.

Sedgwick, Interpretation of Statutes, pp. 123, 7, 8.

Dwarris on Statutes, pp. 519, 533, 563, 604, 621, 6.

The Court has always understood that the Act of 1774 took away the incapacity of the testator, and, with all deference to the opinions ably expressed in a different sense, holds to-day to the opinion that the incapacity of the testator was removed in 1774, by the Act in question. We then find this Act in force in 1789, when the testator made the bequest in favour of the adulterous issue of his intercourse with Rachel Plenderleath.

We come next to the important question as to the incapacity of the legatee, William Plenderleath, to take, under the will of his father, General Christie. At what date is that capacity or incapacity to exist? Is it at the date of the will of the testator in 1789, or at the date of the death in 1799, or at the time when William Plenderleath took the substitution, opened in 1835 by the death of Napier Christie Burton, the legitimate son of his father, General Christie. The question is an important one, as by the Provincial Act of 1801, 41 Geo. 3, cap. 3, the same large terms, which by the Act of 1774 are applied to the capacity of testators, give a capacity to take to legatees. By the Act of 1801 a testator might bequeath to any person whatever, any law, usage or custom to the contrary notwithstanding.

The Court would here say, *entre parenthèse*, that it does not think that that Act can in any sense be regarded as retroactive. It is only prospective.

With respect to the capacity of legatees to receive, a short rule is laid down by the C.C., article 838: "The capacity to receive by will is considered rela-

tively to the time of the death of the testator; in legacies the effect of which remains suspended after the death of the testator, whether in consequence of a condition, or in the case of a legacy to children not yet born, or of a substitution, this capacity is considered relatively to the time at which the right comes into effect, &c."

There is also a case of Hamilton et al., *v.* Plenderleath Christie, reported, 2 Revue de Leg. 1, in which the very question now before the Court was discussed and a formal opinion expressed by the Court of Appeals (composed of Messrs. Bowen, Panet, Bedard and Gairdner, Justices,) at Quebec, on 10th March, 1845.

That opinion was criticized at the bar as not a formal judgment of the Court, inasmuch as the Court, although it expressly enunciated its opinion, did not decide the case on its merits, but merely set aside all proceedings taken in it from the death of the plaintiff, Napier Christie Burton, when the executors of his will (irregularly as the Court of Appeals thought) took up the instance as plaintiffs *par reprise*. It has certainly not of late years been the practice of our Courts to pronounce an opinion which has not culminated in a judgment; but the Courts of France have frequently put an end to litigation, before it could be closed by a judgment, by letting the parties know, pending the contestation, what the opinion of the Court on the merits was. In the case under consideration the judgment appealed from was a judgment of the Court of King's Bench, composed of Messrs. Pyke, Rolland and Gale, Justices, at Montreal, on the 10th October, 1839.

This judgment was against the plaintiff, who sought a judgment from the Court, declaring that the bequest in favour of William Plenderleath Christie was inoperative, null and void as made in favour of an adulterine bastard.

At the present moment, therefore, the matter stands thus: We have the article 838 of the C.C. affirming that the capacity of the legatee in legacies, the effect of which is suspended by a condition or substitution, (as in the present case the legacy to William Plenderleath was suspended till 1835) is considered relatively to the time at which the right comes into effect. In the next place we have the judgment at Montreal, on the 10th October, 1839, and the opinion of the Court of Appeals in the same sense on the 10th March, 1845. It is humbly submitted that the duty of the Court now here requires it to follow in the footsteps of the sworn administrators of the law who have already formally adjudged this matter. The opinion of this Court is, therefore, that the action of the plaintiff should be dismissed.

The judgment was recorded as follows:

The Court having heard the parties by their counsel as well upon the *défenses en droit* of the defendants to the plaintiff's action and *demande*, and the plaintiff's answers in law to the defendants' 4th and 5th pleas, as upon the merits of this action and upon the plaintiff's application by petition for the appointment of a *séquestre* to the immoveables in question in this cause, and having maturely deliberated;

Considering that the *défense en droit* by the defendants firstly pleaded to the action and *demande* of the plaintiff alleges matters which should have been

pleaded by an exception *de cumul* or other preliminary plea and not by a *défense en droit*, doth dismiss the same with costs;

Considering that the late Napier Christie Burton, in the pleadings mentioned, was not heir at law of his uncle William Christie, in the life-time of his father Gabriel Christie, as erroneously alleged by the third count of the declaration of the plaintiff, doth maintain the *défense en droit* of the defendants to the said third count and dismiss the said third count with costs;

Considering that the answers in law by the plaintiff, pleaded to the fourth and fifth pleas of the defendants, allege against said pleas matters which are matters of proof and do not appear by the said pleas, doth dismiss the said answers in law with costs;

Considering that the defendants have not proved the pleas invoking the deed of date the 10th August, 1800, namely, the pleas by them sixthly, seventhly, and eighthly pleaded to the action and *demands* of the plaintiff, and have not proved the pleas of prescription of 10 and 20 years respectively, namely, the pleas by them ninthly and tenthly pleaded to the said action and *demande*, doth dismiss the said several pleas;

Considering further that by law and the jurisprudence of the Courts of this Province, the testator, Gabriel Christie, had, since the passing by the Parliament of Great Britain and Ireland of the Act numbered chapter 83 of the Acts passed in the 14th year of his late Majesty George III., capacity to dispose of his estate and property without reserve, restriction or limitation;

Considering that from and after the passing of the Act of the late Province of Lower Canada, numbered chapter 4 of the Acts passed in the 41st year of the reign of his said Majesty, a testator had a right to bequeath in favour of any person or persons whatsoever, all and every his or her lands, goods or credits, without reserve, restriction or limitation;

Considering that by law and the jurisprudence of the said late Province of Lower Canada the late William Plenderleath Christie had capacity to take the bequest made to him by the will of the testator, Gabriel Christie, at the date of the death of the late Napier Christie Burton, to wit, in the year 1835, when the substitution in favour of the said William Plenderleath Christie took effect;

Doth maintain the *défense en droit* by the defendants pleaded to the second count of the declaration of the plaintiff, with costs;

Considering, finally, that the plaintiff hath not proved the material allegations of his declaration, doth dismiss the action and *demande*, and also the petition for the nomination of a *séquestre*, of the plaintiff with costs.

Action dismissed.

Rose, for the plaintiff.

R., Q. C., counsel for plaintiff.

Ma, for the defendants.

F. Griffin, Q. C., and

A. A. Dorion, Q. C., counsel for defendants.

[J. K.]

COUR SUPERIEURE.

ST. HYACINTHE, 22 NOVEMBRE, 1866.

Coram SICOTTE, J.

No. 1004.

Dubord vs. *Boivin, Percepteur du Revenu de l'Intérieur.*

WRIT DE PROHIBITION.

Held:—1o. Que les deux Juges de Paix qui ont reçu la plainte et signé le Bref d'assignation en vertu de la clause 14 du Ch. 18 de la 27 et 28 Victoria, ont seuls juridiction pour juger finalement la cause; qu'un autre juge de paix ne peut s'immiscer dans l'affaire et juger, que si l'un des deux premiers est absent, et que si celui qui est présent consent à ce que cet autre Juge de Paix siége avec lui, la conviction doit constater que ce troisième Juge de Paix siége en l'absence de l'un de ces deux premiers magistrats et du consentement de l'autre.

2o. Que la conviction doit contenir l'adjudication sur le fait qui constitue la base de la conviction; et que l'énonciation dans la conviction "*qu'il résulte pleinement de la preuve que le Défendeur a vendu sans license des liqueurs spiritueuses*" n'est pas une adjudication suffisante.

3o. Qu'en règle générale, les Juges de Paix doivent adjuger sur les Exceptions qui attaquent leur juridiction ou qui réclament des exemptions afin de permettre aux Cours Supérieures d'apprécier la justice de ces exceptions.

4o. Que l'écrit suivant: "[illegible] M. Dubord trente quatre piastres pour payer une license d'auberge pour laquelle il a obtenu le certificat du Conseil de Comté de Bagot en date de ce jour. St. Hyacinthe, 13 Juin 1866, *Léonard Boivin*, Percepteur du Revenu de l'Intérieur," doit protéger le Défendeur et l'exempter de l'amende sur une poursuite de vente de boisson sans license.

5o. Que le Writ de Prohibition dans l'espèce a été pris avec raison et doit être maintenu, mais sans frais contre le Percepteur du revenu, parcequ'il est un officier public et comme tel représente la Couronne.

Les faits de la cause sont les suivants:

En Mars 1866, le Conseil du Comté de Bagot passe un règlement concernant la vente des boissons dans le Comté, et statue qu'aucune license pour tenir un hôtel et détailler des boissons ne sera accordée, que sur la production d'un certificat approuvé par le conseil local et celui du Comté, et en par l'appliquant payant dix piastres au Conseil de Comté.

Dubord qui demeure au village d'Acton-Vale, présente au conseil de cette dernière localité le deux avril, un certificat des électeurs, qui est confirmé par le conseil local, le même jour, et le 13 juin suivant le Conseil de Comté approuve le certificat de Dubord qui paie les dix piastres exigées par le règlement du mois de Mars. Mais le Conseil local d'Acton-Vale, avait, le seize avril, passé une résolution pour annuller sa résolution du 2 avril, approuvant le certificat de Dubord.

Le 13 juin, Dubord, muni de tous les documents nécessaires, se présente chez le défendeur, pour avoir sa license, lui paie la somme d'argent exigible, et ce dernier lui donne le reçu mentionné ci-dessus, et promet de lui donner sa license.

Le défendeur refuse ensuite de donner la license à laquelle avait droit Dubord.

Quelque temps après, Dubord est poursuivi pour avoir vendu sans license depuis le 13 juin, des boissons enivrantes; l'assignation est signée par deux juges de paix, Turçot et Malhiot. Dubord plaide à cette poursuite, et les juges de paix Turcot et Dufort rendent jugement le 7 septembre 1866 contre Dubord, le condamnant à payer une amende de $50,00 et les frais, et à deux mois d'emprisonnement à défaut de paiement de l'amende et des frais.

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Dubord se pourvoit contre ce jugement par un *Writ de Prohibition.*

Les observations suivantes que fit le savant juge Sicotte, en rendant le jugement, expliquent suffisamment la nature de la défense faite par Dubord devant les magistrats, des moyens invoqués pour prendre le *Writ de Prohibition*, et les défenses du défendeur pour s'opposer à ce *writ.*

SICOTTE, J.—Nul doute que le droit de surveillance accordé aux Cours Supérieures sur les autres tribunaux, peut s'exercer au moyen du *Writ de Prohibition.*

Il n'est pas nécessaire pour l'obtenir, de déclarer qu'il n'y a pas d'autre moyen de garantir ses droits; mais il suffit de se plaindre, que les Justices de Paix n'avaient pas de jurisdiction, qu'ils ont procédé injustement, oppressivement, ou irrégulièrement, ainsi que l'enseigne Hawkins: "For proceeding without jurisdiction, "for proceeding unjustly, oppressively, or irregularly, for refusing to do justice," ainsi que l'enseigne Paley [122].

On peut résumer les moyens invoqués contre la condamnation, de la manière suivante:

1. Le tribunal qui a condamné n'est pas celui désigné par la loi; par conséquent, pas de jurisdiction et pas de tribunal.

2. Une condamnation sans conviction d'offense, et par conséquent pas de condamnation légale.

3. Pas de vente illégale de boissons, pas d'offense, attendu la prétention d'un droit et la preuve faite de ce droit.

4. Il y a eu irrégularité, faute d'adjuger sur les exceptions invoquées par le défendeur.

5. Il y a eu injustice, oppression, en permettant au Percepteur du Revenu de se faire juge de la légalité d'un règlement municipal, et de rappeler le permis de vendre qu'il avait donné, comme nul.

Sur les deux premiers moyens, voici des règles et des principes applicables, fondés sur la loi, la jurisprudence et l'essence de ce qui constitue la jurisdiction et les jugements.

Tout jugement doit être rendu par les juges que la loi a institués, et qui sont désignés pour constituer le tribunal investi de jurisdiction sur la matière. Si la loi indique comment l'absence de l'un des juges doit être suppléée, cela doit apparaître dans le jugement même, autrement le jugement parait avoir été rendu par un autre tribunal que celui que la loi désigne.

Cela est de toute justice car les jugements décident de choses qui intéressent toujours grandement, l'honneur, les biens des citoyens. Leur composition est déterminée d'avance par la loi. Les jugements ne sont valables qu'en autant qu'ils sont rendus par le tribunal réglé par la loi.

Le tribunal désigné et orée par le statut pour juger la matière dont il s'agissait était les deux magistrats devant lesquels la plainte avait été faite et qui avaient signé le bref d'assignation. La clause 14 du Chap. 18, de 1864, veut qu'aucun autre magistrat puisse siéger ou prendre part dans l'affaire, excepté si les deux premiers sont absents, ou à raison de l'absence de l'un d'eux, et dans ce cas même, avec l'assentiment do l'autre juge de paix, c'est le tribunal spécial et le seul compétent à juger l'affaire.

Il est de règle que les formes constitutives d'un jugement doivent être constatées par le jugement même, et que l'omission d'une seule en emporte la nullité ; or une des formes essentielles et constitutives d'un jugement, c'est qu'il y soit énoncé par qui le jugement a été rendu et comment et pourquoi, à défaut des juges titulaires, d'autres ont été appelés et ont jugé, si la loi donnait tel pouvoir à d'autres personnes.

Dans le but de mieux réprimer l'intempérance, le législateur a voulu que l'offense ne pût être jugée que par des juges saisis de la plainte, et empêcher les parties accusées de changer la composition du tribunal, en y appelant des hommes préjugés par les intérêts ou les passions.

Quand il y a empêchement par l'absence, à constituer le tribunal tel que réglé, celui qui reste peut permettre la présence d'un autre juge.

Deux faits sont nécessaires pour valider et légaliser la seconde composition du tribunal : l'absence d'un des juges premièrement saisis de l'affaire, et l'assentiment du juge titulaire qui reste, à l'assistance d'un autre à la place de l'absent. La qualification de ce troisième juge repose uniquement et entièrement sur le fait de cette absence et de tel assentiment ; cette qualification est aussi essentielle pour donner jurisdiction que celle de sa nomination même, comme Juge de Paix. La jurisdiction est toute aussi spéciale, toute aussi exclusive pour l'espèce, que celle des deux premiers titulaires à raison de l'assignation donnée par ces derniers.

Les dispositions de la loi constituent des règles impératives pour la composition du tribunal. L'observation de ces règles doit être constatée dans les actes judiciaires pour lesquels elles ont été prescrites. Si l'on pouvait se dispenser de faire mention dans ces actes qu'elles ont été remplies, l'on pourrait bientôt les transgresser impunément.

Le jugement attaqué ne constate ni l'absence de l'un des Juges de Paix premièrement saisis de l'affaire, ni l'assentiment de l'autre à l'action de celui qui a siégé avec lui.

Dans toutes les affaires tombant sous la jurisdiction des tribunaux inférieurs, tout est de rigueur, rien n'est présumé ou sous-entendu.

Ainsi Paley dit, " where a statute refers the matter to one (qualified) justice, no other but the one answering that description has any authority."

C'est principalement dans ce qui concerne la jurisdiction, que la moindre omission est fatale, et que l'on exige la plus extrême exactitude dans les faits qui la constituent et dans les énoncés qui la font apparaître.—Paley, 147, 8, 9.

Il faut que la jurisdiction apparaisse, non par sous-entente, par déduction, présomption, mais par affirmation et énonciation expresse de ce qui la constitue.

Dans l'instance, un des Juges de Paix n'avait droit d'être là qu'à raison de l'absence de M. Malhiot, et avec l'assentiment de M. Turcot.

Le fait qu'il a siégé ne constate pas l'absence de M. Malhiot, non plus que l'assentiment de M. Turcot. Le premier a pu se retirer parceque M. Dufort siégeait et voulait siéger et le second a pu continuer les séances avec M. Dufort, parce qu'il ignorait son droit de l'exclure et d'en appeler un autre. Son silence, en tel cas, n'est pas l'affirmation d'un assentiment.

Il n'y a pas lieu d'appliquer les principes qui gouvernent les acquiescements tacites dans les affaires civiles par les parties mêmes, à certains actes de procé-

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dure. Les attributions des Juges, leurs pouvoirs ne peuvent s'atténuer, se distribuer par des acquiescements tacites, c'est droit public, et les Juges n'ont d'action, d'initiative que dans les modalités prescrites par la loi. Le droit de juger dépendant d'un fait indiqué et prévu par le statut, ce fait doit être déclaré, énoncé distinctement et non présumé et sous-entendu.

C'est par cette affirmation, par cette énonciation seulement, dans l'acte soumis à leur surveillance, que des Cours supérieures peuvent connaître si la loi a été observée.

Dans cette cause un juge autre que celui désigné par la loi, s'y est immiscé et a jugé. Il pouvait avoir ce droit avenant deux éventualités prévues et indiquées, or ces éventualités ne sont ni exposées, ni énoncées, ni indiquées dans le jugement, et le seul tribunal que les Cours Supérieures peuvent reconnaître comme ayant droit à adjuger sur l'offense, était un tribunal constitué par Messieurs Turcot et Malhiot.

Le jugement est rendu par M. Turcot et Dufort, et la rédaction des qualités ne fait pas même voir quels étaient les juges, devant lesquels l'affaire avait été portée et commencée. Il n'y avait donc pas à la face des papiers constitutifs de la jurisdiction, la plainte, le bref d'assignation et la condamnation, le tribunal désigné par la loi, et par conséquent pas de tribunal compétent.

Tout jugement doit indiquer le fait et l'adjudication sur le fait en dispute et l'application des condamnations décrétées par la loi: cela s'applique aux affaires purement civiles, comme à celle d'une nature pénale ou criminelle.

Paley (212) constate ce que doit contenir le jugement.

Le jugement attaqué déclare bien "qu'il résulte pleinement de la preuve" que le défendeur avait vendu sans licence des liqueurs spiritueuses, mais ne contient pas d'adjudication même par le tribunal sur le fait, "no adjudication of conviction," comme le dit Paley et comme le veut la loi.

Il y a bien une condamnation à la pénalité, mais cela n'est que la conséquence de la conviction, c'est un jugement sans verdict. Il n'y a pas de conviction proprement, et la condamnation ne peut être exécutée, s'il n'y a pas préalablement une conviction, un verdict absolu, et directement affirmatif sur l'offense. Le tribunal chargé de prononcer le verdict ne l'a pas fait, mais s'est contenté d'affirmer qu'il lui paraissait résulter de la preuve que le fait reproché avait eu lieu, sans rendre la sentence qui découlait de cette opinion et de ce motif.

Après avoir exposé que le tribunal qui a jugé n'était pas compétent par sa composition, et que le jugement rendu est nul et sans force, faute de conviction, il suffira de dire sur le défaut d'adjudication, sur les exemptions réclamées par le défendeur, qu'en règle générale, les Juges de Paix doivent adjuger sur les exceptions qui attaquent leur jurisdiction ou qui réclament des exemptions, afin de permettre aux Cours Supérieures d'apprécier la justice de ces exceptions et leur adjudication sur les matières basées presque toujours uniquement sur des considérations légales et intéressant toute la société.

L'exception réclamée, fondée sur un droit de faire ce qui a été fait, devait être décidée. Quelquefois elle enlève toute jurisdiction au Juge de Paix par la disposition de la loi seule, et il serait utile de mettre à la connaissance des Juges de Paix, l'enseignement de Paley sur leurs devoirs en pareilles circonstances (121).

Cette exception est tellement favorable que Paley ajoute (122) "upon a suggestion of title, the Court of Queen's Bench, at any time, while the conviction "remains below and has not been removed by *certiorari*, will grant a prohibition "after conviction to stop the justice from proceeding upon it."

Cette exception fondée sur le paiement de la licence au Percepteur du Revenu, et le papier que lui a donné ce dernier, est-elle justifiée par les faits que Dubord invoque? Pourrait-il se croire raisonnablement autorisé à vendre et détailler des boissons?

Dubord a bien payé le montant requis pour sa license, et à l'officier seul chargé de recevoir ces argents et d'octroyer la license. La réclamation de cet officier, quelques semaines après, contre son propre acte, semble indiquer plutôt que le reçu et l'écrit donné à Dubord couvraient son droit à vendre.

Si cet officier eut toujours été d'opinion que le règlement municipal indiqué dans son écrit, était bon et suffisant, il n'y aurait jamais eu de poursuite et de trouble. Mais Dubord ne doit pas dépendre de cette opinion et des changements qui se feront dans l'esprit de cet officier.

L'on peut et l'on devrait s'enquérir si l'examen sérieux des règlements ne permet pas de dire que d'après les règlements municipaux, Dubord avait droit à l'octroi d'une licence.

(Le Juge examine les règlements municipaux). Cet examen, dit-il, démontre que tout ce qui a été fait a été fait en conformité au règlement du comté passé en mars et que tout est strictement légal à ce point de vue,

La doctrine de *Paley* est sage et rationnelle, quand elle recommande aux Justices de Paix, de ne pas entrer dans ces questions de droit, et qu'il faut renvoyer le défendeur, s'il fait voir un droit plus ou moins contestable, et surtout que les droits qu'il invoque comme ses titres existaient longtemps avant l'accusation, et qu'ils émanent de celui qui réclame contre lui.

Cela, comme de raison, ne peut constater que le papier que Dubord montre pour constater son droit et son exception, est un titre parfait, mais sert à constater ses impressions, sa croyance et par conséquent son innocence par l'absence d'intention de violer la loi.

Il faut dire que la conduite de l'officier ministériel milite contre lui-même; recevoir l'argent pour payer la licence demandée, c'était admettre qu'il allait la faire émaner, ce n'est pas un dépôt fait entre ses mains, ce papier est signé du Percepteur du Revenu, c'est l'état parlant par lui qui déclare que le paiement a été fait pour payer une license d'auberge pour lequel on a obtenu le certificat du conseil du comté. Il n'y a pas de réserve pour examiner si ce règlement est légal et suffisant. La présomption de droit est que la licence même n'était pas accordée de suite, parce qu'on n'avait pas le temps de ce faire, mais le droit à la licence restait bien constaté par le paiement accepté purement et sans réserve et explications. Cela ressort des termes du protêt, comme du fait même d'un protêt.

Il y a injustice quand des officiers ministériels se mettent au-dessus de la loi, par des interprétations, qui ne sont pas dans leurs attributions. Les conseils municipaux ont le droit de réglementer la vente des boissons et non le Percepteur du Revenu; s'il peut dire, le règlement de prohibition n'est pas bon, et accorder des licences, c'est lui qui réglemente et non le conseil municipal. L'ordre

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de la loi est interverti. Cela est toujours dangereux. La protection pour tous est dans la stricte exécution de la loi. Il y aurait oppression trop souvent, si la loi ne dépendait que de l'arbitraire des officiers ministériels, et si dans l'application de la loi par les tribunaux inférieurs, on n'exigeait pas la stricte observation des formalités, quand elles tendent à protéger des individus. Il doit être décidé comme il l'est, que le *Writ de Prohibition* a été bien émané, et que défense doit être faite aux Juges de Paix de procéder sur l'exécution du jugement attaqué. Il ne doit pas être accordé de frais contre l'officier du Revenu, parce qu'il est officier public et comme tel représente la Couronne, ni contre les Juges de Paix qui ne doivent être condamnés à payer des frais, que lorsqu'il y a prise à partie contre eux.

Bourgeois & Bachand, avocats du demandeur.

Chagnon, Sicotte & Lanctot, avocats du défendeur.

(P.B.)

COUR SUPÉRIEURE.

MONTREAL, 31 JANVIER 1870.

Coram MONDELET, J.

No. 1680.

Paquin vs. *Bradley et al.*

JUGE:—1. Que la donation limitée à des choses désignées particulièrement est une donation à titre particulier. (1)

2. Que le donataire à titre particulier n'est pas tenu personnellement aux dettes du donateur. (2)

Le demandeur réclamait des défendeurs le montant d'un billet souscrit par leur mère le 15 août 1862 pour £35. 2s. 6d., et il alléguait que par acte de donation, consenti le 16 octobre 1865, devant Mtre. Savard, N. P., la mère des défendeurs leur avait fait donation entrevifs de deux terres et d'une certaine quantité de biens meubles y énumérés.

Le demandeur, en conséquence concluait à ce que les défendeurs fussent déclarés les donataires universels ou à titre universel de leur mère et condamnés au paiement du montant de ce billet qui était une dette due et échue à l'époque de la donation.

Les défendeurs plaidèrent que le titre en vertu duquel ils possèdent certains biens à eux donnés par leur mère est une donation à titre particulier, et qu'en vertu de tel titre ils ne peuvent être tenus personnellement qu'au paiement des dettes par eux assumées, et que la créance réclamée par cette action n'est pas du nombre de celles dont ils ont assumé le paiement, et que la donatrice ne leur a pas donné tous les biens qu'elle possédait lors de la donation en question.

Les défendeurs ayant fait la preuve de leur exception, le demandeur a été débouté de son action, et le jugement est motivé comme suit :

La Cour, après avoir entendu les parties par leurs avocats au mérite de cette cause, examiné la procédure, pièces produites et preuve, et avoir délibéré; Considérant que le demandeur n'a pas établi son droit d'action, et nommément que

(1) C. C. Art. 780.
(2) C. C. Art. 799.

la donation par *Content Judd*, mère des défendeurs aux dits défendeurs, en date du 16 octobre 1865, reçue devant Savard, et confrère notaires, est une donation à titre universel: Considérant que la dite donation est une donation à titre particulier; Considérant, par conséquent, que les défendeurs ne sont pas tenus envers le demandeur de la dette dont il poursuit le recouvrement par la présente action, laquelle a été contractée envers le demandeur par la mère des défendeurs qui par la dite donation, ne sont pas donataires à titre universel, mais bien à titre particulier; Considérant que les défendeurs sont bien fondés en leur Exception Péremptoire, la Cour la maintient et déboute l'action du demandeur avec dépens.

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Jetté & Archambault, avocats du Demandeur.

Doutre, Doutre & Doutre, avocats des défendeurs.

(P.R.L.)

COUR SUPERIEURE.

MONTREAL, 30 NOVEMBRE 1869.

Coram MACKAY, J.

No. 1180.

Mallette vs. *Tremblay*.

JUGE:—Que par suite d'une exception à la forme fondée sur ce que la copie de la déclaration n'était point certifiée, le demandeur ayant obtenu la permission de la Cour de signifier une nouvelle copie au défendeur en payant les dépens encourus sur l'exception à la forme jusqu'alors; le défendeur ne doit plus procéder sur icelle exception à la forme qui est devenue caduque et inutile.

Le 20 novembre 1866, le défendeur produisit en cette cause une exception à la forme avec le dépôt ordinaire fondée sur ce que la copie de la déclaration qui lui avait été signifiée n'était pas certifiée vraie copie ni signée par le procureur du demandeur.

Le 25 février 1867, le demandeur fit motion, qu'il lui fut permis de faire signifier à ses frais au demandeur la déclaration en lui faisant laisser une copie dûement certifiée en par le demandeur payant aux avocats et procureurs du défendeur les frais qu'il plairait à la Cour de fixer sur l'exception à la forme.

Le 27 février 1867, cette motion fut accordée par la Cour qui ordonna au demandeur de payer les dépens encourus sur l'exception à la forme jusqu'à ce jour-là.

Le 16 octobre 1866, le demandeur ayant fait signifier au préalable une nouvelle copie de la déclaration, et ayant fait taxer les frais sur l'exception à la forme à $12.50, fit offres de cette somme au demandeur, et le somma de plaider au mérite.

Le défendeur ayant inscrit la cause pour l'enquête et l'audition au mérite sur cette exception à la forme, et les parties ayant été entendues, la Cour a rendu son jugement comme suit:—

The Court having heard the parties by their counsel, as well upon the merits of the *exception à la forme*, made and fyled in this cause by defendant, as on the motion of plaintiff of the 8th November, instant, for rejection of deposition of witness, G. Mireault; having examined the proceedings, the evidence and proof of record and duly deliberated; Considering that plaintiff under the leave

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granted him has served true copy of his declaration upon defendant and has, to wit, on the 16th October, 1869, offered and deposited all that he was bound to; doth declare the *exception à la forme*, spent, and to be of no further force as from and after the said offers of plaintiff, of 16th October, 1869; and further doth declare the inscription for *Enquête* and hearing on said *exception à la forme*, (said inscription fyled 18th October, 1869) to have been unnecessary, and the costs of proceedings upon the same to have been and to be upon defendant, and the Court orders the cause to be proceeded with by and upon such other and further proceedings as to law and practice appertain; and considering that by reason of the findings aforesaid, the motion of plaintiff to reject deposition of the witness Mireault is unnecessary, it is ordered that plaintiff take nothing by said motion, without costs.

Mireault, avocat du demandeur.

Duhamel, avocat du défendeur.

(P.R.L.)

SUPERIOR COURT, 1870.

MONTREAL, 31st MARCH, 1870.

Coram TORRANCE, J.

No. 1028.

Calvin et al. vs. *Tranchemontagne* et al., and *Thomas* et al., oppts.

HELD:—That by C. C. 2361, transfers of a Canadian steamer, not made and registered in the manner prescribed by the Act respecting the registration of inland vessels, referred to in C. C. 2360, did not convey to the purchaser any title or interest in the vessel intended to be sold.

2nd:—That a general assignment by an insolvent to trustees, inasmuch as it did not conform to the Insolvent Act of 1864, was in law a fraudulent conveyance by the enactments of said Act, especially, S. 3. SS. 1. & 1."

This case was before the Court on the merits of an opposition *à fin de distraire*. The opposants, Henry Thomas, William Sache and Benjamin Henry Lemoine, in their quality of trustees of the property of the heretofore firm of Frederick St. Louis & Co., claimed *main levée* of a seizure of the steamer "Topsy."

The opposition alleged an assignment by this firm to them on the 26th March, 1868, because they were unable to meet their engagements, and among the property assigned was the steamer "Topsy," of a tonnage of 65 tons. Subsequently by an *Acte*, of date 1st March, 1869, Maitre Jobin, notary, the opposants sold the steamer "Topsy" to a firm of Sincennes & McNaughton. That this firm was then in possession, and the opposants *ès qualités* as their *garants* had a right to oppose the seizure and claim *main levée* of the steamer. The plaintiffs fyled several *moyens* of contestation to this opposition. An answer in law firstly fyled was dismissed. A second answer alleged that the defendants had given plaintiffs a mortgage for $1,823.30, the amount of their debt on the steamer "Topsy"; that the debt was incurred for an engine supplied by the plaintiffs to the "Topsy," and it was agreed at the time of the supply that the mortgage should be given for the payment of the engine; that the judgment now sought to be executed,

was for the amount of the mortgage; that the mortgage had been duly registered in the custom house at Montreal. A third answer alleged that the defendants were still the registered owners of the "Topsy." A fourth answer set forth the obligation set forth in the second answer and the consideration of it. The answer further alleged that, notwithstanding the pretended insolvency of the firm of Frederick St. Louis & Co., the right of plaintiffs, as mortgagees, cannot be affected by said assignment. That the opposants can have no claim until they have paid the plaintiffs the sum of $1,823.30. The last answer was general.

The opposants replied to the first answer of plaintiffs that the mortgage invoked by the plaintiffs was given on the 27th December, 1867, to secure an antecedent debt, and at a time when the defendants were notoriously insolvent, and said mortgage was null as made in fraud of creditors, especially of Henry Thomas, one of opposants; that, supposing that plaintiffs were creditors, they could not seize the "Topsy" in the hands of Sincennes & McNaughton, who were not parties to the mortgage or judgment. The opposants therefore prayed that the said mortgage might be declared null and void as having been made in fraud of creditors, especially of Henry Thomas one of them.

The opposant answered the second answer of the plaintiffs, that the opposants were in possession of the "Topsy" from the 26th March, 1868, to 1st March, 1869, and since this last date the "Topsy" was in possession of Sincennes & McNaughton, as proprietors.

The opposants further answered the third answer of the plaintiffs as they answered the first answer.

The Court remarked in rendering judgment on the merits of the opposition, that the question of title between the parties should first be looked at, in relation to the validity *per se* of the conveyance alleged by the opposants to them, and if that were decided in their favour it would be necessary to look at the title claimed by the plaintiffs, by their deed of 26th December, 1867. In other words, the opposants must succeed, if at all, by the strength of their own title rather than by the weakness of the plaintiffs' title. The plaintiffs argued that the opposants claiming the proprietorship of an inland vessel, it was necessary for them to shew a compliance with the Act respecting the registration of inland vessels, 8 Vic. C. 5., C.S.C. Cap. 41, S. 13, S. 16, and with C.C. 2360, 2361, which required that the transfer of vessels should be made in a certain form, and to be registered at the custom house, and declared that otherwise no title or interest should be conveyed to the opposants, and the plaintiffs remarked as to the claim to oppose as the *garants* of Sincennes & McNaughton, how could the opposants be their *garants* if by non-compliance with the law, they conveyed no interest to them. The plaintiffs further contended that the assignment, of date 26th March, 1868, by the defendants to the opposants *ès qualité* was in contravention of the Insolvent Act of 1864, which said that a debtor shall be deemed insolvent, and his estate shall become subject to compulsory liquidation, *inter alia*, if he has made any general conveyance or assignment of his property for the benefit of his creditors, otherwise than in the manner prescribed by this Act. S. 3, S. S. 1. "I."

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The Court was of opinion that the opposants had not so complied with the provisions of the Shipping Act, cited by plaintiffs, either as regards the form of the assignment or its registration in the custom house, as to enable the Court to regard them as having been proprietors of the steamer "Topsy." Further they had violated the provisions of the Insolvent Act in accepting of the general assignment of the insolvent to them without complying with the requirements of that Act, and their interest either as having been proprietors under the assignment, or as *garants* of Sincennes & McNaughton was not an interest that the Court should notice.

The judgment was *motivé* as follows:—

The Court having heard the parties, plaintiffs and opposants, on the merits of the opposition of the opposants, and the contestations thereof by plaintiffs, and having duly deliberated;

Considering that by the assignment alleged by the opposants, to wit, the assignment, of date the 26th of March, 1868, from Frederick St. Louis & Co., to the opposants, F. Geoffrion, N.P., and by the sale, of date 1st March, 1869, F. Geoffrion, N.P., from the opposants to the firm of Sincennes & McNaughton, the opposants have not complied with the requirements of the Act respecting the registration of inland vessels referred to in the Civil Code of Lower Canada, Article 2360;

Considering that by the Article 2361 of said Code, transfers of vessels, such as the steamer "Topsy," claimed by the opposants, not made and registered in the manner prescribed by the said Act, do not convey to the purchaser any title or interest in the vessel intended to be sold;

Considering further that the said assignment, inasmuch as it did not conform to the Insolvent Act of 1864, was in law a fraudulent conveyance by the enactments of said Act, especially of S. 3, S. S. 1 "I", doth maintain the contestation by plaintiffs of said opposition, and doth accordingly dismiss said opposition with costs.

Opposition dismissed.

Dorion, Dorion & Geoffrion, for opposants.
Ritchie, Morris & Rose, for plaintiffs contesting.
(J. L. M.)

SUPERIOR COURT.

MONTREAL, 31ST MARCH, 1870.

Coram TORRANCE, J.

No. 1589.

Belanger & vir vs. *Brown.*

HELD:—That a deed of sale made by a wife *commune en biens* to a third party of her *propres* for a pretended consideration of $400, when the real consideration was a lease of moveables by the third party to her husband, will be set aside as a contravention of C. C. 1301.

TORRANCE, J. The female plaintiff, Adelaide Belanger, has brought her action to set aside a deed of sale of her *propres* to the defendant, as made without consideration, and as an indirect security given by her to the defendant

for an obligation of her husband. The declaration sets out a deed of sale, of date, 24th December, 1867, (J. Simard, N.P.), by which Adelaide Belanger, authorized by her husband, Antoine Lemieux, transferred to the defendant an undivided fourth part in certain lots of land in the St. Antoine suburbs. The consideration stated by the deed was $400, acknowledged to have been received by the female plaintiff from the defendant. The declaration alleged that no such sum had been received, and that the discharge stated had been given by error, without cause or consideration, and by reason of the *dol* and fraud of the defendant: that the said sale and discharge had only been agreed to by the plaintiff to cover a guarantee (*cautionnement*) of her husband, and in reality to guarantee a debt of her husband: that, in fact, by a deed of lease passed before J. Simard, N.P., the 24th December, 1867, the defendant leased to the said Antoine Lemieux, her husband, certain moveables (named in the deed) for a rent of $800, part payable in 1868, part in 1869, and part in 1870. That the female plaintiff, with the view of binding herself with and for her husband and to guarantee his debt to the defendant, agreed to the said *acte* of sale, and gave the discharge in question without cause or consideration: that in consequence the said sale is null and void, and the discharge has been given without cause or consideration, and is null and of no effect. The female plaintiff, therefore, prayed that the said *acte* of sale may be declared null and of no effect, and that the discharge may be declared to have been given by error without cause or consideration, and that the defendant be condemned to retrocede to the plaintiff the said land, and give a deed and title therefor within such delay as may be fixed by the Court, and in default of his so doing that the judgment to intervene may serve for such deed.

The plea of the defendant, in effect, averred that the consideration of the deed of sale in question was true, and the *acte* agreed to for such consideration.

With respect to the evidence, there is little difficulty. The defendant is examined as a witness, and when pressed as to the consideration for the deed of sale, says that the deed of lease should have been made to the plaintiff, that such was his intention, and if it was otherwise, it arose from the mistake of the notary.

There remains the question of law, how far the Court has it in its power to relieve the plaintiff. C. C. 1301, says: "A wife cannot bind herself either with or for her husband, otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect." The defendant argues that this action could not be brought during the community, to which the plaintiff replies, that the action is a personal action and could not be brought against third parties in good faith in possession of the *propres* of the plaintiff, and it was therefore necessary for her to have the sale set aside as soon as possible, without waiting for the dissolution of the community. The defendant further contends that the article 1301 does not apply to the wife *commune en biens*; to which the plaintiff replies that, when she sold her *propres* as she had done in the present case, she did not bind herself as *commune en biens*. The Court is with the plaintiff. If redress were denied to the plaintiff, the defendant is allowed to do that indirectly which he could not do directly. The

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judgment of the Court will, therefore, grant the conclusions of the declaration of the plaintiff.

The judgment was recorded as follows:—

The Court, &c.

Considering that it is proved that the sale purporting to be made on the 24th December, 1867, by the plaintiff, Adelaide Belanger, to the defendant, by *acte* of that date, passed before J. Simard, N. P., of the following properties, to wit: (here follows a description of the properties,) was made without consideration or cause, and without payment of the sum of $400 alleged to have been paid by the defendant to the female plaintiff, Adelaide Belanger;

Considering that the only consideration for said sale was the lease from the defendant to the plaintiff, Antoine Lemieux, husband of the female plaintiff, of date the said 24th December, 1867, recited in the declaration in this cause, and that the female plaintiff could not bind her *propres* for the obligations of her husband, as she has done by the said *acte* of sale, doth declare the said deed of sale, of date 24th December, 1867, by the plaintiff, Adelaide Belanger, to the defendant, passed before J. Simard, N. P., of the said immoveables, to be null and of no effect, and the discharge given by the said deed of sale to the defendant for the said sum of $400 to have been given by error, without cause or consideration, and doth order the defendant, within fifteen days after the signification of the present judgment upon him, to retrocede and re-convey to the plaintiff, Adelaide Belanger, by a sufficient deed, the said immoveables, and in default of defendant so doing within said delay, the Court doth order that this judgment operate in favor of plaintiff, the said Adelaide Belanger, as such re-conveyance, and the Court doth condemn defendant to pay the costs of this action, at all events, *distraits* to Messrs. Duhamel and Rainville, attorneys of the plaintiffs.

Judgment for plaintiffs.

Duhamel & Rainville for plaintiffs.

Loranger & Loranger for defendants.

(J. K.)

SUPERIOR COURT, 1870.

MONTREAL, 31st MARCH, 1870.

Coram TORRANCE, J.

No. 1109.

Tate et al., vs. *Charlebois et al.*, and *Charlebois*, opposant, and *Tate et al.*, contesting.

HELD:—That an insolvent is discharged, by a composition deed with the requisite number of his creditors confirmed by the Court, from debts for which the creditor has claimed from the assignee of the estate of the insolvent, but not as regards costs incurred subsequent to making the claim by the litigation of the insolvent.

PER CURIAM.—This case is before the Court on the merits of an opposition *à fin d'annuller* to a seizure after judgment. The plaintiffs' action was instituted in 1866.

The opposition alleges that, on or about the 12th October, 1867, the opposant, Alphonse Charlebois as well individually as having been in partnership with Germain Désève made an assignment of his property to Andrew B. Stewart, official assignee; that afterwards the majority of his creditors signed a deed of composition in his favour, of date the 4th November, 1867; that the opposant on the 25th February, 1868, presented to this Court a petition for the confirmation of this discharge, that at that time the debt of the plaintiffs existed and they even appeared to contest the said petition, but having failed to fyle their reasons of contestation, the Court, on the 30th May, 1868, confirmed the discharge; that in consequence the opposant had been liberated from the debt of the plaintiffs. There followed special conclusions by the opposant, for a judgment declaring the debt of plaintiffs to have been extinguished by the judgment of discharge, and for *main levée* from the seizure.

The plaintiffs contested the opposition. By an answer in law, they alleged that the opposition was insufficient, inasmuch as it did not aver that plaintiffs' debt and claim was ever recognized by opposant when insolvent, or under his proceedings in insolvency, by or in a schedule of creditors or any other proceeding.

By a second answer the plaintiffs alleged that the original action was instituted on or about 29th October, 1866; that judgment was rendered in their favour about 29th October, 1867. That defendants in revision obtained the dismissal of plaintiffs' action on the 30th May, 1868; that the Court of Queen's Bench, on the 9th September, 1869, did reverse the judgment in review and condemn the defendants to pay the debt, interest and costs now sought to be levied. That opposant did not in any way recognize the plaintiffs as creditors and he omitted them from the list of creditors in the schedule in insolvency. That the costs of suit now claimed were only exigible and only became a debt or claim long after the proceedings averred in his opposition.

The opposant made an answer in law to the plaintiffs' answer secondly pleaded, and alleged that the said answer was insufficient inasmuch as the plaintiffs' claim existed and was alleged to have existed before the assignment and discharge in question. By a second answer, the opposant averred that the said

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claim existed before the date of said assignment and plaintiffs regularly fyled the said claim with A. B. Stewart, official assignee in insolvency.

There is no difficulty as to the proof. On the 7th June, 1866, the action was instituted by the plaintiffs. On the 12th October, 1867, the opposant made an assignment to Andrew Buchanan Stewart, official assignee, and did not include the plaintiff's claim in the schedule of his creditors. On the 29th of the same month, the plaintiffs recovered judgment. On the 4th November, 1867, a deed of composition and discharge was signed by certain of the creditors.

On the 8th January, 1868, the plaintiffs fyled a claim in insolvency with the assignee for the amount of the judgment. On the 5th March, 1868, the opposant notified the assignee that he should not recognize as creditors or pay the plaintiffs as their debt was not recognized. On the 30th May, 1868, the Court confirmed the deed of composition and discharge.

The Insolvent Act of 1864, S. 9, S.S. 3, says: "The consent in writing of the said proportion of creditors to the discharge of a debtor after an assignment, or after his estate has been put in compulsory liquidation, absolutely frees and discharges him from all liabilities whatsoever (except such as are hereinafter specially excepted) existing against him and proveable against his estate, which are mentioned and set forth in the statement of his affairs annexed to the deed of assignment, OR which are shewn by any supplementary list of creditors furnished by the insolvent, previous to such discharge, and in time to permit the creditors therein mentioned obtaining the same dividend as other creditors upon his estate, OR which appear by any claim subsequently furnished to the assignee, &c." Now we find that the plaintiffs fyled their claim for the judgment, including costs of the Superior Court, on the 8th January, 1868, with the assignee. That claim must, therefore, be considered to be extinguished by the judgment confirming the discharge rendered on the 30th May, 1868. But the costs of the judgments in review and of the Court of Queen's Bench are in a different position; they arose by the litigation of the opposant subsequent to the judgment of the 29th October, 1867, and the Court holds that they were not extinguished by the judgment of discharge. The Court will, therefore, maintain the opposition as regards the judgment of the Superior Court, of date the 29th October, 1867, and maintain the contestation of the plaintiffs as regards the costs of Review and of the Court of Queen's Bench, and order that each party bear his own costs on the opposition and the contestation by the plaintiffs. As regards the contestation of the plaintiffs *par distraction de frais*, Messrs. Perkins and Ramsay, for the costs in Review and the Queen's Bench, this contestation is maintained with costs.

The judgment is *motivé* as follows:

The Court having heard the opposant and the plaintiffs contesting, and the plaintiffs *par distraction de frais*, Messrs. Perkins and Ramsay, contesting, as well on the merits of the answer in law by the plaintiffs to the opposition, and of the answer in law of opposant to the second answer of plaintiffs to said opposition, as on the merits of the said opposition and the several contestations thereof by plaintiffs and by plaintiffs *par distraction*, on the evidence of record;

Considering that the debt of plaintiffs, for which judgment was rendered on the 29th October, 1867, existed at the date of the assignment by the opposant to Andrew B. Stewart, to wit, on the 12th October, 1867, and that the plaintiffs to wit, on the 8th January, 1868, fyled a claim for the amount of said judgment, in principal, interest and costs of the Superior Court, with Andrew B. Stewart, the official assignee to whom the said assignment had been made;

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Considering that by the Insolvent Act of 1864, S. 9, S.S. 3, the opposant was absolutely freed and discharged from the said judgment;

Considering that the sum of $27.90 claimed by the writ of execution in this cause, for costs of the Court of Review, and the sum of $225.94 claimed by said writ for the costs of the Court of Queen's Bench were only due and exigible from and after the 9th September, 1869, the date of the judgment rendered in appeal by the said Court of Queen's Bench:

Doth reject the said answer in law of the plaintiffs to said opposition, and the said answer in law of the Opposant to the second answer of plaintiff to said opposition, and doth maintain the opposition of the defendant as regards the judgment of the Superior Court of date the 29th October, 1867, in principal, interest and costs, for which judgment plaintiffs fyled said claim in insolvency as aforesaid; and doth maintain the contestation of the plaintiffs and of the plaintiffs *par distraction* as regards the said costs in review, to wit, $27.90, and the said costs of the Court of Queen's Bench, to wit, $225.94, and doth order that each party, plaintiffs and opposant, bear his own costs on the said opposition and contestation by the plaintiffs, and the Court doth maintain the contestation by the plaintiffs *par distraction de frais*, Messrs. Perkins and Ramsay, with costs in their favor against the opposant.

Perkins & Ramsay, for Plaintiff.

McCoy & Lefebvre, for Defendant.

[J. K.]

COUR DE CIRCUIT.

ST. HYACINTHE, 23 MARS, 1870.

Coram SICOTTE, J.

No 6955.

Melançon vs. *Sylvestre.*

JUGE:—Que du moment que le président d'une élection de conseillers municipaux, a déclaré élus les sept candidats proposés, l'élection est alors terminée; il n'est pas légal de proposer ensuite de nouveaux candidats et de tenir un *poll*; que si un *poll* est dans ce cas tenu, ce sera illégalement, et aucune personne votant à cette élection, quoique sans avoir les qualités requises par la loi pour lui donner le droit de voter à une élection municipale, n'encourra par ce fait l'amende de vingt piastres prescrite par la section 62 du ch. 24 des Statuts Refondus du B. C.

Dans l'espèce, le président de l'élection des conseillers municipaux de la paroisse de Ste Hélène, ouvre l'élection à dix heures de l'avant-midi, le second lundi de Janvier 1870; sept candidats sont proposés, et l'élection n'étant pas alors contestée par plus de trois électeurs habiles à voter, le président déclare les

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sept candidats dument élus. Immédiatement après, arrivent des électeurs qui se déclarent (dit le rapport du président de l'élection) non satisfaits des conseillers élus; le président consent à ce que d'autres candidats soient proposés, et un *poll* est en conséquence tenu. Le défendeur qui n'est pas électeur municipal, vote cependant à cette élection. Le demandeur *qui tam* le poursuit pour l'amende de $20,00 pour avoir voté sans être qualifié.

La Cour décide que le défendeur n'a encouru aucune amende en donnant *son vote* quoique n'étant pas électeur municipal, que les sept premiers candidats proposés ayant été déclarés dument élus, l'élection se trouvait alors terminée, et il n'était plus au pouvoir du président de recevoir de nouvelles propositions de candidats, tenir un *poll* et prendre les votes des électeurs.

L'action est en conséquence déboutée.

Bourgeois & Bachand, avocats du Demandeur.

Fontaine, Mercier & Decaze, avocats du Défendeur.

(P. B.)

SUPERIOR COURT, 1870.

MONTREAL, 31ST MAY, 1870.

Coram TORRANCE, J.

No. 1172.

Vanden Koornhuyse vs. *Grondin*.

HELD:—1. That a debt under a bill of lading signed at Marseilles, in France, for the delivery of goods at Montreal, where the carrier made default in delivery, and the value of the goods is demanded, is not a debt created without the Province of Canada, C. C. P. 806.

2. That such a debt is not a claim for unliquidated damages, requiring an order from a judge under C. C. P. 801.

PER CURIAM.—This case is before the Court on a motion to quash a Writ of *capias ad respondendum*; 1stly, because the contract upon which the claim was based was entered into at Marseilles in France, and must therefore be regarded as a foreign debt, for which a *capias* could not issue, C. C. P. 806. 2ndly, because the claim was for unliquidated damages, and a judge's order was necessary, under C. C. P. 801. The affidavit upon which the *capias* issued set forth a bill of lading signed by the defendant at Marseilles, for the carriage from Marseilles to Montreal, of "*un baril*" Burgundy Port, of the value of $35, and another bill of lading to the same effect, of "*un baril absynthe*" of the value of $45, making in all $80, to recover which sum the arrest is made.

The Court is of opinion that this is not a foreign debt in the sense intended by C. C. P. 806. The debt to be a foreign debt must have been created without Lower Canada. In the present case, though the inception of the debt was abroad, yet the right of action was only completed in the Province. *McDougall* v. *Torrance*, 5 L. C. Jur. 148. The Court is further of opinion that the claim made by plaintiff, for the value of the goods, $80, is not a claim for

unliquidated damages, and therefore an order from a judge, under C. C. P. 806, was unnecessary.

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T. & C. C. DeLorimier, for Plaintiff.
Carter & Hatton, for Defendant.
(J. K.)

Motion rejected.

SUPERIOR COURT, 1869.

MONTREAL, 4TH MARCH, 1869.

Coram TORRANCE, J.

No. 929.

O'Connor vs. *The Imperial Insurance Co.*

HELD:—1. That although A. is merely the agent of B., in obtaining from C. an advance of money on certain goods, yet, if he render himself liable to C. for any loss which might arise after the sale of the goods, he has an insurable interest in the goods, and can therefore legally insure them in his own name to the full extent of the loan.

2. An insurance, by simple receipt for the premium, is legal and binding without the issue of a policy, and the interest in the insurance money may be legally assigned by any simple form of transfer endorsed on the policy, and such transfer does not require the consent or acceptance of the Insurance Company to make it binding.

This was an action to recover the sum of $2,000 cy., being the amount alleged to be insured by the defendants on coal oil in "Middleton's coal oil warehouse No. 1."

The insurance was effected on the 20th of June 1867, in favor of "S. B. Heward Esq.," by the payment of the required premium to the defendants' agents in Montreal, and the granting of a receipt for the premium in the usual form, signed by such agents.

Heward, at the time, was the holder of a warehouse receipt for the oil signed by Wm. Middleton & Co., and of a note for $2,300 cy., signed by the latter, payable to their own order, and endorsed by them.

Heward was in reality the broker of Wm. Middleton & Co., and as such negotiated a loan from the plaintiff, by way of advance on the oil, and delivered him the note, and assigned to him at the same time the warehouse receipt and the insurance receipt.

The assignment of the insurance receipt was by endorsement thereon, as follows: "I hereby transfer the within policy of insurance to M. O'Connor, Esq."

When Heward negotiated the advance from plaintiff he did not endorse the note, but, by a separate writing, he rendered himself responsible to the plaintiff for any deficiency which might occur should the proceeds of the oil when sold prove to be insufficient.

Middleton subsequently absconded, without paying the note, and the greater part of the oil having been destroyed by fire the plaintiff sued to recover the insurance money covered by the receipt.

At the argument, *Carter, Q. C.*, for the defendant, contended (amongst other things) that Heward had not, under the circumstances, any insurable interest in

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the oil, and that the transfer of the insurance receipt was null for want of acceptance or consent on the part of the defendants.

The following was the judgment of the Court:—

"The Court * * * considering that the defendants have failed to prove the material allegations of their pleas in this cause, doth dismiss the same; considering that the plaintiff hath established in evidence the material allegations of his declaration, and especially that the oil, the value of which is sought to be recovered in this action, existed on the 20th of June, 1867, and from that date to the date of the fire hereinafter mentioned, and that Stephen H. Heward, mentioned in said declaration, had an insurable interest, namely an interest to the amount of $2,000 in the same when he made the insurance referred to in the interim receipt, plaintiff's exhibit number one;

"Considering that by Article 2576 of the Civil Code the insured has in all cases a right to assign the policy with the thing insured;

"Considering that the contract of insurance made with the defendants, on the 20th of June, 1867, and the property thereby insured against loss by fire by said Heward, while he had said insurable interest in said oil, was on the 24th of June aforesaid, for value, namely $2,000 and upwards, by him with the property insured, transferred to the plaintiff;

"Considering that it is established in evidence that 425 barrels of the oil so insured were destroyed by fire on the 17th of August, 1867, while the said policy was in full force, and that plaintiff is entitled to the benefit thereof, and to recover from the defendants the value of the said oil so insured by them against loss by fire; seeing the said *retraxit* fyled by plaintiff whereby he reduces his claim to the sum of $1587.76, with interest thereon from the 16th August, 1867, when the note, plaintiff's exhibit number two, fell due: It is, therefore, considered and adjudged that the said defendants do pay and satisfy to said plaintiff the said sum of $1587.76, with interest thereon from the 16th day of August, 1867, and costs of suit."

Judgment for plaintiff.

Strachan Bethune, Q. C., for plaintiff.
G. B. Cramp, for defendant.
Edward Carter, Q. C., counsel.
(S.B.)

CIRCUIT COURT, 1870.

MONTREAL, 18TH JUNE, 1870.

Coram MACKAY, J.

No. 1985.

Prévost et al. vs. *Pickle.*

Held:—That a note of a third party, (in this case, the mother of the insolvent) given by an insolvent to a creditor, to obtain the creditor's consent to the discharge of the insolvent, is null and void. (29 Vic. Cap. 18, sec. 28.)

The action was on a note for $132, held by Prévost, and signed by defendant. The facts of the case were these:—St. Marie and McDonell were traders, and failed. They made an assignment to Sauvageau, official assignee. In July 1869, they applied for their discharge, in accordance with the Act of

1864. Prévost, the present plaintiff, was a creditor, and contested their discharge. During this contest the defendant, who is the mother of McDonell, signed a note for $132 in favor of plaintiff and gave it to McDonell the son, who agreed to give it to Prévost if he would withdraw his contestation and allow St. Marie and McDonell to obtain their discharge. This plaintiff agreed to do McDonell gave him the note and the contestation was consequently withdrawn. Defendant, however, refused to pay the note when it matured; hence the present action.

MACKAY J., in giving judgment, said:—The question at issue is whether a note of a third party given by an insolvent to a creditor to obtain his consent to the discharge of the insolvent can be considered good and its amount recovered. The insolvent Act of 1864 expressly says that such note given by the insolvent is null and void, but does not say anything particularly as to the note being the insolvent's note, or a third party's. The law of England does expressly mention third parties. and a note given by a third person to a creditor to procure him to consent to a bankrupt's discharge is null. So in the law of France since 1838; but previous to that time, a note given by third parties could be sued for and its amount recovered by the creditor.

But here is the fact that it was the insolvent himself who brought this note to plaintiff, and it comes within the Insolvent Act expressly. The act (of 1865) says: if the creditor of any bankrupt take, directly or indirectly, *from him*, any payment, gift or gratification for consenting to his discharge, or composition, such creditor shall incur a penalty of three times the value of the payment, &c., &c.

The plaintiffs say that third persons are free to give notes to creditors, to get them to waive opposition to bankrupts' discharges. The case has to be judged upon the particular proof made in it, in other words, upon its particular merits. We see it a case of a third person's (Defendant's) note received by plaintiffs *not from her*, (they never spoke to her,) but from her son, one of the Insolvent firm of McDonell & Ste. Marie, taken by plaintiffs, *from him*, on terms that, for it, the plaintiffs would desist from opposing the Insolvents' discharge.

Under these circumstances the Court holds that the amount of the note cannot be recovered by plaintiffs from defendant. There was clear illegality, under our Act of 1865, in plaintiffs' stipulating with the insolvent for this note, as they did, according to their receipt fyled. This illegality is fatal to plaintiffs. *Smith* on Contracts. [150.]

The judgment explains itself.

Considering that against plaintiffs' *prima facie* case, the defendant has proved the material allegations of his pleas.

Considering that the title of plaintiffs to the note sued upon, was and is delivery of it by John D. McDonell, an insolvent, to them, upon and for which delivery the plaintiffs agreed with said John D. McDonell, to discontinue their resistance or opposition to or contestation of his and St. Marie's (his co-partner's) discharge under the Insolvent Act of 1864 and the Act amending it, which discharge plaintiffs would only allow in consideration of said note given to them, after obtaining which they did desist from their contestation of said discharge, and consent to said discharge.

Considering that by sec. 28 of the Act of Parliament 29 Vic., cap. 18, in force before and when plaintiffs contracted for and got delivery of said note, it is enacted that if any creditor of an insolvent, take or receive directly or indirectly from him any payment, gift or gratuity as a consideration to consent to the insolvent's discharge, such creditor shall forfeit a sum equal to treble the value of the payment, gift or gratuity so taken or received.

Considering that any contract made for or about any matter or thing prohibited or made unlawful by such section of the Act is a void contract; that the plaintiffs' contract aforesaid for the note sued upon, upon which contract they received from the bankrupt McDonell, the said note as proved in this case, was and is void by law, (*nommément* by force of the common law, and said section 28, of said Act 29 Vic., cap. 18) that the Court ought not to help to give it any effect; that said note ought upon the proofs made, to be held of no effect but illegal, and plaintiffs' suit incapable of being maintained against defendant, doth dismiss the plaintiffs' action with costs, &c.

Action dismissed.

O. Prévost, for the plaintiffs.
Robidoux, for the defendant.
(J.K.)

SUPERIOR COURT, 1870.

In Review.

MONTREAL, 30th APRIL, 1870.

Coram Berthelot, J., Mackay, J., and Torrance, J.

No. 2602.

Donovan vs. *Smith*.

Held :—(Reversing the judgment of the Court below,) That when the defendant is served personally at a place other than his domicile, the delay is computed according to the distance from the place of such service, (and not according to the distance from his domicile,) to the place where the Court is held.

This case came up on the inscription of the plaintiff to review the judgment rendered by Beaudry, J., on the 23rd February, 1870, maintaining the defendant's exception to the form. (See report, page 138, *ante*.)

Mackay, J. The point has already been decided by the Court of Review in *Currier* v. *Lafrance*, 13 L. C. Jurist, 329. The additional delay is allowed to give the defendant time to travel, and he does not need that when he is served at the place where he is summoned to appear. We hold that the exception is unfounded.

Berthelot, J., and Torrance, J., concurred.

The judgment is *motivé* as follows :—

The Court, etc.

Considering that there is error in the said judgment of the 23rd of February, 1870, to wit, in maintaining the exception *à la forme* referred to in it, to wit, exception pleaded by the defendant, doth, revising said judgment, reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises. Considering that the service of process in this cause was well enough made upon defendant as made to hold defendant to appear, and to defend himself in this cause.

Donovan vs. Smith.

Considering that defendant was personally served in Montreal with the writ and declaration in this cause, and that there is no violation of substance, or sense, of any article of the Code of Civil Procedure in holding that the defendant, under the circumstances, was bound to appear according to the exigency of the said writ, and to defend himself, if he saw fit, in this cause, and that his exception *à la forme* was and is unfounded, doth declare said exception *à la forme* unfounded and insufficient, and doth reject the same, with costs, &c.

Judgment reversed.*

Kelly & Dorion, for the plaintiff.
Perkins & Ramsay, for the defendant.
(J. K.)

COURT OF QUEEN'S BENCH, 1869.

MONTREAL, 8TH JUNE, 1869.

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

No. 29.

JOSEPH OCTAVE HYACINTHE DIT BELLEROSE,
(*Defendant in the Court below*),
APPELLANT;

AND

HENRY HART,
(*Plaintiff in the Court below*),
RESPONDENT.

HELD:—That in an action of damages for $200 for a *voie de fait*, in which judgment was given against the defendant for a sum of $10 by the Court of Review, with costs as in an appealable action for $120, there is no appeal by the defendant from such judgment to the Court of Queen's Bench.

The plaintiff brought an action in the Circuit Court for the District of Richelieu to recover from the defendant $200 for damages for a *voie de fait* The action was dismissed by the Circuit Court on 4th April, 1868, (Loranger, J.) but the judgment was reversed by the Court of Review (Mondelet, J., Berthelot, J., Mackay, J.) which gave judgment on the 21st November, 1868, in favour of the plaintiff for $10 and costs as in an appealable action for $120. The judgment in appeal was *motivé* as follows:

"The Court, &c., considering that by the judgment from which this appeal is brought, to wit, the judgment pronounced by the Court of Revision sitting at Montreal on the 21st of Nov. 1868, the defendant is condemned to pay to the plaintiff a sum of $10 of current money with interest and costs, and that from the said judgment the appellant was not entitled by law to institute an appeal, it is considered and adjudged by this Court that the present appeal be and the same is hereby dismissed with costs, &c.

A. Germain, for appellant.
Armstrong & Gill, for respondents.
(J. K.)

Appeal dismissed.

NOTE: *Lefebvre* v. *Murdoch*, 13 L. C. J. 328, was decided in the same sense by the Court of Review at Montreal. *Quære*, are these decisions not a departure from C. S. L. C., cap. 77, s. 25 and cap. 83 s. 2, and C. C. P. 1142.

* MONDELET, J., and BEAUDRY, J., are of the contrary opinion on this point. See 13 L. C. Jurist, 329, and 14 L. C. Jurist, 138.

COURT OF REVIEW.

MONTREAL, 25th APRIL, 1870.

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

No. 1748.

McGinnis vs. *Horseman.*

HELD :—That the Circuit Court has no jurisdiction to grant the resiliation of a lease where the rent or annual value exceeds two hundred dollars, though the amount of damages claimed be under $200.

The action was instituted by the plaintiff in the Circuit Court under the Lessors and Lessees Act, alleging damages caused by the defendant to the premises leased by him from the plaintiff under a notarial lease, at a rental of $240 per annum. Conclusions for the resiliation of the lease, ejectment of defendant, and for $119 damages alleged to have been suffered by the plaintiff.

The defendant fyled a declinatory exception to this action, on the ground that the Circuit Court had no jurisdiction to grant the resiliation of a lease for a sum exceeding $200 per annum.

The defendant referred to Art. 887 C. C. P., and contended that where there was a demand for the resiliation of the lease, and the annual rent was over $200, the action must be instituted in the Superior Court, even though the amount of damages claimed was under $200.

This exception was maintained by the Circuit Court. The following was the judgment of the Circuit Court, BERTHELOT, J., 29th March, 1870 :

La Cour, etc., considérant que le bail dont le demandeur demande la résiliation à l'encontre du défendeur a été fait et consenti pour £60 par année, et que pour cette raison, la demanderesse conformément à l'art. 1105 C. P. et la loi du pays, aurait dû se pourvoir au terme Supérieur de cette Cour; a maintenu la dite exception et renvoie l'action de la demanderesse avec dépens, etc.

The plaintiff inscribed in review, and urged that inasmuch as the amount of damages prayed for was only $119, he was obliged to sue in the Circuit Court. See 25 Viet. cap. 12, sec. 1.

The plaintiff argued: If we cannot join an action for resiliation, why should there be a special clause in the law? We all know that an action for rent or an action for damages alone must be taken in the Superior or Circuit Court according to the amount of rent or damages claimed, and also that such an action purely and simply for damages or rent cannot come under the operation of the Lessor and Lessees Act; but must be taken out under the common law. It was the practice since the 25th Victoria, to keep down the costs on actions of ejectment by conjoining a demand for a small amount of damages.

MACKAY, J: The Court is unanimously of opinion to confirm the judgment. The Circuit Court has no jurisdiction to grant the resiliation of a lease where the rent or annual value exceeds $200.

Judgment confirmed.

F. A. Quinn for the plaintiff.

John Monk for the defendant.

(J. K.)

CIRCUIT COURT, 1870.

MONTREAL, 2ND APRIL, 1870.

Coram TORRANCE, J.

No. 7435.

Lavoie vs. *Cassant* and *Clendinneng*, mis en cause.

HELD:—That a *saisie conservatoire* by an unpaid vendor, for cash, of stones placed on the land of a third party for whom the purchaser is building a house will be upheld after eight days from delivery to purchaser, unless the third party proves a sale to and payment made by himself to purchaser.

TORRANCE, J.—This action began with a *saisie conservatoire* to attach in the hands of the defendant 7 stones which the plaintiff had sold him for cash about the end of October, but which had not been paid for. The declaration alleged that the defendant was about to employ the stones in the construction of houses for William Clendinneng and one Muldoon. The declaration prayed that the defendant might be condemned to pay the plaintiff $36 as the price of the stone, that the stone be sold according to law to pay the said sum, that plaintiff be declared to be privileged on the price of the said stone, and finally that the said Clendinneng and Muldoon be summoned to hear the said attachment declared good and valid.

The defendant made default. William Clendinneng answered the demand, and alleged that the stones were his property and built into his house, and furnished to him by defendant under his contract to build his house, and were paid for before the issue of the writ, and that plaintiff has no claim to the same.

The evidence is that the stones were worth about $30, and were sold and delivered to the defendant at least eight or ten days before the seizure, which was made on the 25th of November, when the stones were on the ground of Clendinneng ready to be placed in the building. There is no proof of payment by Clendinneng at the time of the seizure. The plaintiff has cited C. C. 2,000 as in his favour. The Court would refer to C. C. 1999, which says that the attachment of the thing sold by an unpaid vendor must be made within eight days as regards a third party who has paid for it. Then C. C. 2,000 says if the thing be still in the same condition, but the vendor be no longer within the delay, he has a like privilege upon the proceeds, except as regards the lessor or the pledgee. Seeing that the third party, Clendinneng, has not proved payment by him for the stones before the seizure, the Court holds that the plaintiff as unpaid vendor has a privilege even after the eight days.

Dugas, for plaintiff.

Judgment for Plaintiff.

A. & W. Robertson, for defendant.

(J. K.)

COUR DU BANC DE LA REINE.

QUEBEC, 19 MARS, 1870.

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

LA CORPORATION DU COMTE D'ARTHABASKA, ET AL.,

APPELLANTES;

ET

JAMES BARLOW,

INTIMÉ.

JUGE:—1. Que la IIe Sect. de la 27e Vict : chap. 9, n'éteint pas l'action en dommages, après les deux ans à compter de la vente par adjudication en vertu de l'acte municipal : La corporation est toujours tenue aux dommages, lorsque les formalités dans les ventes d'immeubles en vertu de l'acte municipal n'ont pas été observées, et telles ventes seront déclarées nulles.
2. Si la corporation ne justifie pas les procédés ou ne plaide pas erreur avec offre d'indemniser l'adjudicataire de bonne foi, ce dernier sera maintenu dans son adjudication et la corporation condamnée seule aux dommages et intérêts envers la partie lézée.

James Barlow était le propriétaire du lot No. 14, Rang 8, du Township de Stanfold, qu'il avait acheté du Shérif pour le District d'Arthabaska, le 13 octobre 1862. Enregistré 28 mars 1863.

Le 30 Mars, 1864, Barlow vendit la moitié N.E. de ce lot de terre à Jérémie Demers, par acte devant Mtre. F. X. Pratte et son confrère, notaires, par $600 avec intérêt.

Le conseil de la municipalité du Township de Stanfold avait fait vendre ce lot de terre pour taxes, le 2 Février 1863, par la Corporation du Comté d'Arthabaska, dont Edward J. Charlton, un des défendeurs dans la cause, en devint l'adjudicataire, pour $4, et le 10 Février, 1865, la corporation du Comté d'Arthabaska lui en donna acte de vente.

Par son action, Barlow demandait : 1er : que cet acte fut annulé, parceque la vente de son lot de terre avait été fait illégalement par les deux Municipalités, à Charlton l'adjudicataire.

2o. Que dans le cas auquel l'acte de vente ne serait pas annulé, en raison des illégalités qui avaient été commises par les deux corporations, qu'elles fussent condamnées solidairement à lui payer $1200 de dommages et intérêts, pour lui tenir lieu et place du dit lot de terre et le rembourser de la créance que lui devait Jérémie Demers qui était perdue par l'acte illégal des corporations.

Barlow, pour justifier sa demande contre la corporation du Township de Stanfold, disait et prouvait :

1o. Que le conseil de la municipalité du Township de Stanfold n'avait jamais passé de règlement imposant une taxe de trente centins sur le dit lot de terre, et la Corporation du Township de Stanfold n'a pu prouver l'existence de ce réglement, (*Blackwell on tax titles, Pages* 70, 71, 73, 75.)

2o Que le conseil Municipal n'avait pas le droit de faire vendre ce lot de terre pour une autre somme de $1.00 (une piastre) pour prétendus travaux faits, dans

l'intérêt de Barlow, il fallait un jugement au préalable condamnant Barlow, à payer cette somme (24 *Vic. chap.* 29, *Sects.* 19, 20.)

3o Que ce lot de terre ne pouvait être vendu pour prétendues taxes dues aux Commissaires d'école montant à $1.64, les Commissaires d'école n'ayant jamais fait de réglement imposant telle taxe, et la corporation du Township de Stanfold n'a pu produire ce réglement. L'acte des S. R. B. C. chap. 15 sect. 85, règle la manière dont les taxes scolaires seront prélevées par les Conseils Municipaux (*Blackwell, pages* 60, 61, 63, 65.)

4o. Barlow possédait des meubles exploitables, dans le Township de Stanfold, valant au-delà de £100, ainsi la corporation devait au préalable, faire exécuter ses meubles, elle n'avait pas le droit de faire vendre ce lot de terre, qu'après l'exécution et vente des meubles (*Blackwell, pages* 62 *et* 63 ; *S. R. du B. C. chap.* 24, *sect.* 59, §13, 14, 15, 16 *pour taxes municipales* ; 27 *Vict. chap.* 11, *sect.* 1 *et* 2 *pour taxes scolaires*), ce qu'elle n'avait pas fait.

La Corporation du Comté d'Arthabaska n'avait pas le droit de vendre ce lot de terre pour les raisons suivantes, savoir :

1o. Parceque le Secrétaire-Trésorier du conseil de la Municipalité du Comté d'Arthabaska n'avait pas donné *avis public* de la vente du dit lot de terre ainsi que voulu par la loi (*S. R. B. C. chap* 24, *sect.* 59 §21 *et* 22, *et sect.* 6 §1, 2, 3, 4, 5 et 6).

2o. Parceque la mise en vente du dit lot de terre n'avait pas été annoncée et publiée dans les journaux ainsi que voulu par la loi (*S. R. B. C. Chap.* 24 *sect.* 59 §21.)

3o. Parceque la vente par adjudication du dit lot de terre n'avait pas été faite au lieu ordinaire des séances du Conseil Municipal du Comté d'Arthabaska (*Idem Chap.* 24, *sect.* 59, §21.)

4o. Parceque la Corporation du Comté d'Arthabaska a vendu le dit lot de terre pour $4. quand elle n'avait à prélever que $2.94.

5o. Parceque Théophile Coté qui avait vendu le dit lot de terre n'avait jamais été nommé Secrétaire Trésorier du Conseil de la municipalité du Comté d'Arthabaska, et que par conséquent cette vente n'avait pu être légalement faite (*Blackwell on tax titles, Page* 91.)

A cette action les Corporations et Charlton se sont défendus séparément ; ils disaient que l'action du Demandeur était limitée et prescrite par la 27ième Victoria, Chap. 9, Sect. 11, par deux années à compter de l'adjudication du 10 février 1863, et que ce délai était expiré lorsque l'action avait été intentée ; qu'elle devait être renvoyée avec les dépens, le Demandeur n'étant plus en temps utile pour intenter son action.

La Cour Supérieure, présidée par l'Hon. M. le Juge Polette, a maintenu cette défense et a débouté l'action du Demandeur par son jugement du 27 décembre 1867.

Barlow, se croyant lézé par ce jugement, inscrivit sa cause devant la Cour Supérieure à Québec, siégeant en revision. Barlow disait :

Cette loi dit que pour faire annuler *une vente*, l'action devra être intentée dans les deux ans qui suivront *l'adjudication*. Or la vente ne se fait que deux ans après l'adjudication (S. R. du B. C. Chap. 24 Sect. 61 §11.) Comment

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peut-elle être prescrite avant d'être née, avant d'avoir été exécutée? Il suffit d'examiner l'acte municipal pour faire disparaître cette prétendue difficulté: Le mot *adjudication* est un *lapsus plumæ* du législateur; il a voulu dire *vente* et que la limitation d'action ne devrait compter que deux ans après l'acte de vente.

La vente par adjudication ne donne que la saisine et la possession de l'immeuble à l'adjudicataire: —*jus ad rem* et non pas *jus in re* (*S. R. du B. C. Chap* 24 *Sect.* 61, §4). Pendant la première année il ne pourra y couper du bois, c'est-à-dire défricher (Idem §5). L'adjudicataire n'en est possesseur qu'à titre précaire, toujours obligé à en remettre la saisine et la possession au propriétaire lorsque ce dernier lui remboursera le prix d'acquisition avec vingt par cent en sus (Idem §6) et cela sans forme de procès, même pendant la deuxième année de sa possession, et le premier individu venu peut déposséder cet adjudicataire même sans la permission du propriétaire [Idem §7, 8 et 9]; cet adjudicataire a moins de droit à la propriété que le *squatter* qui, après la possession de l'an et jour, peut exercer la *complainte* lorsqu'il est troublé. Il est donc clairement démontré que l'adjudication n'est pas une vente. Si cela n'est pas encore suffisamment démontré nous avons d'autres preuves dans l'Acte Municipal.

Si à l'expiration de deux années, le propriétaire ne paye pas, la Corporation du comté *passera* un contrat de vente à l'adjudicataire [Idem 11], et ce contrat sera un titre *translatif* de ce bien de fond et *transferrera* à l'adjudicataire non seulement tous les *droits* du *propriétaire* primitif, mais aura l'effet de *purger* ce bien fonds de tout *privilèges et hypothèques quelconques* dont il pourra être *grevé*. Or la vente pour taxe municipal est considérée comme vente judiciaire par autorité de justice comme faite par le shérif. Mais jusqu'à cet acte de vente au nom de la Corporation du comté, il n'y a pas eu de titre translatif de la propriété. Donc l'adjudication n'est pas la vente indiquée et mentionnée dans la loi, puisqu'elle ne purge pas les *privilèges et hypothèques*; Donc la limitation d'action ne doit commencer à courir qu'après la naissance de l'acte de vente et il ne peut être sujet à la prescription avant d'avoir été fait, avant d'avoir vu le jour. Autrement ce serait prescrire un embryon; ce qui serait non seulement une absurdité et une monstruosité mais une impossibilité. Donc la limitation d'action ne doit commencer à courir que du jour auquel l'acte de vente a été fait, et il ne peut être prescrit qu'après avoir été fait. Donc la limitation d'action mentionnée dans l'acte de la 27 Victoria, Chap. 9, sect. 11 ne commence à courir que du jour auquel l'acte de vente translatif de la propriété a été fait, si cette interprétation ne peut lui être donnée, cette disposition de la loi n'est pas applicable au cas actuel; s'il y a une limitation d'action elle ne peut être que pour les droits conférés à l'adjudicataire par l'acte d'adjudication, et non des droits que lui a transféré l'acte de vente qui n'existait pas encore: [Blackwell, Idem, page 301].

Cette limitation d'action peut-elle être invoquée par les Corporations Défenderesses? Non. La loi, si elle est applicable au cas actuel, ne serait faite que pour favoriser les droits de l'adjudicataire mais ne limite ni ne prescrit l'action pour dommages qu'avait le Demandeur contre les Corporations Défenderesses pour lui avoir ravi injustement sa propriété. Si le Défendeur n'avait pas voulu

plaider limitation d'action, les Corporations pouvaient-elles la plaider pour lui ? Non. Donc la limitation d'action ne peut profiter qu'au Défendeur. La Corporation du Comté d'Arthabaska et al., et James Barlow.

Les Corporations représentées par William Duval, ecr. et l'adjudicataire représenté par J. B. Parkins, Q. C., répondaient au Demandeur :

The present action having been brought nearly four years after the adjudication and three years and a half after the passing of the act, how does the Plaintiff expect to escape from its operation ?

To do so he says : adjudication does not mean adjudication, but it means something else ; it means the final execution of the deed of sale which took place 2nd Feby, 1865, and I am within time from that date.

The first rule is that where the language of a statute is clear and not susceptible of doubt or two interpretations, it must be literally complied with, notwithstanding an inconvenience, injustice or even absurdity which compliance will entail ; it is the *sic volo* of the legislature. Now what word has a clearer signification than *adjudication* ; its legal signification as well as that of its co-relative *adjudicataire* are technical. Its signification in common parlance, identical with its legal signification, is known to every auctioneer, merchant and man of business in the land. No two ideas can be entertained about it. On what mysterious principle of interpretation then is it, that the Plaintiff is to give it a different signification ?

Is the intention of the Legislature to make the time of prescription run from the *adjudication* and not from the *execution* of the deed of sale unreasonable ? Is it not rather consonant with justice and common sense that the two years from the adjudication during which the owner is *en demeure* to redeem his land should be also employed by him to test the validity of the proceedings against him if he felt aggrieved, and that at the end of that period, the purchaser should have his title clear, and not a title which he could neither dispose of in the market nor personally use by applying himself to the cultivation and improvement of his land ? Is it consistent with public morality and the policy of the M. and R. act that so many purchasers of land deriving their title from law and public authority, should be condemned to two years of enforced idleness with a useless piece of paper in their pocket, which they commonly dispose of to speculators ?

That the two years of suspended proprietorship should be extended to four, nothing would be more surely calculated to defeat the operation and intention of the law, colonisation, than such a state of things.

La Cour Supérieure en Révision prononça le jugement suivant :

" La Cour, siégeant en Révision du Jugement prononcé le vingt-sept décembre, " mil huit cent soixante sept, par la Cour Supérieure à Arthabaska, ayant en- " tendu les parties par leurs avocats respectifs et sur le tout délibéré ;

" Considérant qu'il y a eu erreur dans le dit jugement, quant à ce qui con- " cerne les défendeurs, savoir : La Corporation du Comté d'Arthabaska et la " Corporation du Township de Stanfold.

" Considérant que le Demandeur se plaint par sa déclaration, que le lot de " terre numéro quatorse dans le huitième rang du Township de Stanfold qu'il " avait acquis du Shérif d'Arthabaska, par acte du treize d'octobre mil huit cent " soixante-et-deux, a été illégalement adjugé et vendu le deux février, mil huit

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" cent soixante-et-trois, par le secrétaire-trésorier du Conseil Municipal du " Comté d'Arthabaska, à Edward J. Charlton, l'un des Défendeurs, à l'ins- " tance de la Corporation du Township de Stanfold, l'une des parties Défende- " resses, pour cotisations municipales et prix de travaux faits sur ce lot de terre " ainsi que pour cotisations d'écoles, dans ce même Township ; que le dix de " février, mil huit cent soixante cinq, un acte de vente de cette adjudication du " dit lot de terre a été consenti par le dit secrétaire-trésorier au dit Edward J. " Charlton, qu'il n'y avait pas eu de cotisations municipales ni d'écoles d'impo- " sées sur ce lot de terre et qu'il n'en était pas dues, non plus que la somme " réclamée pour de prétendus travaux, et que, pour ces raisons et autres déduites " en la dite déclaration, la Corporation du Township de Stanfold n'avait pas le " droit de faire vendre le lot de terre, ni la Corporation du Comté d'Arthabaska, " aussi partie défenderesse, le pouvoir de faire cette vente ; et conclut à la nullité " de l'acte de vente ainsi consenti par le secrétaire-trésorier à Edward J. Charl- " ton, le dix de février mil huit cent soixante et cinq, à ce que le dit Edward " J. Charlton, remette la possession du dit lot de terre, et enfin à ce que la Cor- " poration du Township de Stanfold, et la Corporation du Comté d'Arthabaska, " soient condamnées solidairement à lui payer la somme de douze cents piastres " de dommages, intérêts et dépens.

" Considérant que par leurs défenses à la demande, les défendeurs ont plaidé " entre autres choses qu'il s'est écoulé plus de deux ans depuis le deux de février, " mil huit cent soixante trois, date de la dite adjudication et vente, même depuis " la passation du Statut de la vingt septième année du règne de Sa Majesté " chapitre neuf, jusqu'au seize de janvier mil huit cent soixante sept, jour que " l'action en cette cause a été intentée, et qu'ainsi cette action est prescrite et " éteinte :

" Considérant: 1o. qu'il est établi que le dit lot de terre a été adjugé et vendu " le deux de février mil huit cent soixante trois par le secrétaire-trésorier du " conseil municipal du comté d'Arthabaska au dit Edward J. Charlton, à l'ins- " tance de la corporation du Township de Stanfold, pour des cotisations munici- " pales qu'elle prétendait lui être dues, ainsi que pour prix de travaux faits ou " prétendus faits sur ce lot de terre et pour cotisations d'écoles dans ce même " Township : et que le dix de février mil huit cent soixante cinq, le dit Secré- " taire Trésorier en a consenti acte de vente au dit Edward J. Charlton, le tout " en vertu de l'acte municipal refondu du Bas-Canada section soixante une ;

" 2o. Qu'il s'est écoulé plus de deux ans depuis le deux de Février mil huit cent " soixante et trois, que le dit lot de terre a ainsi été adjugé et vendu au dit " Edward J. Charlton et même depuis la passation de l'acte, passé dans la " vingt septième année du Règne de sa présente Majesté, chapitre neuf, intitulé " Acte pour amender de nouveau l'acte municipal du Bas-Canada," chapitre " vingt quatre des Statuts Refondus pour le Bas-Canada, jusqu'au seize de Jan- " vier mil huit cent soixante et sept, jour que l'action en cette cause a été intentée.

" 3o. Que suivant l'esprit et la lettre même de cet acte, le délai de deux " années pour suivre la nullité de la vente de même que pour permettre au pro- " priétaire primitif de racheter son bien vendu en payant le montant prélevé avec " vingt pour cent en plus suivant le dit acte municipal refondu du Bas-Canada,

" section soixante-une, paragraphe six, court depuis le jour de l'adjudication et " vente et non depuis la date de l'acte de vente que le Secrétaire-Trésorier consent " au nom de la Corporation du Comté à l'adjudicataire.

" Quil résulte de ce qui précède que l'action du Demandeur aurait duo être " intentée dans les deux ans qui ont suivi la passation du dit acte de la vingt " septième année du Règne de Sa Majesté chapitre neuf, attendu que l'adjudica- " tion et vente avait eu lieu avant cet acte, tandis qu'elle n'a été intentée " qu'après l'expiration de deux années depuis ce même acte, qu'ainsi elle est " éteinte quant à ce qui concerne l'adjudicataire Edward John Charlton, seule- " ment;

" La Cour revisant le jugement rendu en cette cause et rendant le jugement " qui aurait dû être rendu en icelle, déboute l'action du Demandeur quant au " dit Edward John Charlton avec dépens encourus en cour de première instance " seulement contre le Demandeur et non encourus sur la présente Révision, dont " le Demandeur supportera la portion par lui encourue;

" Considérant que quant aux autres dits Défendeurs savoir: La dite Corpora- " tion du Comté d'Arthabaska, et la dite Corporation du Township de Stanfold, " elles sont garantes des irrégularités et des illégalités qui ont précédé et accom- " pagné la saisie et vente du dit lot de terre, lesquelles irrégularités et illégalités " sont la suite de négligence et de faute grossière de leur fait, et qu'en autant " elles ne peuvent invoquer en leur faveur la prescription des deux ans écoulés " depuis l'adjudication susdite;

" Considérant que le Demandeur souffre éviction de la moitié du côté Sud- " Ouest du lot en question laquelle moitié est prouvée valoir six cents piastres;

" Considérant que quant à l'autre moitié du dit lot, elle est en la possession du " nommé Jérémie Demers, du Township de Stanfold, cultivateur, lequel n'est " pas en cause, et qu'il n'est pas encore dépossédé de la moitié du dit lot, et qu'il " est inopportun, quant à présent, d'adjuger quant à la dite moitié du dit lot " aussi en possession du dit Jérémie Demers: La Cour condamne les dites deux " Corporations, savoir: La Corporation du Comté d'Arthabaska et la Corporation " du Township de Stanfold, conjointement et solidairement, à payer au Deman- " deur la somme de six cents piastres de dommages par lui soufferts et lui " résultant de la perte de la moitié Sud Ouest du dit lot de terre, avec intérêts " à compter du vingt sept décembre, mil huit cent soixante sept, [date du juge- " ment soumis à la révision] et les dépens tant en Cour de première instance " que ceux de Révision, réservant au Demandeur son recours en temps et lieu- " et de la manière qu'il avisera, pour tels dommages qu'il peut avoir éprouvés et " qu'il pourra éprouver par suite de telle expropriation que le susdit Jérémie " Demers pourrait avoir éprouvé ou pourrait ci-après éprouver de la moitié Nord " Est du dit lot de terre. Et les dépens alloués au Demandeur sont sur motion " à cet effet distraits en faveur de E. L. Pacaud, écuier, Procureur du dit " Demandeur."

L'honorable Juge Stuart *dissentiente.*

Les corporations défenderesses interjetèrent appel de ce jugement.

Elles disaient, le jugement doit être infirmé:

La Corporation du Comté d'Arthabaska et al., et James Barlow.

Il devait ou annuler l'acte de vente, si la limitation n'existait pas : ou débouter l'action, si telle limitation d'action existait. La Cour en Révision ne pouvait pas syncoper cette disposition de la loi, et dire que la limitation d'action n'existait pas contre les corporations, mais qu'elle existait pour l'adjudicataire : il fallait tout l'un ou tout l'autre : nous maintenons que cette limitation d'action existait en faveur des corporations ; et qu'ainsi le jugement de la Cour Supérieure, présidée par l'Honorable M. le Juge Polette, doit être maintenu dans son intégrité.

L'intimé répondait à cela : La prescription est la punition de celui qui ne veille pas à ses droits, et comment pouvait-il être puni de sa négligence, quand telle négligence n'avait pas existé chez lui. La Corporation de Stanfold n'avait jamais prélevé de taxes ; n'avait jamais fait saisir ses meubles exploitables avant de faire vendre sa terre, et la Corporation du Comté d'Arthabaska avait vendu, sans avis public, ainsi que voulu par la loi.

Les Corporations qui avaient vendu insistaient à ce que l'acte de vente qu'elles avaient fait à Charlton fut maintenu : on peut vendre la propriété d'autrui, et quand le propriétaire demande soit sa propriété ou des dommages, c'est au choix de celui qui a vendu de rendre soit la propriété ou de payer des dommages ; l'Intimé leur a laissé l'alternative par son action, elles ont déclaré vouloir maintenir l'acte de vente, c'était s'obliger à payer des dommages. La Cour en Révision n'a jugé, que comme l'ont demandé les parties, et cette volonté doit être respectée, et le jugement doit être confirmé.

CARON, J.—Barlow est propriétaire d'un lot de terre ; il vend à Demers la moitié $600 qui ne lui sont pas payées, *bailleur de fonds ;* Barlow garde l'autre moitié valant $600. Pour taxe scolaire et ouvrage de route fait sur le lot, la municipalité de Stanfold demande et celle du Comté d'Arthabaska fait faire la vente par encan de la totalité du lot, la moitié de Demers, comme celle restée à Barlow ; Charlton, l'un des défendeurs, adjudicataire pour $4. [le lot valait $1200].—Action par Barlow contre la Municipalité de Stanfold et du Comté d'Arthabaska et aussi contre Charlton, pour faire déclarer nulle la vente faite à Charlton de la moitié, et se faire lui, Barlow, remettre en possession de la moitié adjugée à Charlton, et aussi en dommages pour, en fesant vendre la moitié de Demers, avoir privé lui Barlow de son privilège de bailleur de fonds pour $600. Barlow dit en son action : remettez-moi la moitié vendue à Charlton et payez-moi la somme de $600 que me doit Demers, si non, payez-moi $1200 de dommages me résultant 1o. de la moitié vendue à Charlton, si elle ne m'est pas remise, et 2o pour la perte de mon privilége de bailleur de fonds sur la moitié de Demers.

Que les formalités voulues [les notices, annonces, etc.] n'aient pas été suivies, c'est admis et prouvé même de la part des deux Corporations, [Stanfold et Arthabaska] qui ont plaidé ensemble et la même chose, et aussi de la part même de Charlton, qui a plaidé seul, la même défense ; il est prétendu que tout en admettant le défaut de formalités allégué, et la nullité en résultant, le demandeur, lorsqu'il instituait son action, n'était plus à temps de le faire, son droit étant périmé et prescrit d'après l'acte, 27 Vic. chap. 9, sect. 11 qui, interprêtée à la façon des défendeurs, soustrait tant les municipalités que les adjudicataires à tout recours que peuvent avoir les propriétaires ou autres intéressés dans les immeubles vendus en paiement de taxes et cotisations, si ce recours n'est exercé dans

deux années à compter du jour de l'adjudication. Dans l'espèce, plus de deux ans s'étaient écoulés depuis l'adjudication, lorsque le demandeur a porté sa présente action, laquelle partant, pour cette simple raison, devait être renvoyée, aussi bien quant aux municipalités que par rapport à l'adjudicataire Charlton.

Le Juge Polette, siégeant en première instance à Arthabaska,—a accueilli cette double prétention des Défendeurs, et à renvoyé le demandeur de son action, qu'il a déclarée périmée et éteinte aux termes de la clause citée plus haut.

Le jugement soumis à la Cour de Révision [Stuart, Taschereau et Bossé] a été modifié [par Taschereau, Bossé, Stuart *différant*] de manière à admettre la prescription invoquée à l'égard de l'adjudicataire Charlton, à l'égard duquel l'action de Barlow a été renvoyée avec dépens, tandis qu'elle a été maintenue pour partie, quant aux Corporations, à l'égard desquelles la prescription du Statut est déniée. Il était prétendu, dans les motifs du jugement, que les municipalités sont *à toujours* responsables et garantes envers les parties qui souffrent de l'inexécution des devoirs et de l'abus des pouvoirs conférés et imposés à une Corporation qui n'ont pas droit d'invoquer la prescription du Statut, accordée aux adjudicataires de bonne foi, ou autres intéressés qui n'ont pas participé aux fautes commises par les municipalités.

En conséquence ce Jugement, en renvoyant l'action de Barlow contre Charlton avec dépens, condamne les deux municipalités à payer à ce dernier $600, étant la valeur de la partie de son lot qu'il perd, puisque Charlton ne peut pas en être dépossédé, mais quant à l'autre moitié, celle vendue à Demers, sur laquelle Barlow n'a qu'un droit hypothécaire pour le paiement d'une somme dont il n'est pas encore question, le Jugement, sans statuer à cet égard, préserve à Barlow tous droits qu'il peut ou pourra avoir d'après les circonstances.

Tel est la nature et le résumé du Jugement dont est appel. La dernière partie, celle qui réserve à statuer sur la moitié de Demers, me parait juste et correcte, surtout parceque Demers n'est pas en cause, et aussi parceque rien ne constate l'état où en est le paiement pour lequel cette partie du lot est hypothéquée. Quant à la partie du Jugement qui renvoie l'action à l'égard de l'adjudicataire, je la regarde comme correcte, la clause du Statut sur laquelle cette partie du Jugement est fondée me parait exonérer complètement l'adjudicataire de bonne foi, de tous recours pour nullité ne procédant pas de son fait, qui ne sont pas exercés pendant les deux années. S'il agit de bonne foi, il n'a pas à s'inquiéter si les formalités ont été suivies; il peut et doit présumer qu'elles l'ont été surtout si celui qui a intérêt à dire le contraire, le propriétaire, ne s'est pas présenté dans deux ans. Le fait prouvé que Barlow vivait sur les lieux, fait supposer qu'il savait que son lot avait été vendu. Dans ce cas, pourquoi ne pas se plaindre dans les deux ans. Charlton a donc justement été déchargé de l'action.

Mais quant à la partie du Jugement, qui tout en déniant aux Municipalités le bénéfice de la prescription de deux ans qu'elles invoquent, les condamne à payer à Barlow la somme de $600, étant la valeur de la moitié du lot qu'elles lui ont fait perdre en la vendant à Charlton, injustement et illégalement, comme dit plus haut, elle est, suivant moi, juste et légale en tous points. La clause du Statut ne saurait être interprétée de manière à exonérer les corporations des délits qu'elles commettent au préjudice des tiers, qui par le fait des Corporations et

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par le défaut des formalités voulues par la loi, sont exposés à n'avoir pas été informés des ventes de leur immeuble, que l'on fesait ainsi clandestinement à leur préjudice. La position de ceux qui commettent des délits ou quasi délits est bien différente de celle de ceux qui pouvaient ignorer le défaut de formalité et acheter de bonne foi ; pour eux il était juste de fixer un temps, après lequel ils pourraient jouir en paix et avec sureté de ce qu'ils avaient acquis de bonne foi, tandis que ceux qui avaient fait telle vente devaient être pour toujours garants de leur méfait.

Ce qui précède suffit pour indiquer que j'approuve le Jugement dont appel sous tous les rapports. Je l'approuve en ce qu'il déclare que les formalités voulues et requises par la vente d'immeuble pour taxes, etc., n'ont pas été accomplies dans l'espèce, en ce que les allégués de la déclaration et les conclusions, sont suffisantes pour justifier tout ce qui est ordonné et décrété par le dit Jugement, en ce qu'il admet la prescription de deux ans en faveur de l'adjudicataire Charlton, tandis qu'il la refuse à l'égard des Municipalités, en ce que pour ces raisons il renvoie l'action de Barlow contre l'adjudicataire, tandis qu'il condamne les municipalités à indemniser le dit Barlow, de la perte qu'il éprouve ; en ce qu'il réserve à l'appelant les recours qu'il peut avoir en temps opportun, au sujet du droit hypothécaire qu'il a sur la partie du dit lot qu'il a vendu à Demers, lequel n'était pas en cause, rien ne peut être statué à son égard.

Jugement confirmé avec dépens contre les appelantes dans toutes les Cours.

Badgley, J., et Monk, J., concoururent dans la confirmation du Jugement, disant que les parties, par leurs procédés et procédures, s'étaient fait une loi qui avait été adoptée par la Cour, en Révision, et qu'ils ne voyaient l'opportunité de changer ce Jugement ; mais tous deux dirent que la Cour de Révision aurait dû annuler l'acte de vente de la Corporation du Comté d'Arthabaska à Charlton, qu'ils auraient approuvé cette décision si elle avait été faite ; mais qu'ils confirmaient ce jugement car il était conforme à la loi des parties entre elles.

M. le Juge en chef Duval et Drummond, J., disaient que la Cour en Révision aurait dû suivre strictement la loi, et mettre à néant l'acte de vente de la Corporation du Comté d'Arthabaska à Charlton qui était nul en tout point.

Le jugement de la Cour d'Appel est motivé comme suit :

La Cour, après avoir entendu les parties par leurs avocats, sur le mérite, examiné tant le dossier de la procédure en Cour de première instance que les griefs d'appel produits par les dites appelantes et réponse à iceux, et sur le tout mûrement délibéré :

Considérant qu'il n'y a pas mal jugé dans le Jugement rendu par la Cour de Révision, siégeant à Québec, le cinquième jour d'Octobre mil huit cent soixante et huit, et dont est appel, confirme le dit jugement avec dépens contre les appelantes en faveur du dit Intimé ; et la Cour ordonne le renvoi du dossier à la Cour Supérieure siégeant à Arthabaskaville, *Dissentientibus* L'Hon. M. le Juge en chef et M. le Juge Drummond.

Montambault, Taschereau & Honan, pour les appelantes.

E. L. Pacaud, pour l'Intimé.

N. B.—M. le Juge en chef Meredith et M. le Juge Polette étaient en faveur de la limitation d'action.

M. le Juge en chef Duval, Drummond, Badgley, Monk, Stuart, pour annuler l'acte de vente. La Corporation du Comté d'Arthabaska et al., et James Barlow.

M. M. les Juges Caron, Taschereau et Bossé pour la limitation d'action si invoquée par l'adjudicataire de bonne foi, mais contre la limitation d'action quant aux Corporations municipales.

(E. L. P.)

SUPERIOR COURT, 1870.

MONTREAL, 11TH MARCH, 1870.

Coram TORRANCE, J.

No. 127.

In the matter of *Andrew Macfarlane, & al.*,

INSOLVENTS;

and

James Court, assignee,

PETITIONER;

and

The said *Andrew Macfarlane, & al.*,

CONTESTANTS.

HELD:—That where a deposition is missing from a record, and the judge is satisfied on the evidence of the Prothonotary, or otherwise, that the deposition cannot be found, an order may be issued for the examination *de novo* of the witness.

TORRANCE, J. This is an application by the assignee to be allowed to examine two witnesses, William Lindsay and John Macdonald, *de novo*, on the ground that their depositions, already taken, cannot be found. We have the evidence of the Prothonotary, John S. Honey, that he has made diligent search for the missing papers, and I have no hesitation whatever in granting the application.

Application granted.

D. Girouard, for the petitioner.
S. Bethune, Q.C., for the contestants.
(J.K.)

SUPERIOR COURT, 1870.

IN INSOLVENCY.

MONTREAL, 31ST MARCH, 1870.

Coram TORRANCE, J.

No. 947.

Macintosh vs. *Davis et al.*

HELD:—That the fyling of a declaration in an attachment for compulsory liquidation under the insolvent act of 1869 is irregular.

TORRANCE, J. The defendant moved that a declaration fyled by the plaintiff to accompany the writ of attachment be rejected from the record as not required by the Insolvent Act of 1869. A declaration is required by the Insolvent Act of 1864, S. 3, SS. 6, but not by the Act of 1869. The plaintiff says that the rules of practice (No. 15) require a declaration. The defendant's answer to that is that the rules were made for the Act of 1864 which required a declaration. The Court is with the defendant.

Motion granted.

J. A. Perkins, for plaintiff.
A. Cross, Q.C., for defendant moving.
(J.K.)

SUPERIOR COURT, 1870.

MONTREAL, 31st MARCH, 1870.

Coram TORRANCE, J.

No. 820.

Moineau vs. *Corbeille.*

HELD:—That where the Court cannot correctly know the limits of the land of plaintiff and defendant according to their titles and possession from the evidence of record in an action *en bornage*, it may order a plan to be made by a surveyor, showing the respective pretensions of the parties.

The parties were heard on the merits of an action *en bornage*, and the Court gave the following interlocutory judgment.

PER CURIAM:—La Cour, après avoir entendu les parties par leurs avocats respectifs, considérant que l'action est en bornage, et que les allégués des demandeur et défendeur ont rapport à leur possession respective et mettant en question leurs titres, et qu'on ne peut connaître correctement les limites de leurs héritages conformément aux dits titres et possession sans un plan figuratif d'iceux, est d'opinion et adjuge que la Cour n'a pas suffisamment devant elle les preuves nécessaires pour fonder un jugement, et en conséquence ordonne que par un arpenteur dont les parties conviendront, sinon sera nommé d'office par la Cour, il sera procédé en présence des dites parties ou elles dument appelées à dresser un plan figuratif, des lieux en contestation, désignant particulièrement leurs prétensions respectives tant d'après leurs titres que d'après leurs possessions alléguées, lequel arpenteur sera tenu de faire son rapport le plus tôt que faire se pourra à la Cour pour y être ultérieurement procédé ainsi que de droit.

L. L. Corbeil, for plaintiff.

Belanger & Desmoyers, for defendant.

(J. K.)

COUR SUPERIEURE, 1870.

MONTREAL, 20 JUIN 1870.

Coram BEAUDRY, J.

No. 1198.

Tracy vs. *Isaacson* et al.

JUGE:—Que la forclusion du défendeur de plaider à l'action ne peut pas être accordée par le protonotaire en certains cas.

Il s'agit ici d'une demande ou requête sommaire pour faire mettre de côté les forclusions mises au dossier par le demandeur contre les défendeurs, sous les circonstances suivantes:

Le demandeur a mentionné dans sa liste quatre pièces au soutien de son action; la pièce No. 4, était un reçu sous seing privé. Cette pièce n'a pas été produite avec la déclaration, le 4 mai; elle ne l'a été que le 20 mai dernier, après une première demande de plaider. Avis de cette production en a été donné le même jour; puis le 30 mai 1870 avis de nouveau de plaider, et le 7 juin un acte de forclusion est accordé par le protonotaire. Inscription à l'enquête, *ex parte*, enquête et inscription pour audition au mérite, *ex parte*.

Les défendeurs ont fait motion pour faire rejeter la pièce No. 4 comme produite irrégulièrement et faire annuler la forclusion et tous les procédés subséquents, se basant sur l'art. 141 C.P.C., et prétendant que le demandeur aurait dû demander le consentement des défendeurs ou la permission de la cour pour produire cette pièce.

Le demandeur soutenait qu'il s'était conformé à l'art. 106, en donnant avis à la partie adverse de la production de sa pièce No. 4; et que par l'art. 137 le protonotaire pouvait lui accorder un acte de forclusion à l'expiration des trois jours après la demande de plaider.

PER CURIAM. (Après avoir relaté les faits ci-dessus).

Les défendeurs ont invoqué l'art. 141, C.P.C. Le demandeur au contraire cite l'art. 106, et prétend s'y être conformé. Je pense que c'est cet article qui doit nous servir de règle ici, car il se rapporte aux pièces qui sont invoquées au soutien de la demande. Par l'art. 103 le demandeur ne peut procéder, tant que ses pièces n'ont pas été produites, et l'art. 106 ajoute qu'elles ne peuvent l'être sans en donner avis à la partie adverse, sauf le cas de l'art. 100, qui permet de retenir la pièce lorsqu'elle est sous seing privé, en mettant dans le dossier une copie certifiée par la partie ou son procureur (ici on a mis dans le dossier une pièce qui n'est pas certifiée.) *L'art.* 141 *ne peut s'appliquer au cas actuel*, car, quoique la disposition soit générale, elle n'a cependant rapport qu'aux pièces produites avec les *plaidoiries*, expression sous laquelle on ne peut faire mettre le bref d'assignation et la déclaration, et elle ne saurait mettre au néant la disposition spéciale contenue dans l'art. 106. Sur ce point, les défendeurs ne peuvent réussir à faire rejeter la pièce ou la faire considérer comme produite irrégulièrement. Cependant ils doivent réussir sur la forme de la forclusion. L'art. 141 dit que lorsqu'une partie n'a pas produit ses pièces de la manière prescrite, la forclusion ne peut avoir lieu sans l'ordre du tribunal. Le protonotaire ne pouvait accorder cette forclusion, et elle devra être mise au néant avec toutes les procédures qui l'ont suivie.

Le jugement est motivé comme suit:

The Court having heard the defendant, James O'Farrell, and the plaintiff on the motion made by the said James O'Farrell, on the 13th day of June instant, and on the whole maturely delibérated, doth declare the foreclosure entered of record in this cause, irregular and null, and doth set aside the same, as well as all proceedings had in the said cause by the said plaintiff since the fyling of said foreclosure, without costs.

Doutre, Doutre & Doutre, avocats du demandeur.

Carter & Hatton, avocats du défendeur O'Farrell.

Kerr, Lamb & Carter, avocats des défendeurs Isaacson & Hayes.

(G.D.)

SUPERIOR COURT, 1870.

MONTREAL, 31ST MARCH, 1870.

Coram TORRANCE, J.

No 53.

The Glen Brick Company vs. *Shackell.*

HELD:—That a witness shall not be interrogated about a copy of a statement until the non production of the original is accounted for.

TORRANCE, J.—This case comes up on a motion by the defendant to revise a ruling of BERTHELOT, J., at *enquete*. The action is to recover a balance remaining unpaid to the plaintiff on a subscription of ten shares in the company. The defendant pleads to the action that he was induced by false and fraudulent representations by the Company and its secretary, Walker, to subscribe for the stock. Walker was under examination and the following question was put to him.

"Did you not present to the defendant a statement of the affairs of the company after his second subscription and say when; and is not paper now shewn you marked "Bb" a copy thereof, and does not said paper show that before the first of March 1869, the company plaintiff was embarassed and insolvent, and working at a loss, and produce such original if you have it."

Plaintiff objects to this question as illegal and irrelevant under the issues and as relating to the affairs of the company at a period long subsequent to defendant's subscription, and farther, inasmuch as said paper, purporting by the question to be a copy of original statements of the company's affairs, cannot now be legally proved or fyled. The objection was maintained.

The Court now thinks that the question is inadmissible as seeking to prove a statement by secondary evidence before accounting for the non production of the original.

Motion rejected.

A. & W. Robertson for plaintiff.
Perkins & Ramsay for defendant.
(J. K.)

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 4TH MARCH, 1870.

Coram DUVAL, C. J., CARON, J., DRUMMOND, J., BADGLEY, J., and POLETTE, J., *ad hoc.*

No. 40.

L. J. A. PAPINEAU,

(*Defendant in the Court below,*)

APPELLANT;

AND

JOHN LOVELL,

(*Plaintiff in the Court below,*)

RESPONDENT.

Several seigniors agreed to take measures to protect their interests before the Courts and in Parliament. A committee named by them caused several factums, documents, &c., to be printed.

HELD:—That the members of the committee were jointly responsible to the printer for the price of the documents printed.

Semble. The committee might even have been condemned jointly and severally.

This was an appeal from the judgment of the Superior Court at Montreal and Court of Review, reported at p. 317 of the 11th vol. Lower Canada Jurist.

CARON, J., after stating the allegations of the declaration and the plea:

Action contre quatre défendeurs, comité seigneurial, savoir: Campbell, Pangman, Wurtele et Papineau, l'appelant, tous quatre condamnés en première instance, conjointement, non solidairement (MONK, J.,) son jugement confirmé en Révision, (Berthelot, Monk,) juge Mondelet diffère.

Trois ont acquiescé au jugement de Révision. Papineau seul appelle.

Cet acquiescement des trois ne saurait nuire à l'appelant, ainsi qu'il le prétend, parce que ses moyens de défense sont autres que ceux des autres défendeurs, qui, eux, auraient été justement condamnés, tandis que lui l'aurait été injustement.

Cet acquiescement du moins, parfaitement d'accord avec la preuve, établit quant à tous les défendeurs, l'appelant comme les autres, les faits suivants, sur lesquels il ne me reste aucun doute, savoir:

1o. L'existence et la composition du comité, sous le nom de Comité Seigneurial.

2o. Que le défendeur (appelant) en a fait partie dès le moment de sa formation et tout le temps qu'il a duré.

3o. Que le comité était chargé de surveiller les intérêts des seigneurs (souscripteurs) et de faire à cet effet ce qui était par eux jugé nécessaire, sans spécification spéciale de ses attributions.

4o. Que les impressions dont Lovell réclame paiement ont été par lui faites et que le prix en est correct.

5o. Qu'elles ont été faites par l'ordre du comité, à la connaissance, au vu et su, avec l'assentiment de ses membres ou du moins de quelques uns ou quelqu'un d'eux.

Ces faits, abondamment prouvés ou admis, expliquent assez pourquoi les défendeurs, C. Pangman et Wurtele, après avoir contesté la demande dirigée contre eux, ont ensuite acquiescé au jugement qui les condamnait chacun à payer la même somme que celle pour laquelle le défendeur Papineau a pris le présent appel.

Cette différence suggère la nécessité d'examiner savoir, si de fait, ainsi qu'il le prétend, il a à invoquer des moyens de défenses que les autres n'avaient pas.

Ces moyens sont ceux qu'il allégue dans son exception:

1o. Qu'il n'était pas seigneur et n'avait aucun intérêt personnel comme tel.

2o. Que tout ce qu'il a fait l'a été au nom et pour son père, qui lui était seigneur et qu'il représentait comme son mandataire et rien de plus.

3o. Qu'il n'est pas responsable des actes et engagements de Wurtele qui était bien le secrétaire de ce comité, mais non son agent et autorisé à le lier.

4o. Qu'il n'a eu avec le demandeur aucune communication personnelle ni directe, ni indirecte au sujet des impressions.

Qu'il ne fut pas seigneur lui-même, la chose est admise, mais comme il est établi que cependant, il était bien et dument membre actif et agissant du comité, démontre qu'il n'était pas nécessaire d'être seigneur pour faire partie du comité; que d'ailleurs, quoiqu'il ne fut pas seigneur, son père l'était et que partant il

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avait grand intérêt à voir à ce que les seigneurs obtinssent justice et ne fussent pas privés de leur droits. Le défaut de sa qualité de seigneur n'est donc d'aucune importance dans la cause.

Il n'est pas mieux fondé dans sa prétention qu'il n'a agi que pour et au nom de son père et que si quelqu'un a été lié par ses actes, c'est son commettant que le demandeur connaissait et auquel il aurait dû s'adresser. Rien ne prouve qu'il en ait été ainsi, que ce soit au nom de son père que l'appelant agissait, surtout, que le demandeur savait ou devait savoir que la chose était ainsi; tout, au contraire, fait voir que dans tous les cas, l'appelant a agi en son propre et privé nom, comme les autres membres du comité; que rien n'a été fait ni dit qui fut de nature à indiquer au demandeur, que sous ce rapport il y avait une différence entre lui et les autres, la souscription faite au nom de son père, n'avait pas et ne pouvait avoir ce caractère et ce résultat; cette inférence, si elle était possible, serait repoussée victorieusement par la lettre ou note du 27 septembre 1858, adressée au demandeur, lui enjoignant de livrer à monsieur Cherrier les copies du factum qu'il demandait, laquelle note était non seulement signée de l'appelant, en son propre nom, et non comme agent de son père, mais bien agissant pour et au nom du comité seigneurial dont il était membre à la connaissance de l'appelant, cette déclaration faite à l'époque en question ne laisse aucun doute qu'alors l'appelant se regardait comme ayant été et étant encore membre du comité qu'il prenait sur lui de représenter et donnait sûrement bon droit au demandeur de croire qu'il agissait au nom et en la qualité qu'il prenait en signant la dite note.

Mais, dit encore l'appelant: M. Wurtele n'était que le secrétaire de ce comité, comme tel, il était de son devoir de tenir note des délibérations, faits et gestes de ses membres, et d'enrégistrer leurs résolutions et décisions, mais il n'avait pas le droit de les compromettre et de les lier par des dépenses de l'importance de celles encourues par les impressions dont il s'agit; pour qu'il eût eu ce droit, il aurait fallu qu'il fut l'agent reconnu et autorisé du dit comité. D'abord, il n'est pas correct de dire que Wurtele n'était que secrétaire du comité, il en était en même temps membre, et d'après la preuve, le plus actif et le plus agissant de tous.

Comme membre, il pouvait agir valablement pour le comité et lier les autres dans tout ce qui était dans les attributions de l'espèce de société qu'ils avaient formée entre eux. Si, comme on le prétend, il était tenu d'enrégistrer les délibérations et procédés du comité, c'était aux autres membres et à l'appelant en particulier à protester contre les actes qu'aurait faits Wurtele et qu'il n'aurait pas approuvés; le silence est une approbation, une ratification qui les rend responsables de ces actes, comme s'ils eussent été faits par eux-mêmes. Il est en preuve que dans une occasion où il s'agissait en comité où assistaient tous les membres le composant, de partie des impressions dont il est question, le dit appelant s'opposa à ce que l'un des factums des avocats fut imprimé aux frais du comité; mais que cette opposition de l'appelant ne fut pas accueillie par les autres, qui décidèrent que le document serait imprimé comme demandé, décision à laquelle l'appelant se soumit sans protestation. C'était pour lui, là une occasion favorable de faire savoir au demandeur qu'il ne se tiendrait pas pour

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responsable des dépenses auxquelles il s'était opposé et qui étaient faites malgré lui ; ne l'ayant pas fait, il est censé avoir approuvé cette décision de la majorité, et donné lieu au demandeur de croire qu'il était comme son collègue, responsable des ouvrages ainsi résolus et de tous ceux ordonnés, au nom du comité par leur secrétaire reconnu. C'est donc à tort que l'appelant prétend que Wurtele n'était pas l'agent du comité et qu'il ne liait pas tous ses membres quant aux dépenses, qu'il ordonnait en son nom.

Ce qui précède répond suffisamment à la dernière prétention de l'appelant, lorsqu'il dit qu'il n'est pas tenu, parce qu'il n'a eu avec le demandeur aucune communication ni directe ni indirecte.

D'abord, il est difficile de ne pas trouver une communication très-directe dans la note qu'il adressait au demandeur le 27 décembre 1858, lui enjoignant de livrer les copies de factum demandées par M. Cherrier, et dont il a été fait mention plus haut. Si le dit appelant n'avait rien eu à faire avec les impressions exécutées par le demandeur, quel droit avait-il de le requérir, d'en délivrer deux cents copies et cela au nom du comité comme le démontre sa signature et la qualité qu'il prend.

Mais quand même il n'y aurait pas cette preuve d'intervention directe, est-il possible de croire que l'appelant ne connaissait pas les ordres donnés au nom du comité pour les impressions en question par le secrétaire et les autres membres ; or s'il le connaissait et qu'il ne les désavouait pas, il les approuvait, et en est partant responsable.

Pour ces raisons, l'appelant était tenu comme les autres et a été bien condamné par le jugement dont est appel.

Il aurait été loisible, peut-être de condamner les défendeurs solidairement, mais il n'y a pas de plainte à ce sujet, il est inutile d'en parler.

Judgment confirmed unanimously.

R. Roy, Q.C., for the appellant.
J. L. Morris, for the respondent.
(J.L.M.)

CIRCUIT COURT, 1870.

MONTREAL, 15TH MARCH, 1870.

Coram TORRANCE, J.

No. 2246.

Demers vs. *Lefebvre*, and *Vandal et al.*, opposants.

HELD:—That a gratuitous donation in May, 1863, of moveables without displacement, although there was registration in the registry office of the domicile of donor and donee, is inoperative as against posterior creditors.

TORRANCE, J. The defendant in May, 1863, made a gratuitous donation (Martin, N.P.,) to her three daughters Emérencienne, Sophronie and Sophie Vandal, of the moveables seized under the judgment against the defendant. The debt of the plaintiff only arose after the donation, but it was for wood supplied to the common domicile. The donation was registered on the 7th September, 1864, in the registry office at Montreal, which was the domicile of both donor and donees. The donation stipulated for retention of usufruct to the donor as

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long as she lived. The donor has always continued in possession. The plaintiff took in execution the moveables for the debt of the defendant. The opposants, the donees, have fyled an opposition *à fin de distraire*, and the question before the Court is whether the title to the proprietorship has vested in the donors under the circumstances. There was no displacement or delivery to the donees. Can a posterior creditor take the property for a debt of the donor? The C. C. 777, was cited at the argument, but the jurisprudence anterior to the Code should be our guide, and that jurisprudence has been well established ever since the case *Seed* and *Bonacina*, 3 L. C. R. 446. The rule laid down there will be applied here, and the opposition is dismissed with costs.

Opposition dismissed.

F. X. A. Trudel, for opposants.
De Bellefeuille & Turgeon, for plaintiff.
(J.K.)

CIRCUIT COURT, 1869.

MONTREAL, 15TH DECEMBER, 1869.

Coram TORRANCE, J.

No 1864.

Copland & al. vs. *Cauchon* & al.

HELD:—That where a plaintiff gives notice of a motion to reject an exception *à la forme*, as not filed within the delays limited by the C. C. P. 1070, and afterwards answers the exception by an answer in law and fact, without reserve of the motion, the answer is a waiver and *désistement* of the motion.

PER CURIAM.—The plaintiffs have made a motion to reject an exception *à la forme* as fyled after the four days limited by the C. C. P. 1070. The writ and declaration were returned into Court on the 26th November, 1869. On the 1st December the exception was fyled. On the 6th December the Plaintiffs gave notice of the present motion, and on the 9th December, they fyled an answer *in law and fact* to the exception. The defendants contend that the answer made on the 9th December was a waiver and *désistement* of the motion of which notice was given on the 6th, as the answer made no reserve of the right to make the motion. The Court is with the defendants.

Laflamme & Laflamme, for plaintiff.
Doherty & Doherty for defendant.
(J. K.)

Motion rejected.

COUR SUPERIEURE.

EN REVISION.

MONTREAL, 25 AVRIL, 1870.

Coram BERTHELOT, J., MACKAY, J., BEAUDRY, J.

No. 308.

Dupuis et al. vs. *Dupuis*.

JUGE:—Que la révocation d'un second testament n'a pas l'effet de faire revivre un testament précédent; si l'acte de révocation n'en contient pas une disposition expresse ou que cela ne résulte pas des circonstances sous lesquelles cette révocation a eu lieu.

Les demandeurs ont dirigé contre le défendeur une action en pétition d'hérédité. Le défendeur a plaidé une exception dans laquelle il nia que le père des demandeurs fut décédé intestat, et il allégua que le 5 janvier 1858, il a fait un

testament solennel devant Mtre. Bédard, N. P., et deux témoins en faveur de son épouse, et qu'il décéda ensuite le 1er juillet, 1864, sans avoir révoqué ce testament.

Par leur réponse spéciale, les défendeurs admettent ce testament, mais ils allèguent que le 18 octobre 1856, leurs père et mère ont donné par acte entre vifs pardevant Mtre Normandin, N. P., au défendeur, un de leurs enfants, plusieurs immeubles et la plus grande partie de leurs meubles.

Que le 19 octobre 1859, leur père fit un autre testament par lequel il ratifia cet acte de donation et il donna tous ses autres biens à deux de ses filles et révoqua tous autres testaments antérieurs.

Que le 10 novembre, 1860, leur père, par acte reçu devant Mtre Langevin, N. P., a révoqué son testament du 19 octobre 1859, déclarant qu'il le révoquait et l'annullait expressément comme s'il n'avait jamais été fait ni avenu. Qu'étant ensuite décédé sans faire aucunes autres dispositions testamentaires, il résulte que le testament du 5 janvier 1858 a été bien et dûment révoqué.

La contestation étant ainsi liée et les parties ayant été entendues au mérite, la Cour (TORRANCE, J.,) a maintenu les prétentions des demandeurs (*Vide ante:* pp. 26-28.)

Le défendeur ayant porté ce jugement en révision devant trois juges à Montréal, prétendit que l'acte de révocation du testament du 10 novembre 1860, a eu l'effet de faire revivre le testament du 5 janvier 1858.

Le défendeur cita les autorités suivantes:

Code Civil, Art. 896, 2 Bourjon-Révocation des Testaments, chap. 4, page 390.

Ricard, Don. vol. 1. part. 3 chap. 2, sec. 4.

Duranton, vol. 9, No. 441. Merlin, Rép. vol. Révocation de testament, § 4. nos. 5 et 6.

Les demandeurs ont soutenu devant la Cour de Révision, que cette prétention du défendeur n'est nullement fondée. Pour que la révocation d'un testament ait l'effet de faire revivre un testament précédent qu'il avait révoqué, il faut que l'acte de révocation en contienne une disposition expresse ou que cela résulte nécessairement des circonstances sous lesquelles cette révocation a eu lieu.

C'est ce qu'enseigne Bourjon, Tome 2, 6me partie, ch. 4, nos. 4 et 6. Le même p. 392, ch. 5, no. 3.

Troplong, Don. et Test. no. 2065.

L'article 896 du code civil du Bas-Canada n'a pas introduit un droit nouveau et les commissaires ont indiqué les deux auteurs ci-dessus comme étant les sources où ils l'avaient puisé. C'est donc en se reportant à ces auteurs que l'on trouve la véritable interprétation que l'on doit donner à cet article qui, en supposant qu'il serait contraire aux auteurs cités, ne pourrait régir cette cause puisque la révocation dont il s'agit a eu lieu longtemps avant le code.

Ricard, Don. Tome. 1, part. 3. nos. 177 à 183.

Bourjon, Tome 2, p. 383, part. 6, ch 2, sec. 4, no. 17.

BEAUDRY, J.—Les demandeurs, par leur action, déclarent que Frs. C. Dupuis et Flavie Barse dite Demers, père et mère des parties, sont décédés *intestat* et réclament partie de la succession.

Le défendeur oppose le testament du père en date du 5 janvier, 1858, (Bédard Notaire) en faveur de sa femme, puis une donation du 11 octobre 1865, par cette

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dernière au défendeur de tous ses biens, et le 7 février 1866 un testament de la même en faveur du défendeur.

Les demandeurs répondent que postérieurement au testament de Frs. X. Dupuis, il a fait, conjointement avec sa femme, donation à Arsène, l'un des demandeurs, de plusieurs immeubles et de meubles, composant tout ce qu'il possédait alors, et a confirmé cette donation par un testament du 19 octobre 1859; rétrocession par Arsène le 11 juin 1860, et révocation le 10 novembre 1860 par Frs. X. Dupuis du testament du 19 octobre 1859.

La question soulevée est de savoir si la révocation d'un testament fait revivre un testament antérieur qui se trouve révoqué par ce second testament? Troplong dit que la négative est généralement adoptée. Néanmoins on trouve dans l'ancienne jurisprudence plusieurs décisions contraires. Voir Duplessis, des testaments, sec. 5, No. 16, tome 2, page 191 Edit. in 4o., et Ricard partageait ce sentiment.

D'Aguesseau semble s'être prononcé dans le sens contraire, et un arrêt du 22 mai 1691, a prononcé suivant ses conclusions.

On pourrait sans aucun doute trouver d'autres opinions soit d'un côté ou de l'autre, aussi les commissaires chargés de rédiger le Code Civil, ont-ils cru devoir, au milieu de ce conflit, déclarer (Art. 896.) Que dans ce cas " à défaut de disposition expresse, c'est par les circonstances et les indices de l'intention du testateur qu'il est décidé si la révocation du testament qui en révoque un autre, est destinée à faire revivre le testament antérieur." C'est ce qui avait lieu dans le droit romain, Domat, test. tit. 1, sec. V, Nos. 3, 4, 5. Pothier, test., p. 388, dit: que quoiqu'un second testament qui contient une clause de révocation du premier, soit nul dans la forme, le premier ne laisse pas d'être révoqué par cette clause, car la révocation des testaments peut se faire *nuda voluntate*, pourvu que ce soit par écrit; car quoique ce second testament ne soit pas revêtu des formalités nécessaires pour le rendre valable comme testament, la clause de révocation n'est pas assujettie à ces formalités.

Cependant, je pense qu'il en serait autrement si l'acte était déclaré faux.

Ici nous avons bien un second testament qui révoque le premier, mais ce second testament est lui-même révoqué de la manière la plus formelle, *comme s'il n'avait jamais été fait ni avenu.*

Frs. X. Dupuis déclare néanmoins que c'était ses intentions qui étaient exprimées au dit testament et parmi ses intentions se trouve la révocation du premier testament.

Adoptant la règle du Code, je dirais que ce n'était pas l'intention de Frs. X. Dupuis de faire revivre le premier testament et pour ce motif et non en vertu de la règle générale exprimée par Troplong, je confirmerais le jugement dont on demande la révision. Mais il y a plus, c'est que d'après le Code et les autorités, sur lesquelles est appuyé l'Art. 892, § 4, le premier testament a été virtuellement révoqué, par la donation qu'a fait Frs. X. Dupuis à Arsène Dupuis, en sorte que je ne puis hésiter à confirmer le jugement.

Jugement confirmé.

Dorion, Dorion & Geoffrion, avocats des Demandeurs.
Cartier, Pominville & Bétournay, avocats du Défendeur.
(P.B.L.)

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 9TH JUNE, 1870.

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

THE QUEEN

vs.

EDWARD C. FRASER.

HELD:—1. That even before 1st January, 1870, on a trial for a misdemeanor, the Crown, might without shewing cause, direct jurors, on their names being called by the Clerk of the Court, "to stand aside," until the panel has been gone through.*

2. Illegal evidence allowed to go to the jury under reserve of objection may be subsequently ruled out by the judge in his charge, and the conviction is not invalidated thereby, if it does not appear that the jury were influenced by the illegal evidence.

3. The Court of Queen's Bench has power to adjudicate upon a reserved case of misdemeanor in the absence of the defendant, who has fled beyond the jurisdiction of the Court.

This was a case reserved by Mr. Justice MACKAY under C. S. L. C. cap. 77, sec. 57.

The case was stated by the learned judge as follows:—

"The indictment reads that Edward C. Fraser, on the 18th of April, 1868, at Montreal, did knowingly and fraudulently obtain from David Robertson certain goods and chattels, his property, to wit, three ½ chests of gunpowder tea worth $136.50—three ½ chests of gunpowder tea of the value of $85.25, &c., &c., with intent to defraud said David Robertson of the same, and of the said respective values thereof—against the form of &c., &c.

The defendant was tried before me on the 7th, 8th, and 9th of April, 1869, at Montreal at the term of the Court of Q. B., Crown Side, then being held.

At the commencement of the trial, on the 7th of April, while the jury was being empanelled and the jurors called, the name of John Hicks was called, and said John Hicks appeared and answered, and was about [illegible] into the jury box when he was ordered to stand aside by the counsel for the prosecution. The defendant's counsel objected to this proceeding by the counsel for the prosecution, and claimed that, upon trial of such a case as the present misdemeanor case the Crown, or those prosecuting, had no right to order jurors to stand aside, but only right to challenge for cause.

I ruled against the defendant, and said John Hicks was ordered to stand aside, and he was not sworn. I intimated at the time that, in the event of defendant being convicted, I would state a case, and reserve for the Court in term to say whether my ruling just referred to was correct and legal, or was erroneous.

Michael Carrol, another juror, was then called, and he answered; but was in like manner ordered to stand aside by the counsel prosecuting the indictment; defendant's counsel objecting as before, and I ruling, and intimating, as before

* By 32—33 Victoria, cap. 29, sec. 38, which took effect on 1st January, 1870, "in "all criminal trials, whether for treason, felony or misdemeanor, four jurors may be "peremptorily challenged on the part of the Crown; but this shall not be construed to "affect the right of the Crown to cause any juror to stand aside until the panel has "been gone through, or to challenge any number of jurors for cause."—*Reporter's Note.*

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upon Hicks' being ordered to stand aside. Michael Carrol, of course, was not sworn. In like manner seven others, jurors called, were ordered to stand aside, and were not sworn.

On the same day Alfred Rimmer was called as a witness for the prosecution, and at his examination he was asked as to whether he had sold defendant goods, and whether he had had conversation with defendant about his business. The defendant's counsel objected to proof of sales to defendant by others than David Robertson, and to proof of circumstances whatever about such other sales.

I overruled the objection, stating that, in the event of defendant being convicted, I would state a case, and reserve for the Court in Term to say whether my ruling last referred to was legal, or was erroneous.

Rimmer then said that the defendant on the 18th of April, 1868, was indebted to him in respect of a purchase made from him in February, 1868; that he had asked defendant about his business, and that defendant said that he owned his own place and had about $7,000 of capital; that afterwards he, Rimmer, sold to defendant, took defendant's note, and that defendant never paid him a penny; the note fell due 26th May, 1868.

John H. Semple on the same day, 7th April, was examined as a witness for the prosecution, and swore to defendant's having purchased on the 27th January 1868, from his firm of Moore, Semple & Hatchett, goods, for which defendant gave a note due 30th May. This evidence was objected to by defendant's counsel, by objection similar to that made upon Rimmer's examination, and hereinbefore stated. I overruled the objection, and stated as when disposing of the objection made in the case of Rimmer's evidence.

[It is to be observed that Semple was not asked as to statements by the defendant to him, and did not, in fact, speak of any such, or of conversations with defendant.]

John Francis Crean was afterwards examined for the prosecution, and was asked as to a Tea Company, for which Crean was agent, selling defendant teas in February, 1868, and as to conversation between him, Crean, and defendant, as to defendant's circumstances about the 11th of February, 1868. Defendant's counsel objected to this evidence, and to Crean being so asked; making like objection as before upon Rimmer's examination.

I overruled the objection, exactly as before; and Crean proved conversation with defendant, and statements by defendant, made about the 11th of February 1868; that he owned the house he then occupied, and a good part of the neighboring street.

On the 8th of April, second day of trial, early that day, I stated from the bench, to defendant's counsel, that I would charge the jury to disregard the evidence of Rimmer, and of Crean, as to statements by defendant to them about his business, and about his owning the house he occupied, and other property, unless these statements could be shown to have influenced David Robertson, or his salesman, when delivering to defendant the goods mentioned in the indictment.

On the 9th of April, I charged the jury, and in doing so said, among other things:

"As to the fact of defendant having made other purchases, and as to the fact "of his owing money upon other purchases, I have admitted evidence, and I "think that the circumstances of defendant ought to be considered. Nevertheless, as to what *Rimmer*, and others, have said that the defendant said to them, "when about purchasing from them, I tell you, in favor of defendant, to disregard these alleged statements by defendant, about his business and property, "and to take the fact of the defendant's indebtedness, as spoken of by Rimmer "and others, and no more, from these witnesses. These alleged statements by "defendant about his business and property have not been proved to have moved "Robertson, or his salesman, in any way, to the transaction referred to in the "indictment."

The jury by their verdict found defendant guilty, (with a recommendation to mercy,) but judgment has not followed, because defendant has disappeared, and although a warrant has issued against him, to have him arrested, he cannot be found.

The opinion of the Judges, Court of Queen's Bench, is requested as to whether the conviction of defendant is to be maintained.

Is the conviction to be set aside? Was the jury composition regular and legal; was the ordering of the juror, John Hicks, to stand aside, legal, and so of the juror Michael Carrol, and so of the other seven jurors, who were ordered to stand aside?

Then, again, is the conviction bad, because of my having ruled as stated upon Rimmer's examination, and Semple's and Crean's, notwithstanding my charge to the jury, above stated?

Montreal, May 17th, 1869."

J. A. Perkins, for the Crown:—The Grand Jury of this District, the 2nd October, 1868, returned "True Bill" against Edward C. Fraser, upon indictment brought under 18 Vict., c. 92, s. 11, (Con. Stat. Canada, ch. 92, sec. 73), for having, the 18th day of April, 1868, obtained of David Robertson, of Montreal, Merchant, property, groceries, of the value of $465.72, with intent to defraud, (a misdemeanor, punishable by imprisonment for any period not exceeding two years, with or without hard labor.)

Upon plea of "Not Guilty," he was tried before this Honourable Court, (Mr. Justice Mackay, presiding,) during the 7th, 8th and 9th days of April last. The jurors sworn returned a verdict of Guilty, with a recommendation to mercy.

The matter comes before this Honourable Court upon case reserved by the Honourable presiding Judge, as to

1st, The right of Counsel prosecuting to order and request (as allowed by the Court) one or more jurors to stand aside.

2nd, The right of the prosecution to prove by others than the prosecutor (David Robertson) conversations with the accused, as to his affairs, prior to the 18th April, 1868.

3rd, Upon such evidence allowed, whether or no the charge of the presiding Judge, charging the jury to pay no attention to such conversations, save as relating to his indebtedness to parties holding same with the accused, effectually rules out such evidence (if illegal) so that the same cannot thereafter be questioned.

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The Crown, under the case reserved, which states, "Judgment has not followed, because Defendant has disappeared, and although a warrant has issued "against him, to have him arrested, he cannot be found," respectfully submits, that the case reserved cannot be argued before or considered by this Honourable Court in the absence of the accused, who should not be allowed to obtain the opinion of the Court without being present to abide its final and all-wise decision. Should it be decided that there was error in the decisions given, there would have been mistrial, and the accused be liable to new trial.

No motion for, or demand of, new trial is heard or sanctioned without the personal presence of prisoner.

"All Defendants must be present when the Rule for New Trial is moved for "—otherwise some of Defendants would get the opinion of the Court by putting "forward one of their number, they keeping out of the way."

R. *vs.* Teal and others, 11 East, 307.

R. *vs.* Askew and others, 3 M. & S., 9.

R. *vs.* Lord Cochrane and others, *Ib.* 10 (*n.*)

R. *vs.* Hollingberry and others, 4 B. & C., 329.

See also R. *vs.* Gibson, 7 Mod. R. 205, 2 Str. 968.

Wharton Am. Cr. Law, § 3228. "The Defendant must be personally in "Court at the application for New Trial, and, where several Defendants are "convicted, *all* must be actually present."

2 Denison's Crown Cases, 372, Note c.

As to the presence of prisoners in Court when a motion is made for a New Trial.

Regina *vs.* Cauldwell, Mich. Term, Q. B., 1851.

The Defendant in this case was tried on an indictment for perjury, before Erle, J., at the Berkshire Summer Assizes, and having been found guilty, was sentenced to transportation for seven years. *Pigott* and *Huddlestone*, on the 6th November, being about to move in the Queen's Bench for a New Trial,

Lord Campbell, C. J., said, Is the Defendant in custody?

Pigott—He is not.

Lord Campbell, C. J.—Is he present in Court?

Pigott—No.

Lord Campbell, C. J.,—Then we cannot hear your application.

Pigott—Since 11 George 4, and 1 William 4, c. 70, it has not been decided to be necessary. In *Rex* vs. *De Berenger and others*, 3 M. & S., 67, a motion was made for arresting the judgment, although two of the Defendants were not present to receive the judgment. In this case no warrant has been issued for committing the Defendant in execution.

Lord Campbell, C. J.—I have always considered it to be a hardship, where there are several Defendants who have been found guilty on an indictment, not to allow one of them to move for a New Trial, unless all the other Defendants are present when the motion is made. But there can be no such hardship where there is but one Defendant. In this case peculiarly the Defendant ought to be in Court. Sentence has been passed, which he has hitherto evaded, and the Court will not permit him to make the experiment of obtaining a new trial without coming into Court to abide the consequences in case we should refuse the rule.

Sec. 1 Chitty's Crim. L., 656; 2 Dow & Ry, 46. But as a general rule, when an application is made for a new trial, all the Defendants must be actually present in Court, unless some special ground be laid for dispensing with the rule. As to the power of the Court to dispense with the presence of the Defendant; see R. *vs.* Boltz, 6 Dowl. & Ry. 65; see also Reg. *vs.* Cauldwell (above cited), and see Bac. Abr. "Trial," L. 9.; Com. Dig., "Indictment," N.; Tidd, Prac. 945; Rex *vs.* Cochrane (Lord), 3 M. & S., 10, *n.*

It is admitted that in moving for a new trial where the Defendant is not liable to personal punishment, but to a fine, it is not necessary that the Defendant should be present in Court.

Regina *vs.* Parkinson, Denison & Pearce, Crown Cases, vol. 6, pages 457-8; S. C. 21, L. J. M. C., 48 (*n*)

Russell on Crimes, Edition 1857, vol. 2, p. 726.

Rex *vs.* Mawbey, 6, T. R., 638; Tidd, 942, 943.

It may be now stated that defendant might have attempted to obtain a new trial upon matters set forth in the case reserved. His presence then would have been required. His application would not have received audience in his absence. Why, then, if the Honourable presiding Judge *ex mero motu*, and for the benefit of the accused alone, chooses to reserve points, the reservation whereof depended solely upon his own will, should the accused be in a better position, and while not trusting to his own case as ably submitted, attempt to obtain the decision of this Court while beyond and away from its high authority and jurisdiction.

The Crown therefore respectfully submits that no call to argue the reserved case should now be made upon the parties prosecuting.

2o. As to the ordering, to stand aside of John Hicks and other jurors, it may be at once stated that it was made in obedience to a request of prisoner's Counsel for a mixed jury. Once made, it was taken advantage of, but the prosecutors persisted, well knowing their right, and fearing neither injustice nor illegality.

In this Province, in cases of misdemeanor, Counsel for the Crown have by the Court been permitted, after objection and argument, to order jurors to stand aside.

Regina *vs.* Charles H. Adams *et al.*, (the Kidnapping Case), September Term, 1865.

Regina *vs.* Jean Bte. Leger dit Parizien, (on Indictment for Perjury). September Term 1867. Hon. Mr. Justice Badgley.

See also Wharton's Am. Cr. Law, pp. 2956-7.

Joy on Challenges, page 146.

Roscoe, Criminal Evidence, Ed. 1866, page 197, Challenges to the Polls.

"A practice, however, which has continued *uniformly* from the time of Edward I. to the present, enables the prosecutor to exercise practically the right of peremptory challenge; because, when a man is called, the juror will, on his request, be ordered to *stand by*, and it is only when the panel has been exhausted, that is, when it appears that, if the jurors ordered to stand by are excluded, there will be a defect of jurors, that the prosecutor is compelled to show his cause of objection."

The Queen vs. Edward C. Fraser.

Mansell *vs.* Regina, Dear. & B. C. C., 375. When it appears that, in consequence of the peremptory challenges by the *defendant*, and the jurymen ordered to stand by at the request of the prosecutor, a full jury cannot be obtained, then the proper course is to call over the whole panel again, only omitting those that have been peremptorily challenged by the defendant.

R. *vs.* Geach, 9 Car. & P. 499; 38 E. C. L. R. And even on the second reading over of the panel, a juryman may be ordered to *stand by* at the request of the prosecutor, if it reasonably appears that sufficient jurymen may yet appear. Mansell *vs.* Reg. (*supra.*)

3. As to the evidence of Alfred Rimmer, John H. Semple, and John F. Crean, mentioned in the case reserved, it will be remembered that the Honorable Judge in his charge effectually ordered the jury to disregard certain portions thereof. The jurors receive the law from the Court: it is not to be presumed that *they did regard* such portions. The contrary is certainly to be presumed, as in all respects the jurors obey the rulings of this Honorable Court. That the charge directed the disposal of any (pretended) illegal evidence, estopps any party from further inquiry as to its supposed effect. It will no doubt be said, and much stress laid thereon, by the learned Counsel representing defendant, "Oh! but the jurors heard the evidence. It had its effect upon their minds." This is a strange argument to address to Her Majesty's Court of Queen's Bench, for it is alone based upon the (unfounded) supposition that jurors wholly disregard the charges of the Judges of this Honorable Court.

But the prosecution may well contend that the evidence, legal or illegal, was wholly immaterial, and therefore could not, by any possibility, have influenced the result. No error, therefore, exists.

Vallance *vs.* King, Supreme Court of New York, 3 Barb. Sup. Ct. Rep., 548

Wiggin *vs.* Damsell, 4 New Hamp. Rep., 69.

Bank *vs.* Woodard, 5 N. H. Rep., 301.

Crosby *vs.* Fitch, 12 Conn., 410.

Landon *vs.* Humphrey, 9 Conn. Rep., 209.

Norris *vs.* Badger, 6 Cowen's Rep., 449.

One part of this prosecution consisted in the shewing that Edward C. Fraser was, and knew, and had full cause to know, that on the 18th day of April, 1868, when he purchased from David Robertson, he was hopelessly insolvent, and unable to pay his debt. This could only be proven by the testimony of his creditors, (Rimmer, Semple and Crean.) The question, therefore, was asked Did he purchase of you? when? how much? Then the question, "What conversation did he have with you? was fairly legal. Queries as to legality or illegality of testimony can only be decided as to and upon the questions propounded. The answer rarely comes up to the expectation. The answer is not to be presumed. Each witness might have testified to an admission of insolvency. They might have testified to facts which the Crown could later have proved Robertson to have become aware of, and therefore gave credit and sold goods to the prisoner. But in cases like the present, fraud must be proved from acts and confessions. There is no other means known to our law, as the intent is to be judged from the fact. All surrounding circumstances, every act and every saying

of the accused, everything touching his business and affairs, is fit matter of evidence.

F. Cassidy, Q. C., was heard for the Defendant. He argued that the practice as established in Montreal did not allow peremptory challenges in cases of misdemeanor, and that the direction to "stand aside" was, in point of fact, a peremptory challenge.

MONK, J., dissenting [after referring to the case reserved.] I would not interfere with the conviction on the ground of the admission of the evidence, but as to the other point, is there such a thing as peremptory challenge in a case of misdemeanor? It is said on the part of the crown that the jurors were only told to stand aside; but that is equivalent to a peremptory challenge. I have great difficulty in coming to the conclusion that there is any authority that states there is a challenge for misdemeanor, except challenge for cause. The great difficulty I feel arises from this, that for thirty or forty years it has been the invariable practice of the Queen's Bench in Montreal to hold that in misdemeanors there is no challenge except for cause. I do not wish to disturb that practice and say that the Court has been in error during all that time.

DRUMMOND, J. I agree with Mr. Justice Monk, and corroborate fully, as far as my experience goes, what he has stated with reference to the practice in challenges for misdemeanor. I can go back to 1826, when James Stuart was conducting a criminal case, and Chief Justice Vallières de St. Réal said he had never heard the doctrine that there was such a thing as peremptory challenge allowed in misdemeanors.

DUVAL, C. J. As to the right of the judge to direct a juror to stand aside, either in misdemeanor or in felony, I take that to be undeniable. I have never known the practice to be doubted, and I have known the right to be constantly exercised. I have been acquainted with the practice at Quebec for forty years, and have practised there when the Court was presided over by Chief Justice Sewell whose opinion was held second to none in England. It is said the practice in Montreal has been different. The practice is nothing more than [illegible]. But name a case where the question was raised and the right denied. In Archbold, Pleading and Evidence, it is stated that in cases of misdemeanor, no right of peremptory challenge exists at all, the privilege having been originally given by the common law *in favorem vitæ*, although it is now extended to all cases of felony. But it has been usual for the officer of the Court to abstain from calling any particular names mentioned to him, if others be left to form a jury. Roscoe says: A practice which has continued uniformly from the time of Edward I. to the present, enables the prosecutor to exercise practically the right of peremptory challenge; because, when a man is called, the juror will on his request be ordered to *stand by*, and it is only when the panel has been exhausted, that the prosecutor is called upon to show his cause of objection.

As to the question of evidence, the judge allowed it to be taken, because he was not prepared to say at the moment that it was inadmissible; but he afterwards told the jury to disregard it. I wish to be distinctly understood on this point, that if I entertained any doubt that this evidence influenced the opinion of the jury either directly or indirectly I would give the defendant the benefit of

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it; but I have not the slightest hesitation on the point. For these reasons, the judgment will not be interfered with.

BADGLEY, J., agreed with the Chief Justice. He referred to *Regina v. Lacombe*, 13 L. C. Jurist, 289, and would apply his remarks in that case to the present. In the case of *Mansell*, (vol. 1, Dearsly & Bell's Crown Cases, p. 375, 425) would be found the jurisprudence on the subject from the time of Edward I.

CARON, J., concurred. The judgment is recorded as follows:

"In the opinion of this Court, the proceedings had and taken in the said Court at Montreal are regular, the ruling of the judge presiding the said Court of Queen's Bench is correct, and no reason hath been shewn by and on behalf of the said E. C. Fraser, sufficient to set aside the conviction on the indictment.

Conviction affirmed.

J. L. Morris, and *T. P. W. Dorion* for the private prosecution.

F. Cassidy, Q.C., and *B. Devlin* for the defendant.

(APPEAL.)

In connection with the above case, the following is of special interest:

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

June, 1870.

APPEAL IN JURY.—Yesterday Mr. Sergeant Sleigh made an important application on the part of a prisoner named Hugo Levenger, confined in Melbourne gaol, Victoria, for leave to appeal. He was an alien, and challenged a jury-man. The objection was not allowed. The prisoner was tried for murder and convicted of manslaughter, and sentenced to seven years' imprisonment. He asked to appeal on account of the jury. The Attorney-General, with whom was Mr. Archibald, appeared for the Crown. The Court allowed leave, and as the applicant was in custody an early day would be appointed.

July 23, 1870.

(*Present*—*Lord* CAIRNS, *Sir J.* COLVILE, *Sir J.* NAPIER, *and Sir* L. PEEL.)

LEVENGER, v. THE QUEEN—JUDGMENT.

Sir JOSEPH NAPIER gave the judgment of the Court in this case. The appellant was indicted for murder and convicted of manslaughter, on which he was sentenced to seven years' penal servitude. He, being an alien, had a mixed jury, and challenged peremptorily an alien juror. The Court refused to allow the challenge and the trial proceeded, and ended as stated, on which the prisoner appealed. He still remains in Melbourne Gaol.

His LORDSHIP, in delivering the judgment of the Committee, reviewed the law on juries, and noticed the absence of any case bearing on the simple question before the Court, which was, whether an alien could challenge peremptorily an alien juror. After tracing the rights exercised by prisoners from a very early period their Lordships saw no reason why a prisoner, though an alien, should be deprived of his right to challenge an alien juror peremptorily. Their Lordships would therefore humbly advise Her Majesty that the conviction in this case should be quashed, and the proceedings set aside, with leave to issue a writ of *venire de novo*.

The prisoner, it is undertood, will be released, as it is not intended to empannel another jury."

We have extracted the above from an English paper. It [illegible] nothing is said, from which we may gather whether a writ of error had been [illegible] had been refused, in Victoria, before [illegible] application to the Privy Council for leave to appeal. The report shows the fallibility of Judges and Courts, in matters pertaining to trial in criminal cases. The Crown had a right to make jurors, ([illegible] jurors,) stand aside at the trial referred to; it would have been only common justice to have allowed the prisoner the right to challenge peremptorily, as usually. Ed. [illegible] August, 1870.

COURT OF QUEEN'S BENCH, 1869.

MONTREAL, 9th MARCH, 1869.

Coram DUVAL, C.J., CARON, J., BADGLEY, J., MONK, J., MACKAY, A. J.

No. 27.

DUFRESNAY,

(*Intervening party in Court below,*)

APPELLANT;

AND

ARMSTRONG,

(*Plaintiff in Court below,*)

RESPONDENT.

HELD:—1. That a wife *séparée de biens*, may legally renounce to the customary dower of herself and children, after the property affected with the dower has been sold *par décret*.

2. That a wife may legally renounce to dower, under authority of a Judge, when her husband is interdicted for insanity.

This was an appeal from a judgment rendered in the Superior Court, at Montreal, by the HON. MR. JUSTICE MONDELET, on the 28th December, 1867, dismissing the contestation by appellant of a report of collocation and distribution.

The appellant was the wife of the defendant in the case in the Court below, whose property had been sold by the sheriff under the execution therein issued, and the object of her contestation was to have a renunciation to the customary dower of herself and children which she had made, after the property was sold, set aside.

The appellant's husband was under interdiction for insanity at the time the renunciation was made, and she was in consequence specially authorized by a judge to make the renunciation.

The following was the judgment appealed from:—

"Considérant que l'Intervenante Dame Marie Angélique Dufresnay n'a pas "prouvé les allégués de sa contestation et nommément qu'elle ait été par erreur "ou fraude induite à renoncer au Douaire Coutumier pour elle-même et ses "enfants, comme elle l'a fait par acte de renonciation en date du 23 Janvier "1865, à Berthier, reçu devant Mtre. J. O. Chalut et confrère notaires, comme "appert à icelui.

"Considérant que la dite Intervenante a, au contraire, après y avoir été dûment autorisée, renoncé au dit douaire coutumier pour elle-même et ses enfants, "pour bonnes et valables causes, et que la dite renonciation a été faite légalement et librement.

"Considérant, partant que vû la légalité et suffisance de la dite renonciation "faite par la dite Intervenante, cette dernière est sans intérêt à contester l'ordre "de collocation et distribution, quant à ce qui a rapport aux sommes d'argent y "accordées au dit Hon. David M. Armstrong et qu'à cet égard, la contestation "de la dite Intervenante est mal fondée: cette Cour la déboute avec dépens, et "adjuge et ordonne que l'ordre de collocation et distribution, en autant que le

Dufresnay and Armstrong.

" dit Hon. David M. Armstrong y est colloqué, soit et il est homologué, le tout " avec dépens contre la dite Marie Angélique Dufresnay."

In appeal, several reasons were assigned why the judgment complained of should be reversed, which it is unnecessary to specify as they related principally to the merits of the case. The 5th reason, which was one of law, was stated as follows:—

En effet, la femme séparée de biens ne peut, son mari étant insolvable et interdit pour aliénation mentale, renoncer à son douaire coutumier sur un immeuble du mari, après la vente forcée, le décret de tel immeuble; or, tel est le cas ici; l'appelante est dûment séparée de biens du dit feu Louis Boucher, et ce dernier, lors de la renonciation, était notoirement insolvable, et lors de la renonciation, l'immeuble affecté au dit douaire coutumier avait été décrété depuis longtemps par le shérif. La section 52 du chap. 37 des S. R. du Bas-Canada n'a pas, à notre humble avis, en vue de permettre à la femme de renoncer à son douaire sous de telles circonstances; en vertu de cette section, une femme peut fort bien renoncer à son douaire, *avec le consentement et l'autorisation de son mari*, pour faciliter *une aliénation volontaire du mari*, ou encore pour lui aider à *contracter un emprunt avantageux et volontaire*. Mais lorsque le mari est notoirement insolvable, que la femme est dûment séparée de biens, qu'elle renonce, sans l'autorisation du mari, à son douaire coutumier existant sur un immeuble décrété forcément et après qu'il a été décrété, sa renonciation prend dès lors le caractère d'un engagement ou cautionnement prohibé par la section 55 de la même loi, et se trouve illégal et nul; la renonciation de Dame Marie Angélique Dufresnay, est donc illégale et nulle.

Les savants auteurs de notre Code Civil ont ainsi interprété ce statut, et celui de 1862. L'article 1443 pose comme principe qu'aucune aliénation du mari ne peut éteindre le Douaire, " *à moins qu'il n'y ait renonciation expresse conformément à l'article qui suit*," c'est-à-dire l'article 1444. Cette réserve nous semble comporter deux choses essentielles: d'abord une prohibition formelle à la femme de renoncer même à son propre douaire, droit qu'elle avait sous l'ancien droit existant avant l'ordonnance des Bureaux d'hypothèques; en second lieu, permission à elle accordée de *renoncer à son Douaire*, pourvu qu'elle le fasse suivant l'article 1444. Ce dernier article lui permet " *cependant* " de renoncer mais dans l'acte même par lequel son *mari vend, aliène ou hypothèque, ou par un acte différent et postérieur*, mais bien entendu avec le consentement et la participation du mari. Et pourquoi? Les articles 1445 et 1446 donnent à la renonciation faite suivant l'article 1444 l'effet de purger l'immeuble affecté, même du douaire des enfants. Le contrepoids à ce droit illimité de renoncer qui, autrement, serait la ruine des familles, se trouve dans le consentement et la participation obligés du mari soit dans l'acte même où il vend, aliène ou hypothèque privément et volontairement ou dans l'acte subséquent à celui où il consent à vendre ou hypothéquer volontairement et privément.

Dans l'espèce actuelle, la renonciation est en faveur de l'acquéreur [l'adjudicataire Champagne] qui n'a jamais demandé cette renonciation. Elle a été faite sans que le mari ait vendu, puisqu'il a été exproprié, et sans qu'il ait autorisé sa femme ni même qu'il ait été partie à l'acte de renonciation.

La renonciation de la femme en faveur d'un créancier dont l'hypothèque aurait été acquise sans le concours du mari, comme celle créée par un tiers avant que le mari eût la propriété, ou celle résultant d'un jugement, ne serait pas dans les termes du Statut; il faut que ce soit une hypothèque créée par le mari; de même lorsque la renonciation est en faveur de l'acquéreur, il faut que le mari ait vendu.

L'autorité du juge ne peut suppléer à celle du mari, parcequ'il ne s'agit pas d'un acte ordinaire, qui n'affecte que les intérêts de la femme seule, mais bien ceux de la femme et de ses enfants. La règle étant que le Juge ne peut autoriser la femme que pour les actes qui n'affectent que ses propres biens et non ceux qui affectent en même temps les intérêts du mari, de la communauté et de la famille.

Demolombe, tome 4, page 316 et 318.

Bourjon, tome 2, page 374, chap. 11, sect. 1, no. 7.

Le pouvoir accordé à la femme de renoncer au Douaire, tant pour elle que pour ses enfants, est un droit exorbitant, en dehors du droit commun et ne doit pas être étendu aux cas qui ne sont pas spécialement prévus.

La Cour Inférieure a donc eu tort de sanctionner une telle renonciation par le jugement dont cassation est humblement requise.

Respondent's authorities:—

Pothier, Puis.. Mar. 25–28; 3 Pand. franc., 397, 8; Fenet—Pothier sur l'Art. 222, p. 57; C. N. 222; 4 Vol. Demolombe, p. 390, No. 246.

CARON, J., *dissentell*, on the ground that renunciations to dower effected under the provisions of the Registry Ordinance must be strictly interpreted and strictly confined to the cases specified in the law. In the present instance the property had been actually sold, by sheriff's sale, and he was therefore of opinion, that renunciation to dower on such a property could not (as regarded the children) be legally made, under the provisions of the Ordinance.

DUVAL, C. J., for the majority of the Court, said, that the only question here was as to the validity of the renunciation. There could be no doubt, that under the circumstances the authorization by the Judge was perfectly legal. And, as to the fact that the renunciation had been made after the property had been sold by the sheriff, he remarked, that according to Pothier the *vente en justice* is always a sale in the name of the owner, and, therefore, the case is the same as if the sale were a private one. The Court was of opinion, consequently, to confirm the judgment, and at the same time amend it, by striking out that part of the judgment of distribution which ordered the respondent to give security to the *adjudicataire* against the dower, which had been evidently omitted to be done by a clerical error.

Judgment of S. C. confirmed.

Mousseau & Dan[illegible], for appellant.

Lafrenaye & Armstrong, for respondent.

(S. B.)

COURT OF QUEEN'S BENCH, 1869.

[redacted]L, 9TH DECEMBER, 1869.

Coram [redacted]MMOND, J., BADGLEY, J., POLETTE, J., *ad hoc.*

No. 54.

EDWIN CORNELL,

(Plaintiff in Court below,)

APPELLANT;

AND

THE LIVERPOOL & LONDON FIRE & LIFE INSURANCE CO.,

(Defendants in Court below,)

RESPONDENTS.

HELD:—That the condition endorsed on a Policy of Insurance, to the effect, that no suit or action shall be sustainable for the recovery of any claim under the Policy, unless commenced within the term of 12 months next after the loss shall have occurred, is a complete bar to any such suit or action instituted after the lapse of that term.

This was an appeal from a judgment of the Superior Court, (THE HON. MR. JUSTICE MONK presiding) rendered at Montreal, on the 10th of June, 1867, dismissing the appellant's action with costs.

The action was founded on the Respondents' policy of insurance, No. 525548, dated the 10th of October, 1864, by which they insured, against accidents by fire, certain property in the township of Farnham, then owned by one William Truax, namely:

On the building of a tannery, including vats therein.....	600
On machinery therein.....	750
On the building of a sawmill.....	100
On machinery therein.....	50
In all,	$1500

Besides reciting the policy, the appellant, in his declaration, alleged, in substance,—that on the 15th of November, 1864, the whole of the insured property, to a greater extent in value than $1500, was accidentally destroyed by fire;—that immediately afterward, Truax, the assured, gave notice of the fire to the respondents, and, in all other respects, fulfilled the conditions of the policy;—that the loss was fixed and determined by the agents and servants of the Respondents at $1125, which sum the respondents, waiving all further proof, promised to pay;—that on the 3rd of December, 1864, by a notarial deed, Truax assigned his claim against the respondents, for the said $1125, to one Andrew Beatty, who, afterward, by a like deed, made on the 28th of July, 1866, assigned it to the appellant, whereby the latter became subrogated in all the rights of Truax, the assured, under the policy;—the conclusions of the declaration were, accordingly, for a judgment against the respondents for $1125, with interest from the date of the fire, and costs.

The respondents pleaded two peremptory exceptions and the general issue. By the first exception, the 15th and 18th of the conditions indorsed upon, and forming part of, the policy, were set up: they were as follows:

XV.—It is further hereby expressly provided, that no suit or action of any kind against the said Company for the recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced ....

XVIII.—No one of the above conditions, either in whole or in part, shall ever be deemed to have been waived by or on the part of the said Company, unless the waiver be clearly expressed in writing, signed by the Company's Resident Secretary, or other authorized agent, and delivered to the assured, or to the lawful agent or representative of the assured.

And the respondents, expressly denying that they had ever waived those conditions, or either of them, claimed that, under the 15th condition, they were entitled to, and they therefore prayed for, a judgment dismissing the appellant's action, with costs, the same not having been commenced until nine months, and upward, after the expiration of the twelve months next after the fire.

By the second exception, the respondents set up the 10th, 11th, 17th and 18th conditions of the policy; these were as follows:

X.—That persons insured by this Company sustaining any loss or damage by fire, shall forthwith give notice to the Directors or Resident Secretary of the said Company ..., and shall, within fifteen days after such fire shall have happened, deliver to the Directors, their Secretary or Agent, as accurate and particular an account of their loss or damage respectively (supported by vouchers), as the nature and circumstances of their respective cases will admit, and shall verify the same, by solemn declaration or affirmation, before a Justice of the Peace, and shall produce such other evidence as the Directors may reasonably require; and until such declaration or affirmation, account and evidence, are produced, the amount of such loss, or any part thereof, shall not be payable or recoverable....

XI.—That in every case of loss or damage for which the said Company shall be liable, the same, on being duly proved, and the account adjusted, shall either be paid immediately, or the said Company shall have the option, where the insurance may be on goods, to supply the insured with the like quantity of goods of the same sort, and of equal value and goodness with those destroyed or damaged by fire; [illegible] the insurance may be on houses and buildings, the said Company shall have the option, with all convenient speed, to rebuild or to repair and reinstate the same, and put them into as good and substantial a condition as they were in at the time when such fire happened....

XVII.—No notice required by any of the above conditions to be given by the assured to the Company shall be deemed sufficient, unless it be given in writing, signed by the assured, or the lawful agent or representative of the assured, and delivered to the Resident Secretary, or other authorized Agent, of the Company.

XVIII.—*As above quoted.*

And the respondents, expressly denying that they had ever waived those conditions, alleged, that after the fire, Truax, the assured, did not comply with the said conditions, in so far as they were applicable to his case; and, more particularly, he did not, within fifteen days next after the fire, deliver to the respondents any such accurate and particular account of his loss or damage, sup-

Edwin Cornell and The Liverpool & London Fire and Life Insurance Co.

ported by vouchers, or other evidence, and verified by his solemn declaration or affirmation before a Justice of the Peace, as the nature and circumstances of his case admitted, and as he was required to do by the 10th of the said conditions; whereby he had forfeited all right to recover from the respondents the amount of his loss or damage; and, by consequence, the appellant, under the aforesaid assignments, was not entitled to recover the same from the respondents.

The appellant joined issue on the pleas, and filed *articulations* of facts, which were duly answered.

By their pleas, and also by their answer to the *articulations*, and again by formal admissions, the respondents admitted—the making of the Policy—the occurrence, and notice to them, of the fire—and the extent of the loss [$1125]; —the assignments of the claim for that loss to Beatty and the appellant, respectively, with the significations thereof to the respondents, were shown by notarial copies of those instruments filed by the appellant. The issues at *enquête* were thus reduced to (1) the fulfilment, after the fire, of the conditions of the policy, on the part of the assured; and (2) the waiver of those conditions by the respondents, and their promise to pay the amount of insurance money claimed.

The following was the judgment of the Superior Court:—

"The Court, having heard the parties by their respective Counsel, upon the merits of this cause, examined the proceedings, proof of Record, and having deliberated; considering that the defendants have established by legal and sufficient evidence the matters and things by them set up and alleged in their exceptions and plea to the plaintiff's action and demand, and more particularly that William Truax, the party in whose favour the policy of insurance, mentioned in the declaration of the plaintiff, and in the exceptions and plea of the defendants, was made and granted, never complied with or fulfilled the several conditions referred to in and endorsed upon the said policy, and more especially the conditions numbered on the said policy, 10, 11, 15, 17, and 18; and considering particularly that by the fifteenth condition of the policy, it is provided, stipulated and agreed, that no suit or "action of any kind against the said Company, for "the recovery of any claim, upon, under, or by virtue of this policy, shall be "sustainable in any Court of Law or Chancery, unless such suit or action shall "be commenced within the term of twelve months next after the loss or damage "shall occur; and in case any suit or action shall be commenced against the said "Company after the expiration of twelve months next after such loss or damage "shall have occurred, the lapse of time shall be taken and deemed as conclusive "evidence against the validity of the claim thereby attempted to be enforced;" considering that a period of nearly two years elapsed between the occurrence of the alleged fire and loss and the institution of the present action; and considering finally that the non-compliance with and the failing to observe the said conditions, or any one of them, constitutes a bar to any action or demand against the said defendants upon such policy of insurance; the Court doth maintain the said exceptions, and doth dismiss the plaintiff's action with costs."

CARON, J., said, that it was unnecessary to enter into the details of the case or to refer to all the points raised by the several pleas, as there was one plea,

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namely that of prescription, which was sufficiently formidable of itself to decide the case. On this plea the Judge in the Court below mainly rested his judgment, and this Court is unanimously of opinion that that judgment should be confirmed. The condition on the policy is express, that the action must be brought within twelve months next after the loss has occurred. In the present instance, one year and nine months had elapsed after the occurrence of the fire before the action was instituted. The Court has nothing to do with the severity of the application of the strict rule established by the condition of the policy,—that is the business of the parties. They made their contract in that sense and they must abide by the consequences. The judgment appealed from is therefore confirmed.

Judgment of S. C. confirmed.

A. & W. Robertson, for appellant.
F. Griffin, Q.C., for respondent.
S. Bethune, Q.C., counsel for respondent.
(s.b.)

SUPERIOR COURT, 1870.

IN REVIEW.

MONTREAL, 9th JULY, 1870.

Coram BERTHELOT, J., MACKAY, J., AND BEAUDRY, J.

No. 1589.

Bélanger et vir vs. *Brown*.

HELD:—(Confirming the judgment below) That a deed of sale made by a wife *commune en biens* to a third party of her *propre* for a pretended consideration of $400 when the real consideration was a lease of moveables by the third party to her husband, will be set aside as a contravention of C.C. 1301.

This case came up on the inscription of the defendant for the revision of the judgment rendered by the Superior Court, TORRANCE, J., maintaining the plaintiff's action. The judgment below will be found reported *ante*, page 212.

MACKAY, J., (dissenting). I dissent from the judgment about to be pronounced, and will state why I do so.

I hold the plaintiff's action bad. True, the defendant's plea is not straightforward, and pretends the contrary of the truth; but this does not make legal the plaintiff's pretensions. She states all about the transaction, and says that she may have her conclusions, because of her having only become surety for her husband. I hold that a wife *commune* may sell her *propre*, with her husband's consent, and let the money go into the community, or even to pay her husband's debt. Till the dissolution of the community she is *commune*. Let her, on the dissolution, renounce, if she please, and then go against the community, and against her husband's estate and property generally; or claim back her *propre aliéné*, alleging that the alienation was mere suretyship for her husband, and that she could not become surety for him except as *commune en biens*, and that renouncing she ceases to be *commune* and may revendicate, by force of our law against wives' suretyships for their husbands; but if she accept the community,

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let her not pretend to revendicate; for her alienation of her *propres* would in such case be established as mere suretyship by a wife *commune*, which is permitted.

In this very case, the plaintiff's husband may die rich, and she may accept the community, say five or ten years hence. The rights of the woman accepting the community, in such case of alienation of her *propres* for her husband's, or the community's purposes, are plain: exactly what they were one hundred years ago, and what they have been ever since,—Art. 232, Custom of Paris; Art. 1357, C.C. This is the law and means something; but would be a dead letter if the plaintiff prevailed. She is not to go free, at any rate as to the rents, issues, and profits, during the community, of this *propre*. They are Brown's; as the plaintiff's husband during the community (supposing this deed had never been,) might have had, or might have, them.

Boudria and *McLean* (6 L.C.J. 65), I approve of. The woman was heard, having renounced to the community. So of Ste. Marie in *Pinsonneault* vs. *Brasseau*, and *Ste. Marie*, opposant; and so of *Byrne* vs. *Trudeau*, 13 L.C.R. [The wives had renounced to the community.] No case can be shown of a woman *commune*, before any dissolution whatever of the community, getting free from her act of alienation or hypothecation of her *propres*. If a woman *commune* alienate or hypothecate her *propres*, let her, during her husband's life, and and so long as she is *commune*, be treated as a wife *commune* used to be in old France or here, say in 1800. Could a wife holding to the community, and her husband living, have brought, in Lower Canada, such an action as the present in 1800? No.

Art. 232, Custom of Paris, is in force still. Our code recognises alienations of the wife's *propres*, and provides for *remploi*. But, according to the plaintiffs "remploi des propres aliénés de la femme" is no longer to be talked of. I hold the contrary. It is to be talked of, as much as ever, under the *régime de communauté*, and where the wife holds to the *communauté*, as the female plaintiff does.

Were we to adopt the plaintiff's argument, we should have to hold that the *propres* of the wife, *commune*, are inalienable. Nobody will say that they are. Now, as in 1800, and before, her *propres* may be alienated by her. Wives *communes* shall not be allowed actions revocatory, or *en nullité*, of their alienations of their *propres*, but shall be referred to their other rights under the code, which settles all that they are entitled to.

No case can be shown of a wife *commune*, living her husband, getting free of her obligation as *commune*, merely because it was an obligation for her husband, or at his request, or to pay his debt. C.C. 1301. does not favor the present action, but quite the contrary. It involves that a wife *commune* can bind herself and act as freely as wives *communes* ever could. The Velleien prohibited a woman from obliging herself for others. Henry IV. abolished it. We have, in a qualified way, given it force again. But only to the extent that we have enacted is our law different from what it was in old France after Henry IV.'s abolition of the Velleien, and before we made the enactments we have, in favor of wives *séparées* or *non communes*:—the enactments [illegible] now are in the Art. 1301, C.C.

The plaintiffs are man and wife, under the *régime de communauté*. The woman does not affect to be other than *commune en biens*. I cannot conceive her to have right, without, and previous to, any kind of dissolution of the community, to ask that her alienation of a *propre* be declared illegal, *as given for the uses of her husband*. The plaintiff's declaration shows the alienation referred to to have had a cause, a legal cause. The defendant got alarmed at the action, however, and pleaded a cause other than the real one. He was in bad faith so pleading; yet his bad faith in so doing cannot give right to the plaintiff without law. I would dismiss the plaintiff's action, and let each party bear his own costs.

BERTHELOT, J.—La demanderesse, commune en biens avec son mari Antoine Lemieux et durant la communauté, poursuit le défendeur pour faire prononcer la nullité de la vente qu'elle lui a faite le 24 décembre 1867, sous autorisation maritale, de son propre pour couvrir et assurer dans le fait le paiement d'une vente faite par le défendeur à son mari, de chevaux et voitures, sous un contrat de louage déguisé, au lieu d'avoir été pour valable considération donnée et payée à la demanderesse ainsi qu'il a été exprimé en l'acte de vente.

Le défendeur a plaidé purement et simplement que la considération exprimée en l'acte du 24 décembre 1847 était vraie.

La preuve a fait voir le contraire, et elle résulte même des aveux du défendeur et des contradictions de son témoignage.

La première question soulevée lors de l'argument est de savoir si pareille action peut être intentée par la femme durant la communauté, attendu qu'elle rejaillirait contre elle-même comme commune.

Bien que cette question ait été très-controversée par les auteurs, elle doit être résolue en faveur de la demanderesse, parce que, ainsi que je l'ai fait remarquer à l'audition, s'il leur fallait attendre un évènement aussi incertain que la dissolution de la communauté, par son décès ou celui de son mari, elle ou ses héritiers ne pourraient peut-être plus alors rapporter la preuve des faits nécessaires pour l'exercice de leurs droits.

Ce pourrait peut-être le cas pour elle en cette cause, puisque sa preuve ne procède que de la bouche même du défendeur et c'est là sa seule preuve.

La seconde difficulté soulevée à l'argument est qu'il n'y avait pas de preuve que l'immeuble était le propre de la demanderesse; cette dernière n'avait pas besoin de faire d'autre preuve que celle qui lui résultait de l'acte de vente même, et l'acheteur, le défendeur, ne pouvait soulever une objection qui ne pouvait valoir que dans la bouche d'un tiers; et ce n'est pas le cas de l'application de l'article 737 des Obligations de Pothier cité par le défendeur—où il s'agissait d'une action en revendication par un tiers qui se disait héritier pour partie du vendeur, contre l'acquéreur de ce dernier.

La troisième question qui est le fond même de la demande, est de savoir si la femme commune peut aliéner valablement son propre ou s'obliger pour les affaires de son mari. Le jugement dont la révision est demandée a maintenu ce principe et la majorité de la cour est pour le confirmer, et maintenir la même doctrine

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que celle qui a été maintenue dans un grand nombre de jugements devant cette cour.

La femme commune qui vend son propre pour payer la dette de son mari ou pour garantir ses obligations et l'aider dans son commerce, ne s'oblige pas seulement comme commune, mais elle s'oblige directement pour son mari, et c'est ce que la loi a eu en vue de prohiber sous quelque forme que ce soit, pour assurer la fortune de la femme de l'atteinte des mauvaises affaires du mari.

Le défendeur a rapporté dans son factum l'opinion qui est donnée comme celle du juge Meredith lors du jugement dans la cause de Boudria *vs.* McLean—en appel.

"A married woman unquestionably has the power of alienating her own *propres* to pay the debt of her husband."

Si cette proposition est vraie, en droit abstractement parlant, ce ne peut être que lorsque la femme reçoit réellement le prix de son propre, et l'emploie librement à payer la dette de son mari, mais non pas dans ce cas-ci, lorsqu'elle le vend pour faire faire commerce à son mari.

Cette maxime ne peut pas plus prévaloir dans cette cause plus qu'elle n'a prévalu dans la cause de Boudria *vs.* McLean—auquel jugement le juge Meredith a concouru.

Si elle devait prévaloir que deviendrait la prohibition des avantages indirects entre mari et femme ?

Quant au petit fait, que la demanderesse est allée avec le défendeur chercher les chevaux et les voitures en question, je n'y vois qu'une manœuvre à laquelle la demanderesse s'est soumise pour aider son mari à lui enlever son bien.

BEAUDRY, J., concurred. Judgment confirmed.

Duhamel & Rainville, for plaintiff.
Loranger & Loranger, for defendant.
(J. K.)

COURT OF REVIEW, 1869.

MONTREAL, 31ST MARCH, 1869.

Coram MONDELET, J., TORRANCE, J., BEAUDRY, A. J.

No. 188.

Lafaille vs. *Lafaille.*

HELD:—That the parties in a suit, wherein the attorney of the plaintiffs has asked in the declaration for *distraction de frais*, can settle the suit as they please, without the concurrence of such attorney, and consequently that the attorney cannot (when the case has been so settled) continue the suit for the mere recovery of his costs.

This was a hearing in review of a judgment rendered by the Superior Court, at St. Johns, in the district of Iberville, on the 19th November, 1867, condemning the defendant to pay the costs of suit to Mr. Desplaines, the plaintiff's attorney, *par distraction de frais.*

In the declaration the plaintiff's attorney prayed for *distraction de frais.*

The parties settled out of Court, without the concurrence of the plaintiff's attorney, and on the 19th November, 1866, the plaintiff's attorney fyled a *désistement*, declaring at the same time that he intended to continue the suit for the recovery of his costs.

The suit was accordingly continued, and by the final judgment the defendant was condemned to pay the costs of the suit *distraits* to Mr. Desplaines, the plaintiff's attorney.

The Court of Review reversed this judgment, on the ground that so long as the costs are not awarded to the attorney by actual judgment the parties are free to settle as they please, without the concurrence of the attorney.

The following were the *motifs* of the judgment in Review:

" La Cour * * * considérant qu'il appert par l'acte de la demanderesse en date du 24 octobre 1866, produit en cette cause le 19 novembre 1866, qu'elle retirait son action, les parties ayant pris arrangement.

Considérant que par la production de ce document par le procureur de la demanderesse, l'action de celle-ci a été mise au néant, et que le procureur de la demanderesse ne pouvait légalement intervenir en son propre nom dans la cause et la continuer pour le recouvrement des frais dont il n'avait point obtenu distraction.

Considérant, par conséquent, que par le jugement rendu par la Cour Supérieure siégeant dans le district d'Iberville, le 19 décembre 1866, lequel admet le procureur de la demanderesse à amender dans ce sens le désistement par lui fait le 19 novembre 1866, il y a mal jugé.

Considérant que par ce jugement final rendu le 19 novembre 1867, condamnant le défendeur à payer les dépens de l'action distraits à Mtre. Desplaines, procureur de la demanderesse, il y a aussi mal jugé.

Cette Cour infirme, casse * * * et, attendu que le dit Mtre. Desplaines s'est mal à propos et illégalement immiscé en la dite cause, s'y constituant demandeur en son propre nom pour le recouvrement des dépens, et à cette fin continué la dite action, et a en cour de Révision persisté à soutenir le mal jugé susdit, cette Cour le condamne aux dépens, tant sur les procédés illégaux en Cour de première instance qu'en Cour de Révision.

Judgment of Superior Court reversed.

Jetté & Archambault, for Plaintiffs.
Leblanc & Cassidy, for Defendants.
(S. B.)

COUR SUPERIEURE.

En Révision.

MONTREAL, 9 JUILLET, 1870.

Coram MACKAY, J., TORRANCE, J., BAUDRY, J.

No. 307.

Dorval vs. *Chevalier*.

JUGE:—Que dans une action en démolition de nouvel œuvre portée devant la Cour de Circuit, la valeur de la servitude doit être alléguée et prouvée ne dépassant pas $200 de manière à donner juridiction à la Cour de Circuit.

Dorval vs. Chevalier.

Le demandeur ayant porté son action en démolition de nouvel œuvre devant la Cour de Circuit du comté de l'Assomption dans le district de Joliette, le défendeur plaida une exception déclinatoire prétendant 1o. que la Cour de Circuit n'a pas de juridiction dans cette matière; 2o. que la valeur des choses et de tout ce qui est demandé par les conclusions du demandeur n'y est pas spécifié et qu'il n'y apparait pas que la dite valeur ne dépasse la somme de $200. 3o. Qu'en réalité la valeur des choses et de tout ce qui est demandé par les dites conclusions dépasse de beaucoup la somme de $200.

Les conclusions du demandeur étaient 1o. Au paiement de $100 de dommages pour le passé. 2o. A la démolition, et à l'enlèvement par le défendeur d'une digue et d'obstructions sur un cours d'eau.

3o. A défaut par le défendeur de ce faire; à la permission ou autorisation pour le demandeur de faire ou faire faire lui-même aux frais du défendeur ces démolitions et enlèvement.

BAUDRY, J.—L'action est portée pour le recouvrement d'une somme de $100, et de plus pour la démolition de certaines obstructions construites par le défendeur, qui arrêtent l'écoulement des eaux qui traversent le terrain du demandeur dont le niveau est plus élevé que celui du défendeur; ce dernier a plaidé une exception déclinatoire prétendant que ce cumul des demandes du demandeur excède la compétence de la Cour de Circuit.

Le demandeur prétend que non, qu'on ne doit considérer que les frais de démolition qui ne peuvent excéder $100 outre les dommages.

Le défendeur de son côté dit qu'on doit considérer non pas seulement les frais que causera la démolition, mais encore la valeur de la chose à démolir, que d'ailleurs le demandeur n'ayant aucunement allégué la valeur de cette démolition, la cause doit être considérée comme de la compétence de la Cour Supérieure qui prend connaissance de toute cause qui n'est pas du ressort de la Cour de Circuit (C. P. art. 28), la juridiction de la Cour de Circuit étant restreinte aux demandes dans lesquelles la somme ou la valeur de la chose réclamée ne dépasse pas $200 (art. 1054.)

Pour que la Cour de Circuit puisse connaître d'une demande il faut donc qu'il apparaisse que la somme ou la valeur de la chose réclamée n'excède pas $200, autrement la Cour Supérieure a seule juridiction.

Ici la demande réclame 1o. $100 de dommages et la reconnaissance d'une servitude (Code Civil art. 501) en demandant la démolition de l'obstruction ou empêchement à l'exercice de cette servitude. Ce n'est donc pas seulement le coût de la démolition qui est demandé, mais la reconnaissance d'une servitude dont la valeur n'est pas alléguée et qui est indéterminée.

Le jugement déboutant l'exception déclinatoire rendu le 26 octobre 1870 fut infirmé par la Cour de Révision dont le jugement est motivé comme suit:

La Cour, considérant que l'action portée par le demandeur contre le défendeur en démolition de nouvel œuvre comporte une déclaration de servitude sur le fonds du défendeur en faveur de celui du demandeur; que le demandeur n'a ni allégué ni prouvé que la valeur de cette servitude ne dépassait pas la somme de $200 de manière à donner juridiction en cette cause à la Cour de Circuit, et qu'ainsi il y

a erreur dans le jugement qui a débouté l'exception déclinatoire du défendeur, infirme le dit jugement, et maintenant la dite exception déclinatoire du défendeur lui donne congé de la demande avec dépens.

Dorval vs. Chevalier.

Jugement renversé et Exception déclinatoire maintenue.

Dorion, Dorion & Geoffrion, avocats du demandeur.

Piché, avocat du défendeur.

(P.R.L.)

Autorités du défendeur :—14 L. C. R. p. 323.

Dalloz tome 3, p. 159,283,287.

Dalloz tome 4 vo. dégrés de juridiction, p. 613, 620, 710.

COUR SUPERIEURE.

En Revision.

MONTREAL, 31 MAI 1870.

Coram Mackay, J., Torrance, J., Baudry, J.

No. 174.

Morrison vs. *Cyr & Perron*, Mis en cause.

Juge:—1o. Que le shérif ne peut pas obliger un enchérisseur de renouveler la déclaration du lieu de sa résidence à chaque enchère qu'il fait. (1)

2o. Que le shérif n'a pas le droit de recevoir une contestation sur telle déclaration de résidence faite par un enchérisseur.

Baudry, J.—David Cyr a mis une enchère de $3400. Perron a mis une surenchère de $3450. Le député shérif, sous prétexte que Perron ne voulait pas déclarer son lieu de résidence, a refusé de lui adjuger l'immeuble et l'a adjugé à Cyr.

Sur requête de la demanderesse pour folle enchère contre Cyr, ce dernier a contesté la demande en alléguant qu'il n'avait pas été le plus haut et dernier enchérisseur, puisque Perron avait mis une surenchère et que l'immeuble aurait dû lui être adjugé, puisque le député shérif avait déjà reçu son enchère deux fois et pris sa déclaration de résidence.

La cour maintint cette contestation et ordonna d'amender le rapport du shérif de manière à déclarer Perron dernier enchérisseur et adjudicataire, et sur requête de la demanderesse pour vente à la folle enchère de Perron,—la Cour Supérieure dans le district d'Iberville, par le jugement dont est appel, ordonna cette revente à la folle enchère.

Il me semble qu'il y a erreur dans ce jugement; le shérif a été en faute en refusant l'enchère de Perron, et en adjugeant l'immeuble à Cyr, Perron ayant, lors de sa première enchère, déclaré sa résidence ainsi que constaté au procès verbal d'enchère, n'étant pas tenu de renouveler cette déclaration à chaque enchère, et le député shérif n'avait pas droit d'en recevoir la contestation, il aurait dû adjuger l'immeuble à Perron. Il a manqué à son devoir et Perron dont l'enchère a été refusée, se trouvait libéré de l'engagement qui en résultait.

Je considère que l'enchère offerte par un enchérisseur n'a plus d'effet, aussitôt que l'adjudication a eu lieu, et la séance levée il ne peut plus être tenu. C'est ce qui résulte des Arts. 674, 683 et 686, C. P. C.

(1)—Art. 674, C. P. C.

Morrison vs. Cyr et Perron.

Le jugement de la Cour de Révision infirmant le jugement de la Cour Supérieure du district d'Iberville, rendu le 19 novembre 1869, qui avait décrété la folle enchère contre le mis en cause, est motivé comme suit:

The Court,.....Considering that there is error in the said judgment, to wit; in rejecting the contestation by said *mis en cause* of the *demande* made against him to have the land seized in this cause resold at his *folle enchère* and in so far as ordering resale at his (Perron's) *folle enchère* in manner and form expressed in said judgment, doth, revising said judgment, reverse the same and proceeding to render the judgment that ought to have been rendered in the premises;

Considering that said Perron was not accepted at the sheriff's sale referred to as last *enchérisseur* for said land seized in this cause *super* the defendant or as a purchaser thereof;

Considering that said Perron's *réponse* to plaintiff's *requête* against him in this cause was and is well founded;

Doth maintain said *réponse* of said Perron and doth reject said Plaintiff's *requête*.

Jugement renversé et Motion pour folle enchère rejetée.

Décary, avocat de la demanderesse.

Leblanc & Cassidy, avocats du mis en cause.

(P.R.L.)

SUPERIOR COURT, 1869.

MONTREAL, 30TH JUNE, 1869.

Coram BERTHELOT, J.

No. 1678.

Butters vs. *The Bank of Montreal*, and *Steele et al.*, Intervening parties.

HELD:—That money specially deposited at interest in a chartered bank, by consent, and under the sanction of the Court, in the name of the Prothonotary, and subject to the future order of the Court, or of a judge thereof, cannot be legally withdrawn and used by the Prothonotary without such order.

This was a rule on the Prothonotary to compel that officer to deliver and endorse to the plaintiff (by consent of the parties) a special deposit receipt for the sum of $3,887 cy. granted by the Merchants Bank of Canada, on the 28th of October, 1868, payable with 5 per cent. interest to the order of the Prothonotary, and in default to pay the amount with the interest to the plaintiffs.

The money had been so deposited in the name of the Prothonotary, by consent of the parties and under the sanction of the Court, until the further order or judgment of the Court, or of a judgment thereof.

Immediately on being handed the deposit receipt the Prothonotary cashed it, and in showing cause against the rule, the Prothonotary contended he had a right to do so and to retain the interest.

The Court thought otherwise, and ordered the Prothonotary forthwith to pay plaintiffs the amount of the deposit and all the interest that ought to have accrued thereon had the money been left in the bank. Butters vs. The Bank of Montreal, and Steele et al.

Rule against the Prothonotary absolute.

J. J. C. Abbott, Q. C., for Plaintiffs.

Barnard & Pagnuelo, for Prothonotary.

(S. B.)

COUR DE CIRCUIT, 1870.

MONTREAL, 16 AOUT, 1870.

Coram BEAUDRY, J.

No. 1194.

Gareau vs. *Paquet.*

JUGE:—Qu'un locataire n'est tenu d'avoir dans la maison louée que les meubles suffisants pour répondre d'un terme de sa location.

Le demandeur intente contre le défendeur une action en résiliation de bail sur le motif que le défendeur ne garnit pas de meubles suffisants la maison louée.

Le loyer est de $3.50 par mois, payable mensuellement.

Le défendeur plaide que la maison est suffisamment garnie.

A l'enquête, il est prouvé qu'il y a dans la maison louée des meubles pour la valeur d'environ $14.00, dont partie appartiennent à un sous-locataire.

PER CURIAM.—Le locataire n'est tenu d'avoir que les meubles qu'il faut pour garantir un terme du bail et les frais d'une action en expulsion. Dans la présente action, le terme est un mois, et il a été établi que le défendeur avait, tant par lui que par le sous locataire, des meubles pour la valeur d'environ $14. Cela suffit. L'action doit donc être déboutée.

Jugement pour le défendeur.

Jetté, Archambault & Christin, pour le demandeur.

DeBellefeuille & Turgeon, pour le défendeur.

Autorités citées par le défendeur:—Troplong, Louage, 531. Marcadé, sur l'art. 1752. Mourlon, Répétitions sur le Code Napoléon, t. iii. no. 773. Bourjon, t. ii, p. 46, no. 27.

(E. L. DE B.)

SUPERIOR COURT, 1870.

MONTREAL, 28TH JUNE, 1870.

Coram TORRANCE, J.

No. 322.

Ex parte WHITEHEAD, *Petitioner for a writ of certiorari, and* A. BRUNET, *Prosecutor.*

HELD:—That upon the inscription for hearing on the merits of the cause under the writ of *certiorari*, a motion to quash the conviction is necessary. Art. 1231, C.C.P.

The writ of *certiorari* was returned in this cause with the papers and conviction.

Exparte Whitehead.

On the 29th April, 1870, the petitioner inscribed the case upon the rôle de droit for hearing on the merits the 17th May, 1870.

On the 17th May, 1870, the petitioner was heard on the merits, the prosecutor not appearing.

The Court afterwards discharged the case from *délibéré*, as no motion to quash the conviction had been made. The inscription did not do away with the necessity for a motion to quash, which was like the conclusion of a declaration.

Délibéré discharged.

Perkins & Ramsay, attorneys for petitioner.

(P.R.L.)

COUR SUPERIEURE.

En Revision.

MONTREAL, 30 AVRIL, 1870.

Coram MACKAY, J., TORRANCE, J., BAUDRY, J.

No. 617.

Lefebvre vs. *Bruneau.*

JUGE:—Que la possession en fait de meubles équivaut à un commencement de preuve par écrit, suffisant pour permettre au possesseur d'expliquer sa possession par une preuve testimoniale.

Le demandeur par son action réclamait du défendeur la valeur d'un cheval ($120) qu'il lui aurait donné en gage pour sûreté de la somme de $31.

Il alléguait qu'il avait offert de remettre cette somme au défendeur qui a refusé de lui remettre son cheval, et que le cheval était depuis mort par la faute du défendeur.

Le défendeur plaida à cette action qu'il n'avait pas eu ce cheval en gage, mais qu'il l'avait acheté du défendeur pour $63, savoir: $31 en argent payé comptant et la balance par autant que lui devait le demandeur pour effets, que ce cheval ne valait que $60 et qu'il est mort par cas fortuit et force majeure.

Le défendeur a été entendu sur faits et articles. Le demandeur a ensuite voulu faire entendre des témoins pour prouver ce contrat de gage, nonobstant les dénégations du défendeur sous serment.

Le défendeur s'objecta à l'enquête et son objection fut maintenue. (MONDELET, J.)

Au terme suivant, le demandeur interrogea le défendeur comme témoin qui nia encore le contrat de gage. Le demandeur tenta encore de faire entendre des témoins, le défendeur fit la même objection et le juge présidant aux enquêtes (TORRANCE, J.) permit la preuve sous réserve.

Alors le défendeur à son enquête produisit un témoin et lui posa la question suivante: "le 12e août de la dite année, veuillez dire en vertu de quelle convention intervenue entre le demandeur et le défendeur, ce dernier est devenu en possession de la jument en question?"

Le demandeur s'y objecta prétendant que la preuve testimoniale n'était pas

admissible, vu que le défendeur voulait prouver un contrat pour une somme excédant $50.

Lefebvre vs. Bruneau.

Le juge présidant aux enquêtes (BERTHELOT, J.) maintint l'objection.

C'est cette décision qui fut soumise à la cour de Révision à Montréal en avril 1870.

Le défendeur soumit à la cour de Révision que le fait de la possession du cheval formait en sa faveur une présomption de droit de propriété assez forte pour lui donner droit de prouver son titre par témoins.

Il cita Marcadé, prosc. art. 2280 s. 2, p. 249.

Duplessis, Exécutions liv. 2, p. 618.

Bourjon, vol. 2, p. 692, tit. 8, ch. 2, sec. 5, 91.

Pigeau, Vol. 1, p. 258. Liv. 2, s. 2, tit. 2.

Après l'audition des parties, la cour de Révision a rejeté l'objection faite à l'enquête par le demandeur à la question posée comme ci-dessus, sur le principe que la possession du cheval par le défendeur était équivalent à un commencement de preuve par écrit. Jugement infirmé. Objection à l'enquête rejetée. (*)

Robidoux, avocat du demandeur.

Duhamel & Rainville, avocats du défendeur.

(P.R.L.)

SUPERIOR COURT, 1870.

MONTREAL, 9th JULY, 1870.

Coram TORRANCE, J.

No. 1608.

Judah vs. *The Mayor, Aldermen, &c., of Montreal.*

HELD:—That an action will not lie for damages caused by the Corporation of Montreal to a proprietor, by the expropriation of his property, where the damage caused by such expropriation has been assessed by the Expropriation Commissioners and paid to the proprietor, and where the Corporation has acted within the powers conferred upon it by the Legislature.

PER CURIAM.—This is an action of damages by a proprietor of real estate in Montreal, against the city corporation. The declaration sets forth *inter alia* that the plaintiff on the 3rd July, 1867, was, and for 20 years thereto previous, had been the owner of a lot of land and house in Little St. James street, in Montreal; that on the 3rd July, 1867, the defendants resolved to widen the said street, and for that purpose to expropriate and acquire a strip of land on the north side of the said land; that on the 9th November, 1867, they gave notice that they would apply on the 28th December, 1867, to one of the judges of the Superior Court for the nomination of three commissioners to fix the compensation to be allowed for the widening of said street, including a portion to be taken from said lot of the plaintiff; that commissioners were duly appointed and reported on the compensation to be allowed, and their report was duly confirmed on the 12th May, 1868; that by said report Plaintiff was awarded $6824.01 as compensation; that on the 27th May, 1868, [illegible] defendants deposited the said

(*) 9 Toullier, No. 94.
Merlin, Rép. Vo. saisie revend., art. 8.

Judah vs. The Mayor, Aldermen, &c., of Montreal.

sum of $6924.01 in the hands of the prothonotary of the said Court, and the said strip of land was vested in the defendants, who then entered upon and took possession of the same; that plaintiff remained in possession of the residue of said land; that the Commissioners appointed assessed the cost of the said improvement upon the real estate which they determined to be benefited thereby, and the share of the plaintiff of the said assessment amounted to $2759.40, and that he duly paid the same on the 9th October, 1868, thus reducing the amount of his indemnity to $4164.61; that plaintiff's property was assessed upon its value in view of the said improvements, and that his assessments amounted to these large sums by reason of and in consideration of the increased value which it was supposed the widening of Little St. James street and making it uniform with Great St. James street and widening Place d'Armes Hill would give to the same; that defendants by a by-law resolved to lower the level of the street, and they forthwith cut down to the new level the width of the new portion of the street, but they left the roadway of the old portion of the street and the side walk on the south-east side on the old level, thus giving two levels to the same street, and that the new level is four feet lower than the old one; that immediately after the establishment of the new level the defendant began building on the residue of his property a first class cut stone store, and completed the same before the 1st February, 1869, in order to lease it and make it productive from the 1st May, 1869, and he expended in its construction $14,000; that he has been deprived of one year's rent from 1st May, 1868 to 1st May, 1869, by the expropriation, that the said residue and new building have been assessed for the current year from the 1st May, 1869, at a valuation of $16,000 and a rental of $240, and the municipal and school assessments for the said year amount to $54, and have been paid by the plaintiff to the defendants; that he has fulfilled his obligations arising from his said ownership towards the defendants, but the defendants have not fulfilled their obligations arising from the widening of the said street, and the alterations in the level thereof, towards the public and the plaintiff, thereby leaving the plaintiff since the 1st of May, 1868, to the present time without any rent or profit from his property, but during which he has had two yearly assessments amounting to $111.25 levied on him as proprietor thereof, exclusive of the assessments for widening the street and Place d'Armes Hill; that the defendants after having taken possession were bound with all possible despatch to level the said street, and to make and pave the road way and lay down sidewalks, and to give for the residue of the properties of the persons expropriated an unobstructed and good street to and from which access might at all times be had; that the defendants have constantly and wilfully *neglected* to put the said street into good order and pave the same and to lay a sidewalk on the north-west side thereof; and that in the month of September, 1868, they put up a fence five feet high in the line between the two levels, from one end of the street to the other; that the whole of the width of the new level since September, 1868, hath been and is now impeded and obstructed by piles of stone, &c., &c., by reason whereof all passage through the said new level with vehicles hath been and is prevented, and that it is difficult and even dangerous for

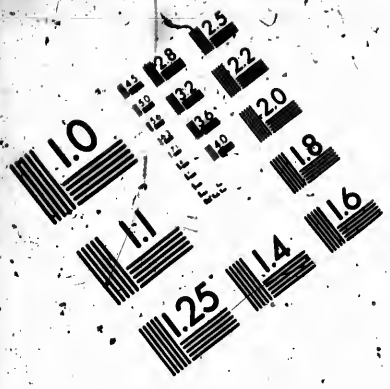
pedestrians to pass through or along the same, and no thoroughfare has been established; that in consequence the building of the plaintiff has been entirely cut off and isolated from the rest of the city, and the plaintiff by reason thereof and of the negligence of defendants hath been [illegible] and has lost the rent for the current year: that before [illegible] plaintiff's property yielded him a net revenue of $916, and he [illegible] from the new building a net revenue of $2,000 per annum; th[illegible] consequence of the gross fault of the defendants has suffered g[illegible] widening of the street, and will also lose the interest on the sum [illegible]9, being the surplus of his outlay over the net amount of the indemnity [illegible] by him and on the taxes paid by him; that the damages sustained by plaintiff amount to $2000, which he is entitled to obtain from the defendants, &c. Wherefore, &c.

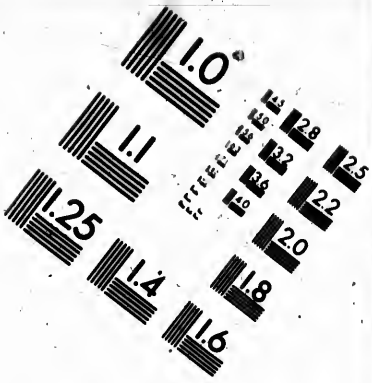
The defendants met the action by a first plea, which averred that at the request of the plaintiff and others they resolved to widen the said street: that in all their proceedings they acted according to law and have used due diligence and care in carrying out the said improvement; that on the 28th of August, 1868, at the request of the plaintiff and others, they resolved by a by-law to lower the level of the street, and in all their proceedings in lowering the level they acted according to law, and used all care and diligence: that in the amount of $6924 paid to plaintiff was included indemnity for all damages sustained by plaintiff arising from the widening of the street, &c.; that the said award was on the 12th May, 1868, homologated and confirmed by the judge and accepted by the plaintiff; that by by-law Chap. 29, sec. 7, persons erecting buildings may have a portion of the street opposite their building not exceeding one-third of the width of the street allotted to them on which they may put building materials: that since the 24th August, 1868, plaintiff and other proprietors have encumbered the portions of said street allotted to them with building materials: that owing to the erection of buildings on both sides of plaintiff, his building, even if completed, which defendants deny, was valueless as a shop and dwelling through no fault of defendants; that when plaintiff instituted the present action, his building was in an incomplete and unfinished state and untenantable; that even if Little St. James street had been graded in May, 1868, plaintiff could not have leased his building, the houses on both sides being still in an unfinished state; that in the winter and spring of 1869, there were many buildings similar to plaintiff's in better business streets for which tenants could not be obtained, inasmuch as there were more of such buildings than were required in the city. Wherefore, &c.

The defendants also pleaded the general issue.

To sum up:

The plaintiff claims from the defendants $2000 damages, sustained by him from the neglect of the defendants to fulfil the obligations which he alleged they were under with all despatch to level the said street and to make and pave the roadway and lay down sidewalks, and to give for the residue of the properties of the persons expropriated an unobstructed and good street to and from which access might at all times be had.





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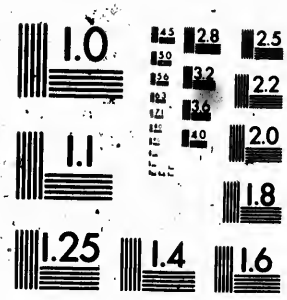

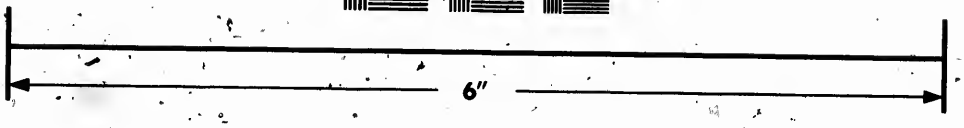

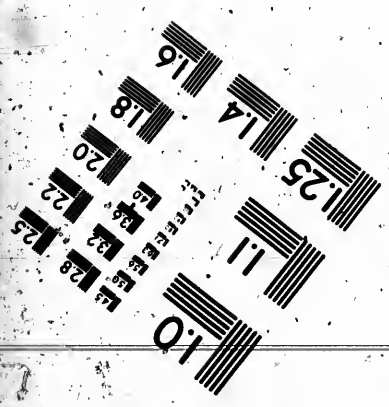

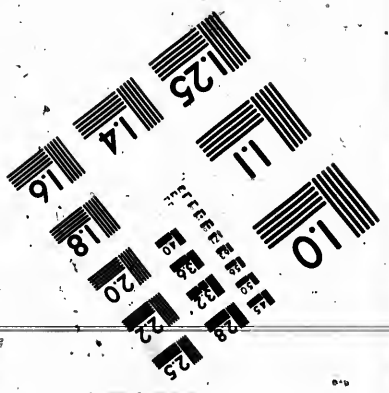

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The defendants have argued in effect against the plaintiff's demand that there was no contract at all between the plaintiff and defendants. They say that they are a government and legislature; that they have legislative powers which they hold for public purposes and as part of the government of the country, and that they enjoy the exemption of the government from responsibility; that plaintiff is one of the corporation, and that they are not bound to put a sidewalk at all. The expropriation is a thing by itself and uncomplained of, and was paid for. The street had become a new street. There was here *damnum absque injuriâ*. Angell,—Highways. S. 211—217. Here was an attempt by an individual to coerce a corporation in the exercise of their legislative functions. Was there an action on the case by a private individual? The Act of 1866 (29 and 30 Vic., c. 56, s. 11) provided that proprietors interested in an improvement might object to the improvement being carried out. For the construction of a footpath, by 27 and 28 Vic. c. 60, s. 27, a resolution of the council was necessary, and it could be made at the expense of the proprietor. 4 D. and E. Term R. 794, *The Governor and Company of the British Cast Plate Manufacturers* vs. *Meredith et al.*, Abbott's Dig. Law of Corporations p. 500, s. 185, 186, p. 501, s. 201. Sherman & Redfield on Negligence, s. 121, 153. This last authority, s. 127, reads as follows: "A large part of the functions of a city corporation are legislative or governmental, and necessarily a wide discretion is confided to it in determining the means of accomplishing its ends, and the Courts will not supervise that discretion. Otherwise, if the Courts could by writ of *mandamus* or other process compel the opening and paving of streets, building of sewers, &c. not in conformity with the views of local officers, inextricable confusion in the administration of government would ensue, for the duty of building public works of this kind is one requiring the exercise of deliberation, judgment and discretion. It admits of a choice of means and the determination of the order of time in which such improvements shall be made. It involves also a variety of prudential considerations relating to the burdens which may be discreetly imposed at a given time, and the preference which one locality has over another. Hence a municipal corporation is liable neither for an omission to exercise its discretion as to a particular matter, nor for the consequences of its lawful exercise."

The Court, on the question of the liability of the defendants on the issues raised between the parties, is with the defendants. The action is therefore dismissed.

The *motifs* of the judgment are as follows:

The Court having heard, &c.

Considering that the defendants in the expropriation made of plaintiff's property, in Little St. James street, and in the widening and lowering of the level of said street acted according to law;

Considering that the defendants in causing damage to plaintiff by said expropriation did not exceed the powers conferred upon them by the statutes in such case made and provided;

Considering that the damage caused by said expropriation was paid for by the award of the Court appointed for that purpose;

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Considering that the plaintiff hath not proved that the defendants were under obligation to the plaintiff with despatch to level the street, and make and pave the roadway and lay down side-walks and to give to the residue of the properties expropriated an unobstructed and good street, to and from which access might at all times be had;

Considering on the whole, that the plaintiff hath failed to prove the material allegations of his declaration:

Doth dismiss the action and *demande* with costs.

Action dismissed.

Judah & Wurtele for the plaintiff.

H. Stuart, Q.C., and K. Roy, Q.C., for the defendants.

(J. K.)

COUR SUPERIEURE, 1870.

MONTREAL, 31 MARS, 1870.

Coram MACKAY, J.

No. 159.

Joel Leduc vs. *The Provincial Insurance Company of Canada.*

JUGE:—1o. Que l'assureur d'un navire qui a accepté le délaissement fait par l'assuré ne peut ensuite repousser la demande de ce dernier, sous prétexte de violation des clauses de la police et de déviation de la route indiquée.

2o. Que la valeur du navire étant fixée par la police, le copropriétaire qui a assuré tout le navire en son nom seul, a droit à la moitié entière de cette valeur, et non-seulement à la moitié de la somme assurée, lorsque cette moitié de valeur ne dépasse pas le montant assuré.

Le 15 Décembre, 1866, Leduc fait assurer par la Compagnie d'Assurance appelée *The Provincial Insurance Company of Canada*, la goëlette "*Babineau et Gaudry*," pour une somme de $5,000. La goëlette est évaluée par la police même, à $7000. L'assurance est effectuée pour un an, le navire devant voyager pendant ce temps, de Montréal à Terrencuve, la Nouvelle-Ecosse, les Indes Occidentales, Cuba et les différents ports des Provinces maritimes.

Entr'autres stipulations, la police contenait la clause suivante: "*Not allowed "under this Policy, to enter the Gulf of St. Lawrence, before the twenty-fifth "day of April, nor to be in the said Gulf after the fifteenth day of November. "Nor to proceed to Newfoundland, after the first day of December, or before the "fifteenth day of March, without payment of additional premium and leave "first obtained, war risk and sealing voyages excepted.*"

Le 16 Novembre, 1867, la goëlette "*Babineau et Gaudry*" laisse le port de Montréal pour St. Jean de Terrencuve, avec un chargement de farine, assuré aussi par la compagnie Défenderesse, et ce, la veille du départ du navire, le 15 Novembre 1867, et par l'entremise du Demandeur Leduc, pour le compte du propriétaire de la farine. Le 27 Novembre 1867, la goëlette se trouvait au Bic, et quelque temps après faisait naufrage sur l'Ile d'Anticosti. Tout l'équipage ayant péri, on n'eut aucune nouvelle du vaisseau avant le mois de mai 1868.

En apprenant le naufrage, Leduc fait signifier de suite à la Compagnie Défenderesse un acte de délaissement et abandon du navire. Cet acte, fait en forme authentique, est signifié au Bureau de la Défenderesse à Montréal, le 19 Mai,

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1868, et l'agent de la Compagnie transmet de suite la copie par lui reçue au Bureau central à Toronto. La Compagnie envoie aussitôt à Gaspé, un de ses agents, du nom de McGregor, pour surveiller ses intérêts dans le naufrage du navire. McGregor, en passant à Montréal, le 24 Mai, va au bureau de la Compagnie, pour demander des renseignements, et l'agent local McCuaig lui répond qu'il a envoyé tous les papiers à Toronto. McGregor s'adresse alors au Demandeur qui lui donne tous les renseignements contenus dans l'acte de délaissement. McGregor part de Montréal, le 25 Mai 1868 et se rend à Gaspé, puis à Anticosti. Il fait transporter la cargaison de farine à Gaspé et la fait vendre pour le compte des intéressés, puis revient à Anticosti, fait relever et réparer le navire et le fait conduire à Montréal, dépensant pour ce au-delà de $3000, puis le fait vendre à l'encan et en obtient $350.

Malgré ces faits et cette acceptation du délaissement, la Compagnie Défenderesse refuse de payer au Demandeur le montant assuré, et ce dernier intente son action.

La Défenderesse, par une Défense en Droit et deux Exceptions, invoque la clause susrécitée de la police, et prétend que le navire se trouvant dans le Golfe, savoir à Anticosti, après le 15 Novembre, le naufrage ayant eu lieu vers le 30, le Demandeur avait violé les conditions de son assurance, et forfait à son droit.

Le Demandeur répond que la clause invoquée devait s'interpréter non dans le sens grammatical, mais dans le sens commercial, et que la coutume suivie pour le départ des navires du port de Montréal, en automne devait aider à en fixer le sens. Que le vrai sens de cette clause était que les mots *not to be in the Gulf after the 15th of November* voulaient dire *not to enter into the Gulf after the 15th of November*, mais que quant à la sortie du Golfe après cette date, la police n'avait pas l'effet de l'interdire, puisque la phrase suivant immédiatement celle-là, permettait au navire de partir pour Terreneuve, en aucun temps avant le 1er Décembre et que puisque le navire pouvait partir pour Terreneuve le 1er Décembre, cela voulait dire qu'il devait pouvoir être dans le Golfe après le 15 Novembre.

De plus, que la Défenderesse ayant accepté le délaissement que lui avait fait le Demandeur, avait par là donné elle-même une semblable interprétation à cette clause de la police, et avait par là renoncé à toute objection fondée sur cette stipulation.

MACKAY, J.—La question d'interprétation de la clause de la police n'est pas sans difficultés. Mais si l'acceptation du délaissement par la Défenderesse a eu l'effet que prétend lui donner le Demandeur, il est inutile d'aller plus loin. Ce délaissement est signifié le 19 Mai 1868, à l'agent de la Compagnie à Montréal, et ce dernier envoie de suite l'acte au bureau principal à Toronto. Ce délaissement est fait en termes clairs et précis, et donne tous les détails de la perte du navire avec beaucoup de franchise. Avant le 24 du même mois, la Défenderesse fait partir son agent McGregor pour le lieu du naufrage afin de surveiller ses intérêts. La Défenderesse dit qu'elle ne connaissait pas alors le délaissement et qu'elle ne l'a connu et n'a reçu la copie de l'acte qui le contient que le 18 Juin, et qu'il lui a alors été envoyé de Québec par McGregor. C'est le témoin Crocker, gérant

de la Compagnie, qui l'affirme. Mais ceci me parait bien singulier, car McGregor n'est pas allé à Québec dans le mois de Juin. Lorsqu'il a demandé des renseignements et des papiers au bureau de Montréal, en Mai, on lui a répondu que tout avait été envoyé à Toronto. Dans les premiers jours de Juin, il se trouvait à Gaspé; le 15 Juin, il était à Anticosti, d'où il est ensuite revenu encore à Gaspé. Comment pouvait-il, pendant ce temps-là, envoyer de Québec une copie notariée de l'acte de délaissement pour que cette copie arrive à Toronto le 18 Juin? D'ailleurs de qui McGregor aurait-il eu cette copie? Il n'y en a eu qu'une de signifiée à la Défenderesse, savoir celle laissée à McCuaig, et c'est précisément celle-là qui se trouve maintenant en la possession de la Défenderesse.

Comment la Défenderesse a-t-elle pu avoir cette copie sinon de McCuaig lui-même, qui déclare l'avoir envoyée au bureau principal, avant le 24 Mai? Il y a donc lieu de croire que cet acte de délaissement était connu de la Défenderesse avant le 24 Mai, et avant que McGregor fut parti de Montréal. De plus, ce même jour, 24 Mai, le Demandeur répète à McGregor tout ce que contient l'acte de délaissement, McGregor lui-même l'avoue. Le Demandeur a donc ainsi renouvelé son délaissement à la Défenderesse, et cela, sans aucune répudiation de cette dernière.

La preuve établit clairement que le vaisseau était tellement brisé et endommagé que le Demandeur avait parfaitement droit de le considérer comme totalement perdu et d'en faire l'abandon.

Cet abandon était formel, contenait tous les détails du naufrage et était fait sans conditions. En vertu des dispositions de notre code, l'acceptation d'un tel délaissement rend l'assureur propriétaire absolu de la chose assurée.

Quant à l'acceptation du délaissement, elle peut être explicite ou implicite. Les assureurs peuvent refuser d'accepter le délaissement, mais s'ils veulent refuser, ils doivent en donner avis. Dans l'espèce, la Défenderesse aurait pu répudier le délaissement fait par le Demandeur et s'en tenir aux arguments qu'elle a ensuite invoqués, savoir la violation des conditions de la police et par suite sa libération de son engagement. Mais la conduite de la Défenderesse après le délaissement, prouve contre elle.

Il est parfaitement loisible aux assureurs de se départir des objections même valables qu'ils peuvent avoir à opposer à une réclamation, et les tribunaux apprécient souvent leurs actes comme comportant une telle renonciation. Ces questions se présentent tous les jours devant les tribunaux, et il en sera toujours ainsi puisqu'il s'agit ici non d'interprétation de la loi, mais de l'appréciation de certains faits et de la portée et des conséquences qu'il est juste de leur donner. Il en est de même des pouvoirs des agents ou des personnes par qui ces actes sont faits, pouvoirs qui sont continuellement mis en question et dont le juge doit aussi décider.

La défenderesse plaide que le Demandeur a dévié des engagements qu'il avait pris par la police; mais ceci était connu de la Défenderesse qui a été informée par le Demandeur lui-même, de la marche du navire, de l'époque de son départ, du lieu du naufrage, etc., le tout avec une mise en demeure de lui payer la somme assurée et la déclaration de délaissement. Que fait la Défenderesse en

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présence de cette déclaration si franche et si complète; elle ne répudie pas le délaissement, au contraire elle prend possession du navire et le répare avec des frais énormes. Elle renonce donc aux objections qu'elle pouvait faire au Demandeur, et en acceptant le délaissement, fait du navire sa propriété. Or la Défenderesse ne peut pas agir ainsi et refuser ensuite toute indemnité au Demandeur.

Le délaissement était justifié, il était parfaitement valable quand il a été fait, et après son acceptation, les droits des parties se sont trouvés définitivement fixés. Si la perte, au lieu d'être totale, avait été minime, la Défenderesse en aurait profité.

La Cour maintient donc que la Défenderesse en s'appropriant le navire délaissé par le Demandeur, a renoncé à (waived) toutes objections qu'elle pouvait faire à ce dernier.

Je trouve dans le vol. 18 du "*Jurist*" (Anglais,) 1854, une décision rendue par Sir Knight Bruce et Sir G. J. Turner, dans une cause de *Wing vs. Harvey*, que voici :

A avait fait assurer sa vie, avec cette condition : *not to leave Europe.* Il transporte sa police à B et vient en Canada où il meurt environ une année après. B paie la prime sur l'assurance de A pendant l'absence de ce dernier, à un agent des assureurs en Angleterre, et a quelquefois occasion de parler à cet agent de l'absence de A et de sa résidence en Canada. L'agent en question n'était pas au bureau central de l'Assurance, mais en était au contraire, assez éloigné.

Il est évident qu'il y avait eu ici déviation complète des conditions de l'assurance, puisqu'il était stipulé que l'assuré ne devait pas laisser l'Europe. Néanmoins les assureurs ayant reçu la prime pendant l'absence de A, leur agent étant informé de cette absence, il fut jugé qu'ils s'étaient désistés de leur droit, et ils furent condamnés.

Ici, *Leduc* n'est pas tout à fait dans la même position, mais les assureurs lui ont pris sa propriété entière, la chose assurée elle-même.

La position de *Leduc* est donc encore plus favorable que celle du Demandeur dans la cause que je viens de citer.

Quant à la somme pour laquelle jugement doit être rendu en faveur du Demandeur, si Leduc avait établi son droit à la propriété entière du navire, il devrait recouvrer tout le montant réclamé, $5000; mais je rejette le témoignage de Vigneau; je trouve que Leduc n'est propriétaire que de la moitié du navire. Ce navire est évalué par la police, à $7000; la perte de Leduc qui a assuré seul est donc de $3,500, et cette somme étant moindre que celle assurée $5000, le Demandeur doit avoir Jugement pour ces $3.500.

Défense en Droit et Exceptions renvoyées, Jugement pour le Demandeur.

Jetté & Archambault, avocats du Demandeur.

Ritchie, Morris & Rose, avocats de la Défenderesse.

(L.A.J.)

CIRCUIT COURT, 1869.

MONTREAL, 15TH DECEMBER, 1869.

Coram TORRANCE, J.

No. 787.

Archibald et al., vs. *Shaw & McDonald* et vir, intervening parties.

HELD:—1. That the sale of a safe by a hotel-keeper to a trader to whom the former was indebted for groceries furnished, is a commercial matter under C.S. L.C. Cap. 82, sec. 18.

2. That a landlord's *gage* on the effects in the premises leased will not prevent the sale of the effects to a third party, even when rent is due, unless the landlord seizes and prosecutes the seizure to judgment.

PER CURIAM.—This case is before the Court on the merits of a *saisie revendication* and an intervention. The defendant has not pleaded. On the 7th December, 1868, the intervening party, Mary McDonald, granted a lease to Henry Lampen, boarding house keeper, of the premises known as the Victoria house for a rent of $2400 per annum. During the existence of the lease, about the 29th January, 1869, Lampen sold and delivered to the plaintiffs in payment of a bill for groceries a safe which was in the leased premises. On the 2nd February, 1869, Mary McDonald sued out a writ of *saisie gagerie par droit de suite* against Lampen for $600 rent accrued on the 1st February. This *saisie gagerie* was not returned into Court owing to a settlement alleged to have been made between Mary McDonald and Lampen. But under the *saisie*, the safe was taken out of the possession of the plaintiffs and finally placed by Mary McDonald in the hands of the defendant. The plaintiffs on the 21st May, 1869, attached the safe as their property in the hands of the defendant. Mary McDonald has intervened in this suit, setting up the lease, the indebtedness of Lampen for rent, for over $400, her lien on the safe as one of the *meubles meublans* of the premises, and a settlement between herself and Lampen after the *saisie gagerie*, by which settlement she was allowed to keep the safe in part payment of her rent. That the safe and other things in the premises were not sufficient to pay said rent, and in order to prevent costs of following up the suit *sur saisie gagerie* said Lampen handed over said safe to the female petitioner to be disposed of at auction or otherwise for the payment of said rent, according to its sufficiency. "That thereupon she placed it in the store of the defendant as an auctioneer to be stored there for her until defendant could and would sell it at auction for said purpose, and the same still remains there *gagé* as aforesaid for said rent, and she hath right to hold the same until said rent is paid by sale of said safe or otherwise." The conclusion of the petition in intervention was to the effect that she might be allowed to intervene and take up the *fait et cause* for the defendant, to plead to the plaintiff's action as she might be advised and protect her rights. She then pleaded by plea to the action, setting up in effect the matters alleged in the intervention, adding further that the safe was her property and that she had a right to hold the same until payment of the rent. The prayer of this plea was that the *saisie revendication* might be set aside, and the action dismissed. The intervening party also pleaded the general issue. The plaintiffs have fyled an answer in law to the first plea of the intervening party, and the chief reasons alleged in support of it are that the plea does not show any

Archibald et al., vs. Shaw & McDonald et ux, intervening parties.

right of proprietorship in the safe in Mary McDonald, and that the pretended transfer by Lampen to her was without the consent of the plaintiffs who were before the *saisie* in admitted possession of the safe as proprietors. The plaintiffs further pleaded by a second plea the sale to them of the safe by Lampen, the seizure by the *saisie gagerie*, and that the *saisie gagerie* was never returned into Court or adjudicated upon, but was discontinued by an agreement between Lampen and Mary McDonald. "That the said plaintiffs cannot now in any manner or form be held affected or be deprived of their right in the said safe whether the said remaining effects were more than sufficient to secure the payment of any rent accrued, accruing or to accrue to the said intervenants, and that no transfer or attempted transfer of the safe, seized in this cause, was included in any agreement or ever made to intervenant as falsely alleged in said pleading. That even if any privilege of *gage* had existed upon the said safe in favour of the said intervenants, the same was lost and abandoned by reason of the discontinuance of the said action of *saisie gagerie*."

The Court after a careful examination of the evidence is of opinion that the identity of the safe and possession by the plaintiffs under a sale from Lampen to them about the 29th January is proved by Lampen, and that proof is allowed by C. S. L. C. cap 82, sec. 18. Mary McDonald on her part has proved the indebtedness of Lampen for rent on the 1st February for $600, that the safe was in the premises leased as *gage* for the rent, and that the other furniture was insufficient security, but she has not proved the settlement with Lampen. In fact the process of *saisie gagerie*, under which the safe was taken out of the possession of the plaintiffs, was abandoned. The Court sees a *bona fide* sale and delivery to plaintiffs about the 29th January, which vested the property in them subject to the *gage* of the landlord if the privilege was exercised within 8 days after removal from the leased premises. Under these circumstances, has Mary McDonald an absolute right to hold the safe against the plaintiffs and pray for the dismissal of their action?

The Court is against the pretensions of the intervening party.

The judgment is recorded as follows:

The Court having heard the plaintiffs and the intervening parties on the merits of the contestation raised by the intervening parties to the action and *saisie revendication* of the plaintiffs, having heard the parties also on the motion of the intervening parties made at the hearing that the evidence of the witness, Henry Lampen, so far as it attempts to prove by verbal testimony a sale of the safe referred to in this cause from the said Lampen to the plaintiffs as being not a commercial matter, and also the payment of the rent due by the said Henry Lampen to the intervening party, Mary McDonald, as being a larger sum than $50, be rejected from the record; having examined the pleadings and evidence, and duly deliberated:

Considering that by C. S. L. C. cap. 82, sec. 18, the sale of the said safe by said Lampen to plaintiffs could be proved by verbal testimony;

Considering also that the payment of rent under the said lease between said Lampen and said Mary McDonald could not be proved by verbal testimony, doth dismiss so much of said motion as has reference to the proof of said sale, and

doth grant that part of the motion which has reference to the proof of payment of rent;

Considering further that the plaintiffs on or about the 29th January, 1869, bought and obtained delivery, without fraud on their part, of the said safe from the said Henry Lampen subject to the privilege of the said Mary McDonald as lessor, if that privilege were exercised by *saisie gagerie par droit de suite* or otherwise within eight days next after the said safe was removed from the leased premises;

Considering that the writ of *saisie gagerie* sued out by the said Mary McDonald on the 5th February, 1869, under which she took possession of the said safe, was never returned into Court or adjudicated upon, and there is no proof that plaintiffs have been lawfully dispossessed of said safe;

Considering that the said Mary McDonald hath failed to establish that she is entitled to the conclusions of her intervention or pleas to the plaintiff's action, doth dismiss the said intervention and plea with costs distraits. (*)

C. P. Davidson, for the plaintiffs.

Doherty & Doherty, for the intervenants.

(J.K.)

SUPERIOR COURT, 1869.

MONTREAL, 22ND MAY, 1869.

Coram TORRANCE, J.

No. 275.

Harvey vs. *Phillips*.

HELD:—That an application by a defendant for a writ of *commission rogatoire* must be made within the delay specified in Art. 308 of the Code of Civil Procedure, and will not be granted afterwards, except on special cause shown and in the discretion of the judge.

This was a motion to revise the ruling at *enquête* of THE HON. MR. JUSTICE MONDELET.

The case had been duly inscribed for *enquête* for the 6th April, 1869, when plaintiff closed his *enquête*.

On the 4th of May, 1869, the defendant applied by motion for a writ of *commission rogatoire* to examine certain witnesses at Hamilton, in the Province of Ontario.

The application was supported by affidavits, establishing that the commission was necessary, and that defendant's absence in England was the cause of the application not having been made within the proper delay.

MONDELET, J., rejected the motion as coming too late.

(*) This Judgment was confirmed in Review, 28th June, 1870, BERTHELOT, J., MACKAY, J., and BEAUDRY, J.

Harvey vs. Phillips.

TORRANCE, J., (after stating facts)—The application ought to have been made within 4 days after the plaintiff's *enquête* was closed, and, although special cause has been shown by affidavit, the Court has to exercise a discretion in the matter and must reject the application as coming too late. The motion to revise Judge Mondelet's ruling is consequently dismissed with costs.

Motion to revise ruling rejected.

Carter & Hatton, for Plaintiff.
J. J. C. Abbott, Q. C., for Defendant.
(S. B.)

COUR SUPERIEURE.

EN REVISION.

MONTREAL, 31 MAI, 1870.

Coram MACKAY, J., TORRANCE, J., BAUDRY, J.

No. 239.

Hutchins et al. vs. Fraser et al.

JUGE:—Que la contestation est liée par une réponse générale à une exception.
2. Qu'aucune replique n'est recevable. (1)

Les demandeurs réclamaient par leur action intentée devant la Cour de Circuit pour le district de St. François, à Sherbrooke, la somme de $103.75.

Le défendeur plaida une exception de paiement.

Les demandeurs produisirent une réponse générale et en même temps leur articulation de faits, savoir : le 25 octobre 1867.

Le lendemain, 26 octobre, le défendeur fit signifier un avis de motion aux demandeurs pour faire rejeter l'articulation de faits comme étant produite trop tôt et irrégulièrement, les défendeurs prétendant qu'ils avaient le droit de produire une réplique à la réponse générale.

Le 10 décembre 1869, la Cour de Circuit à Sherbrooke, SHORT, J., a renvoyé la motion avec dépens.

Les demandeurs ont porté ce jugement devant la Cour de Révision à Montréal.

PER CURIAM:—Il s'agit de savoir s'il y avait besoin d'une replique à une réponse générale faite à une exception de paiement, de manière à empêcher l'articulation de faits avant la production de cette replique.

L'art. 148 C. P. déclare que la contestation est liée sans cette réplique.

Jugement confirmé. (2)

L. H. Davidson, avocat des Demandeurs.
Ives & Hovey, avocats des Défendeurs.
(P. R. L.)

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(1) Art. 148 C. P. C.
(2) Vide L. C. J. Vol. 13, p. 168.

COURT OF QUEEN'S BENCH, 1869.

MONTREAL, 8TH JUNE, 1869.

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

Ex parte Edward Spelman, for a Writ of *Habeas Corpus*.

HELD:—That where a party undergoing imprisonment, on conviction of felony, has been released on bail, in consequence of the issue of a writ of error, and such writ of error is subsequently quashed, he may be re-imprisoned, for the unexpired term of his sentence, on a warrant of a Judge of the Court of Queen's Bench (Crown side) signed in Chambers and granted in consequence of the Court having ordered process to issue, to apprehend such party and bring him before the Court, "or before one of the justices thereof, to be dealt with according to law."

This was an application to the Court of Queen's Bench (Appeal side) for a writ of *Habeas Corpus*.

The prisoner had been convicted of felony in the Court of Queen's Bench (Crown side,) and sentenced to two months imprisonment.

Whilst undergoing imprisonment under the sentence he was released on bail, in consequence of the issue of a writ of error, which was subsequently quashed, as reported at pp. 154 and seq., 13th L. C. Jurist.

Application was afterwards made to the Court of Queen's Bench, (Crown side) for the process of the Court, to apprehend the prisoner and bring him before the Court, "or before one of the Justices thereof, to be dealt with according to law."

Process issued accordingly and the prisoner was apprehended and brought before THE HON. MR. JUSTICE MONK, who thereupon issued the following warrant, under which the prisoner was re imprisoned :—

IN THE COURT OF QUEEN'S BENCH.

PROVINCE OF QUEBEC, DISTRICT OF MONTREAL.

(*Crown side*)

In vacation—after March Term, 1869.

In Chambers.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the High Constable of the District of Montreal in our said Province, and to the Keeper of Our Common Gaol, of the said District at the City of Montreal—Greeting:—Whereas at the Term of Our Court of Queen's Bench (Crown side) begun and holden at the Court House, at the City of Montreal, in and for the District of Montreal, on the 24th day of September, in the year of Our Lord 1867, Edward Spelman, late of the Parish of Laprairie de la Magdeleine, in the District of Montreal, laborer, was before our Justices of Our Said Court of Queen's Bench (Crown side) convicted in due form of law, on the 3rd day of October, in the year last aforesaid, of a certain felony, to wit, for that he, the said Edward Spelman, on the 9th day of April, in the Year of Our Lord, 1867, at the Parish of Laprairie de la Magdeleine aforesaid, feloniously did, by threats of force and violence, obstruct one Thomas Catgrove

Edward Spelman, for a Writ of Habeas Corpus.

Johnson Racey, he, the said Thomas Catgrove Johnson Racey, then being an officer of excise, and then being in the due exercise of his office and duty as such officer, 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, and afterwards, to wit, at the said term of our said Court of Queen's Bench, Crown side, on the 8th day of October, in the year last aforesaid, the said Edward Spelman was, upon the conviction aforesaid, duly sentenced for the said offence and felony to be imprisoned in the common gaol of the said district for and during the term and space of two calendar months, and whereas the said Edward Spelman before the termination of the said period of two calendar months, to wit, on the tenth day of the said month of October in the year last aforesaid, sued out of our Court of Queen's Bench (Appeal side) for Lower Canada on the fiat of the Honorable the Attorney General for the Province of Quebec, a writ of error, from the said conviction and judgment, and likewise on the said tenth day of October, in the year last aforesaid, applied for our most Gracious writ of *Habeas Corpus*, and obtained his release on bail in consequence of such writ of error having been sued out, and there and then entered into recognizances before the Hon. Mr. Justice Drummond, one of the Justices of our said Court of Queen's Bench, conditioned for his appearance before the Court of Queen's Bench (Appeal side) on the first of December then ensuing, before which last mentioned Court the said writ of error should be heard and determined, and also for his appearance before the then ensuing term of the Court of Queen's Bench (Crown side), and then afterwards from day to day until duly discharged, and whereas in and by the judgment rendered and pronounced by the Court of Queen's Bench (Appeal side) on the 9th day of September, in the year 1868, upon the said writ of error, it was considered and adjudged that there was no error either in the record or proceedings so had before the Court of Queen's Bench (Crown side) against the said Edward Spelman, or in the giving of the judgment aforesaid, and it was farther considered and adjudged, that the judgment aforesaid be in all things affirmed and stand in full force and effect, and whereas at a term of the Court of Queen's Bench (Crown side) begun and holden at the Court House, in the said city of Montreal, on the 24th day of March, in the year 1869, a duly certified copy of the judgment so rendered and pronounced by the said Court of Queen's Bench (Appeal side) on the 9th day of September in the year 1868, was on the 14th day of April, in the year 1869, duly read and published in open Court, and the same was then and there duly entered on the original record in proper form, and the said Edward Spelman was then and there, on the said 14th day of April, in the year last aforesaid, duly called in open Court, sitting the said Court of Queen's Bench (Crown side), on his said recognizance and made default, and upon motion of Edward Carter, Esquire, Queen's Counsel, representing the Crown, then and there made, it was ordered by the said Court of Queen's Bench, (Crown side), that the process of the said Court should issue to apprehend the said Edward Spelman and bring him before the said Court of Queen's Bench (Crown side) or before one of the Justices thereof, to be dealt with according to law, and whereas the said Edward Spelman, hath this day been brought before me, the Honorable Samuel Cornwallis Monk,

Edward Spelman, for a Writ of Habeas Corpus.

one of the Justices of the said Court of Queen's Bench, under the process of the Court so issued against him; by the High Constable of the said District of Montreal; these are therefore to command you, the said High Constable, to convey the said Edward Spelman to the common goal at Montreal aforesaid and there deliver him to the keeper thereof together with this precept, and you, the keeper of the said common gaol, to receive the said Edward Spelman into your custody in the said common gaol, there to remain under the sentence and judgment of the said Court of Queen's Bench (Crown side) rendered and pronounced on the 8th day of October, in the year 1867, aforesaid, for the unexpired term of two calendar months' imprisonment, adjudged against him by the said sentence and judgment, to wit, for such portion of the period of said two calendar months during which he, the said Edward Spelman, was not imprisoned in the said common gaol by reason of his having been released from your custody as aforesaid on the tenth day of October, 1867, under the said Writ of *Habeas Corpus*, and for so doing this shall be your sufficient warrant. Given under my hand and seal at Montreal aforesaid, this 21st day of April, in the Year of Our Lord, 1869."

Signed, S. C. MONK,
J.Q.B.

The following were the grounds assigned, in support of the application for *Habeas Corpus*.

"1st. Because the said warrant is signed in Chambers by the Hon. S. C. Monk, one of the Judges of this Court, he not having any power whatever to make or sign the said warrant of commitment.

2nd. Because by the said warrant the high constable is ordered to convey your petitioner to the common gaol of this district, and the said keeper of the common gaol is ordered to detain your petitioner in the said common gaol for the unexpired term of two calendar months, which order the said Honorable S. C. Monk had no power, right or authority to make.

3rd. Because in and by the said warrant the said Honorable S. C. Monk took and exercised jurisdiction over your petitioner without any just cause or reason.

4th. Because the period for which your petitioner is ordered to be imprisoned is in the said warrant uncertain and not specified with precision.

5th. Because the said warrant is null, void and of no effect."

DUVAL, CH. J. The case really admits of no difficulty. The sentence had to be carried out in one of two ways. Either the officer of the Court might send the party to gaol, or application might be made to the Court or Judge to have that done. In this instance application was made to the Court direct for process to secure the re-arrest of the prisoner, and his re-imprisonment was effected under the warrant of one of the Judges of the Court. This warrant we have carefully examined and find perfectly in form. It is, moreover, in the interest of the prisoner, that his re-imprisonment should be settled by the Judge and not by the officer. On the whole, we are of opinion to reject the application for *Habeas Corpus*, and it is rejected accordingly.

Application for *Habeas Corpus* rejected.

Wm. H. Kerr, for Prisoner.
E. Carter, Q.C., for the Crown.
(S.B.)

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 8th SEPTEMBER, 1870.

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

No. 94.

JAMES BENNING,

(Defendant in the Court below,)

APPELLANT;

AND

MARIA SOPHIA GRANGE,

(Plaintiff in the Court below,)

RESPONDENT.

HELD:—1. That an action of damages lies for breach of promise of marriage.

2. That where the Jury have found a verdict for plaintiff, and the defendant has not moved for a new trial, the Court cannot take into consideration the question whether the damages awarded by the jury are excessive.

This was an appeal from the judgment of the Superior Court, Montreal, MACKAY, J., rendered on the 21st September, 1869, a report of which will be found at page 290, 13th volume L. C. Jurist. The case was appealed for the purpose of obtaining the opinion of the Court of Appeals on the question raised by the defendant on demurrer in the Court below, namely, whether an action of damages lies for breach of promise of marriage. The demurrer was dismissed by the Superior Court (13th L. C. Jurist, 126), and leave to appeal from this interlocutory judgment was refused by the Court of Appeals (13 L. C. Jurist, 153). Final judgment having been rendered in accordance with the verdict of the jury, and the defendant's motion for judgment *non obstante veredicto* having been rejected, the present appeal was brought.

Girouard for the appellant:

Les prétensions de l'appelant se résument comme suit: Une promesse de mariage est nulle en droit et la simple inexécution d'une promesse de mariage ne donne pas ouverture à une action en dommages, à moins bien entendu, qu'elle soit précédée, accompagnée ou suivie de quelques circonstances particulières qui portent un préjudice réel.

Ce sont ces circonstances qui constituent le délit et le tort, et qui, par conséquent, sont la vraie et seule cause de l'action; la promesse de mariage n'apparait que parce qu'elle en a été l'occasion.

Dans le cas actuel, ces circonstances dommageables n'apparaissent pas ni dans la déclaration, ni dans les questions soumises au jury. On dit bien, dans la déclaration que la demanderesse s'est préparée pour le mariage, qu'elle a même souffert dans sa réputation. Mais quels préparatifs a-t-elle faits? Ont-ils été l'occasion d'une dépense pécuniaire, de perte de temps, etc. C'est ce qu'on ne dit pas et c'est néanmoins ce que l'on devait dire. De plus, ce dommage à la réputation, a-t-il résulté de quelques circonstances particulières? Non, il a ré-

sulté, dit-on, du simple refus d'exécuter la promesse de mariage. Or l'appelant a confiance que cette Honorable Cour maintiendra que la promesse de mariage aussi bien que son inexecution pure et simple ne donnent aucun droit; et que le seul droit, dont elles peuvent être l'occasion, est celui pour le recouvrement de *dommage réel* résultant des circonstances injurieuses qui ont précédé, accompagné ou suivi les fiançailles et qui par conséquent doivent être alléguées, par exemple, le congé d'un parti avantageux, les frais de trousseau, la diffamation, etc. Ce que, donc, l'appelant reproche au tribunal inférieur c'est d'avoir donné l'action pour inexécution de promesse de mariage purement et simplement *sans alléguer aucun autre fait*, et enfin d'avoir condamné l'appelant à payer $3500 de dommages, uniquement parce qu'il a refusé de marier la demanderesse.

Voici la liste d'autorités de l'appelant :

Guyot, Vo. Fiançailles, No. 1.

Denizart, Vo. "

Dictionnaire de Droit Canonique, Vo. Fiançailles.

Favard, Vo. Obligation.

Duranton, t. 10, p. 383.

Merlin, Vo. Fiançailles, No. 6, p. 176, 177.

Rolland de Villargues, Vo. Promesse de Mariage, No. 7, 3e alinéa.

Bacquet, Droits de Justice, t. 1, p. 327, Nos. 329, 330, 331, p. 331, 332.

Le Prestre, Cent. 1ère, ch. 68, Nos. 5, 6, p. 209, 211.

Journal du Palais, t. 2, p. 177.

Arrêts du Parlement de Provence, 16 Mai 1640 et 2 mai 1656 rapporté par Boniface.

Déclaration du 26 nov. 1639, art. 7.

Duchesne, Du Mariage (1848) p. 422 en note.

Pezzani, Empêchements du Mariage No. 79 et seq.

Duranton, Code Civil, vol. 10, p. 320, 321.

Répertoire du Palais, vo. Promesse de Mariage, No. 26.

Arrêt de la Cour de Cassation du 11 juin 1838, rapporté au Journal du Palais (J. P. 1838.)

Arrêt de la même Cour, 30 mai 1838 (J. P. 1838.)

Arrêt de la Cour d'Appel de Bordeaux (S. 1853, 2, 245.)

Arrêt de la Cour de Poitiers, 29 mai 1839, 2, 394 (S. 1834, 2, 254.)

Sirey, Recueil, an 1806, 2, 160.

Maleville, Discussion du Code, t. 1, p. 166.

Marcadé, Revue Critique de Législation, 1853, 1ère partie, p. 197.

Kay v. Bradshaw, 2 Vernon, 202 (1689.)

Woodhouse v. Shepley, 2 Aitk., 535 (1742.)

Lowe v. Peers, 4 Burr. 2230.

Baker v. White, 2 Vernon, 215.

2 Parsons on Contracts, 60.

Code Civil du B. C. art. 116, 128, 148, 907, 998, 1059, 1062, 1080, 2613.

Aussi Rapport 2 des Codificateurs p. 24 sur l'art. 62.

BADGLEY, J. It is unnecessary to enter into the particulars of the case itself, which at present rests upon the procedure taken by the appellant to avoid the

James Henning and Maria Sophia Grange.

verdict against him. The action is in damages by the respondent against the appellant for breach of promise of marriage, and among the pleas filed by the latter was a demurrer to the action, upon grounds stated, chiefly denying the right of action for breach of promise. The demurrer was rejected after argument by the Superior Court, that decision was sustained by the Court of Review, and the subsequent application to be admitted to appeal to this Court from those concurrent decisions was refused here, leaving the point open for discussion in this Court when the proper opportunity should arrive. The prevalent impression at the Bar, and on the Bench generally, has been that a breach of promise of marriage is a personal wrong to be compensated in damages, and the right of action has not been questioned in the Courts with any persistency until this case appeared. If it is a personal wrong at all, then it is of that class of personal wrongs that is triable by a jury, whose province it is to ascertain the facts of the wrong inflicted and to estimate and assess the damages occasioned by the injury suffered. This case was submitted to a jury at the instance of the respondent, without objection by the appellant to that form of trial, and a verdict was found in favor of the respondent for the sum of $3500, after a full examination of the written and oral testimony adduced and a careful investigation of the facts of the case. To avoid the entry of judgment against him upon the verdict, the appellant adopted three different proceedings, which will be particularly referred to hereafter, but having failed to receive the approval of the Superior Court upon his pretensions, the judgment on the verdict was entered in that Court against him in favor of the respondent, and he has in consequence appealed to this Court, and has brought into the first and most prominent line of discussion the point of the right of action involved in the grounds of the demurrer already adverted to. That point is invoked substantially in the objective procedure adopted by him against the verdict, namely, the motion *non obstante*, which impugns the sufficiency in law of the respondent's allegations in support of her action, and is finally resolved into the simple question whether a breach of promise of marriage is a personal wrong? If it be so, a very simple statement of the circumstances of the promise, and of its breach, would be sufficient allegations in law to support the demand. The provincial statute, which defines in general terms the cases or matters susceptible of a trial by jury, amongst the number, refers to *personal wrongs* generally, and these, according to the statute, *are proper to be compensated in damages*. What then is a personal wrong? In the 2nd vol. of Blackstone's Commentaries, p. 185, we read, "A failure by a man "to perform his promise or undertaking is a wrong to him to whom it was made." This is very comprehensive, and means, in the most extensive sense the violation of a contract, or, in other words, the breach of an agreement between two persons. Now, marriage itself is only the fulfilment of the agreement of the man and woman to marry, and among Protestants, as these parties are, marriage is merely a civil contract completing the mutual consent of the parties to be man and wife, independent of the accompaniment of the contract with religious observances or the presence of a clergyman, and, therefore, the failure by either man or woman to give effect to the promise by refusal to complete the contract is, to all intents a personal wrong done to the other. In the con-

sideration of what constitutes personal wrongs, it is ridiculous to confine parties living in civilized society of the present day to the constituents of personal wrong as they existed in less civilized times. Modern societies, more or less influenced by commercial appreciations of wrong done and injury suffered, cannot be governed by notions prevalent in periods of history when feudal institutions prevailed, and the great and the noble were privileged to do acts of violence and wrong which remained unredressed except by power greater than their own. The existing condition of modern times guarantees and governs the state of morals in general society, and these, in turn, react upon and regulate the social relations in modern societies. In countries not less moral, on the whole, than France, whether ancient or modern, from which our common law is derived, or even than Lower Canada, where that law has been applied and become municipal, the marriage promise is the only consecration of the marriage itself, and it is therefore not only ridiculous but paradoxical, where marriage is only a civil contract, but at the same time of the highest and best moral character, to stigmatize as immoral an action for breach of promise of marriage, a consummation, which is divinely said, to be honorable in the sight of God and man: it would be equally ridiculous and paradoxical to talk of the immorality of marriage itself. In general terms, such as personal wrongs and others scattered through the law books, the usages and customs and feelings of society come in to give them a definition, and hence modern life does not consider an act such as this reputable, it does not admit it to be allowable, but stigmatizes it as a wrong to be redressed. In common parlance a wrong partakes both of injustice and injury: it is, in fact, an injury done by one person to another in express violation of justice. The man who seduces a woman does her the greatest of all wrongs, so the man who after a long and most unreserved intimacy and companionship with a woman, short of marriage itself, seduces her into the confiding belief that she will be his wife, but finally publicly casts her off without any reason, also commits a wrong upon her, only less in degree than if he had violated her person. An injustice may be repented of, an injury may be repaired, but a wrong must be redressed. His casting her off carries with it an imputation upon her amongst her friends and intimates and in the society in which she moved, who all were aware of her engagement. Courts of justice are not tied down absolutely to definitions nor precisions, even where they are given in the books, but where only a general term is to be found, such as this of personal wrongs, then Courts must be guided by the common appreciation of the terms themselves, and in this view it is plain that a wrong involves a malfeasance committed which must be redressed, and therefore comes within the legal mode of redress, proper to be compensated in damages. Judgments are of frequent occurrence in our Courts where damages are awarded for wrong and injury done by libel and slander, in some cases of a very indefinite character, where material damage is not established, but where the solatium is given for the wounded feelings of the slandered sufferer, and yet it is alleged that that solatium must be legally denied to the cast off promised wife, for the social slander thrown over her by her promised husband's declaration of refusal, and that she must be restricted to the recovery only of the material loss she has incurred in the cost of her milliner's bill and the expense of the

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trousseau which she has been induced, perhaps importuned, by her promised husband to prepare and purchase. This is not the redress of the law, which is more than a mere trading appreciation of the damage done by the wrong doer, and is neither honest, moral nor legal. In this case there is no denial of the promises and besides, the appellant's letters and his answers on facts and articles, clearly establish that fact by written proof of his *promesses avouées*. This point being established, a reference to Pothier is desirable. "Lorsque le juge trouve l'engagement valable, il condamne la partie *qui refuse* de l'accomplir, à une somme à laquelle il arbitre les dommages et intérêts dues à l'autre partie pour l'inexécution de l'engagement. Les dépenses que les récherches de mariage ont causées pendant tout le temps qu'elles ont duré, à celui qui se plaint de l'inexécution des fiançailles et la perte du temps qu'elles lui ont causée, sont les objets les plus ordinaires de ces dommages et intérêts. L'affront que souffre la partie à qui on a manqué de foi, y peut aussi quelquefois entrer, dans le cas auquel il y aurait lieu de craindre qu'il ne peut nuire à son établissement avec un autre."

As long ago as 1680, a celebrated arrêt was rendered in France in a case of breach of promise, which confirmed previous arrêts to the same effect, and held, "qu'une personne qui change de volonté, doit les dommages intérêts de l'inexécution de son contrat de mariage." And Ancien Denizart, vo. mariage, holds "Les mariages devant être libres, on ne peut contraindre qui que ce soit d'en contracter soit en conséquence de promesses, de fiançailles ou pour d'autres causes: mais si, par inconstance ou autrement, après un contrat de mariage of de fiançailles, celui qui avait promis de se marier, change de résolution, il doit des dommages intérêts qui s'arbitrent suivant les circonstances," and he then gives several instances in which various amounts were adjudged, 4,000 livres, 60,000 livres, and in the case of the arrêt above referred to, 100,000 livres were given, in every case without what we technically call special damages being proved. Denizart says, "on accorde des dommages intérêts aux personnes du sexe, dans le cas, &c., parceque ces ruptures peuvent préjudicier à leur réputation," and in the case of the arrêt above stated, heavy damages were claimed and given, because "la demoiselle réfusée se trouvait en quelque façon méprisée par ce changement et exposée à la diversité du jugement du public." So as to the *affront* of Pothier, that cannot be put aside from the estimation of the cast off woman's damages. The fact of her being cast off would scarcely be a recommendation to another person to take her up for himself. It is for such reasons the solatium was given in France and cannot be refused here. In this case not only is the promise of marriage established by the appellant's own letters to the respondent, but in one of them will also be found his determined and fixed refusal to marry her at all. It is objected that the *demeure* i not proved, and yet that could scarcely be required in the presence of his letter breaking off the engagement which he concludes, "I don't expect an answer to this as I shall leave for England to-night and not return for some months." Under all these circumstances of fact found in her favor, and of her allegations stating those facts, it only remains to say that by old French common law, by the opinions of its more modern jurisconsults of eminence and authority, Pothier, Denizart and others, and by the jurisprudence of our own Courts of Justice in such cases, she

has a legal right of action, and that her allegations are sufficient in law to maintain the verdict, and therefore that the appellant's motion *non obstante* was properly dismissed by the Superior Court. As to the next motion of the appellant, his second procedure, namely the motion in arrest of judgment, it is not within any of the grounds of the 431st Article of the Code de Procedure required for the support of such a motion, and this motion, like the former one, cannot avail to the appellant. There remains the appellant's third procedure, the motion to reduce the verdict to $200, which the appellant generously allows as sufficient to cover the *actual loss and damage which the respondent has incurred.* The action being in damages for a personal wrong and the appreciation and estimate of their amount being solely within the province of the jury, cannot be questioned by the Court, unless their exorbitancy be submitted for its consideration under a motion for a new trial. The Court has no power otherwise, and even if disposed to adopt a motion for a new trial, the action of the Court would be restricted to set aside the verdict altogether and leave to another Jury to make their own estimate of damage, but would not extend to estimate the damage itself or to reduce the amount of the verdict and order the reduced amount to be entered in the judgment as the actual verdict. This would be a judicial falsehood recorded by the Court, which would substitute its own unauthorized estimate for that of the Jury. Such a proceeding would be peculiarly novel, but at the same time is not to be found in the Code de Procedure, and is altogether inconsistent with the law and practice in force respecting the powers of juries and trials by jury in general. The third motion is therefore equally untenable with the two others, and the judgment below must be affirmed.

DUVAL, C. J. If the defendant had moved for a new trial, I would have been disposed to grant it, but the appeal is based on the judgment rendered. The question which might have been raised if the verdict was not before the Court, cannot be raised now with the verdict before us; for there can be no doubt whatever that a female who has sustained special damage, as the jury have found here, is entitled to an action to recover such damage. The Court cannot, therefore, interfere with the judgment.

DRUMMOND, J., concurred. He believed that the jurisprudence on the point raised by the appellant was too well settled to admit of a doubt.

MONK, J., regretted that there was no motion for a new trial. If there had been, he would have had no hesitation in saying that the verdict, on the face of the record, was entirely unjustifiable. But as the case came up, the Court had no power to alter the judgment.

Judgment confirmed.

D. Girouard, for the appellant.
Hon. A. A. Dorion, counsel.
B. Devlin, for the respondent.
Hon. J. J. C. Abbott, Q. C., counsel.
(J. K.)

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 7TH SEPTEMBER, 1870.

Coram DUVAL, C. J., CARON, J., DRUMMOND, J., BADGLEY, J., and LORANGER, J., *ad hoc.*

No. 76.

ROBERT HERVEY, *ès qualité*,
(*Defendant in the Court below,*)
APPELLANT,

AND

WILLIAM HERVEY,
(*Plaintiff in the Court below,*)
RESPONDENT.

HELD:—Where a bequest was made in the following words: "I hereby will, devise and bequeath "£125 to my ward, William Hervey, to be appropriated to the finishing of his education," and the education of the legatee was completed at the testator's expense before the death of the latter, that the accomplishment of the object for which the legacy was given before the testator's death did not relieve the executor from paying the legacy.

This appeal was from a judgment of the Court of Review at Montreal confirming a judgment of the Superior Court there, whereby the defendant, and appellant, was condemned to pay £125, as the amount of a legacy bequeathed to the plaintiff and respondent, in the last will and testament of the late James Hervey, in the following words:

"I hereby will, devise and bequeath, one hundred and twenty-five pounds to my ward, William Hervey, youngest son of my cousin, the late James Hervey, to be appropriated to the finishing of his education."

The appellant was sued in the Court below as well in his capacity of sole executor of the last will and testament of the late James Hervey, as in his capacity of legatee in his own right for one half of the succession of the testator, and of fiduciary legatee of the residue of the other half, with remainder to the appellant's children.

He pleaded:

1st. That in and by the said will bequeathing $500 to plaintiff, it was specially mentioned and declared that the said sum was intended for the finishing of the education of the said plaintiff; that the will was made in 1857, when the plaintiff was about 14 years, and that the testator died in April, 1864, when the plaintiff was about 21 years; that at the time of the testator's death, the education of the plaintiff had been entirely finished, and at the expense of the testator, and that the object of the said legacy had been entirely accomplished; and that in consequence the plaintiff was not entitled to demand the same from the plaintiff.

2nd plea. That plaintiff was indebted to testator in a much larger sum than the amount of legacy, and that the same was compensated thereby.

3rd. *Défense en fait.*

The respondent answered that it was not a condition of the legacy that it should only be valid and be paid in event of his education not being completed at the time of the testator's death. That on the contrary it was given absolutely and without condition; and that the words "to be appropriated to the finishing of his education" merely expressed the wish of the testator as to the mode in which the money bequeathed should be appropriated by the legatee. That the education of the respondent was finished long before the testator's death, and that if he had desired that the legacy should not take effect, he would have revoked it. And that in fact since the testator's death the appellant had repeatedly admitted the legacy to be due and made propositions for its payment. And that with regard to the alleged indebtedness, it had never existed.

Upon these issues evidence was taken in the first instance by the appellant, to establish the indebtedness, and the fact that the respondent's education was finished before the testator's death. The latter of these two propositions was admitted; and, in proof of the former of them, the appellant examined Mr. James Hervey, a brother of the respondent, and Mr. Jonathan Findlay, formerly in the employ of the testator. In rebuttal the respondent examined Miss Jane Lawder and Mr. J. M. Lawder, niece and nephew of the appellant.

The result of the testimony thus adduced may be summed up as follows: The testator was an old bachelor, residing at Brockville; the respondent and his brother and sister lived with their mother, the widow of a cousin of the testator, at Chicago; and at the request of the testator came to Brockville to live with him as members of his family, residing with him in that character from 1851 to the time of his death in the year 1864. During this period they were treated by the testator in every respect as if they were his children. He provided them with everything they wanted, sent them to school, and acted towards them in every way as a parent would do. Being a business man, and, as the witnesses stated, very particular in ascertaining what became of his money, memoranda or entries were made in his books of account from day to day of all his expenditure in the clothing, maintenance, and education of these children; and it was the entries so made which were relied upon by the appellant as indicating an indebtedness by the respondent to him. After the death of the testator, the appellant became the sole acting executor of the estate, he being at the same time the absolute owner of one half of it as a bequest, and the owner of the residue of the other half, subject to a reversionary interest in it in favor of his children. Being possessed of the estate in these capacities he was applied to by the children, in favor of each of whom a bequest was made by the will similar to that in favor of the respondent, for payment of their respective legacies. The appellant first made a proposition to them for payment, which was not accepted; and after further delay, action was brought to recover the amount.

Judgment was rendered by Mr. Justice MONK, 9th July, 1868, in favor of the plaintiff. The judgment was recorded as follows:—

Considering that the plaintiff hath established the material allegations of his declaration, and that the said defendant hath failed to prove the matters and things alleged in his pleas to the plaintiff's action and demand, and that the said

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plaintiff ought not by reason of such matters and things to be barred and prevented from obtaining the conclusions of his declaration in this cause fyled; doth dismiss the said pleas, and doth condemn the said defendant in his said capacities to pay and satisfy to the said plaintiff the sum of $500 currency, amount of the legacy bequeathed to the said plaintiff by the late James Hervey, in and by his last will and testament made and signed in the form of an olograph will and bearing date the 7th day of March, 1857, with interest upon the said sum of $500 from the eleventh of October, 1867, date of the service of process in this cause, until actual payment and costs of suit; *distraits*, &c.

This judgment was confirmed in review, 31st March, 1869, TORRANCE, J., and BEAUDRY, A. J., (MONDELET, J., dissenting.)

MONDELET, J., dissented in review on the ground that the legacy was for a particular object, and the object having been accomplished, the legacy lapsed.

TORRANCE,, J., for the majority of the court, held that the accomplishment of the object for which the legacy was given, before the death of the testator, did not relieve the executor from the responsibility of paying the legacy. In support of this opinion the learned judge cited "Redfield on Wills:" That courts of equity would not compel the legacy to be applied to the special purpose in the will mentioned. In *Barton* vs. *Cooke* it was decided that if a legacy were bequeathed to an infant to be used for a particular purpose, and it could not be so applied, it would nevertheless be due, to be applied in some other manner. As to the plea of compensation it was not available. The late James Hervey, as appeared from his accounts, was a very careful man and marked every item of his expenditure with exact precision, but although he kept an account of the advances made to the plaintiff there was no proof or even probability that he intended to charge them against him.

Henry Stuart, Q.C., for the appellant:—The allegation of the first plea, that the object of the legacy had been accomplished, was established by the admission of the plaintiff that his education was completed at the time of the testator's death, which occurred in 1864. The bequest was made in 1857, when the plaintiff was at school, and intended, as the will clearly expresses, to finish the education; the object of the testator being clearly that the plaintiff, in the event of his death, should continue his education, and he thereby provided means for that purpose; a very limited amount for children of tender age, shewing that the testator did not contemplate liberality, but merely to secure these distant relatives an opportunity of supporting themselves when their education should be finished. The education having been finished at the expense of the testator, before his death, the intention of the legacy having been attained at the testator's cost, the legacy lapsed by the accomplishment of the object for which it was made.

As to the second plea, it is abundantly proved that the debt is due by the plaintiff; in fact, the plaintiff admits under examination that the entries are correct. The attempt to construe the legacy into an intentional gift, or release of the debt, by the allegation that the repayment of the advances was never intended to be enforced, cannot be maintained. The waiver of the right to

demand the payment of monies furnished is not to be inferred from the fact of the legacy.

The debt has been clearly proved, and it is, of course, impossible to presume a gift, or release, or a waiver of any right. The law on this point admits of no doubt:—

"Where a creditor bequeaths a legacy to his debtor, and either does not notice "the debt, or mentions it in such manner as to leave his intention doubtful, and "after his death the securities for debt are found uncancelled among the testa- "tor's property, the Courts of Equity do not consider the legacy to the debtor "as necessarily, or even *primâ facie*, a release or extinguishment of the debt." (2, *Williams on Executors*, p. 1,173.)

The appellant submits that, under these circumstances, the plea of compensation ought to have been maintained, and the legacy declared set off and extinguished by the debt owing to him.

The defendant would again refer to *Williams on Executors*, p. 1,174, where the law on this point is distinctly stated:—"Where a legatee is indebted to the "testator, the executor may retain the legacy, either in part or full satisfaction "of the debt, by way of set off; and it has been held that, in a suit by a legatee "to obtain payment of the legacy out of the assets of the testator in a due "course of administration, the executors may retain so much of the legacy as "is sufficient to satisfy a debt due from the legatee to the testator, although the "remedy for such debt was, at the time of the death of the testator, barred by "the Statute of Limitations."

The intention of the testator being clear and the indebtedness of the respondent well established, the appellant feels confident that this court will maintain the present appeal and dismiss respondent's action.

J. J. C. Abbott, Q.C., for the respondent:—As regards the pretension that the legacy was compensated, the respondent insists that no indebtedness towards the appellant was created by the fact that the testator maintained and educated the children while residing with him; no intention of being repaid these sums, or of demanding or exacting repayment, appearing ever to have existed in the mind of the testator. In fact it would appear from the evidence that he stood of his own free will towards the children *in loco parentis*; and had no more idea of charging them with the expenses of their bringing up than a parent would have had. The evidence on this point is very explicit and decided. Mr. J. M. Lawder, who was apparently an intimate friend of the testator, was in his employ and had charge of his books, and was aware of the nature of the relation between the widow and her children and the testator, states; that the testator always expressed his affection for the respondent and his brother and sister, declaring that he cared for them as much as if they were his own children, that he would bring them up as his own children; and that as long as he had a house he would share it with them. And he explains the reason why the items expended upon the children were entered at all, namely, that the testator was a very particular man in business; kept a very exact account of everything spent; and insisted upon having every halfpenny that was paid out properly entered. But he declares that so far as he could

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ascertain the intentions of the testator, he never entertained the idea of his nephews being called upon to refund the amount expended in their bringing up.

Miss Jane Lawder, another niece who lived with him a considerable number of years, and between whom and himself great confidence existed; gives the same evidence, and speaks of conversations with him, in which he declared that he looked upon them as his own children, and spoke of them as having them with him as members of his family. She also had received benefits from the testator in the way of sums spent for her maintenance and education; and these sums were entered as were those spent for the respondent; but no attempt in her case was made to set off these expenses against her legacy, nor, as she declares, could there have been any such intention in the case of her cousins, one of whom is the respondent. This evidence is confirmed by the witnesses for the appellant, Mr. James Hervey, and Mr. Jonathan Findlay.

The respondent therefore contends that no presumption of indebtedness arises from these circumstances, but that on the contrary the testimony and the presumptions arising from it are alike in favor of the intention of the testator to bestow gratuitously upon the destitute family of his relative the care of their persons and their education.

With regard to the pretension of the appellant that the legacy was given for the sole purpose of educating the respondent, he contends that in fact the will does not assign that as a condition of the legacy, but states it in the form of a direction or wish as to its application. The bequest is not to an executor or trustee for the purpose of being expended in a particular way; it is made direct to the legatee, not with any condition, but followed by a simple request or direction that the legatee should appropriate it in a particular manner. The devise therefore is absolute and, as the respondent submits, cannot be controlled by any reason assigned for it, or by the expression of any wish of the testator as to the mode in which the legatee might choose to spend it. The statement in the concluding part of the bequest that it is to be appropriated to finishing the education of the legatee is not, in the language of the French writers, *la cause finale et déterminante* of the legacy; it is merely *la cause impulsive*, and it is universally laid down that there is a broad distinction between the effect given to these two causes; for one may serve to annul a bequest, the other never can. Moreover it is well said by a late writer on this subject, *si le testateur n'a point usé de la faculté de révoquer, il est censé avoir persévéré dans la même volonté jusqu'à sa mort.* And a commentator on Zachariae puts this pertinent question, *Qui sait en effet si, même en l'absence de la cause exprimée, le donateur n'aurait pas fait la donation?*

The respondent contends that in this instance, though the testator may have had for an object to assist the respondent in completing his education, there is nothing to shew, that he intended his bequest to lapse in the event of the respondent's education being completed, or that he intended it to be diminished *pro tanto* if his education could be finished for a less sum of money than the amount of the legacy.

As to the pretension of compensation, the respondent urges that there is no evidence of the existence of any debt by which the legacy could be compensated

And he refers to the offers of settlement by the appellant, to shew that he had admitted the position of the respondent long previous to the bringing of the action.—And being himself the proprietor of the estate to be affected by those admissions, they are binding upon him. Robert Hervey and William Hervey.

For these reasons the respondent respectfully submits, that the two judgments rendered by the Court below should be confirmed.

BADGLEY, J. The late James Hervey by his will bequeathed a money legacy to the plaintiff, stated in the will to be for his education. The legatee was educated by the testator, who died long after the legatee had completed his education and had even been taken into the service of his relative. The legacy, as matter of course, only became open at the testator's death, long after the intent of it had gone by. The testator before his death had not changed his will as to the legacy, but it seems that being a man of business he regularly charged in his account books whatever he paid out either for himself or for any of his family, and among others he charged to the legatee from his early childhood what he had expended in bringing him up, his clothing and education. The residuary legatee has set this off against the legacy, but it is distinctly proved that in entering these expenses in his books, the testator never intended to make the children repay him and frequently declared so. The judgment appealed from is correct and the appeal must be dismissed.

DUVAL, C. J., concurred. The pretension of the executor, appellant, was untenable, and the respondent was undoubtedly entitled to receive the legacy.

Judgment confirmed unanimously.

Henry Stuart, Q.C., for the appellant.

J. J. C. Abbott, Q.C., for the respondent.

(J.K.)

SUPERIOR COURT, 1870.

MONTREAL, 30TH SEPTEMBER, 1870.

Coram TORRANCE, J.

No. 1701.

Fournier dit Prefontaine vs. *La Corporation du Comté de Chambly.*

HELD:—That where a by-law of a municipal council of a county appointed a committee to acquire land, and contract for the construction thereon of a "Court house, Registry office, and fire-proof vault," such committee exceeded its powers in contracting for the construction of a "*public hall*, court house, registry office, and fire-proof vault," even though the cost stipulated in the by-law was not exceeded; and no action will lie against the Corporation on such contract, the Corporation having notified the contractor that they would not hold themselves responsible for any work done under the contract.

TORRANCE, J.—This is an action of damages by a contractor against the Corporation of the County of Chambly. The declaration of the plaintiff sets forth that at a quarterly meeting of the Council of the Corporation, held on the 12th September, 1866, a by-law was passed for the purchase of land, and the construction of a registry office and court house, and for the construction and keeping of a fire-proof vault for the preservation of the archives of the registry office

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and court, that a committee of three was named by the council to acquire land at Longueuil for the construction of a building for a registry office and court house, "à telles considérations, charges, clauses, et conditions," that the Committee, or a majority, should think proper: that the Committee, or a majority, was by the by-law authorized to cause to be constructed for the council, and at its cost, on the land it should acquire, a suitable building, either in brick or stone, with a fire-proof vault, &c.; that this committee was composed of D. Gédéon Larocque, Jean Baptiste Jodoin, and Toussaint Bétourney, all members of the council, provided nevertheless that the Committee should not bind the council for more than $2000; that this committee and plaintiff, on the 11th December, 1866, made an agreement for the construction of the building, and the price was to be $4350, if the defendants drew money from the Government, and $2000 in the other case; but in any case, the defendants were not to pay more than $2000, for the Fabrique of Longueuil gave the defendants the land required, with an old stone house, giving sufficient materials for the new building, and promised to pay defendants $800, and adding the government moneys, $1550, the sum total was $4350. That the plaintiff began the fulfilment of his contract, but on the 31st December, 1866, the defendants directed their secretary to notify the plaintiff to discontinue his work, as the council would not be responsible for it, and a notification was accordingly made on the 2nd January, 1867. That on the 5th February, 1867, the plaintiff notified the defendants that he had begun the work, bought stone and wood, and transported it to the place, and employed workmen, and protested against them for all damages; and the defendants having persisted in their resolution, the plaintiff could not execute his contract, and defendants are bound to indemnify him for delays, for loss incurred by him, and gain which he was prevented from making; and he has a right to an indemnity for the nonconstruction of the entire building, which he estimates at $1000; and he has a right to demand another sum of $1000 for expenses incurred by him in the purchase of materials, their transport, and the wages of workmen, and loss of time, &c.

The conclusion was for $2000, with a resiliation of the contract of the 11th December, 1866; but if the defendants should offer to allow plaintiff to continue the work, then the conclusion was for $1000 damages, and costs.

The defendants pleaded a variety of matters, and, *inter alia*, that the committee exceeded their authority under the bye-law, which did not authorize the construction of a public hall, and that the contract in several other respects deviated from the authority given by the bye-law.

After an enquête had, the case was submitted to the judgment of the Court on the merits.

The important question submitted to the Court, is whether the committee appointed to do the work exceeded their authority.

The bye-law in question contains these words: "En conséquence, qu' un comité composé de 3 membres soit nommé par ce conseil afin d'acquérir pour le conseil municipal du comté de Chambly et aux frais d'icelui, un terrain situé au village de Longueuil, chef lieu du comté de Chambly, dans un endroit convenable pour construire *une bâtisse pour* le bureau d'enrégistrement dudit comté de Chambly

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et *pour une cour de justice* de comté dans ce comté; à telles considérations, charges, clauses, et conditions que le dit comité ou la majorité du dit comité jugera à propos, ou accepter tout terrain qui pourra être offert au dit comité gratuitement et à telles considérations, charges, clauses, et conditions qu'il jugera à propos, et que le dit comité ou la majorité des membres du dit comité soit et est par le présent règlement autorisé à passer actes à cet effet. Que le comité ou la majorité des membres du dit comité soit et est, par le présent règlement, autorisé de faire construire pour le dit conseil municipal du comté de Chambly et aux frais d'icelui, une *bâtisse convenable* sur le terrain qu'il acquerra, soit *en pierre ou en briques, avec une voûte d'une dimension* convenable à l'épreuve du feu pour y mettre en sureté les archives du dit bureau d'Enregistrement et *d'une cour de Justice* de comté dans ce comté.

Que la dite bâtisse sera construite de la dimension et de la manière qui sera jugé convenable par le dit comité ou par la majorité des membres du dit comité qui est par le présent autorisé à faire faire la dite bâtisse à telles conditions et de la manière que le dit comité ou la majorité des membres d'icelui jugera à propos."

Further on the bye-law says: Enfin, que le dit comité soit composé de MM. Gédéon La Rocque, Jean Baptiste Jodoin, et Toussaint Bétournay, tous membres de ce conseil; et que tout ce que les membres du dit comité ou la majorité d'iceux, feront pour les fins ci-dessus et notamment pour l'acquisition, la construction et l'entretien d'un bureau d'enrégistrement dans ce comté et d'une cour de justice de comté pour ce comté, et pour la construction et le maintien d'une voûte à l'épreuve du feu, pour la conservation des archives du dit bureau d'enregistrement de ce comté et de la dite cour de justice de ce comté soit et est par le présent reglement ratifié par ce conseil. "Pourvu toujours que le dit comité n'engage pas ce conseil pour une somme plus forte que celle de $2000 à être prelevée sur les propriétés imposables de la municipalité du comté de Chambly."

It will be noticed that the authority given to the committee by the council is "notamment pour l'acquisition, la construction et l'entretien d'un bureau d'Enregistrement dans ce comté, et d'une cour de justice de comté pour ce comté, et pour la construction et le maintien d'une voûte à l'épreuve du feu, pour la conservation des Archives du dit bureau d'Enrégistrement de ce comté, et de la dite cour de justice de ce comté."

Under this authority, what was the action of the Committee?

They made an agreement with the plaintiff, by which he bound himself to construct a building referred to in a plan and specification, "avec entente et explication entre les dites parties, que le plan et dévis de ces ouvrages sera divisé en trois parties pour les deux premiers étages et en une seule partie pour le dernier étage de 22 pieds chaque, la première partie pour l'usage de la cour de justice, pour le comté de Chambly, la deuxiéme partie sera pour celle du bureau d'enrégistrement du dit comté de Chambly et la troisième partie sera pour celle d'une salle publique à l'usage de la paroisse de Longueuil et tel que le tout est mentionné et spécifié aux dits plan et dévis."

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Here, under an authority for the construction of a building for a registry office, court house, fire-proof vault, the contract entered into by the Committee, and which the plaintiff relies upon, is for the construction of a building, containing registry office, court house, fire-proof vault, and public hall, for the use of the parish of Longueuil. Apart from the question of cost of the building, which is not now discussed by the Court, the Corporation may have excellent reasons for objecting to the combination of a public hall, which they did not ask for, with a registry office, court house, and fire-proof vault.

The Court comes to the conclusion that the Corporation cannot be bound by the contract declared upon by the plaintiff, whose action therefore must be dismissed.

The judgment is *motivé*, as follows: The Court, etc., considering that the Committee appointed by the *réglement* of date, 12th September, 1866, plaintiff's Exhibit No. 1, exceeded the powers conferred upon them by said *réglement*, by the contract which they entered into with the plaintiff for the construction of a building, containing a "*salle publique*," as well as the "*bureau d'enrégistrement*" and "Cour de Justice," doth maintain defendant's first plea *pro tanto*, and dismiss plaintiff's action and *demande*, with costs *distraits*, &c.

Action dismissed.

Moreau & Ouimet, for the Plaintiff.
Edward Carter, Q.C., for the Defendant.
(J. K.)

SUPERIOR COURT, 1870.

MONTREAL, 30TH SEPTEMBER, 1870.

Coram MONDELET, J.

No. 1975.

Winning, et al. vs. *Leblanc, et al.*

CAPIAS. BAIL. CONTRAINTE.

HELD:—That the Bail under Art. 825, C. P. C., for a defendant arrested under *capias ad respondendum*, are *cautions judiciaires*, and liable to *contrainte par corps* to compel payment of a judgment against them on their Bond.

On the 5th June, 1868, the plaintiffs instituted an action against one E. C. Fraser, for $1818, accompanied by *capias ad respondendum*, under which Fraser was arrested. On the 25th June, 1868, Fraser was released from custody, having given bail under Art. 825, C. P. C. (C. S. L. C., c. 87, s. 10). The sureties were C. Leblanc and A. Blache, (now defendants). The bond was in the usual form, the bail undertaking jointly and severally "for and on behalf of E. "Fraser, that he will surrender himself into the custody of the sheriff of "district, whenever required so to do, by any order of said Court or of any one "of the Judges thereof made as by law provided; or within one month after "service upon him (Fraser) or upon them (Leblanc & Blache) of such order, and "that in default of his so doing he will pay plaintiffs their debt, interest and "costs; and in the event of said Fraser not so surrendering himself or paying

"as aforesaid, they, (Leblanc & Blache,) hereby jointly and severally promise "and undertake to pay to plaintiffs their said debt, interest and costs to the "extent of $2,400."

On the 27th April, 1869, judgment was rendered against Fraser for the amount sued for, interest and costs, and the *capias* declared valid.

Fraser failed to fyle a statement of his affairs as required by Art. 766, C. P. C. (C. S. L. C., c. 87, s. 12,) and was on the 2nd June, 1869, under same section of C. S. L. C. c. 87, and Art. 766, C. P. C., ordered to be imprisoned in the common gaol for six months, and an order to the sheriff issued accordingly. Fraser having fled the country, copies of the order were served upon the bail, with notices requiring them to produce and surrender him to the sheriff, as required by the order, and as their bond stipulated. They failed to do so within the month limited in the Bond, and Plaintiffs then instituted this action against the bail on the bond for the recovery of their judgment against Fraser, interest and taxed costs, as well as those incurred on the order to imprison, and they also prayed for *contrainte par corps*. Judgment was rendered 20th October, 1869, in their favour *ex parte* for the sums claimed, without pronouncing on the demand for *contrainte*. *Fi. fa. de bonis* issued, but the sheriff made returns of *nulla bona* against each defendant; their property having disappeared since the execution of the bond.

On the 27th of May, 1870, the plaintiffs obtained a rule against the defendants in these terms: "The Court, etc., doth order, inasmuch as by the judg- "ment rendered 26th October, 1869, the defendants were jointly and severally- "adjudged and condemned as *cautions judiciaires* to pay and satisfy to plaintiffs "the sum of $2099.80 with interest, &c., inasmuch as subsequently a "writ of *Fi. fa. de bonis* issued against defendants for the recovery of said "sums, which writ has been returned with return of *nulla bona*; inasmuch "as the defendants do jointly and severally neglect and refuse to pay "plaintiffs, though requested, said several sums with interest and costs; and inas- "much as by their declaration in this cause plaintiffs duly prayed for "*contrainte par corps* against the defendants, and inasmuch as said defendants "are *contraignable par corps;* that a writ of *contrainte par corps* do issue in "this cause, directed to the sheriff of Montreal, ordering said sheriff to arrest "the bodies of defendants and each of them, and to imprison them in the common "gaol of this district, and to detain them until they pay to plaintiffs said sum of "$2099.80, &c., &c., and costs of this proceeding, &c., &c., *nisi causa*, 17th June, 1870." Blache having left the country, Leblanc alone could be personally served; he appeared by counsel to shew cause and obtained leave to file a written contestation, which, after alleging certain facts to invalidate his bond (of which however, at the *enquête* ordered thereon, he adduced no proof), further set forth that

"Les dites cautions (defendants) ne sauraient être soumises à une obligation plus considérable ni à une penalité plus grande que celle quelle fut condamné le débiteur principal, Fraser, en vertu des lois sur le cautionnement, savoir six mois de prison, penalité à laquelle était condamné le débiteur principal, mais non à la prison pour un temps indéterminé, ou jusqu'à ce qu'ils aient payé la dette, frais et intérêts et frais subséquents, tel que demandé par la règle.

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"Que de plus le cautionnement du 25 Juin, 1868, n'est pas un cautionnement judiciaire, et que les cautions ne sont point passibles à la contrainte par corps."

Prayer to set aside rule. The plaintiffs answered generally.

J. C. Gagnon, for the defendant Leblanc, shewing cause, argued that:

Defendant is not liable to *contrainte par corps*. Code Civil, 2271, 2. "The persons liable to *contrainte par corps* are tutors, &c., * * 2. Any person indebted as "*séquestre*, guardian, &c., 3. Any person indebted as *judicial surety*, &c., &c."

He is not *caution judiciaire*, Code Civil, 1930. "Suretyship is either conventional, legal or judicial. The first is the result of agreement between the "parties, the second is required by law, and the third is ordered by judicial "authority." The bail in this case was clearly not ordered by any judgment, but was solely the result of the free will of all the parties, and therefore not *caution judiciaire*.

2. In no case can defendant, being a surety (simple) be condemned to a greater penalty than the principal debtor. Code Civil, 1933. Fraser was condemned to six months imprisonment only; while it is now sought to imprison Leblanc for an indefinite period.

R. A. Ramsay, for the plaintiffs, in support of the Rule:

1. Fraser was released and bail was put in as allowed by C. P. C. 825, founded on C. S. L. C. c. 87, s. 10, "Any defendant arrested and confined in gaol under any writ of *cap. ad. resp.* shall * * * be released from such arrest and confinement, if he gives good and sufficient security to *the satisfaction of the Court* * * * or of any judge of such court, or of the Prothonotary thereof, that he, the defendant, will surrender himself, &c." This procedure was established in the interest of defendants to avoid the delay which would be necessary in giving notice of a petition to put in bail as is still required in *saisie revendication*, &c. The statute does not say the defendant *must* put in bail, (that might be legal suretyship only), but that he shall be released *if he gives bail*, &c., *i. e.* if he chooses to do so. A defendant must therefore in each case be presumed to ask to be allowed to enter bail, and such bail ordered in terms of his request, all notice of application and other formalities being waived under the act. The putting in of bail is optional with defendant; and it is done with the leave and to the satisfaction of the Court, &c. When after the justification of the bail, the Court is satisfied with their sufficiency, it is presumed to order that those offered and so approved be taken. They are therefore to be treated as *cautions judiciaires*. Bail to the Sheriff under Art. 828, C. P. C., (C. S. L. C., c. 87, s. 22,) although not given to the satisfaction of the Court as in this case, were held *contraignable par corps*. *Belle* v. *Côté*, 13 Jurist 26. Plaintiffs refer to the authorities there cited which apply to this case

2. On defendant's 2nd point: Fraser was condemned to six months imprisonment under C. P. C. 776, C. S. L. C., 87, s. 2, ss. 2, for neglecting to fyle a statement of his affairs after the *capias* was maintained. Leblanc is to be *contrainte par corps* until he pays the judgment against him, not for that pena neglect but because being *caution judiciaire*, he has neglected to pay a judgment obtained on his bond in consequence of his failure to surrender Fraser in terms of the order for his imprisonment. The grounds of detention are therefore distinct and the article cited by defendant does not apply.

On 30th September, 1870,—(MONDELET, J.) the defendant's contestation was dismissed and rule made absolute, the Hon. Judge remarking that he considered the case clearly one of *caution judiciaire*. Winning et al. vs. Leblanc et al.

R. A. Ramsay, for plaintiffs.

J. C. Gagnon, for defendant Leblanc.

(R. A. R.)

SUPERIOR COURT, 1870.

MONTREAL, 30TH SEPTEMBER, 1870.

Coram TORRANCE, J.

No. 1579.

Whyte es qual. vs. *The Home Insurance Company.*

HELD:—1. That a *bonâ fide* equitable interest in property of which the legal title appears to be in another, may be insured, provided there be no false affirmation, representation or concealment on the part of the insured, who is not obliged to represent the particular interest he has at the time, unless inquiry be made by the insurer.

2. That such insurable interest in property of which the insured is in actual possession may be proved by verbal testimony.

TORRANCE, J. This is an action on a fire policy to recover $2,000. It was instituted on the 8th June, 1869, by the plaintiff in his quality of assignee to Edward Fleming Miller.

The declaration of the plaintiff sets forth that, on the 12th May, 1868, a policy was issued by the defendants in favor of Edward Fleming Miller, insuring him against loss or damage by fire to the amount of $2,000, namely, on a store in the village of Richmond, $1,000, and on goods therein $1,000; that previous to 28th March, 1868, the said E. F. Miller carried on business in partnership with William Scott Miller, under the name of W. S. & E. F. Miller; that during the partnership, the firm, out of its assets, built the said building on land the title to which was in W. Scott Miller, and when the firm was dissolved, the building was its property; that on the said 28th March, 1868, the firm was dissolved, and W. S. Miller transferred to E. F. Miller all his right, title and interest in said building and stock for a consideration of $1750, payable in three notes, the first for $600 payable in one year, the second for $600 payable in two years, and the third for $550 payable in three years, from the 28th March, 1868; that by virtue of the said purchase by the said E. F. Miller, the latter became and was the substantial owner of the said building, and had an insurable interest therein at the time of effecting the said insurance, and thereafter until its destruction, which took place by fire on 28th September, 1868, when the goods, saving the value of about $200, were also destroyed; that at the time of the fire the building was worth $2,800, and the goods were worth $3,784.

The defendants, by a first plea, set forth that by a condition of the policy, the interest of the assured, whether as owner, consignee, factor, mortgagee, lessee or otherwise in the property, had to be truly stated in the policy, otherwise the policy should be void; that E. F. Miller, at the time of effecting the policy, did

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represent himself to be the absolute owner of the building, and, in fact, he was not owner, but the title to the building was in William Scott Miller; that the interest of the said Edward Fleming Miller assured under the policy was that of owner, whereas the assured was not owner, and therefore the policy is null and void.

By a second plea, the defendants set forth a condition of the policy, that the interest of the assured should be set forth in the proofs of loss verified by affidavit, and if there should appear false swearing, then the insured should forfeit all claim under the policy, and that there was a false affidavit.

The chief question is, whether the policy was void because there was no deed of the property to Edward F. Miller, and whether the evidence of record is sufficient to prove the ownership to be in the said Miller, the insured, without such deed.

As to the evidence of record, there is a letter from William Scott Miller, now deceased, of date 22nd January, 1869, in which he writes to the insolvent, "The whole transaction was with both companies, in good faith, and I trust they will not be allowed to take an unprincipled advantage of any flaw that may exist, or oversight that may have occurred, in the transfer of the goods and stock, &c."

We have next the fact of E. F. Miller being in possession of the land and stock, and his evidence, and that of the widow of W. S. Miller, and their production of the notes given, proving the agreement for a sale by W. S. Miller to E. F. Miller, so far as verbal testimony could prove it. The defendant has made a motion to reject the evidence of witnesses tending to prove the sale from W. S. Miller to E. F. Miller.

Is the evidence admissible to the extent of proving that E. F. Miller had an insurable interest in the building and goods insured, and that he was owner of them though the title of the land was in another? I find several American cases in which it has been done. I refer Counsel, in the first place, to Angell on Insurance, § 69: "A right must be of such a nature, in order to constitute an interest, as the law will recognize and enforce, for a mere *moral* title will not sustain an insurance." * * * * * *

After giving cases where the policy was held void, he says: "Upon the same principle, the purchaser of an estate who has merely entered into a *verbal* contract cannot insure, but if any act has been done constituting such a part fulfilment of it as would entitle him to a specific performance in a Court of Equity, he may do this, since an equitable title creates an interest which the law will recognize." In the present case, if the widow and children of W. S. Miller were to bring an action against E. F. Miller to recover possession of this land, as belonging to the estate of the deceased W. S. Miller, would they succeed with such evidence as there is of record against them? The Court inclines to think not. In the case of Converse vs. Citizens Mutual Insurance Company, 10 Cushing (Mass.) R. 37, it was held that one partner might have an insurable interest in a building purchased with partnership funds, although it stands upon land owned by the other partner. In Curry vs. The Commonwealth Insurance Company, 10 Pickering, 535, the house insured belonged to the plaintiff's wife and her sister, was acquired by him, and he moved it to the back of the lot, the

title to which was in his wife and her sister, and built an addition in front towards the street, thereby making the dwelling house insured by him, and the Court held that the insurance made by plaintiff on the building as his own was recoverable, there being no fraud. In Fletcher vs. The Commonwealth Insurance Company, 18 Pickering, 419, the plaintiff obtained insurance on his one-story framed store, occupied by him, without disclosing the fact that it stood on the land of another person under a verbal agreement, terminable at the pleasure of such person, upon six months' notice, neither was any inquiry made by the insurers in regard to the title. It was held that there was not a concealment of a material fact, and that the policy was not void. The Court here sees a difference between this case and the case under consideration, but they agree in this that the title of the land was in another person.

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In Tyler vs. Ætna Fire Insurance Company, 12 Wendell, 512, Nelson, J., says: "It has been deliberately settled in Massachusetts, as an established principle of the law of insurance, that a *bonâ fide* equitable interest in property of which the legal title is in another, may be insured under the *general name of property*, or by a description of the thing insured, unless there be a false affirmation or representation, or a concealment after enquiry, of the true state of the property; and the applicant need not represent the particular interest he has at the time, unless enquired of by the Company."

In Kenny vs. Clarkson et al., the plaintiff purchased of Messrs. Douglas, Stewart & Minot, at Jamaica, the vessel insured by the defendants for $3,000, at which time he paid $1,800 in part. No bill of sale was executed, but the vessel was delivered to the plaintiff, and an agreement, in writing, was entered into between him and Douglas, Stewart & Minot, by which it was agreed that the vessel should continue in the name of the vendors until the residue of the purchase money was paid, when they promised to deliver to plaintiff the register and a regular bill of sale. The plaintiff remained in possession of the vessel from the day of the purchase until the time of the insurance and subsequent loss. It was there held by the Supreme Court of the State of New York, that the plaintiff had an insurable interest. 1 Johnson's R. 385.

The Court has bestowed much attention on this case, and comes to the conclusion that the plaintiff is entitled to judgment in his favor. The equities of the case, so far as shewn by the evidence, are entirely in his favor, and if the pleas of the defendants are to be maintained, they must succeed by the judgment of a higher court. The judgment is *motivé* as follows:—

The Court having heard the parties by their Counsel, as well upon the motion of the defendants to reject the evidence given by the plaintiff, as upon the merits of this cause, having examined the proceedings in this cause, proof of record and evidence adduced, and duly deliberated;

Considering that the plaintiff was well founded in proving by verbal testimony the insurable interest of the insolvent, E. F. Miller, in the building described in the policy, plaintiff's Exhibit number one, and in the goods contained in said building, doth reject the said motion with costs;

And considering that the defendants have failed to prove the allegations of their plea, doth reject the same;

Castongué vs. Perrin et al.

And considering that plaintiff hath proved by sufficient evidence the material allegations of his declaration; that the defendants insured E. F. Miller against fire, $1,000 on said building, $1,000 on said goods; that the said building and goods were destroyed by fire on the 22nd September, 1868, and that the said E. F. Miller lost by said fire much more than the said two sums of $1,000 each, and that the defendants are liable therefor under said policy;

Doth adjudge and condemn the defendants to pay and satisfy to the plaintiff in his quality of assignee to the estate of said E. F. Miller, the said two sums of $1,000 each, to wit, $2,000 in all, with interest thereon from the 10th day of June, 1869, date of service of process in this cause, and costs of suit, *distraits*, &c.

Judgment for plaintiff.*

J. J. C. Abbott, Q. C., for plaintiff.
Carter & Hatton, for defendants.

AUTHORITIES OF DEFENDANTS.

Quesnault; Assurance, n. 167, p. 137.
Agnel; Ass., n. 26, 27, 28.
n. 195, p. 146, 7, (n. 8) and p. 80.
n. 118.
11 U. C. Q. B. Rep. 73. Shaw vs. St. Lawrence Mutual Ins. Co.
10 U. C. Q. B. Rep. 525. Walsworth vs. St. Lawrence Mutual Ins. Co.
Journal du Palais, Rép. gen., vo. Assurance Terrestre, p. 199, No. 183, and p. 200.

(D. M^c M.)

SUPERIOR COURT, 1870.

MONTREAL, 30TH SEPTEMBER, 1870.

Coram TORRANCE, J.,

No. 328.

Castongué vs. *Perrin et al.*

HELD:—That where parties settle a case out of Court, after pleatyled, by a *compromis*, it is not competent to the plaintiff's attorney who asked for distraction of costs, to proceed to judgment in his favour for costs on the ground that the *compromis* has been made out of Court in order to deprive him of his costs.

The action of the plaintiff was for an alimentary pension, and directed against children, and the declaration asked for distraction of costs in favour of the attorney.

The defendants pleaded to the merits, and a few days afterwards made an arrangement with the plaintiff by which the action was settled.

Subsequently, one of the defendants made a motion in court praying *acte* of the production by him of the deed of arrangement, and that the parties be sent out of court. The Court granted *acte* on the 30th April last.

Notwithstanding this, the attorney of the plaintiff proceeded to make an *Enquête* for the plaintiff, and examined the defendants *sur faits et articles*.

* The case is now in review.

Gagnon for plaintiff cited Stinguy *v.* Stinguy, 2 Rev. de Leg. 120; Peltier *v.* Landry, Id; Richard *v.* Ritchie, 6 L. C. R. 98; Hebert *v.* La Fabrique, 13 L. C. R. 66; McCulloch *v.* Hatfield, 13 L. C. R. 321; Gauthier *v.* Lemieux, 2 L. C. R. 273; Charlebois *v.* Coulombe, 7 L. C. J. 300; O'Connell *v.* the Mayor *et al* of Montreal, 4 L. C., J. 56; Robertson's Dig, p. 114; Darche *v* Dubuc, 1 L. C. R. 238; Harrison's Dig. p. 206, 7; Colo *v.* Bennett, and contended that he was entitled to a judgment for costs as the arrangement had been made to defeat him as to costs.

Archambault for Côme Perrin, and *H. Prévost* for C. F. Perrin *e contra* cited Lafaillo *v.* Lafaillo in Review, 14 L. C. Jurist, p. 262, and Quebec Bank *v.* Paquet, 13 L. C. J., 122.

PER CURIAM:— The Court applies the rule laid down in the Quebec Bank *v.* Paquet 13 L. C. J., p. 122, and turns the parties out of Court without costs.

Parties *hors de cour.*

J. C. Gagnon, for Plaintiff.
Jetté & Archambault, for Côme Perrin.
H. Prévost, for C. F. Perrin.
De Bellefeuille & Turgeon, for Madame Prévost.

(J.K.)

COURT OF REVIEW, 1869.

MONTREAL, 30TH SEPTEMBER, 1869.

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

No. 1497.

Dorion et al. vs. *Baltzley.*

HELD:—In the case of a lease by one deed of two separate premises, subject to the condition that the tenant should "not make over his interest in the present lease, without the consent of "the said lessors being first obtained in writing for that purpose," that a sub-lease of one of such premises, without the written consent of the landlord, was legal and valid.

This was a hearing in review of a judgment, rendered in the Superior Court at Montreal on the 3rd day of June, 1869, by THE HON. MR. JUSTICE MACKAY, dismissing the plaintiff's action.

The action was brought *en résiliation de bail*, on the ground that the defendant had leased one portion of two separate premises leased to him by the plaintiffs, in contravention of the conditions of the lease.

The lease was for three years of the whole of the upper part of a two-story house on Notre Dame street, belonging to the plaintiffs, and for two years of a shop (No. 370) in the lower part of said house, and both premises were leased by one and the same deed of lease which provided that the lessee "shall not make over his interest in the present lease, without the consent of the said lessors being first obtained in writing for that purpose."

The defendant sublet the said shop, without such written consent.

MACKAY, J., dismissed the action, on the ground that the plaintiffs had "failed to prove that the said defendant hath violated the lease . . . set "up and declared on in the declaration."

Spelman vs. Muldoon.

MONDELET, J.—The question here is whether a lessor who has simply forbidden to sub-let, and has not particularly forbidden to sub-let any part, can obtain the resiliation of the lease, when the lessee without changing the nature or destination of the thing leased, sub-lets a room, and reserves to himself or continues to occupy the rest. The question has been already several times decided. The judgment appealed from decided that the defendant under the circumstances did not violate the said clause of the lease. This judgment is correct, and should be and is confirmed.

Judgment of S. C. confirmed.

Kelly & Dorion, for plaintiffs.
John Monk for defendant.
(S.H.)

SUPERIOR COURT, 1869.

MONTREAL, 30TH NOVEMBER, 1869.

Coram MACKAY, J.

No. 2282.

Spelman vs. *Muldoon.*

HELD:—That a tenant has no right to make repairs to the leased property, unless he obtains the authority of the Court (by action) to make the same at the expense of the lessor.

This was a hearing on law.

The plaintiff sued the defendant to recover (besides an amount claimed for damages) the sum of $500 as the cost of certain necessary repairs which he alleged he had been obliged to make to the leased premises.

The defendant pleaded a *défense au fond en droit* to the demand of the plaintiff for the $500 cy., on the ground that it did not appear from the allegations of the declaration that any action had ever been brought by plaintiff to compel defendant to make the repairs, or that the defendant had ever been placed *en demeure* to do so.

PER CURIAM:—According to article No. 1641, of our own code, the plaintiff was bound to put defendant *en demeure* by action to make the repairs, and to have obtained the authority of Court to do them, in case of default by the landlord. The demurrer must therefore be maintained, and the plaintiff's action, so far as his claim for the $500 is concerned, dismissed with costs.

Demurrer to action maintained.

William H. Kerr, for plaintiff.
Doherty & Doherty, for defendant.
(S.B.)

COURT OF REVIEW, 1869.

MONTREAL, 30TH OCTOBER, 1869.

Coram MONDELET, J., BERTHELOT, J., TORRANCE, J.

No. 441.

McDonald et vir, vs. *McDonald*, and *Dodd*, Int. party, and *McDonald* et al., *tiers* opposants.

HELD:—That the fact that one of the *tiers* opposants, (who claim as co-partners) is a defendant in the cause, is no bar to their right to fyle their opposition.

This was a hearing in review of a judgment rendered by THE HON. MR. JUSTICE BERTHELOT, in the Superior Court at Montreal, on the 28th day of April, 1868, rejecting the petition, in the nature of a *tierce-opposition* fyled by the copartnership firm of E. and D. McDonald, under Art. 510 of the Code of Civil Procedure. No reasons were assigned on the face of the judgment, but the Hon. Judge was understood to hold that as Edward McDonald, (one of the opposants,) was evidently the defendant in the cause, the petitioners did not come within the purview of the article.

MONDELET, J.—The judgment appealed from was rendered by the Superior Court, Montreal [BERTHELOT, J.,] in April, 1868. By that judgment the petition and *tierce opposition* fyled by Edward McDonald *et al.* was dismissed. The object of the petition and *tierce-opposition* was that, in the judgment to be rendered in the cause with reference to such *tierce-opposition*, the defendant should be condemned to pay to petitioners the sum of money therein mentioned awarded by the judgment already rendered in said cause to the intervening party, or that the said intervening party should pay the sum to petitioners. There are no reasons assigned in the judgment appealed from, for the dismissal of the petition, but the learned counsel for the petitioners, appellants, stated at the hearing that the Honourable Judge who pronounced the judgment was understood to say that because one of the petitioners appeared also to be a defendant in the cause, and was consequently already a party thereto, the petitioners did not come within Art. 510 of the Code of Civil Procedure.

It seems to me that there is nothing on the face of the pleadings nor in the evidence to justify the assumption that the Edward McDonald, who is a defendant, is the same as the Edward McDonald, one of the petitioners. Morally, I believe them to be the same, but there is no legal evidence of it in the record. But admitting them to be the same, that would not deprive Edward McDonald of the right of fyling the petition and *tierce-opposition* in question, because the said McDonald was a member of a firm composed of others besides said McDonald. This firm cannot be presumed to have been a party to the cause, nor can the defendant, who has appeared in his own individual or personal interest, be legally held to be a party to the cause as representing said firm.

L. H. Massue and John Morley.

It is in my opinion sufficient for a petitioner, under the present circumstances, to be admitted an intervening party, to show an apparent *prima facie* interest. That requisite is shown on the face of the petition. It will be time enough when the merits of the case come to be investigated to deal therewith. I am of opinion that the judgment dismissing the petition should be reversed and the petitioner permitted to intervene.

The judgment under review was accordingly reversed and the *tierce-opposition* ordered to be received and form part of the cause.

Judgment of S. C. reversed.

Dorion & Dorion, for plaintiffs.

S. Bethune, Q.C., for *tiers* opposants.

(S.B.)

COURT OF QUEEN'S BENCH, 1869.

MONTREAL, 9TH DECEMBER, 1869.

Coram CARON, J., DRUMMOND, J., BADGLEY, J., JOHNSON, J., *ad hoc*.

No. 60.

LOUIS H. MASSUE,

APPELLANT;

AND

JOHN MORLEY,

RESPONDENT.

HELD:—1. That a general renunciation for consideration by a wife *séparée de biens*, in 1828, of all rights she might have in a property sold by her husband, and which at the time was hypothecated for the payment to her of a *douaire préfix*, did not operate as a bar to her children's claim to be paid such dower, when the same became open.

2. That a sale of the property, under the bankruptcy laws in force in 1845, did not purge the property from the dower, not then open.

This was an appeal from the judgment rendered by the Court of Review, on the 30th November, 1868, (confirming the judgment in the Superior Court of THE HON. MR. JUSTICE MONK), reported at pp. 85 and *seq.*, of 13th vol. of the L. C. Jurist.

CARON, J., said, it was unnecessary to go into all the details of the case which had been fully reported, and that, after careful consideration of the legal questions involved, the judges were unanimously of opinion to confirm the judgment appealed from.

Judgment of Court of Review confirmed.

Barnard & Pagnuelo, for appellants.

Dorion, Dorion & Geoffrion, for respondents.

(S.B.)

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 8th SEPTEMBER, 1870.

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

No. 47.

ROBERT WATSON, ES QUALITE,

(Petitioner and Defendant par reprise d'instance in the Court below,)

APPELLANT;

AND

THE CITY OF GLASGOW BANK,

(Plaintiffs in the Court below,)

RESPONDENTS.

HELD:—That the right to petition to quash a Writ of Attachment in compulsory liquidation under the Insolvent Act of 1864 is purely personal to the debtor, and cannot be exercised by a person to whom he has made a voluntary assignment. (Act of 1864, Sec. 3, Sub.-sec. 12; Act of 1869, Sec. 26.)

E. Carter, Q. C., for the Appellant:—

On the 26th October, 1868, an affidavit was made by Richard B. Angus, as the agent of the plaintiffs, the City of Glasgow Bank, under the provisions of the Insolvent Act of 1864, in which the defendants were described as "James "Arbuckle, of the City of Glasgow, in Scotland, and James Bruce, of the City "and District of Montreal, merchants and co-partners, trading at Montreal, "under the style and firm of 'Arbuckle & Bruce.'" This affidavit was sworn to before the Prothonotary at Montreal, and thereupon a writ of attachment in compulsory liquidation was issued, and property belonging to James Bruce alone, was attached.

On the same day, James Bruce, one of the said defendants, who had been for some time previous carrying on business alone, under the style of James Bruce & Company, made a voluntary assignment to Robert Watson, the appellant, in pursuance of a resolution passed at a meeting of his creditors previously held, at which meeting the City of Glasgow Bank, by their attorney, were present.

The contest in this case is between Robert Watson, the assignee of James Bruce, whose petition to be permitted to intervene to contest the writ of attachment was allowed and fyled, and the respondents, plaintiffs upon the said writ of attachment.

The petition in intervention set forth:—

"That James Bruce, of the City of Montreal, merchant, one of the defendants "dants mentioned in the said writ of attachment in this cause issued, for the "period of nearly one year prior to the assignment hereinafter mentioned, car"ried on business in the City of Montreal, alone, under the style and firm of "James Bruce & Company.

"That the said James Bruce was seised and possessed of the goods, property "and effects attached under the process issued in this cause, and that under and "by virtue of the assignment made and executed in favour of your "petitioner, (Robert Watson) under the provisions of the Insolvent Act of "1864, before William Ross, notary public, on the 26th day of October, 1868, "the aforesaid property and effects became vested in your petitioner as assignee,

Robert Watson and the City of Glasgow Bank.

" and by reason thereof, your petitioner hath an interest in contesting the pro-
" ceedings had and taken in this cause by the plaintiffs, and the right to inter-
" vene in this cause for all legal purposes whatsoever connected with the defence,
" inasmuch as no such firm as that of 'Arbuckle & Bruce' was in existence at
" the time of the issuing of the writ of attachment in this cause; and the said
" attachment has been illegally and irregularly issued, for the purpose of pre-
" venting your petitioner, as such assignee, from obtaining possession of the
" estate of the said James Bruce."

After the return of the writ of attachment, and within the delays prescribed by the Insolvent Act, the appellant, as the assignee of James Bruce, contested the said writ of attachment, and, by his petition to set aside and quash the same, set forth:—

" That the affidavit in this behalf, fyled in this cause, upon which the writ of
" attachment was issued, was and is illegal, informal, and null and void, inas-
" much as the same was sworn to before the joint prothonotary, who have no
" authority to administer an oath in matters relating to insolvency.

" That at the time the said writ of attachment was issued, the said James
" Bruce was not carrying on business with the said James Arbuckle, as is therein
" set forth, but was carrying on business alone, under the style of James Bruce
" & Company.

" That the plaintiffs in this cause were fully aware, at the time the said pro-
" cess of attachment was issued, that the partnership heretofore existing between
" the said James Arbuckle and the said James Bruce had been dissolved in the
" month of March last, of which the plaintiffs were duly notified, and further,
" the plaintiffs were fully aware that the said James Arbuckle had long since,
" and during the said partnership, become a bankrupt in Scotland, and that
" thence after the said James Bruce was carrying on business alone, under the
" style of James Bruce & Company.

" That the property attached in this cause, was and is the property of the
" said James Bruce, and was not the property of any co-partnership of Arbuckle
" & Bruce, if any existed, which the said Petitioner and intervening party
" claims."

The respondents, on the 18th November, 1868, fyled an answer in law, as also an answer in the nature of a *défense au fond en fait*, denying the facts alleged.

The answer in law, upon which the judgments aprealed from were rendered, is as follows:—

" And the said plaintiffs, for answer in law to the petitions of the said Robert
" Watson, *ès-qualité*, respectively presented to the Hon. Mr. Justice Mackay,
" on the 9th and 16th days of November instant, in Chambers, and now fyled
" of record in this matter, saith, that the said petitions are irregular and illegal,
" and that the allegations in the said petitions are insufficient in law to enable
" the said petitioner to have the conclusions thereof for the following amongst
" other reasons, to wit:

" 1.—Because the proceeding adopted by the said petitioner is not known to
" the law, and he has no right, by summary petition, to ask for the delivery of

"any of the goods attached in this matter, and the Court and the judge in va-
"cation has no jurisdiction to award the conclusions of the said petitions, or any
"of them.

"2.—Because the said petitioner does not represent the insolvents in this "matter, and the insolvents have not presented any petition to set aside the "attachment, or to stay proceedings as provided by law.

"3—Because the only interest that the petitioner, who is a stranger to the "proceedings of the plaintiffs, has to urge any of the matters alleged by him in "his said petitions, is to obtain possession of certain goods claimed by the peti-"tioner to belong to him in his said quality, a remedy which he cannot by law "have upon the summary petition.

"4.—Because the only ground upon which a petition could by law be presented "in this matter under the circumstances, would be that the estate of the insol-"vent had not become subject to compulsory liquidation, which is not alleged "by the petitioner.

"Wherefore the plaintiff prays that the said petitions, and each of them, be dismissed with costs."

Paragraph 13 of Sec. 3 of the Insolvent Act, enacts:—

"Immediately upon the expiration of five days from the return day of the "writ, if no petition to quash or to stay proceedings be fyled, or upon the ren-"dering of judgment on the petition to quash, if it be dismissed, the Judge, "upon the application of the plaintiff, or any creditor intervening for the pros-"ecution of the cause, shall order a meeting of the creditors to be held before "him or any other Judge, at a time and place named in such order, and after "due notice thereof for the purpose of giving their advice upon the appointment "of an official assignee."

The Judgment rendered by the Hon. Mr. Justice Mackay, on this law issue, confirmed by the majority of the Judges in Review, (Mr. Justice Mackay being one of the three Judges sitting in Review,) is as follows:

"Having heard the parties by their respective Counsel, and considered the "petitions of the said Robert Watson, intervening party and petitioner, fyled "the 9th of November, 1868, and the 16th of November, 1868, respectively, and "the answer in law, fyled against said petitions, having examined the record, "proceedings and the documents produced and fyled and maturely deliberated, "considering the nature of the debt claim of the said plaintiff, as set forth in the "affidavit for attachment, fyled by the plaintiff on the 26th day of October, "1868, and that it is a debt that originated against defendants, James Arbuckle "and James Bruce, before any alleged dissolution of their partnership, and that, "therefore, right was and is in plaintiff to proceed against said James Arbuckle "and James Bruce, as the plaintiff hath done.

"Seeing that there is no nullity nor illegality in or about said attachment by "plaintiff, or in or about the affidavit fyled by the plaintiff, which was well sworn "to before the prothonotary, to wit, under chapter 83, section 2, of the Consol. "Stat. of L. C., and art. 30, Code of Procedure.

"Seeing that under said attachment all the property of James Arbuckle and

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" James Bruce, and of even James Bruce, (belonging to him by any name, even " by such a name as James Bruce & Company,) might lawfully be seized at suit " of plaintiff, proper accounts being, however, to be kept of the joint estate of " said partnership of Arbuckle & Bruce, and also of the separate estate of said " James Arbuckle and of said James Bruce. Considering that I, said Judge, " have no right to grant, and, by law, cannot grant the prayer of said Robert " Watson's petitions aforesaid, for the reasons set forth in them; I, the said Judge, " do maintain the answer in law before referred to, and refusing the conclusions " of said petitions, and each of them, do reject said petitions, and each of them, " with costs."

The appellant respectfully submits that the judgment appealed from should be reversed.

If the City of Glasgow Bank had issued their attachment in conformity with the facts as admitted by the answer in law, that attachment would have issued against James Bruce alone, as heretofore co-partner with James Arbuckle, and under the provisions of law amending the Insolvent Act of 1864, the appellant, as the assignee of James Bruce, would have been entitled to claim that the property attached should be delivered over to him as such assignee.

That provision is as follows:—(29 Vic., Cap. 18, Sec. 10.) " If, pending " proceedings for compulsory liquidation, the insolvent should make a voluntary " assignment of his estate and effects, in conformity with the provisions of the " said Insolvent Act of 1864, and of this act, the assignee, under such assign- " ment, may apply for and obtain from the Judge an order to stay such pro- " ceedings, subject to the claim of the plaintiff for payment out of the estate of " the costs incurred in such proceedings."

The right of the appellant, as the assignee of James Bruce, to contest the affidavit and writ of attachment, cannot be denied, and assuming that no assignment had been made by James Bruce, he would have had the same right to contest the legality of the issue and service of the process of attachment, as any defendant in ordinary civil process could exercise. And when it is considered that the objections raised were, that a firm was impleaded which did not exist, and that the property attached was not the property of the firm, but the private property of one of its members, who had assigned to the appellant, it is difficult to understand upon what principle the Court could set aside the objections raised on a demurrer or answer in law.

The answer in law being an admission of the facts pleaded by the petition, the judgment should have been in favor of the appellant.

Ritchie, Q. C., for the Respondents:—

On the 26th October, 1868, the City of Glasgow Bank, being the creditor and, so far as known to the Bank, the only creditor of a firm of Arbuckle & Bruce, (composed of James Arbuckle and James Bruce) trading at Montreal, sued out upon an affidavit duly made a writ of attachment, under the Insolvent Act of 1864, having for its object the placing of the estate of the alleged insolvents in compulsory liquidation and the appointment of an assignee to the same. The ground set forth in the affidavit for adopting this proceeding (in addition to the allegation of insolvency) was that James Bruce, one of the insolvents, was about

to assign and dispose of the assets of the defendants with intent to delay the creditors of the defendants. The writ is in the usual form, and commands the sheriff to attach the estate of the insolvents and to summon them to answer the plaint contained in the affidavit of record. It was returnable on the 11th November, following. The writ was duly executed by the sheriff, Mr. James Court, an official assignee, being made guardian of the estate, and was returned before the Court.

Before noticing the proceedings which took place in this matter, it may be well to review the provisions of the Insolvent Acts of 1864 and 1865 respecting compulsory liquidation as they bear upon the questions in issue between the parties to the present appeal.

In opposing an attachment the alleged Insolvents had a right:

1. To present, within five days from the return day of the writ, but not afterwards, a petition praying for the setting aside of the attachment made under the writ, on the ground that their estate had not become subject to compulsory liquidation. (Insolvent Act, 1864, sec. 3, § 12) or,

2. To petition the Judge (instead of applying to quash the attachment) to suspend further proceedings and to submit such petition to a meeting of creditors and the debtors in order that the creditors might determine whether the proceedings should be suspended or not. (§ 15.)

Upon the expiration of five days from the return day of the writ, no petition to quash or to stay proceedings being fyled, or the petition to quash if fyled being dismissed, a meeting of creditors would be ordered and an official assignee would be appointed. (§ 13 & 14.)

The insolvents did not adopt either of the foregoing remedies, the only ones open to them under the law, and did not even appear in answer to the writ.

The law is express in declaring that the petition to quash, made by the insolvent, as provided in sec. 3 § 12, above cited, is the only mode by which proceedings for compulsory liquidation, commenced by attachment, can be set aside. The Insolvent Act Amendment of 1865, 29 Vic., c. 18, s. 7, provides that, "No declaration shall hereafter be required in proceedings for compulsory liquidation, and such proceedings shall not be contested either as to form or upon the merits, otherwise than by summary petition, as provided by sub-section twelve of section three of the said Act," *i. e.* the Insolvent Act of 1864.

Before the return day of the writ, that is, on the 29th day of October, 1868, Robert Watson, the appellant, who had procured an assignment to him of the individual estate of James Bruce, one of the insolvents, presented a petition to His Honor Mr. Justice Mackay, but after hearing, withdrew it.

On the 9th November following, the appellant, in his quality of assignee of the estate of the said James Bruce, presented another petition, alleging that for nearly a year then past James Bruce had been carrying on business alone under the style of James Bruce & Company; that James Bruce was seised and possessed of the goods, &c., seized under the process issued, and that by virtue of the assignment to the petitioner, (appellant,) by the said James Bruce, such goods, &c., became vested in the petitioner (appellant) who had consequently an interest in contesting all proceedings taken by the plaintiff and the right to

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intervene for all legal purposes connected with the defence, inasmuch as no such firm as that of Arbuckle and Bruce was in existence at the time of the issuing of the writ of attachment, which had illegally and irregularly issued for the purpose of preventing the petitioner (appellant) as such assignee from obtaining possession of the estate of the said James Bruce. The conclusions are that the petitioner (appellant) in his said capacity "be permitted to intervene in this cause for the purpose of contesting the attachment and proceedings had in this cause, and of pleading thereto and by all other ways and means by petition or motion to quash and annul the said attachment, the whole with costs, &c."

The reception of this petition was resisted by the plaintiff (respondent), but was "allowed to be filed, saving all rights *au fond* to all parties."

The appellant having thus obtained a foothold in a proceeding to which he was, by law, an entire stranger, filed another petition on the 16th November, 1868, in which he attacks the affidavit upon which the writ of attachment issued as not sworn to before the proper officer, reiterates the allegations of the previous petition as to James Bruce having carried on business alone and being the proprietor of the goods, &c., seized, sets up the dissolution of the partnership and the alleged bankruptcy of Arbuckle, in Scotland; and concludes by asking that the writ of attachment be quashed, or if not quashed, that all proceedings be stayed and the property seized delivered over to him as the assignee of James Bruce.

The plaintiff (respondent) fyled an answer in law to these two petitions as irregular and illegal, and alleged that the allegations were insufficient in law to enable the petitioner to have the conclusions of his petitions. The reasons given in support of this pleading are the following, viz.:—

1. Because the proceeding adopted by the said petitioner is not known to the law, and he has no right by summary petition to ask for the delivery of any of the goods attached in this matter, and the Court, or a Judge in vacation, has no jurisdiction to award the conclusions of the said petitions or any of them.

2. Because the said petitioner does not represent the insolvents in this matter, and the insolvents have not presented any petition to set aside the attachment or to stay proceedings as provided by law.

3. Because the only interest that the petitioner, who is a stranger to the proceedings of the plaintiff, has to urge any of the matters alleged by him in his said petitions is to obtain possession of certain goods claimed by the petitioner to belong to him in his said quality, a remedy which he cannot by law have upon summary petition.

4. Because the only ground upon which a petition could by law be presented in this matter under the circumstances would be that the estate of the insolvents had not become subject to compulsory liquidation, which is not alleged by the petitioner.

The plaintiff also fyled another plea denying the truth of all the allegations contained in the two petitions.

The issues having been joined and the parties heard, Mr. Justice Mackay maintained the answer in law of the respondent and dismissed the two petitions.

An inscription was then fyled by the petitioner (appellant) for hearing of the

matter before three Judges in Review. (In this inscription and his subsequent proceedings the petitioner erroneously styles himself "defendant par reprise d'instance," there having been no instance to be taken up, and if there had, the petitioner never having asked or been permitted to take it up.)

After hearing in Review, the judgment of Mr. Justice Mackay was confirmed.

The appellant, as respondent conceives, entirely mistook his powers and privileges under the assignment made to him by James Bruce, one of the insolvents. That assignment merely conveyed to the appellant the individual estate of James Bruce, (Insolvent Act of 1864 S. 2 §7.) It gave him no right to interfere with an attachment having for its object the appointment of an assignee to the partnership estate which was not touched by the assignment of the individual estate, and it did not take away the right which the insolvents had to have the writ of attachment quashed upon the ground that the partnership estate had not become subject to compulsory liquidation. The insolvents alone could attack the proceedings taken against them, and only upon the grounds stated.

If the foregoing view is correct the appellant was an intruder in proceedings which in no way concerned him. The object of these proceedings was the appointment of an assignee to the estate of Arbuckle & Bruce. Such appointment the creditors had a right to have made unless the debtors themselves should allege and prove, in the manner pointed out by the law, that their estate was not subject to compulsory liquidation. Even if no property whatever had been attached under the writ the right to have an assignee named would remain intact, and it is a hardship that the proceedings of the respondent to have an assignee named to an estate of which the bank is the principal if not the only creditor, have been so long delayed by obstructions interposed by a stranger.

Even if the appellant could claim goods alleged by him to belong to an estate of which he was assignee, upon summary petition, (a proposition by no means admitted), his application was premature for the simple reason that until the appointment of an assignee to the partnership estate there was no one to represent the latter estate, or to act in the interests of its creditors.

If the appellant has the right to adopt the proceedings which he has taken in this matter he can, no doubt, point out the sections of the Insolvent Act giving him such right. If he cannot do so it is conclusive that the right does not exist.

The appellant, therefore, having no standing in the Court below, and his petitions being irregular and illegal, the question of the truth or falsity of the facts set up by him is immaterial. He had no right to present the petitions at all, and the only error committed by the Honorable Judge in the Court below was in allowing the petitions to be fyled. The appellant sought a remedy which the law did not give him, and his first attempt to enforce it ought to have been refused.

As to the regularity of the oath to the affidavit upon which the attachment was based, (an objection which, under the views above enunciated, could not be urged by the appellant) it is only necessary to refer to Article 30 of the Code of Civil Procedure, which provides that the oath required by law, in any proceedings before the Court, may be taken before the Prothonotary.

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The respondent respectfully submits that the judgment dismissing the petitions of the appellant was correct and ought to be confirmed, and the respondent permitted to prosecute the appointment of an assignee under the writ of attachment issued in this matter, and the appellant left to urge his rights, if any he has, at the proper time and in the proper manner.

BADGLEY, J.—The Bank, Scotch creditors of James Arbuckle and James Bruce, trading in co-partnership at Montreal, under the firm of Arbuckle & Bruce, caused to be issued, upon the required affidavit therefor, the insolvent writ of attachment for compulsory liquidation in insolvency against these parties. The writ was duly executed and the property in the hands of Bruce was arrested and attached, as provided by law, and taken into possession by Mr. James Court, an official assignee. After this had been effected, Bruce individually, and in his own name, made a voluntary assignment in insolvency into the hands of the appellant, another official assignee in Montreal, who filed an intervention before a judge sitting in insolvency, claiming to be put into sole possession of the attached effects, upon the ground that the co-partnership alleged in the affidavit had ceased to exist before the issue of the writ and that the effects were the property of Bruce alone, who was and had been for several months a sole trader. The intervention was demurred to upon the ground chiefly, that the insolvent trader alone could object to the validity of the writ, and that not having availed himself of the privilege offered to him by the insolvent law, the appellant, as his individual voluntary assignee, could not interfere with the writ or remove the arrestment, and that therefore the intervention was against law, and the writ remained in full force and effect. Now the insolvent law allows the adoption of insolvent proceedings against a trading co-partnership, as well as against an individual trader, and necessarily arrests in its course all the property and effects of each partner as well as that of the co-partnership. The proceeding against the partnership of course included the individual partners and each as an individual trader, and the law provides, in substance, that so long as the original writ holds good no subsequent individual proceeding shall avail. But insolvents are allowed personally to petition to quash the compulsory proceedings, and necessarily a partner would have that right also, but it is a purely personal one and cannot be delegated to another, and certainly not to a subsequently appointed assignee voluntarily chosen by the particular insolvent partner himself. The law points out the duties and rights of assignees, but gives them no power to petition to quash a previously issued writ of attachment. If the insolvents themselves, or either of them, do not petition to quash, in the manner and within the time strictly limited by the Insolvent Acts, the writ necessarily stands good against them or him. Any subsequent action by either in the shape of a voluntary assignment cannot avail to stop the force and effect of the issued writ, which, by the insolvent's failure to petition to quash, is rendered absolutely effective. The estate and effects have thus become validly held under the writ and cannot be divested from it, except by proceedings provided by law. The petition in intervention of the appellant, the alleged assignee of the individual part-

ner, one of the insolvent firm, cannot affect the writ, and therefore his appeal must be dismissed and the judgment below confirmed. Robert Watson and the City of Glasgow Bank.

Judgment confirmed unanimously.

Carter & Hatton for the appellant.

Ritchie, Morris & Rose for the respondent.

(J. K.)

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 8TH SEPTEMBER, 1870.

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

No. 3.

LEWIS O. WILSON,

(*Plaintiff in Court below,*)

APPELLANT;

AND

JOSEPH DEMERS,

(*Defendant in Court below,*)

RESPONDENT.

Where a promissory note was made in a foreign country, and payable there, and the debtor about the time of the maturity of the note absconded from his domicile in such foreign country, and came to Lower Canada, and his domicile was discovered by the creditor, after diligent search, only about the time of the institution of the action, and it appeared that under these circumstances the plaintiff's recourse on the note would not be barred by the statute of limitations of the foreign country where the note was made, and where it was payable:—

HELD, that the action was not barred by the statutory limitation of Lower Canada, though more than five years had elapsed after the maturity of the note before the action was brought.

This was an appeal by the plaintiff from the judgment rendered by the Court of Review at Montreal, 30th November, 1868, dismissing the plaintiff's action. A report will be found 13th L. C. Jurist, p. 24.

Popham, for the appellant, argued: 1st. That the question was one to be decided by private international law. 2nd. That by private international law the *lex loci contractus*, or the law of the place where the note was made payable, should be applied. 3rd. That even if the *lex fori* be applied, the questions of fact proved in the case, suspended the pleas of prescription pleaded by respondent, and sanctioned the pretensions of the appellant.

On the third point, on which the judgment in appeal principally turned, the appellant submitted, that, granting that the *lex loci contractus* was inapplicable, and that a note similar to that in question may, under ordinary circumstances, be prescribed by our Provincial statute, nevertheless, by the law of

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this country, the facts set up in the declaration, if true, suspend the prescription, and give to the appellant a right of action. The ground for this position is supplied by a principle recognized in our law, *contra non valentem agere nulla currit prescriptio*. Pothier, standing as he does almost alone in the advocacy of the *lex fori*, also adopts this maxim, and admits that prescription cannot begin to run but from the day the creditor has the power to bring the action. Obl. part III., No. 679 and 680, Prescription No. 22. "On n'est pas," says Le Merle, "recevable à se plaindre ni à se prévaloir de son propre fait, de sa négligence, de son imprudence, à plus forte raison de sa faute, au préjudice d'autrui." Fins de non recevoir, chap. 7, p. 144. These citations are closely applicable to this case. The plaintiff's declaration alleges and at *enquête* he has proved the secret and sudden absconding of the defendant from his domicile about the period of the maturity of the note; that the plaintiff had since made diligent search for him, but without success, until a month previous to the institution of the action, when he for the first time found defendant in this Province; that in consequence of this fraud by the defendant he was unable to institute any action upon the note according to the laws existing in New York and Wisconsin, and consequently by these laws the statute of limitations was, as regards the note, suspended.

Girouard, for respondent, after referring to the opinions expressed by various writers on the subject, continued:—The review we have just made clearly shows that no less than eight different systems prevail on the continent:

1. The law of domicile of the creditor in all cases, supported by Pothier.

2. The law of the domicile of the debtor at the time of the institution of the action in all cases, supported by Huber, John Voët, Pohl, Thol, Bar, Berroyer and Laurière ou Duplessis, Arrêts of the *Parlement de Flandre*, (17th July, 1692, and 30th October, 1705), Bruxelles, (24th September, 1814), Merlin, Marcadé, Félix, Arrêts de Cologne, (7th January, 1836, 4th April, 1839, and 14th December, 1840), Cour de Cassation of Berlin (8th October, 1838.)

3. The law of the place of the contract in all cases, supported by Hert, Mansord, Rocco, Reinhardt, Schaffner; Douai, (16th August, 1834); Paris, (7th February, 1839, and 18th January, 1840.)

4. The law of the place of the contract, and when a place of payment is specified, the law of that place, supported by Wachter, Koch, Bornemann and Savigny.

5. The law of the domicile of the debtor at the time of the institution of the action and when a place of payment is specified, the law of that place, supported by Christin, Burgundus, Mantica, Casaregis, Favre, Boullenois, Troplong and Massé.

6. The law of the domicile of the debtor at the time of making the contract, and when a place of payment is specified, the law of that place, supported by Pardessus.

7. The law of the domicile of the debtor at the time of the making of the contract in all cases, supported by Dunod.

8. The law of the place where the action is brought in all cases, supported by

Paul Voët, Huber, Hommel, Weber, Tittman, Meier, Gluck, Mittermaier, Muhlenbruch, de Linde, and by the English and American decisions.

In Scotland another system, still assented to by Guthrie on Savigny, prevailed in former times, viz., the law of the domicile of the debtor during the whole currency of the term of prescription.

The counsel for respondent concluded as follows:—Finally, it may be said that in the present cause, it is immaterial as to the note in question whether we are governed by the *lex fori*, or by the *lex domicilii debitoris* at the time of the institution of the action, or by the law of the domicile of the debtor during the whole currency of the term of prescription, as the result under each system would be equally fatal to the appellant's action. And so the respondent's case is supported by not only the English, Colonial and American jurisprudence, but also by the majority of the French commentators and decisions, and by a large number of the other continental writers.

If the Court feel inclined to choose between the said three systems, the respondent humbly contends that the rule of the *lex fori* is the most reasonable and logical, and that it should be declared to be the law of Lower Canada for, amongst other reasons, the following:

1. Because our Statutes of Limitations do not make any exception with regard to foreign promissory notes.

2. Because the said rule is virtually maintained by the old French commentators and *arrêts*, and is further adhered to by many modern French and Continental jurists, the *lex domicilii debitoris* meaning with them the same as the *lex fori*.

3. Because the question in controversy being one, not of local but of international law, should be decided in conformity with the jurisprudence of other nations.

4. Because the rule of the *lex fori* is the law of Ontario, the United States, England and Scotland, and also of other nations.

5. Because our law of prescription in commercial matters, having been copied from that of England, ought to be governed by the English rules.

6. Because this question bears upon the relations of foreigners with British subjects, and is, consequently, a question of public law to be governed by the rules of the English jurisprudence.

7. Because our law of prescription, like that of every nation, relates to procedure only.

8. Because the foreign contract is not affected in the least by the plea of limitation, the respondent remaining still liable to an action in the foreign country.

9. Because a debt declared prescribed still exists *in naturâ*, and can be good consideration of payment.

10. Because our Statutes of Limitations are to preserve the peace of citizens of this country, and not of foreigners.

11. Because foreigners cannot claim higher or more extensive privileges than those allowed to Canadian inhabitants.

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12. Because the appellant neglected to bring his action in due time in this country.

13. Because the parties, when contracting, cannot be supposed to contemplate the Statutes of Limitations of any country.

14. Because if the parties, when contracting, be supposed to have contemplated prescription, they must be presumed to have looked to the limitation of the country where the action would be brought.

15. Because the plea of prescription is a plea belonging to the person of the defendant, and consequently must be ruled by the law of the place where the defendant is served with process.

16. Because the fact that the Court cannot of its own motion supply the said plea, demonstrates that it does not relate to the contract or debt of the plaintiff.

BADGLEY, J. Two brothers named Demers, of whom the respondent was one, established themselves in business in co-partnership at Fond du Lac, in Wisconsin, and purchased goods in New York from a merchant there, for which they gave their promissory note, dated the 12th September, 1857, for $1,120.47, payable to order at four months after date. At about the time of the maturity of the note, the makers secretly and fraudulently left their place of business and domicile. Until April, 1863, they concealed their whereabouts from their creditor so successfully that at this last date only was the domicile of the respondent discovered in Lower Canada, at Beauharnois, where he had established himself in business. Proceedings, by action at law, were then instituted against him for the recovery of the amount of the note, which had been duly protested after non-payment when it fell due, and indorsed by the payee to the appellant. Subsequently to this the co-partnership between the brothers was dissolved. The respondent having, among other prescriptions, pleaded our Statutes of Limitations against the suit, the contention turns upon the applicability of the statutory limitations to relieve the respondent from the action against him. In the contention of this case a very elaborate discussion has been raised of what appears to be a plain principle of law. There is no difficulty as to the facts of the case. The business co-partnership of the respondent and his brother, their domicile and place of business in the State of Wisconsin, their purchase of the goods, the consideration of the note at New York, the making of the note in the State of New York, their departure from Wisconsid about the time of the maturity of the note, with their means of paying it, and its timely protest for non-payment, the dissolution of their co-partnership, and the entire ignorance of the creditor of their place of refuge, until his final discovery, in April, 1866, of the respondent's residence at Beauharnois, in Lower Canada, about which time the action was instituted against him. The respondent demurred to the action by excepting in law,—first, the Provincial Statute of Limitations; second, the statutory prescription of five years for promissory notes; and, third, the statutory prescription of six years. After evidence taken in the case, judgment *en première instance* was for the plaintiff, but this was reversed in revision by the Court, which dismissed the plaintiff's action altogether; and this appeal is from that final judgment. The elaborate discussion of this case by both parties has

extended over the legal limitations of the States of Wisconsin and New York; the legal effect of statutes of limitation in general, and their governing principle as derived either from the *lex loci contractus* or the *lex fori*. The former cannot apply beyond its own territory, and the latter can only apply where the law of the *forum* allows the forum applied to to make the application. All such limitations are necessarily matters of procedure, that is, in the use of local Courts for the enforcement and defence of contentious litigation, and it is plain that if the law of a country will not allow its Courts to be used for a particular purpose, after the expiration of a limited period of time, this is a law of procedure which does not reach the merits of the contract. National comity, of course, extends the use of local Courts of justice to suitors generally, but as the mere creatures of local legislation, those Courts are restricted and limited within the conditions of the law of their regulation and permission to act. The foreign suitor, therefore, coming into our Courts does not bring his foreign procedure with his contract; he brings the contract, and the proof of it only, and is, therefore, necessarily compelled to submit to the procedure which the local legislature has allowed to be used in its Courts of Justice, and which is provided by it according to the circumstances, and in the manner and time limited by the wants and requirements of the country as declared by its legislative enactments. This foreign creditor having resorted to our Courts, and our procedure, is therefore subject to the restrictions and limitations of our local law, that is, the *lex fori*, technically so called, which, therefore, in that respect, displaces and sets aside the limitation and its incidents of the *lex loci contractus*. It is, therefore, the *lex fori*, in other words, our law of limitations or prescription, which applies to this case, and not that of any foreign country. But this law of limitation or prescription, like all other laws, is subject to what is fair and possible, namely, the subjection of the suitor to its application; but where a foreign debtor so fraudulently acts towards his foreign creditor as to conceal himself in another country foreign to his creditor, he puts it out of that creditor's power to enforce his rights in that country of refuge against his debtor, or to use the procedure of the country to which the debtor has fled, without the creditor's knowledge of his whereabouts. A fair equality must exist between them; if the creditor is to be limited in his recourse, he ought to have the means of enforcing it. If the debtor has the advantage of relief by the local limitation, he must not fraudulently and dishonestly, by his own act, exclude his creditor from the power of enforcing his recourse against him. It was only in April, 1866, that the debtor's domicile was first discovered. It is manifest that our local prescription or limitation could only legally begin to run from the time of that knowledge, and the respondent's factum seems to admit this, in allowing that the action then would lie. The maxim of our common law overlying our prescription is the means or power of enforcing recourse under the equitable rule, *contra non valentem agere non currit prescriptio*; the disability must be removed to allow of the full effect of the limitation, and that disability was removed only in April, 1866, when it was known that the debtor was domiciled in Canada. Making the strictest application of our Statute of Limitations against the foreign creditor, it could only hold him when, by his knowledge of his debtor's domicile in Canada, that

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became a binding law upon the creditor; up to that time, the fraudulent absconding and evasion of the debtor from the foreign country, and his refuge here without his creditor's knowledge, could not cut out the creditor from his right to demand his debt from him, and the limitation only began to be operative from April, 1866. The action is brought in that year, which is in good time within the statutory limitations, and, therefore, the judgment appealed from must be reversed, and judgment entered up for the appellant, with costs of both Courts. It is only necessary to add that the fraudulent absconding from the foreign country, and the evasion by the debtor, respondent, from both the States of Wisconsin and New York, prevented the operation of their Statutes of Limitation against the creditor, and leaves the liability of the respondent in those States exactly as it was at the time of his withdrawing himself from the operation of their State law.

DUVAL, C. J. The pretension of the defendant amounts to this: I committed a fraud. I succeeded in stowing myself away out of the States of the Union. My creditors looked for me everywhere, and I must succeed in getting this action dismissed, because I have hid myself for six years. Is it possible that such a rule as this could be laid down in any civilized country in the world? The case, to me, seems so plain that I cannot conceive how there can be any doubt on the subject.

MONK, J., concurred. On the question of law, his Honor seemed to concur with Mr. Justice Mondelet's opinion in the Superior Court, that it was the *lex loci contractus* which must be considered.

DRUMMOND, J., also observed that, in his opinion, it was the *lex loci contractus* which must decide the case; and, therefore, there was no prescription acquired by the defendant.

CARON, J. Le factum de l'Appelant est concis, et parait exposer les questions de fait et de droit correctement.

Prendre à ce factum, page I, les faits de la cause, les allégations de la déclaration, et la nature de la défense.

Une défense en droit, admise par le Juge Berthelot en première instance, a été renvoyée par la Cour d'Appel; les parties ont été à l'enquête, et ayant été entendues au mérite, jugement a été rendu (Juge Mondelet) maintenant l'action et condamnant le défendeur. La Cour de Révision a renversé ce jugement et a renvoyé l'action;—C'est de ce jugement qu'est appel.

La question est de savoir quelle est la loi à laquelle il faut recourir pour décider la question de prescription, sur laquelle roule toute la difficulté. Billet, 12 Septembre, 1857, fait dans le Wisconsin, payable à New York, à quatre mois, $1120.47. Action portée dans le Bas Canada.

L'absence du défendeur et la recherche faite pour le trouver sont prouvées. Aussi la loi de New York et de Wisconsin, par laquelle l'absence suspend la prescription. Si la cause doit être décidée d'après ces lois, le billet n'était pas prescrit lors de l'action, qui a été portée aussitôt que le domicile du défendeur a été trouvé. C'est là la prétention du demandeur, appelant, laquelle a été accueillie par le jugement en première instance du 28 Mars, 1868, qu'il faut voir

la page 4 du factum de l'appelant, renversé par celui de la Cour de Révision, 30 Novembre, 1868, (Mondelet, Mackay, et Torrance, JJ.) Mondelet, J., différant. Lewis O. Wilson and Joseph Demers.

Je pense que le Juge Mondelet a bien jugé en disant que c'était d'après la loi du lieu où avait été fait le billet ou bien de celui où il avait été mis payable, que la cause se devait décider ; cela étant, d'après la preuve, la prescription n'était pas acquise et le défendeur a été bien condamné. (Voir les raisonnements de l'appelant et les autorités qu'il a citées en son factum.)

L'Intimé, au contraire, prétend que c'est la Cour de Révision qui a bien jugé, en décidant que c'était la loi du domicile du défendeur qui devait être appliquée à l'espèce. Que ce domicile, lors de l'action, étant le Bas Canada, notre loi était contraire aux prétentions du demandeur ; que son action était prescrite lorsqu'elle était portée d'après le Stat. Réf. chapitre soixante quatre et aussi d'après le Stat. 10 et 11 Victoria, ch. 11. (Voir ce jugement, page quatre, du factum de l'appelant.)

Il ne me paraît pas très-sûr que le ch. 64, sect. 31, soit applicable à notre cas, puisque cette clause ne paraît regarder que les billets *dûs et payables* dans le Bas Canada. Or celui dont il s'agit n'a jamais été payable dans le Bas Canada. Quant au Stat. 10 et 11 Victoria, chap. 11, étant antérieur au chap. 64, plus haut cité, il a été mis de côté par ce dernier, en autant que leurs dispositions diffèrent. Dans ce cas, c'est au chap. 64 qu'il faudrait recourir,—d'où il résulterait que la partie du dit jugement (Cour de Révision) qui est fondée sur la 10 et 11 Victoria, chap. 11, est incorrecte.

Mais en supposant que le chap. 64 soit, dans toutes ses dispositions, applicable à l'espèce, et qu'il fût vrai de dire que dans les cas ordinaires, un billet pareil au nôtre, dût être regardé comme prescrit, cependant d'après la preuve, celui-ci ne le serait pas, par la raison que le défendeur, ayant été absent et n'ayant été découvert que peu de temps avant l'action, la prescription n'a pas couru contre le demandeur, tant qu'il n'a pu connaître le domicile du défendeur.

L'information qu'il est prétendu avoir reçue ne me paraît pas suffisante. Le principe applicable est "*Contra non valentem agere, nulla currit prescriptio.*"

En conclusion :

1. C'est la loi du Wisconsin, où a été fait le billet, ou bien celle de New York, où il était payable, qu'il faut suivre ; or, d'après cette loi, qui est la même dans les deux endroits, la prescription n'a pas couru, au préjudice du demandeur, tant que le défendeur s'est tenu caché et que son domicile n'a pas été connu. Le demandeur était donc à temps pour poursuivre.

2. En supposant que ce soit la loi du domicile, qui est celle du Bas Canada, le chap. 64 des Stats. Ref. du Bas Canada, qui est notre règle sur le sujet, ne s'applique pas à l'espèce, vû que le billet n'a jamais été payable dans le Bas Canada.

3. En admettant que cette interprétation du statut fût incorrecte ; d'après notre droit commun, applicable, l'absence du défendeur, telle que prouvée a interrompu la prescription et l'a empêché de courir au préjudice du demandeur.

Je renverserais donc le jugement de la Cour de Révision et j'adopterais, en son entier, celui du Juge Mondelet.

Lewis O. Wilson and Joseph Demers.

The judgment is recorded as follows:

The Court, etc., considering that the promissory note, the subject of contention in this cause, bearing date at New York on the 12th day of September, 1857, was then and there made by the co-partnership firm of Demers & Brother, composed of the said respondent and his brother Hector Demers, then trading in co-partnership at Fond du Lac, in the State of Wisconsin, one of the United States of America, and was by the said firm made payable at Fond du Lac aforesaid, at four months after the date thereof, which said note was there duly protested for non-payment at the maturity thereof.

Considering that about the time of the maturing of the said note for payment thereof, the said respondent and the said Hector Demers, co-partners aforesaid, absconded from their domicile at Fond du Lac aforesaid, and abandoned the United States without returning thereto and having domicile therein.

Considering, therefore, that the Statutes of Limitation in force in the said States of New York and Wisconsin have no application to the said promissory note, and do not bar the legal recourse in the said last mentioned States, or either of them, upon the said promissory note.

Considering that the domicile of the said respondent, since his absconding from Wisconsin and departure from the said United States, and after diligent but unsuccessful search therefor, was discovered to be at Beauharnois, in the Province of Quebec, only at or about the time of the institution of this action, to wit, in April, 1866.

And considering, therefore, that the statutory prescriptions or limitations of Lower Canada could not apply, and could not bar the action and demand of the said appellant against the said respondent in this behalf.

Considering that in the judgment of the Court sitting in this cause, at Montreal, and rendered on the 30th November, 1868, in revision of the judgment rendered in this cause by the Superior Court sitting at Montreal, and rendered on the 28th day of March, 1868, there is error, doth reverse and set aside the said judgment in revision, and doth for the causes and reasons above mentioned affirm and maintain the said judgment of the said Superior Court, with costs, against the said respondent in favor of the said appellant, of the said Superior Court, and of the said Court of Revision and Review and of this Court.

Judgment reversed.

John Popham, for appellant.
D. Girouard, for respondent.
(J.K.)

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 8th SEPTEMBER, 1870.

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

No. 1.

THOMAS RIMMER ET AL., APPELLANTS;

AND

THOMAS RUSTON, RESPONDENT.

HELD:—That when A sells to B 400 barrels of Coal Oil for a price, payable in a specified time from date of return of the gauge of the oil, and B accepts a certificate of gauge of 352 full barrels (the gauged contents of 400 barrels), and an invoice from A, for 352 barrels only, without protest or objection, and promises to pay the amount of such invoice, he cannot afterwards repudiate the transaction and insist on a delivery to him of 400 barrels of Coal Oil.

The facts and circumstances connected with this appeal are fully disclosed in the following remarks of counsel, and in the judgment of the Court:—

Bethune, Q. C., for appellants:—

This is an appeal from a judgment of the Superior Court, at Montreal, sitting in Review, rendered 22nd May, 1869, confirming a judgment rendered by the Hon. Mr. JUSTICE MONDELET, in the said Superior Court, on the 30th December, 1868, condemning the appellants to pay to the respondent the sum of $400 currency, with interest from 10th September, 1867, and costs of suit.

The facts, as sworn to in the Court below, may be briefly stated as follows:

On the 8th July, 1867, the defendants sold plaintiff 400 barrels coal oil, "Victoria Brand," at 17 cents per gallon, of which $1 per barrel was agreed to be deposited by plaintiffs, and the balance was to be paid for "*in fifteen days from date of return of Campbell's gauge.*"

The defendants caused the 400 barrels to be gauged, and, as "some of the barrels" were "*partially empty*, and others *altogether so*," (as testified by Campbell's assistant gauger) 352 full barrels were made out of the whole lot.

The certificate of gauge is fyled *by the plaintiff* as his exhibit No. 2, (paper 4 of record) and was handed to him on the 25th of July, 1867, when he (the plaintiff) wrote thereon in pencil,—"Received 25th July." "Due 9th August."

This certificate was so handed to plaintiff by Stephen B. Heward, the broker who negotiated the sale between plaintiff and the defendants, and Mr. Heward attests that "he (the plaintiff) looked at it and placed it on the desk in his office, and said, *that the account would be paid when it was due.*"

Mr. Heward further swears that the plaintiff *did not then or at any time afterwards object* that the certificate had reference *only* to 352 barrels.

When the certificate of gauge was so delivered, the invoice *fyled by the plaintiff*, as his exhibit No. 4, (paper No. 6 of record) was *also* handed to the plaintiff by Mr. Heward, and the date of its reception is also recorded thereon,—"Received 25th July." This invoice corresponds, as regards number of barrels and their contents in gallons, to the certificate of gauge.

Mr. Heward swears that the plaintiff again made *no objection* to the fact that the invoice only referred to 352 barrels of the oil instead of 400, "*but on the contrary promised to pay the amount of the said invoice when due.*"

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Mr. Heward adds that he called again on the plaintiff, after the said invoice became due, for payment of it, but "*could get nothing from him but promises.*" He says he then wrote, and delivered to plaintiff, a letter, of which exhibit B, (paper 34 of record), fyled by him, is a copy, threatening proceedings by defendants, and that *after* sending that letter to plaintiff he "saw him and he told" witness, "*that the account would be settled.*"

Mr. Heward also attests, that it was only "*after* the occurrence of what he last swore to, that plaintiff, *for the first time*, said that "he wanted the whole 400 barrels."

The defendants subsequently re sold the oil, the plaintiff *retaining the certificate of gauge* (which by the terms of the contract was equivalent to delivery of the oil sold) and the *invoice* of the sale, as of 352 full barrels.

The plaintiff then sued the defendants to recover back his $400, which he had paid as deposit, and for damages for alleged breach of contract.

Under the circumstances, the defendants pleaded as follows:—

That true it is, they agreed on the eighth day of July last, at Montreal aforesaid, to sell and deliver to the plaintiff 400 barrels of coal oil, "Victoria" brand, at seventeen cents per gallon, one dollar per barrel to be deposited cash, balance to be paid by plaintiff in cash in fifteen days from date of return of Campbell's gauge, and that the plaintiff deposited with defendants the sum of $400 currency, in accordance with the contract, but the said defendants say that, owing to the subtle and volatile character of coal oil, it was and is matter of notoriety in the trade, and was and is well known to the plaintiff, that it is impossible to keep the barrels containing the oil full for any considerable time.

"And the said defendants say that, according to the usages and custom of trade, when any given number of barrels of coal oil are sold, it is perfectly understood that the barrels are not considered or held to be full, and that the sale in consequence is made at so much the gallon, and the oil paid for according to the result of the actual gauging of the contents of the barrels.

"And the said defendants say that the sale above admitted as having been made to the plaintiff, was made in accordance with the usage and custom of trade, as aforesaid, and with a full knowledge and understanding on the part of the said plaintiff, that the said 400 barrels were not in fact full of coal oil, and were not, for the purposes of such sale, to be considered or held to be full of oil.

"And the said defendants say that when the said sale was so made as aforesaid, they, the said defendants, had in store, in Middleton's Coal Oil Stores, near Montreal, (as the said plaintiff well knew,) four hundred barrels of coal oil of the brand and description aforesaid, and before proceeding to have the same gauged by Campbell, the gauger above named, the said defendants applied to the said plaintiff to ascertain from him whether he preferred to have the 400 barrels gauged, according to their actual contents, and delivered to him in their then actual condition, or whether he preferred that the full barrels should be made out of the 400 barrels guaged, and he, the plaintiff, then and there consented and agreed that full barrels should be made out of the contents of the said 400 barrels, and the contents of such full barrels gauged, and to receive such full barrels as a compliance on the part of the said defendants with the aforesaid contract.

"And the said defendants further say that the invariable usage and custom of the trade in Montreal has been and is, when any lot of coal oil is to be gauged and any of the barrels composing the lot are partially empty, to make full barrels out of the whole lot before gauging the lot.

"And the said defendants say that, out of the contents of the said 400 barrels, 352 full barrels of said coal oil, of the brand and description aforesaid, were made and were gauged by the said Campbell and ascertained to contain 13,870½ gallons of said oil, as is established by the gauge of said Campbell, which is fyled in this cause by the said plaintiff, and which was delivered to the said plaintiff on the 23rd day of July last.

"That the said plaintiff received the said gauge without objection or protest of any kind, and hath retained the same ever since in his possession, but notwithstanding the premises, he, the said plaintiff, did not, within fifteen days from the delivery of the said gauge, pay to the said defendants the balance of the said purchase money remaining unpaid, after deduction of the said amount of $400 currency.

"That on the said 23rd day of July last, the said defendants did furnish to the said plaintiff the account fyled in this cause by the plaintiff as his exhibit number four, which the said plaintiff also received and retained in his possession without objection or protest of any kind.

"That payment of said account was repeatedly demanded of the said plaintiff, and that more especially on the twelfth day of August last, when the said plaintiff faithfully promised to pay the amount of the said account by three o'clock in the afternoon of the said twelfth day of August last.

"That notwithstanding the premises, the said plaintiff still failed to pay the amount of said account, and thereupon the said defendants, on the thirteenth day of August last, through the ministry of T. Doucet, notary public, formally demanded payment of the aforesaid balance of said purchase money, and did notify him that unless he paid the said balance and removed the said oil within twenty-four hours, the said defendants would sell the said oil for such price as they might get for the same at public auction, and hold him responsible for and claim and recover from him all loss that they might sustain by difference in price, and all other losses, expenses, injury and interest then already suffered and to be suffered in the premises.

"That the said plaintiff, notwithstanding the premises, still neglected to remove the said oil and pay for the same in terms of said contract, and in consequence of various rumours which prevailed in the city that the stores of the said Middleton would be destroyed by fire, the said defendants sold the said oil through a broker for an amount equivalent in net cash (after deducting the broker's commission) to $2,133.27 cts. currency. And that the price so realized was greater than could or would have been realized had the said oil been sold by public auction, and was the full market value of the said oil at that time.

"That by reason of the neglect of the said plaintiff to remove the said oil and to pay for the same as aforesaid, the said defendants incurred, in consulting counsel, in notarial charges, in storage of said oil, and in the gauging of said oil,

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costs and expenses to the extent of thirty dollars and seventy-four cents currency, which the said defendants, by reason of the said several premises and by law, have a right to deduct from the net proceeds of said sale and from the said deposit of $400 currency.

"That the price of the said oil so sold to the said plaintiff amounted in the aggregate to $2,357 98 cts. currency, and after deduction therefrom of the net proceeds of the said sale, so made subsequently, as aforesaid, by the said defendants and of the said deposit of $400 currency, less the said sum of thirty dollars and seventy-four cents currency, there remains a balance of $146.77 currency, due to the said plaintiff as cash, on the twenty-second of August last, as shewn by the statement herewith fyled.

"That the said defendants have been at all times ready and willing to pay the said amount last mentioned to the plaintiff, with interest thereon since the said twenty-second day of August last, but he has at all times refused to accept the same.

"That the interest on the said sum of $146 77 cts. currency, accrued to this day, and the costs to date, as in an action for the recovery of such an amount, form with the said demand itself, the sum of $170 84 cts. currency, which the said defendants herewith deposit and consign to the hands of the Prothonotary of this Honourable Court, to the end that the plaintiff may accept the same if he think fit to do so.

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

"Wherefore the said defendants pray *acte* of their tender and *consignation* aforesaid, and that the declaration and action of the plaintiff, as regards the surplus of his demand, be hence dismissed with costs."

The usage and custom of trade invoked by the plea, and its knowledge by the respondent, were abundantly established in evidence, and, although the appellants did not prove that they actually applied for and obtained respondent's consent to make full barrels of the lot of 400 (as alleged in the plea), yet the respondent's action (as already shewn), on receiving the certificate of gauge and invoice clearly proved, that he understood the matter and consented to receive 352 full barrels, as the representative or equivalent of what he actually purchased.

The following was the judgment rendered by the Hon. Mr. Justice MONDELET:—

"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 duly and maturely deliberated:

"Considering that the plaintiff hath proved the material allegations of his declaration, namely, that on the eighth day of July, 1867, at the City of Montreal, the defendants sold to plaintiff 400 barrels of coal oil, "Victoria" brand, at seventeen cents per gallon, one dollar per barrel to be deposited, and the bal-

ance to be paid in cash fifteen days from date from return of Campbell's gauge;

"Considering that plaintiff hath performed his part of the contract which he was bound to;

"Considering that defendants have failed to deliver, as thereto bound and obliged, the said quantity of 400 barrels of coal oil, or any part thereof;

"Considering that plaintiff hath a right to recover from defendants the said sum of $400:

"It is ordered and adjudged that the defendants do pay and satisfy to plaintiff the said sum of $400, with interest thereon, from the tenth day of September, 1867, the day of service of this action, together with costs *distraits* to Messrs. A. & W. Robertson, attorneys for plaintiff. Out of which sum of $400 the sum of $170 84 cts., amount of defendants' tender, shall be deducted, the plaintiff having received the same."

And the following was the judgment in review, (Justices MONDELET, BERTHELOT AND BEAUDRY presiding):—

"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 of the District of Montreal, on the 30th day of December, 1868, having examined the record and proceedings had in this cause and maturely deliberated;

"Considering that there is no error in the said judgment, doth in all things confirm the said judgment, with costs against the defendants, *distraits* &c."

The appellants respectfully submit:

1.—That under all the circumstances of the case, the delivery by the defendants of the *gauged contents* of the 400 barrels sold was a virtual compliance with the terms of the contract.

2.—That, under any circumstances, the acceptance by plaintiff of the certificate of gauge and of the invoice, *without objection or protest, and his retention of the same coupled with his repeated promises to pay* amounted in law to a waiver of any right he might otherwise pretend to have to exact delivery of 400 full barrels of oil, instead of their mere gauged contents.

3.—That defendants, having proved the allegations of their plea, were and are entitled to a judgment in their favor, according to the conclusions of such plea.

And therefore, that the judgment complained of ought to be reversed and judgment rendered in terms of appellants' plea.

Robertson, Q. C., for the respondent:—

It will be seen that the usage pleaded in the original plea is "that it is understood the barrels are not considered or held to be full;" in other words, that the defendants were, by this usage, bound to deliver the 400 barrels with their contents, be the contents more or less. The usage set up in the *amended* plea is that the barrels are always filled up before ganging; this means that the purchaser gets so many full barrels, as may happen to be obtainable, filled up out of the number of barrels mentioned in the contract, and that in this case the plaintiff only can obtain 352 barrels out of the 400 mentioned in the contract. The former usage is far less repugnant to principle than the *latter*. It, in effect, says: "I sold you *a specific lot of oil*, according to the usage of trade, 400 barrels, in

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Middleton's sheds or elsewhere. Take the 400 barrels, and pay me at the contract price per gallon and on the actual contents." This gives the purchaser 400 barrels as they were, and their contents, more or less. But the defendants *did not deliver or offer the* 400 *barrels* according to the pretended usage first pleaded.

This usage, even if proved, cannot avail to discharge the appellants from their written contracts, even if they could tender legally 400 barrels more or less empty; nor was the sale of the oil, by the sale notes, a sale of a *specific lot* in a fixed place. It was not limited to a lot pointed out, and known and seen by both parties. The defendants had a right to go into the market and buy oil of the "Victoria brand" and tender it to plaintiff. They were not limited to the delivery of a special lot, nor could the respondent refuse oil of the brand and quality mentioned in the contract, nor insist upon the oil said to be in Middleton's stores.

The question raised by the pleadings are two:—*one of fact.* Have the defendants proved the usage set up in their plea? *The other of law.* Can usage of the kind invoked over-ride the law, and the contract as contained in the bought and sold notes?

As to the usage and custom, defendants examined only two witnesses, Heward, the broker, and Muirhead, a gauger in Campbell's employ.

Heward says the invariable usage is, "when barrels are partially empty to make full barrels out of the whole lot. In consequence of the volatile and subtle character of coal oil, as before explained, it is perfectly well understood in the trade in Montreal, when any given number of barrels of coal oil are sold in store, as the oil in this case was, that the barrels cannot be full, and, consequently the oil is sold at so much a gallon, and paid for according to the actual result of the gauging here. This is the usage and custom of trade in Montreal.

Cross-examined he says "the practice is, that in case of purchase of a specific quantity of barrels, say 400, the buyer gets only what the 400 may contain."

Now this usage cannot avail the defendants, for they did not give the 400 barrels as they were, with their contents more or less, but only 352, keeping the empty barrels to themselves, which are worth from sixty cents to one dollar each.

Muirhead says "the custom is when any lot of coal oil has to be gauged and any of the barrels composing the lot are partially empty, to make full barrels of the whole lot before gauging."

This may fairly be taken to support plaintiff's pretension, that the defendants should have filled the 400 barrels up, before gauging or delivering them.

But, when cross-examined this witness states that, if 400 barrels were sold, the purchaser, by custom and usage, is entitled to receive 400 barrels: that it is the custom "in large lots to made full barrels out of the lot." The following question is then put:

Question.—"Are you aware of any usage of trade which would allow a seller of a certain number of barrels without any particular lot being mentioned in the contract, delivering a less number of barrels than the quantity mentioned in the contract?"

Answer.—"Not unless specially stated."

The witness Maume, a coal oil merchant examined on behalf of the respondent, shews distinctly his understanding of the usage or custom. "If there is no bar-

gain to the contrary the quantity of oil in each barrel would be gauged and paid or, and the barrels be handed over to the purchaser." Again,

Question.—In case of the sale, say of 400 barrels at so much per gallon, to be ascertained by gauging, do you know of any custom or usage which, without an agreement, would permit the seller to deliver, say, 352 full barrels, himself keeping the empty barrels?

Answer.—"In such a case, the seller, so far as I am acquainted with the usage and custom, either delivers the 400 barrels, gauging what is in the barrels, or he fills up the 400 barrels full."

He says empty barrels in July, 1867, were worth one dollar per barrel, at present only sixty cents.

The usage contended for by the pleas is not proved. The contract is not complied with, either by delivering 400 barrels with their contents more or less, or by delivering 400 full barrels, which is what the contract meant.

Heward, defendant's witness, says, defendants had 1000 barrels of coal oil in store, and it would have been easy to have filled up the barrels, or at least have given the plaintiff the 400 barrels as they were, to complete the number given in the contract.

Without any qualifying words in the contract, a sale of 400 barrels generally means a sale of 400 *full* barrels. If the 400 barrels were seen and pointed out, and were sold as they were, at so much per gallon; then the 400 barrels should still be delivered, and the purchaser is entitled to each and every one of them before his contract is fulfilled. The appellants failed to deliver 400 full barrels, or 400 barrels partially full. And yet from their Notarial Protest of 13th August, 1867, (Doucet, N. P.) filed as plaintiff's exhibit No. 5, one would suppose the whole of the 400 barrels were tendered. In the plaintiff's protest (Exhibit No. 6) of the 22nd August, plaintiff offers to pay the balance of the price on receiving Campbell's gauge for 400 barrels; and to his demand for the 400, the answer is "our answer is recorded in the protest served on him and above referred to." That protest goes on as if the 400 barrels had been tendered and refused, which is not the case.

The defendants construe the contract as if it had been for the "delivery of all the oil that may be in the 400 barrels lying in such a place, at so much a gallon, empty barrels to belong to seller." This is not the contract as evidenced by the brokers' notes.

Can any usage avail to change the contract as made, into a contract such as defendants want to make it?

The plaintiff submits that no usage can convert the contract for 400 barrels into a contract for 352. The contract binds the parties as made. The Court is to construe the contract, and it is submitted that the judgment brought up for review is well founded and ought to be sustained.

The attempt to fix a liability on plaintiff by the witness Heward, from the delivery of the invoice for the 352 barrels, and a vague promise to pay for the oil, ought not to be allowed to stand as a waiver of plaintiff's right to the 400 barrels, more especially as Heward does not say that Ruston would be satisfied with less than 400 barrels, but simply that the invoice was correct.

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The evidence of the appellant as to usage is insufficient and contradictory, and ought not to be allowed to control the written contract.

There was no evidence on the part of the respondent of any special damage by a rise in the price of oil, and the judgment rendered by the Judge in the Court below condemned the appellant to pay simply the deposit of $400 acknowledged as paid under the contract, less the sum of $170 84 cts., tendered with the plea, and paid over to the respondent previous to the judgment. This judgment was maintained in review, and, as respondent submits, should be affirmed in Appeal.

BADGLEY, J. This contention arises from a broker's contract of sale and purchase of 400 barrels of coal oil, stored in Middleton's store, according to the gauged quantity of the contents of the barrels at 17 cts. per gallon, payable, as per agreement, in fifteen days after the gauge certificate shall have been delivered to the purchaser, with a cash deposit of $400, which was forthwith paid. The oil sold was to be the contents of 400 barrels and no more, and the amount payable was to be fixed by the gauged quantity in the 400 casks, which amounted to 13780½ gallons, for which the regular gauge certificate was obtained by the broker, who at once delivered it to the purchaser, the appellant, with a statement or bill of parcels of the amount due at the price agreed upon. The oil had been taken from the barrels so as to make up 352 full barrels, and the bill of parcels charged that number of full barrels only, which was explained at the time, corroborating the proof adduced of the fact well known to the trade and also to the appellant, that the barrels of this oil are never full, owing to the volatile nature of the article, and are not bought and sold as full barrels except upon the hazard assumed by the buyer, the purchase in common being upon the gauged quantity found in the casks, not the gauge of the casks themselves. Ruston manifestly acknowledged this, because, upon receipt of the gauge certificate and the bill of parcels from the buyer, he made no difficulty but assumed the gauged quantity in the 352 full casks as his bargain, and at once marked both with the day of receipt of both, and further endorsed upon the certificate the date of payment to be made by him after the fifteen days agreed upon from the delivery to him of the certificate, himself writing upon the certificate, *due 8th May*, the proper day of payment. This fact is clearly proved and establishes his liability in conformity with his agreement, and that was corroborated by his promise, when the payment became due, and on subsequent days, to pay the amount without making the slightest objection of any kind. It was only when he did not meet his engagement and without making any objection, that he had recourse to law and declared that the bargain had been for 400 full barrels, and not for the gauged contents of 400 barrels: he therefore claimed back his deposit of $400 and also demanded $1200 of damages for the non-delivery of 400 full barrels. Had his demand succeeded, he would have made a very satisfactory operation for himself, however doubtful its good faith might have been. The Court below, however, rejected the damages but held for him the $400 of his advance, a judgment which seems not a little inconsistent with itself, because, if he was entitled to repayment of his advance in full, it could only have been predicated upon the fact of his alleged bargain for full barrels being established, but not carried into effect by the appellants, and he would under those circumstances, have been entitled to damages also. But

in fact, this was not the case, and the appellants, the sellers, were finally compelled to realize the gauged quantity at a slight loss, but at the best and current market rate, and, deducting the usual expenses incurred for sale, &c., from the $400 advance in their hands, they made up the balance of it to his credit, which they tendered to him with costs of his action, incurred up to the filing of their plea. The respondent refused the tender and proceeded to final judgment upon his demand, which accorded to him the $400 in full, but refused the damages, and set aside the appellants' plea of tender. The respondent has not appealed from the judgment and therefore is satisfied with it, and it will also be seen that he made no claim for the 48 empty barrels. Under the circumstances of the case the respondent's pretensions are unfounded, he cannot escape from his bargain and his frequent promises to pay the amount of the gauged quantity, and not having disproved the correctness of the amount tendered, the appellants' plea of tender must be maintained, and respondent will be condemned to pay the costs of his unjust contention in the Superior Court from the filing of the plea, together with the full costs of the Court of Revision and also of this Court.

The judgments of the Courts below were accordingly reversed, and judgment was rendered according to the conclusions of the appellants' pleas; the Court of Appeal assigning the following reasons:—

"Considering that the said respondent purchased from the appellants the quantity of coal oil in the declaration and pleadings in this cause fyled mentioned, for the price, and payable at the term of payment in the pleadings aforesaid set forth, namely, the gauged quantity of the said oil, specified in the certificate of gauge thereof delivered to him and agreed to and adopted by him;

"Considering that the respondent agreed to receive the said oil, and at the time when the price thereof was payable and at divers times thereafter, previous to the institution of this action, promised and undertook to pay the same to the appellants, without any objection against the same by the said respondent, but finally refused to receive the said oil and to make the said payment therefor, in breach of his said agreement and promise in that behalf;

"Considering that the said appellants were therefore compelled to realize the said gauged sold quantity of oil, at the current market price therefor, and did in consequence realize and sell the same at the best market price to be obtained therefor, and did thereby incur certain costs and expenses, whereof the said respondent was liable, by reason of his said breach of his said agreement and promise, and which said costs and expenses were, of right, deducted by the said appellants out of and from the said advance of $400, as in the said pleadings mentioned deposited with them by the respondent as earnest money of his said purchase;

"Considering that the sum tendered by the appellants to the respondent in and with their plea in this behalf, together with the costs of suit up to the fyling of the said plea, was the actual balance remaining of the said sum so advanced, for the recovery whereof, among other things, this action was instituted against them by the respondent, after deducting the said costs and expenses from the amount of the said advance, and was a valid and sufficient tender by the appel-

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lants in this behalf, which was refused by the said respondent, and the said contention and plea in this behalf of the appellants were contested by the respondent, until judgment was rendered upon the said contention." * * *

Judgment of Superior Court and Court of Review reversed.

Strachan Bethune, Q. C., for appellants.

A. & W. Robertson, for respondent.

(S. B.)

COURT OF QUEEN'S BENCH, 1869.

MONTREAL, 9TH DECEMBER, 1869.

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

No. 61.

ALEXANDER PERRY,

APPELLANT;

AND

GEORGE R. S. DEBEAUJEU, et al.

RESPONDENTS.

HELD:—That in questions purely of practice, the Court of Appeal will not, as a general rule, disturb the judgment of the Court below.

This was an appeal from an interlocutory judgment rendered in the Superior Court at Montreal, by THE HON. MR. JUSTICE BERTHELOT, on the 28th day of February, 1867, rejecting the motion of the appellant (defendant in Court below) to be permitted to re-plead in consequence of the plaintiffs having been allowed to amend their declaration, when the case stood inscribed for final hearing on the merits, so as to conform with the facts as proved.

CARON, J., (after explaining facts) said that the question submitted by the appeal was one purely of practice. The Judge in the Court below was allowed a discretion under the statute to grant an amendment such as was allowed in the present instance, and this Court is not disposed to enquire whether the Judge has exercised that discretion wisely or not. The judgment will, therefore, be confirmed, the Chief Justice (who is unavoidably absent) *dissenting*.

Judgment of S. C. confirmed.*

Doutre & Lefebvre, for appellant.

Laflamme, for respondents.

(C. S.)

* A judgment maintaining the same principle was rendered the same day, in No. 95, Doyle, appellant, & Desjardins, respondent, *Coram* Caron J., Drummond J., Badgley J., and Monk J.—REPORTER'S NOTE.

SUPERIOR COURT, 1870.

MONTREAL, 27TH SEPTEMBER, 1870.

IN CHAMBERS,

Coram TORRANCE, J.

No. 1858.

Sénécal et al. vs. *Vienne* and divers opposants.

HELD:—That by C. C. P. 876 taken in connection with C. C. P. 645, a judge in chambers has jurisdiction to appoint a sequestrator to an immoveable seized under an execution when its sale has been stopped by an opposition.

The plaintiffs on the 25th August last presented a petition in chambers to Mr. Justice TORRANCE, having given notice previously to the defendant that the petition would be presented on that day, for the appointment of a sequestrator to an immoveable of which the sale under an execution had been stopped by an opposition. The article C. C. P. 645, gave jurisdiction to the Court in this matter, but a later article, C. C. P. 876, says that all demands for sequestration may be presented to the Court or to a judge.

Dorion, Dorion & Geoffrion, for petitioner. Petition granted.

(J.K.)

SUPERIOR COURT, 1870.

MONTREAL, 30TH DECEMBER, 1870.

Coram TORRANCE, J.

No. 1975.

Winning, et al. vs. *Leblanc*, et al., & *Leblanc*, Petitioner.

HELD:—That Arts. 778-7 C.P.C. apply to debtors in custody on *contrainte par corps*, as well as to those detained on *capias*; and that under art. 777, such debtor cannot obtain his discharge until four months have elapsed from the filing of a schedule and declaration of abandonment.

A rule absolute for *contrainte par corps* was made in this case (30th September, 1870) against the defendant Leblanc, as *caution judiciaire*. Vide Report, *ante*.

On 19th December, 1870, Leblanc fyled a schedule of his creditors and declaration of abandonment (*Bilan et Cession*) in the terms of Art. 764, C.P.C.; and, having given notice thereof to plaintiffs, *Doutre, Q.C.*, (23rd December, 1870) presented a petition for his discharge from custody, contending that he had complied with all the requirements of law, and was entitled to his release at once under Art. 793, C.P.C.

R. A. Ramsay, for plaintiffs, opposed the application for immediate release, urging that although under Art. 793, C.P.C., the debtor so imprisoned "may obtain his discharge, 1st * * 4th, by the abandonment of his property, as men-

" tioned in the preceding section," yet the mode of such discharge must be governed by the clauses of that preceding section; that thereunder (Art. 773, C.P.C.,) the detaining creditor is allowed *four months* from the fyling of the schedule, when the debtor is in prison, and two years when he is at large on bail, to contest the correctness thereof; and that the debtor is not entitled to his discharge until these four months have elapsed, while the plaintiffs' contestation of the schedule may be produced at any time during that term, and then, if he can prove his allegations within that period (Art. 774, C.P.C.,) the defendant becomes liable to further imprisonment under Art. 776. That it is only after those four months that the release can be obtained, is shewn by Art. 777.

"If the allegations of the contestation be not proved within the delays above "mentioned, the Court or Judge may order the discharge of the debtor." The provisions of C. S. L. C., chap. 87, from which the articles of the C.P.C. are framed (Vide authorities of the commissioners) are even clearer; section 13, § 3. "But if no omission * * * is established * * then the Court, &c., *at the* "*expiration of said period of four months*, may order the defendant to be "discharged from his imprisonment."

Doutre, Q.C., in reply, argued that the clause of C.S.L.C. cited applied to arrests on capias only; as did also the Art. 776, C.P.C. The whole section of C.P.C. (abandonment of property) applied to debtors arrested on capias alone, (Vide the first article thereof, 763), except article 764, relative to the form of the schedule and abandonment, which was by the article 793, made to apply to prisoners on *contrainte*; and the latter article does not provide for any longer detention and must be held to contemplate an immediate release. No distinct enactment of this four months' imprisonment being made, the Court cannot imply it, and on a mere implication restrain the liberty of the subject.

On 30th December, 1870, the Court (Torrance, J.,) rejected the petition:

PER CURIAM. The petitioner (defendant) asks for his liberation. He is in jail to answer for the amount of the judgment rendered against him. The plaintiffs object that he has not yet been in jail four months, which they claim must elapse after the fyling of his statement before he can obtain his liberation. The Court is of opinion that the plaintiffs' objection is well founded, and therefore rejects the petition.

Petition rejected.

R. A. Ramsay, for plaintiffs.
Doutre, Doutre & Doutre, for defendant Leblanc.
(R.A.R.)

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" :—The unpaid, can legally attach (in the case of a sale for cash), even after 8 days from delivery, stones placed on the land of a third party, for whom the purchaser is building a house, unless the third party prove a sale to and payment by himself of the stones seized. (Lavoie *vs* Cassault, and Clendinneng *mis en cause*, C. C.) 225

VESSEL :—A transfer of a, not made and registered in the manner prescribed in the Act respecting the registration of inland vessels, does not convey to the purchaser any title or interest in the vessel. (Calvin et al *vs* Tranchemontagne et al, and Thomas et al., Oppts., S. C.) 210

WAGES :—Not due at the time of the service of a writ of attachment, are exempt from seizure. (Wurtele et al. *vs* Douglas, and the Mayor et al., T. S. C.) 17

WILL :—Where a testator makes a will and subsequently another will revoking the first, and afterwards revokes the second will, purely and simply, the first will is not thereby revived. (Dupuis et al. vs. Dupuis, S. C.) 26

" :—A disposition dictated by the testator to a notary in the presence of two witnesses, to be reduced to writing and executed as an authentic will, but not completed by the notary, or signed by the testator, in consequence of his sudden death, while the will was being reduced to writing, is null and void, and cannot avail even as a nuncupative or verbal will in English form. (Malo and Ir, Applts., and Migneault, Respdt., Q. B.) 141

" :—From and after the passing of the 14th Geo. 3, Ch. 83, a testator had capacity to devise or bequeath, without reserve, restriction or limitation, and in the same way after the passing of the 41st Geo. 3, Ch. 4, and that in favour of any person or persons whomsoever. (King *vs.* Filintreault, et al., and Tunstall, et al., Defdts., *per reprise d'instance*, S. C.) 197

" :—A bequest by a testator, who died in 1799, in favour of an adulterine bastard, who only had a right to the bequest in 1835, is to be considered as regards its validity relatively to the time at which the right comes into effect. (Do. Do.) 197

" :—The revocation of a second will does not revive the preceding one unless the *acte* of revocation contain an express provision to that effect, or unless the intention to revive the first will be clearly deducible from the circumstances under which the revocation has been made. (Dupuis et al. *vs.* Dupuis, C. of R.) 242

" :—Where a bequest was made in the following words: "I hereby will,

devise and bequeath £135 to my ward, William Hervey, to be appropriated to the finishing of h[illegible] and the education of the legatee was completed at th[illegible] before the death of the latter, the accomplish[illegible] for which the legacy was given before the testator's death did not relieve the executor from paying the legacy. (Hervey, Applt., and Hervey, Respdt., Q. B.)..... 200

Witness.—When a deposition of a, is missing from a record, and the judge is satisfied on the evidence of the Prothonotary, or otherwise, that the deposition cannot be found, an order may be issued for the examination *de novo* of the witness. (In th[illegible]arlane et al., Ins. & Court, Assignee Petr., & Macfarlane et al., contesting, S. C.)..... 235

Writ of Prohibition.—A, will lie, to restrain Justices of the Peace from enforcing a judgment rendered by two justices, of whom only one received the original complaint, when the conviction does not establish the absence of one of the original justices and his being replaced by the third justice with the consent of the other, and where the conviction was bad in other respects. (Dubord vs. Bolvin, S. C.)..... 203