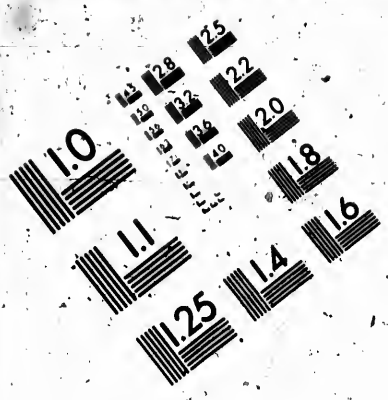

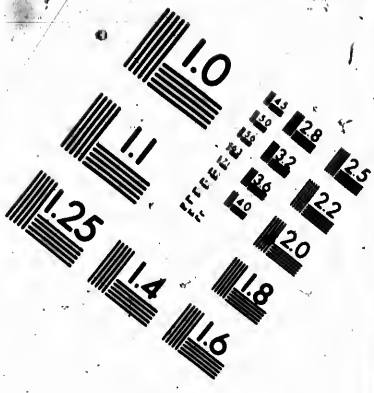

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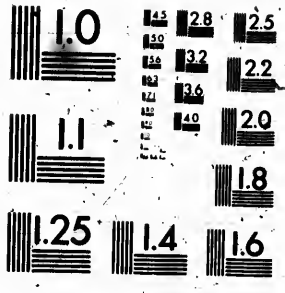

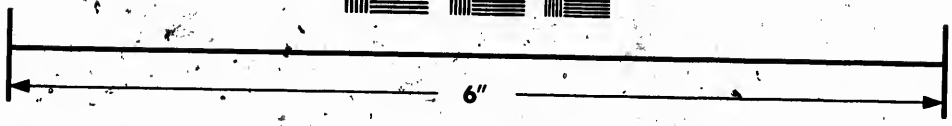

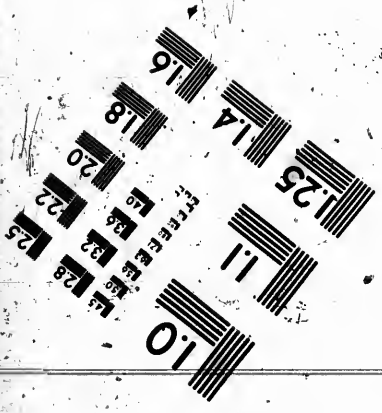

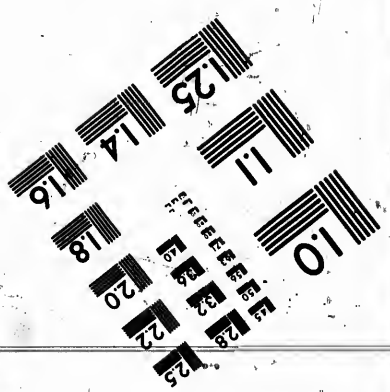

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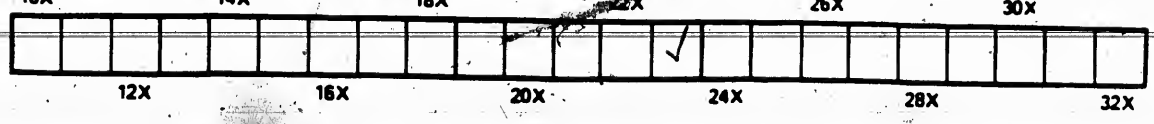

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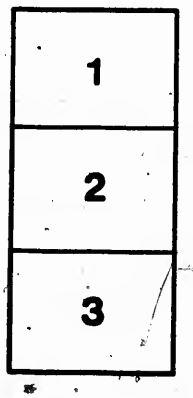

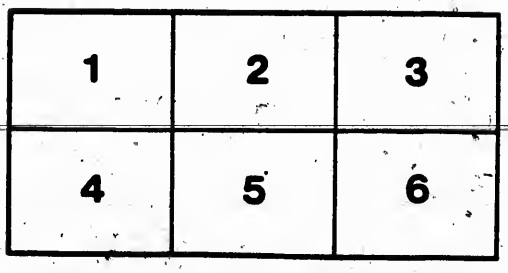

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THE

LOWER CANADA

Jurist.

COLLECTION DE DECISIONS

DU

BAS CANADA.

EDITOR:

J. S. BUCHAN, B.C.L.

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INDEX

TO CASES REPORTED IN THE THIRTY-FIFTH VOLUME

OF THE

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COMPILED BY

J. S. BUCHAN, B.C.L.

COURT OF REVIEW, 1888.

MONTREAL, 30TH NOVEMBER, 1888.

Present:—JOHNSON, C. J., JETTÉ AND LORANGER, JJ.

JOHN C. JELLY,

vs. PLAINTIFF;

A. M. DUNSCOMBE,

DEFENDANT.

HELD:—That where all the members of a partnership are absentees, a *qui tam* action will not lie against them for failure to register the said partnership.

That the statute provides only for the case where there is an omission to register when all the partners reside here; or, 2nd, where some of the partners reside here, who are obliged to act for those who are absent.

That where there has been an omission to register, and the delay has expired, such omission will not be cured by a registration made subsequent to the expiration of such delay, but a *qui tam* action issued after such registration has been effected should be without costs.

This was an inscription in Review from a judgment of the Superior Court rendered by His Honor Mr. Justice Tellier, the 27th April, 1888. This was one of three similar actions brought by the plaintiff against a firm composed of three parties named Binns, Darwin, and Dunscombe respectively, to recover the penalty provided by Cap. 65, C. S. L. C., for failure on the part of a commercial firm to register their partnership. The judgment in the Court of first instance in the case against Binns is reported in 32 L. C. J. 96. The facts of the case appear from the remarks of His Honor Mr. Justice Johnson in delivering the judgment of the Court, and which are as follows:

JOHNSON, J.—This was an action *qui tam* in the court below for a penalty alleged to have been incurred under ch. 65 Cons. Stat. of L. Canada.

The first section enacted that "all persons associated in partnership in Lower Canada, etc., shall cause to be delivered to the prothonotary of the Superior Court in each district, and to the registrar of each county in which they carry on or intend to carry on business, a declaration in writing signed by the several members of such partnership when all such members are at the time of making the same in this province, and if any of the said members be absent at the time, then by the members present in their own names and for their absent co-members, under their special authority to that effect."

The sub-sec. 2 provides "that the declaration is to be in the form of a schedule appended to the statute, and is to contain the names and surnames and addition and evidence of every partner, and the name, style, or firm under which they are to carry on business, and also the time the partnership has existed." Subsection 3, that "such declaration shall be fyled within sixty days after the formation of the partnership," etc.; and sub-section 4, that "each and every member of any partnership, with regard to which the requirements of this section are not complied with, shall be liable to a penalty of two hundred dollars," to be recovered by action in the form taken in this case. It was, therefore, the

John C. Jelly vs. A. M. Dunscombe.

non compliance with either of two prescribed forms that was subject to the penalty.

The informant or *qui tam* plaintiff alleged in his action that the defendant at Montreal formed a partnership with Binns and Darwin, both of Ripon, in Yorkshire, England, to carry on business at Montreal, and that this partnership was formed on or about the first of May, 1886. Then he alleged that the defendant, personally, as well as the partnership of which he was a member, had failed to register within the sixty days, and the conclusion asked for a condemnation for the penalty of $200 to be divided according to the statute, and for costs.

The defendant pleaded, apart from the mere argumentative portion of his plea, that he had registered on the 15th December, and to the actual knowledge of the plaintiff, who had, on the 24th December, brought another action against the other partners five days before the present one was brought; and, admitting that the registration was after the sixty days, he argues, nevertheless, that it is a sufficient registration, and fulfills all the requirements of the law, if it was made before action was brought.

The very language of plaintiff's argument is in the plea itself, and it is this, "that any action to recover said penalty can only be taken and will only validly be after the expiring of the sixty days which follow the formation of the said partnership, and before the fyling of the said declaration by the said partnership, and no such action will be or can be validly taken after the said fyling is made."

To this commixture of fact and law and argument called a plea, the plaintiff, by his answer demurred; but the answer was by the final judgment dismissed, and the defendant's pretensions were maintained, the court below holding in addition to what the defendant had advanced as a plea to the action, that it did not appear in the case that the defendants were associated in partnership in Lower Canada, nor that any of these had been present in Lower Canada, so as to make the statutory declaration for themselves or for their partners, and further, that the statute did not apply to partnerships of which all the members were resident out of the province.

As to the existence of the partnership in this province, the registered declaration of the three partners, viz., Thomas Binns, Gerald Lascelles Darwin and Adolphus Montague Dunscombe, made on the 15th December, is a declaration not made by one of the partners for the others as is permitted by the statute, but it is made by a person not a partner at all, viz., Mr. Thomas W. C. Binns, their attorney; therefore, though this was not the declaration required by the Act, it is an admission in express terms, if there is authority to make it, that these gentlemen have been since the 1st May, 1886, carrying on business in Montreal in partnership, although they all reside in England; therefore, I hold that this is a partnership in Lower Canada; but the question still remains whether the defendant, a member of it, resident in England, and not shown or alleged to have been here at all (for we take the admission as it was given,) has been guilty of a violation of the Act by not doing what it does not appear he could do, and what the statute did not make provision for his doing; for the statute only enacts a

penalty for non registration in two cases, viz., 1st, where there is an omission to register in the case of all the partners residing here; and 2nd, where there is the same omission in the case of those residing here, and who are bound to act for the others.

This is neither of those two cases; but it is the case of none of the partners being here; and there is no provision made for the mode of registering in that case, and there can be no offence for omitting to do it. The defendant was not even here to have service of the writ made upon him, but Mr. McCord accepted service; of course, however, that could not make him guilty of not registering within sixty days if the Act does not say how it is to be done, so as to make an offence of the not doing it.

Although, therefore, civil rights exercised within the province may, as a general thing, imply civil liabilities, and though a partnership here, of which all the members reside in England, might have been made subject to this law, if any mode of conforming to it had been prescribed, no such provision appears to have been made, and no offence has been created in such a case. Partnerships in Lower Canada, the law says, are to be registered, but it has only enacted a penalty for the omission in two cases, of which this is not one.

With respect to the other point which was mainly relied upon, and indeed was the only one relied upon by the defendant, there is no authority for saying that an omission, which after a stated time is made penal, can be cured by subsequent performance. I find authority, however, for saying that in such a case the exercise of the *qui tam* action ought to be without costs. It is evident, however, that even if subsequent registration before action were effective to cure the omission where the penalty has already accrued, it must be a registration in conformity with the Act, and not a registration by attorney of parties out of the country which the law does not authorize. In strictness, however, we are not held to decide this after the decision of the other point which disposes of the case. I would observe, however, if it is of any use to the parties, that the only argument to support this part of the case was that the sole object of the law being to secure against loss or damage those having dealings with co-partnerships, and such object being in the case of the plaintiff amply effected by his knowledge of registration before action brought, he was without right of action, because he had not been exposed to suffer anything.

Such was certainly a principal, but not the only, object of the law. Another and a very important, though a subsidiary, object was to punish those who disobeyed it. The judgment inscribed must be maintained, on the ground that there has been no offence proved under the statute. The other ground assigned in the judgement ought to be expunged.

As to costs, the defendant succeeds upon a point he never raised; and the plaintiff, on the other point, would not be entitled to costs at all. Therefore I would give the defendant his costs only in this court, in which he is obliged by the plaintiff to come; but the majority of the court, holding the other ground of the judgment good, and which was raised by the defendant, the defendant will get his costs in both courts.

J. C. Jelly vs. A. M. Duncombe.

JUDGMENT IN REVIEW.

La Cour, considérant qu'il n'y a pas erreur dans le dit jugement du 28 avril 1888, le confirme en tous points avec dépens contre le demandeur.

Judgment confirmed.

Macmaster, Hutchinson, Weir & Maclennan, attorneys for plaintiff.
D. R. McCord, attorney for defendant.

SUPERIOR COURT, 1890.

MONTREAL, 27TH APRIL, 1890.

Present: HIS HONOR MR. JUSTICE LYNCH.

N. W. TRENHOLME ET AL., PLAINTIFFS;

vs.

ROBERT MITCHELL ET AL., DEFENDANTS.

Libel in Pleading— Evidence of fact posterior to date of action.

T, the plaintiffs, a firm of advocates, brought an action under No. 578 against M, to recover $372.80 due for professional services. M pleaded ignorance of law and want of skill on the part of plaintiffs, and also charged them with acting contrary to the instructions and against the interests of M, to whom, by reason of their incapacity, plaintiffs caused great loss and damage. While the cause 578 was still pending, T brought an action under No. 1816, against M, for libel, as contained in the allegations of said plea. Before the hearing of the cause 1816, judgment was rendered in 578, dismissing the said plea. At the trial of cause 1816, proof was offered by T of the judgment in 578, and objected to by M as "being proof of facts posterior to the action in this case."

The Court reserved the objections, and at judgment on merits,

HELD:—Overruling the objection and admitting the evidence objected to, that the allegations contained in said plea, which had been pronounced unfounded and dismissed, constituted a written defamatory libel against plaintiffs.

That malice was properly and legally inferable from the nature and falsity of the charges and the manner in which they were made by M against plaintiffs.

That plaintiffs were entitled to recover damages from M, which the Court assessed at $300 with *contrainte par corps* for the payment of same against the male defendants.

On the 27th of February, 1888, the plaintiffs, a firm of practising advocates, brought an action bearing No. 578, Superior Court, Montreal, against the defendants in their quality of executors and executrix of the estate of the late Eliza Lane Ross, to recover the sum of $372.80, due by defendants for professional services and disbursements made by plaintiffs for defendants.

To this action defendants pleaded *inter alia* that plaintiffs had mismanaged certain suits committed to their care, and had shown ignorance of law and want of skill, and had acted contrary to the interests and against the instructions given them by defendants.

On the 25th July, 1889, while the action No. 578 was still pending, the plaintiffs brought the present action No. 1816, to recover damages from defendants for the libel contained in said plea. To this action defendants pleaded

that the said pleas were filed solely to protect the interests of their clients, and without malice. That they admitted the integrity and ability of plaintiffs, and that plaintiffs had suffered no damage.

On the 8th of February, 1890, judgment was rendered in the cause No. 578 dismissing said plea; and on the 12th of June, 1890, the cause No. 1816 came before the Court for proof and hearing.

At the trial of the cause No. 1816, James M. Mitchell in his examination was asked if judgment had been rendered in cause 578. The defendants objected to this proof of the judgment as being proof "of facts posterior to the action in this cause." This objection was reserved by the Court, and adjudicated upon at the final judgment.

On the 27th September, 1890, the Court rendered judgment, overruling the objection and admitting the evidence objected to, and condemned the defendants in the sum of $300 damages, with *contrainte par corps*, the judgment being as follows:—

The Court having examined the proceedings and proof of Record, and having deliberated thereon;

Seeing that the libel set forth in plaintiffs' declaration is contained in a written pleading filed by defendants in a certain cause heretofore pending before this Court, bearing the number 578, wherein the present plaintiffs were plaintiffs and the present defendants were defendants and incidental plaintiffs, and which pleading was pronounced unfounded and dismissed by judgment of this court, rendered on the 8th day of February, 1890;

Considering that the allegations of said pleading, as set forth in plaintiffs' declaration fyled in this cause, constitute and are a written defamatory libel against the character, honor and professional reputation of plaintiffs, distinctly charging them with ignorance of law and want of skill in the management of a certain case committed to their care by defendants, while acting therein contrary to the instructions and against the interests of defendants, and generally with causing defendants great loss and damage by reason of their incapacity in the management of defendant's business;

Considering that the accusations so made by defendants against plaintiffs are of a nature to seriously affect the business character, professional honor and reputation of plaintiffs, who are practising advocates, before this Court, and who enjoy a high reputation for ability and integrity, as established by the evidence and as admitted by the defendants in their pleading;

Considering that the defendants have attempted to establish the existence of a probable cause to excuse or explain the said libel;

Considering that malice is properly and legally inferable from the nature and falsity of the charges so made against plaintiffs by the defendants, as well as from the manner in which they are made;

Considering that plaintiffs are entitled to recover from defendants damages by reason of said libel, which damages are assessed by this Court at the sum of $300.

Doth, in consequence, condemn the defendants jointly and severally to pay

N. W. Trenholme et al. vs. Robt. Mitchell et al.

and satisfy to plaintiffs the said sum of $300, with interest thereon from the date hereof, and doth further condemn the male defendants to the payment of the said sum by all legal means even *par contrainte par corps*, the whole with costs of the action as brought, including costs of exhibits distraits to Messrs. Trenholme, Taylor and Buchan, attorneys for plaintiffs.

Trenholme, Taylor & Buchan, attorneys for plaintiffs.

Carriere & Delisle, attorneys for defendants.

SUPERIOR COURT, 1890.

(IN REVIEW)

MONTREAL, 31ST DECEMBER, 1890.

Present: LORANGER, GILL and DAVIDSON, J. J.

THOMAS M. TAYLOR ET AL.,

PLAINTIFFS;

vs.

THE NORTHERN ASSURANCE CO.,

DEFENDANTS.

By a Power of Attorney executed in August, 1866, N, an Insurance Co. in England, appointed T at Montreal their agents for Canada. The power of attorney contained the following clause:—"Finally, we, the said Northern Assurance Co., reserve to ourselves the right of, at any time, revoking the powers granted by this deed." On the 9th Sept., 1886, N formally notified T that the agency was terminated, the notice to take effect on the 31st December following. T brought an action to recover damages, claiming that under the correspondence between the parties the original terms of the contract had been modified and that at least a year's notice should have been given. The case was heard before a special jury and a verdict of $14,000 awarded T. T moved for judgment on the verdict and N for a new trial.

HELD:—In Review, that the terms of the original contract had been modified by the correspondence between the parties, although there was no special clause of any letter which derogated from the original contract.

That in the circumstances a year's notice would have been fair, just and reasonable in accordance with well established usage, and also in view of the fact that under the contract T was entitled to a certain allowance "per annum," and the notice had only been given in August to terminate the contract in December.

That according to the evidence adduced, T would have made $3,500 profits on commissions during the year, and that T was entitled to this amount because of the wrongful dismissal.

That T was entitled to $5,000 for the established business connection appropriated by N, and also $1,500 the value of books and documents handed over to N.

That the sum of $4,000, awarded by the jury for expenditure and liabilities, rendered useless by the dismissal, should not be allowed, as it was included in the amount awarded for profits.

That, if the plaintiffs acquiesced in a judgment for $10,000, the Court would enter up judgment for that amount, otherwise they would order a new trial.

The facts of this case are shown by the summary above and by the remarks of His Honor Mr. Justice Davidson, in rendering the judgment of the Court, which were as follows:—

DAVIDSON, J.:—Plaintiffs move for judgment upon the verdict of a special jury, whereby they were awarded $14,000 in compensation for their wrongful

dismissed as general agents of the defendants in Canada. On the other hand, defendants move for a new trial.

An unbroken connection of nearly twenty years was terminated by a letter dated London, 9th September, 1886, wherein the general manager wrote: "I have now to give you formal notice that the agency of this company, at present held by you, will be terminated on the 31st December next, after which date the Canadian business of the agency will be placed under the control of its newly appointed manager." Defendants plead that they were entitled under their contract of engagement to terminate the agency when they chose; that a transfer of the business to the company's immediate employees had become advisable, and that no compensation was due to plaintiffs.

There is no dispute as to the writings which led up and concluded the original agreement. The appointment was practically to exist during the pleasure of the company, as is evidenced by the following clause taken from the power of attorney:—"Finally we, the said Northern Assurance Company, reserve to ourselves the right of at any time revoking the powers granted by this deed." True enough, assert plaintiffs; but that hard and fast condition was modified and supplanted by a long course of after correspondence, in which you excited us to great efforts and great expense, in the belief that we were to have some permanent rights in the resulting business; moreover, by law and usage we acquired rights in the connection so formed and in its future benefits; and a year's notice would only be "a fair, reasonable and legal notice of your termination of the agency."

Upon these issues the parties obtained permission to put no less than twenty-seven questions to the jury. I expressed a fear at the trial, that the number and detail of the suggestions thus settled would make an absolutely uniform and effective verdict very difficult of obtainment, and the court in its consideration of the motions now submitted has also reason to regret that the verdict had not been sought upon a few questions conveying the principal points in controversy between the parties, and sufficiently broad to include discussion and proof upon the many matters of detail alleged in the declaration and pleadings. We have, however, to deal with the case as we now find it, and it becomes our duty, so far as may not be inconsistent with law, or violently opposed to the facts of record, to give moderate effect to a verdict which unquestionably speaks, and speaks strongly, in favor of the plaintiffs.

The questions put to and the answers obtained from the jury as to permanency of employment are as follows:—

Were the said terms and conditions, as they are expressed in said plaintiffs' Exhibit No. 1 and in said power of attorney ever renounced or modified by said defendants? If yes, when, how, and in what precise manner were they so renounced or modified? Ans. They were modified and renounced by correspondence and dealings with plaintiffs, by defendants giving plaintiffs to understand that the agency would only be terminated in the event of the withdrawal of the defendants from Canada.

Were the terms of the said power of attorney in fact and effect modified during the course of said appointment referred to in previous questions, and did

T. M. Taylor et al. vs. The Northern Assurance Co.

the defendants hold out to plaintiffs that the only alternative to defendants continuing to do business in Canada in connection with plaintiffs, under said arrangement [so long as the latter were willing and able to continue], was the withdrawal of defendants altogether from business in Canada? Ans. Yes, in accordance with answer made to previous question—Yes, but not subsequent to 1883.

Did plaintiffs, under the belief so induced, that the said power of attorney would only be terminated in case of the withdrawal of defendants altogether from business in Canada, and with the knowledge and approval of defendants, so frame their course in said business, and expend their efforts and means in such manner and to such an extent in building it up with a view to future profits, that the rewards heretofore received were an inadequate return for plaintiffs' past efforts and expenditure; and were plaintiffs, by the acts and conduct of defendants, led to look chiefly to the future profits of the business, so built up, for their reward for such past efforts and expenditure? Ans.—Yes. Plaintiffs were encouraged by defendants' letters to build up a business, looking mainly to the future for their remuneration.

To these findings defendants strenuously object. They claim that the answers are against evidence, and fail to state how and in what precise manner the terms and conditions of the original contract were renounced and modified. We are not prepared to declare the answer to No. 3 bad for want of sufficient precision. In point of form it seems to come fairly within the instructions given by the judge to the jury upon the legal features of this question. It is, perhaps, best to briefly quote from the charge itself. I spoke as follows:—

"Now, the ordinary rule with reference to a written contract is that it needs another written contract to change, or modify, or extend it; but the law, I imagine, would also recognize an invasion of its terms, which might be the outcome of a long course of dealing or of correspondence. Twenty years, for example, of dealing or of correspondence, which would lead you to the conclusion that these parties had in that practical form put aside the strict terms of the contract which brought them together, and were dealing upon a different basis, might be sufficient; but you will have to be careful how you treat a matter of that kind; you will have to seek for something more than uncertain and remote interferences; you will see that the plaintiffs in this case are not able to put their hand on any particular letter, upon any particular phrase, or upon any particular date which, in itself, would be sufficient to modify this original contract; but what they say is that there was an accumulation of sentences of letters and of correspondence which, in the end, at some undermentioned time or date, brought about this change in the original contract, leaving the plaintiffs to the firm belief that they were there as a permanency, or at least as a permanency to the extent of being entitled to a year's notice of the termination of their agency. So, if you are able to read the correspondence which has been put before you in such a way as to bring you to a clear and positive conviction that, as a total result, it did alter the terms of the original contract, it would be possible for you and would be proper for you, so far as the law is concerned, to so declare, although you had no special or specific counter contract in that respect before you."

Now, the jury appears to have given a reasonable obedience to these directions when, after answering that the original contract had been modified, they proceed to state that the modification grew into form, and became complete, as to manner, by the correspondence and dealings between the parties; as to detail, by the plaintiffs being given to understand that "the agency would only be terminated in the event of the withdrawal of the defendants from Canada"; and as to time, by answer No. 4, fixing the dates of the letters to a year not later than 1883.

Whether or no the jury have thus found in flagrant defiance of the evidence put before them is another matter. This court might possibly arrive at a different conclusion from that found by the jury if it became our duty to deal with, and judge independently upon, the facts of record. But twelve business men, summoned because of their supposed special qualifications, have been called together to interpret the purport, tenor and effect of a purely business correspondence and connection, and they have found that it gave the Taylors a right to resent and resist the summary dismissal to which they were subjected.

It must be said that the correspondence to some extent justifies this view. One cannot read the many letters which passed between the parties on the general prospects and future of the business without appreciating the amazement which the Taylors must have felt when they opened the September notice of dismissal. That great if not uniformly successful energy marked the conduct and development of the business is past doubt. It is also shown that plaintiffs, whether rightly or wrongly, were ever looking forward to the future for their substantial returns, and so time and again, without counter protest, declared to the company. So late as 1885, Mr. Taylor, with the full concurrence of his principals, made a long and presumably expensive trip to the Northwest for the purpose of extending business, and this is no doubt one of the features of the course of dealing between the company and its agents which produced a strong impression upon the jury. Of this effort the general manager wrote, under date 24th December, 1885:—"We have little doubt that this long tour of inspection will prove highly beneficial to the business, and we will await with much interest the receipt of the promised report of observations made in these provinces."

Well, within nine months plaintiffs had their notice of dismissal. While the company at times gave natural expression to regrets over losses, or suggested improvements in the Canadian business, on no occasion, either by inference or assertion, was complaint made of the Taylors' capacity or conduct. The twenty years correspondence abounds, in a remarkable degree, with personal tributes to their Canadian agents. No doubt these recurring testimonials, covering, as they did, the whole time of plaintiffs' employment, also produced some impression upon the jury.

It is desirable to give examples from the correspondence under discussion. As provoking, in the opinion of the jury, a belief of permanency, I quote some fair specimens of what occurred with considerable frequency in the correspondence up to 1883:—

December 14, 1871.—"If it falls in your hands we shall despair of it altoge-

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ther." "Still, you have a hold on the business now and an acknowledged position in the insurance world, which must give you an advantage, and this, one would think, must tell in the long run."

March 29, 1873.—"If it falls in your hands we shall despair of it altogether."

January 31, 1874.—"If it succeeds, both you and we benefit; and if it fails, it will neither pay you nor us to carry it on."

February 14, 1878.—"They felt it was due to the company, due to the agency, due to yourselves, that a fresh experiment should be made on entirely different lines before any question of retirement was considered, assured that if the business, when carried on in a way more in accordance with what you have often recommended, should prove a failure in a pecuniary point of view, and business which brings no profit is, of course, of no possible use to us, you yourselves would be the last person to urge a word against its abandonment."

Then this letter settles new terms of payment, and concludes with a hope that "you will appreciate the desire of the directors to give every possibly opportunity for affording the Canadian business under your care a fair and exhaustive trial."

It becomes, at once, important to enquire into the reason which led to plaintiffs' replacement by a manager in the immediate employ of the company. "The directors," says their letter of the 9th Sept., 1886, "have once more had under consideration the position of the company in Canada and the arrangement for the management of its business in the Dominion; and enclosed I beg to hand you extract of the minutes of their meeting, from which you will learn the result of their deliberations." Turning to the resolution referred to, we find, to quote its words, that "the board took into consideration the question of the company's position in Canada, looking more particularly at the arrangement at present existing for the supervision and management of its agencies and its business generally, and * * * It was decided to establish a regular branch for the management of the Canadian business, similar to those already existing in the United States." * * And * * * "It was resolved that the appointment of Messrs. Taylor Bros. be determined, as from the 31st of December next."

In all this there is not a word about mismanagement or undue losses, or, in fact, about any other special motive for action than the desire to create a new system of supervision and management. I feel compelled to also briefly refer to some of the many strong expressions of approval which the company from time to time conveyed to plaintiffs.

May 11th, 1871.—"The directors instruct me to say that it is their very sincere desire to go to the utmost limit of what they conceive to be their power in order to retain the services of agents upon whom their experience of your management of our affairs has led them to place a very high value."

December 8th, 1871.—"But they have thought it due to agents, whose administration of the interests committed to their charge within the comparatively narrow limits to which they have been restricted has left nothing to be desired."

March 29th, 1873.—"We duly received your very able and exhaustive letter

of the 6th instant, which gives ample and renewed evidence of the great care you bestow on the multifarious details connected with the agency. * * * when we have the proofs before us of the pains you take, and of the extent to which you are prevented from doing what you would by the short-sighted competition which unfortunately prevails."

June 14th, 1881.—"In connection with the enclosed intimation of recent changes in the staff of the office, rendered necessary by my retirement from the management of the company's affairs, I am anxious to say a word to you personally, to express the regret I feel at what (console myself, as I may, by the reflection that my position as a director will preserve my connection with the company unbroken) is a severance of the ties which have so long and so delightfully linked me to the friends with whom it has been my good fortune to be associated in the work of this company—yourselves notably amongst the number."

September 13th, 1884.—"We beg to acknowledge copy of the Canadian Insurance Commission report for 1883, which we have perused with much interest. Taken as a whole, the business does not appear to have been as good as that of the preceding year, and it is, therefore, all the more satisfactory to find the Northern, from point of view of profit, as near to the head of the lists of its competitors as it was to the end of the list twelve months ago."

September 9th, 1886.—"In intimating to you, as I do now, the approaching termination of our present connection, I should like to bear testimony to the friendly relations which have throughout existed between yourselves and the company, and I cannot but regret that the interest of the company should require us to take a course involving the severance of the connection."

October 26th, 1886.—"I (the assistant secretary) hardly like to step into a position, even for a short time, which has hitherto been so ably filled by your good selves for so many years, and for the sake of the community generally, I wish you could make it convenient to attend."

These are certainly strong certificates of a maintained good character and efficient services. Some earlier reference ought to have been made to the finding that after 1883 defendants did not hold out to plaintiffs that the alternative of their dismissal was to be the company's withdrawal from Canada. But the jury did not by that limitation at all intend, as will appear by their full answers to Nos. 3, 4 and 5, to declare that the antecedent representations thereby ceased to have effect.

The vital importance of these questions has compelled a close and perhaps tedious analysis of the facts in respect of them, which the jury had before it. A court must be impressed, if not convinced, with what plaintiffs have been so far able to prove and argue in their behalf. It was laid down in Cantlie *vs.* Coaticook Cotton Company, M. L. R., 3 S. C. 446, that derogation of an absolute right of revocation might be operated tacitly by the nature of the powers conferred upon and the duties exacted from the agent. We must refuse to disturb the answers thus given. It cannot be said that the view taken by the jury is unsupported by proof or contrary to the evidence adduced in any such sense as would justify a new trial. The jury properly found that defendants termin-

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ated the agency without any notice other than or prior to their letter. dated September, 1886.

To the eight questions they answer that this was an insufficient, unfair and unreasonably short notice, and that one year would be a fair, reasonably and sufficient notice, and one in accordance with well established usage.

The presence of these last words is strenuously objected to by Mr. Bethune as not appearing in the declaration, and at the trial he entered an exception to any admisson of evidence tendered with reference to usage. The court now confirms that ruling, and upon the principle that by articles 352 and 400 of the Code of Procedure, it becomes the duty of the trial juge to consider as relevant all facts assigned to be enquired into by the jury, no matter what the pleadings may be. For the moment the proof is limited to the facts thus submitted, it seems to have been considered, both in this court and elsewhere, that the remedy against illegal questions was by immediate appeal.

Having decided that a modification of the original contract had taken place, it is for the jury to decide what was a fair and reasonable notice of dismissal under the waiver so declared to exist. (Ram. of facts for the jury, 22). That usage must be expressly alleged in an elementary principle of pleading. But it may be asked if, in challenging a decision upon what is a fair and reasonable notice, the plaintiffs do not state the same issue in other terms. The question must be decided either by caprice of the jury or by an application of their discretion and special experience as to what persons engaged in the business would understand by all that occurred between the parties up to 1886.

It is clear that the issue has been carried beyond a strictly legal interpretation of the original contract between the Taylors and the company. The question put to the jury is cumulative, and they have answered not only that the notice given was in defiance of the usage of trade, but that it was, as well, an unfair and unreasonable notice. Is not the one largely, if not altogether, to be tested by the same rules of commercial or insurance life as is the other? I would hesitate to charge now, as I did at the trial, "that this original contract was terminable according to its terms, that is, at any moment. and without notice. That would not of course mean that the plaintiffs had not rights and possible remedies in other directions." I ought to have given greater importance to the facts that a notice of dismissal received in September, to take effect in December, was intended to terminate a contract which was made in August, and which included an allowance of so much per annum. The court is not prepared to hold that the question is fatally bad in its form, or that the jury answered contrary to evidence or to a fair discretion.

The jury have found upon the 18th question that the plaintiffs would have made $3,500 profits on commissions during the currency of a fair, sufficient and reasonable notice to plaintiffs of the termination of their agency. That is not an extravagant estimate upon the large business which plaintiffs were handling, but are they entitled to the benefit of it, or, in fact, of any sum whatever for future profits? A clear distinction exists between the case and Cantlie vs. The Coaticook Cotton Co., M. L. R., 3 S. C. 9; M. L. R., 4 Q. B. 444. In

the latter the revocation of the agency was held to be lawful, and as a legal sequence the court refused to indemnify for loss of future profits; but here we are dealing with a dismissal found to be wrongful, and as a result must recognize plaintiffs' right to compensation for the breach of contract. Whether it is given under the name of future profits, or indemnity, or damages is of little importance.

The jury have also found that the defendants appropriated without indemnity, but not unfairly, rights and benefits in plaintiffs' insurance business, consisting of the established business connection secured by their efforts, which appropriation is valued at $5,000. It is reasonable to suppose that this figure did not include anything for "good will," as the jury were explicitly charged that this could not exist where parties were in hot dispute as to the retention of the business.

To allow for loss of profits and also for a wrongful attack upon a business connection is not necessarily an improper cumulation of indemnities. But, as I told the jury, questions 18 and 19 had to be approached with great care. It was obvious that an immoderate verdict might mean a double condemnation for the same thing. In the case of the Fire Association of Philadelphia *vs.* Law & Co. (Weekly Law Bulletin, Columbus, O., 14th February, 1887) cited on behalf of defendants, the decision as to "good will" does not affect the present discussion, and the holding with reference to sub-agents was founded on the fact that they were directly appointed and commissioned by the company, whereas the Taylors named and authorized their own sub-agents.

As the judge's charge on No. 19 receives the approval of this court, and justifies our assent to the answer given by the jury, I read some brief extracts from it:—

"Be very careful before you apply values here to determine what you are applying those values to. You are asked to value the rights and benefits in what? In the insurance business and good will. Now, clearly, you have got to blot out of consideration entirely the expression 'good will,' because it is a contradiction in terms to declare that there can be a good will in the transference of a business when the party who pretends to own it is challenging not only your title to it, but your continued possession of it. . . . . What rights had the Taylors in this insurance business? It is largely for you to determine. I imagine it resolves itself into this question of connection. If you believe that that was worth anything at the moment, and that they gained it in such a sense as to make them proprietors of it, well and good, fix a value of some kind upon it.

"In law the business no more belonged to them than it did to the Northern Assurance Company. They may have rights and they may have remedies, but I do not know what the Northern Assurance company could largely take from them in that respect. It was a fair fight between the company and the Taylors as to who would secure the continued services of the sub-agents, but unquestionably the Taylors had built up a very large and apparently extremely valuable insurance business from an insurance point of view; and if you consider it was

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their property, according to the usages of the trade here, it is only fair you should put upon it a proper and reasonable value, but do not be carried away into exaggerated figures."

In the presence of these—it must be admitted—guarded instructions, the jury have considered, and even more specifically under question 25, that the plaintiffs had interests in the 150 sub-agencies, the business connection resulting from twenty years of effort, and the expense involved in their creation, which were invaded and appropriated as results of the company's too summary dismissal. They evidently believed that its very purpose was to leave the Taylors powerless as competitors.

The jury have further allowed $1,500 as the value of books and documents handed over to the company. These were beyond doubt plaintiffs' property, and the amount awarded has evidence to sustain it.

It is lastly found that the plaintiffs had incurred expenditure and liabilities to the extent of $4,000, which were rendered useless and unprofitable and a loss to them on account of the termination of the agency as complained of. We cannot see how plaintiffs are entitled to have judgment for this last item; it would have been lost to them if they had carried on the business, and they cannot now have the profits and what those profits would have cost.

A review of the whole case leads us to the conviction that the dismissal was unduly harsh, and inflicted serious injury upon the plaintiffs. If the jury found correctly on the matter of fact as to notice, the plaintiffs are entitled to serious indemnification. It may be that the verdict rendered is in several respects not the one at which we would have arrived. But it stands a judgment as to facts, and one must remember that no ground of new trial is more carefully scrutinized, or more rigidly limited, than the one of the verdict being against evidence. Mere difference of opinion is not enough. To doubt the sufficiency of the evidence offered is not enough. The verdict will not be set aside unless clearly and decidedly against the evidence or unless there has been a flagrant abuse of discretion. (Hilliard, N.T., 340.)

The verdict of the jury is claimed to be one for $14,000. As already stated, we do not think that the company is liable for the 4th item of $4,000 found under question 21. If other forms of compensation had not been already allowed, this sum might properly go to plaintiffs, and that, too, even if the notice were sufficient. It would then represent the indemnification for actual loss recognised as lawful in Cantlie *vs.* the Coaticook Co.

We are ready to enter judgment for $10,000 if the plaintiffs acquiesce; and if they do not, we will order a new statement of facts to be settled and a new trial to be had upon them. We send down an order like to that settled by the Supreme Court in Laflamme *vs.* The *Mail*.

JUDGMENT.

The Court, having heard the parties by their respective counsel on motions by plaintiffs and defendants respectively for judgment on verdict; examined the record, the proceedings, and deliberated;

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Considering that on the thirtieth day of December last (1890), this Court made the following order, to wit:—

The Court are unanimous of opinion that upon the plaintiffs consenting to reduce the verdict to ten thousand dollars, with interest from date of service of process and costs, defendants' motion for a new trial is to stand dismissed with costs;

Should the plaintiffs not consent so to reduce the verdict, there must be a new trial, and a new assignment of facts will be ordered;

If the plaintiffs should accept the reduction of the verdict to the amount before mentioned, they are to signify their election so to do by filing a consent to that effect with the Prothonotary within eight days from this date;

Considering that on the fifteenth day of January instant, the Court considered and declared that the consent filed by plaintiffs within said delay was not in terms satisfactory, and adjourned until the twenty-first day of January instant (1891), to permit plaintiffs to amend said assent;

Considering that the plaintiffs have filed the following assent, to wit:—

"The plaintiffs hereby consent to the reduction of the verdict herein in their "favor to the sum of ten thousand dollars ($10,000.00), with interest thereon "from date of service of process herein, and costs in the terms of the judgment "of the said Court of the thirtieth of December last; the whole without pre-"judice to all plaintiffs' rights in the event of further appeal or proceedings by "the company defendants;"

Considering that plaintiffs are entitled upon said verdict to judgment for ten thousand dollars with interest from date of service of process;

Doth grant the said plaintiffs' motion for judgment to the said extent of ten thousand dollars, and doth condemn said defendants to pay and satisfy to said plaintiffs the said sum of ten thousand dollars with interest since the sixteenth of August, day of service of process with costs, and doth dismiss the defendants' motion with costs distraits to MM. Trenholme, Taylor & Buchan, plaintiffs' attorneys.

Trenholme, Taylor & Buchan, attorneys for plaintiffs.

Bethune & Bethune, attorneys for defendants.

COUR SUPÉRIEURE, 1889.

MONTRÉAL, 31 JANVIER 1889.

Présent: TELLIER, J.

OCTAVE MONTIGNY,

DEMANDEUR

vs.

ALPHONSE TRUDEL et MÉLINA LABERGE,

DÉFENDEURS PAR REPRISE D'INSTANCE.

Dénonciation calomnieuse.—Dommage.

JUGÉ:—Que la dénonciation fausse mais faite prudemment et avec cause probable, n'expose le registrateur à aucun dommage, même si la personne accusée est ensuite libérée par le petit jury. (Art. 1053 C.C.)

JUGEMENT.

Considérant que par suite de la dénonciation du défendeur, le demandeur a été arrêté, traduit devant un magistrat et renvoyé, après enquête préliminaire, devant la Cour du Banc de la Reine, en matières criminelles, à Montréal, et dénoncé ensuite par le grand jury, pour répondre à une accusation criminelle grave; mais qu'il a été enfin acquitté par le petit jury des charges qui lui étaient imputées;

Considérant qu'il résulte de la preuve que le demandeur n'était pas présent à la commission de l'offense reprochée à lui et à d'autres par le défendeur; qu'il n'y a pris aucune part, et que la prétendue admission au contraire, faite par le demandeur à Mademoiselle Oliva Paquette, ne paraît pas sérieuse ni admissible;

Considérant que si dans l'espèce, le demandeur s'est attaché et a réussi à démontrer son innocence, il a néanmoins fait défaut d'établir ce qui lui incombait de prouver, savoir: l'absence de cause probable dans la dénonciation du défendeur contre lui;

Considérant que la défenderesse n'a pas établi par une preuve légale et admissible, que le demandeur avait renoncé au recours en dommages-intérêts qui est exercé en cette cause,

Considérant qu'il est en preuve que le défendeur en impliquant le demandeur dans la perpétration de l'offense criminelle qui a été commise, et dénoncée à la justice, a agi sur des informations qui le justifiaient de le faire, et qui ont été maintenues devant le magistrat et devant la cour, par le serment d'une personne nullement reprochée; que le demandeur admet [illegible] dans sa réponse au plaidoyer que la dénonciation du défendeur et la [illegible] témoin [illegible] Lévesque justifiaient le magistrat et le grand ju[illegible] l'arrestation du demandeur; mais qu'il n'a pas établi sa prétention que leurs déclarations étaient malicieuses, mais que partant il y a lieu de présumer que le défendeur qui a porté contre le demandeur une accusation fausse, mais qu'il avait toute raison, comme le magistrat et le grand jury de croire vraie, a agi de bonne foi, sans malice aucune, et avec cause raisonnable et probable; par ces motifs maintient le plaidoyer du défendeur et déboute le demandeur de sa demande et action avec dépens.

Saint Pierre, Globensky & Poirier, avocats du défendeur et de la défenderesse par reprise d'instance.

COUR DU BANC DE LA REINE, 1885.

(En Appel).

QUEBEC, 7 MAI 1885.

Présents : Sir A. A. Dorion J. en C., Ramsay, J., Tessier, J., Cross, J. et Baby, J.

ALEXANDRE RODRIGUE McDONALD

(*Demandeur en Cour Supérieure*),

APPELANT ;

ET

LOUIS MESSIER

(*Défendeur en Cour Supérieure*),

INTIMÉ.

Assurance mutuelle contre le feu.

Jugé :—Que le renouvellement d'une assurance mutuelle constitue, de la part de l'assuré, une nouvelle obligation, quant au paiement des primes distinctes de celle résultant de la première assurance.

Que la propriété assurée, et qui est vendue, cesse d'être couverte par la police, s'il n'en est fait un transport à l'acheteur.

Le 17 juin 1884, la Cour Supérieure pour le District de Kamouraska, Taschereau, J., a rendu le jugement suivant :

JUGEMENT DE LA COUR SUPÉRIEURE.

Considérant que, par l'acte de dissolution de la société ayant existé entre les parties (acte du deux janvier 1880), le défendeur s'est obligé de payer toutes les dettes alors existantes du demandeur, plus toutes celles de la dite ci-devant société ; plus de continuer les assurances alors en force sur le fond de leur magasin, et ce tant et aussi longtemps que le dit défendeur n'aurait pas acquitté en entier la dette par lui contractée, envers le demandeur par le dit acte ;

Considérant que le défendeur n'a terminé de payer entièrement la dite dette en dernier lieu mentionnée qu'en janvier dernier (1884) ;

Considérant que les polices d'assurances étaient au nom du demandeur, qui était personnellement responsable vis-à-vis les compagnies d'assurances dans lesquelles les polices susdites avaient été prises, savoir : la compagnie nommée Hochelaga Mutual Fire Insurance Company, et celle nommée Stanstead and Sherbrooke Fire Insurance Company ;

Considérant que, vu le défaut du défendeur de satisfaire à ses obligations susdites, le dit demandeur a été poursuivi par les dites compagnies auxquelles il était dû, savoir : à la compagnie Hochelaga, deux cent onze piastres et onze centins, et à la compagnie Stanstead et Sherbrooke, soixante-sept piastres et vingt centins, pour arrérages de prime répartitions et billets de dépôt échus avant le dit mois de janvier mil huit cent quatre vingt-quatre ;

Considérant que le demandeur a contesté l'action de la dite compagnie Hochelaga, a succombé dans sa contestation, et a encouru des frais au montant de quatre-vingt-huit piastres et soixante centins ; que le trente et un décembre mil huit cent quatre-vingt-trois, il a obtenu quittance de la dite compagnie, pour capital et frais de la dite action, et qu'en outre ses frais de défense dans la dite

A. Rodrigue McDonald et Louis Messier.

action se sont élevés à quatre-vingt-trois piastres et quinze centins; qu'il n'a pas contesté l'action de la compagnie Stanstead et Sherbrooke, et qu'il a réglé avec cette dernière, le cinq mars, mil huit cent quatre-vingt-quatre, pour le capital, soixante-sept piastres et vingt cents, et pour les frais avant entrée, douze piastres quarante-deux cents;

Considérant qu'il est en preuve que les montants réclamés par les dites compagnies étaient légitimement dus, savoir: à la dite compagnie Hochelaga, en vertu du jugement par elle obtenu et dont le défendeur n'a pas contesté l'exactitude, et à la dite compagnie Stanstead et Sherbrooke, en vertu de la police, des billets de dépôt et des répartitions mentionnés en la déclaration, et, aussi, par le renouvellement tacite de la dite police, à compter du vingt juillet, mil huit huit cent quatre-vingt-un, ainsi que prouvé par le témoin J. E. Casgrain, et aussi par le défaut du défendeur de contester l'exactitude du montant ainsi payé à la dite compagnie;

Considérant que le règlement de compte plaidé par le dit défendeur, et intervenu entre les parties le dix octobre, mil huit cent quatre-vingt deux, ne pouvait couvrir ces montants, qui n'avaient pas encore été payés par le demandeur, à l'acquit du défendeur, et, considérant que le demandeur en réglant avec le défendeur, ne pouvait prévoir que ce dernier ne remplirait pas ses propres obligations;

Considérant néanmoins que le défendeur n'est redevable, quant aux frais payés par le demandeur, que pour ceux encourus avant l'entrée des dites causes, le demandeur aussitôt poursuivi, n'ayant pas mis le défendeur en demeure de régler les dites causes, et le défendeur ne pouvant être tenu des frais subséquents, ni de ceux de défense encourus par le demandeur, à ses propres risques et périls;

Considérant que par le mémoire établissant le montant des frais dans la cause dans laquelle la compagnie d'Hochelaga était demanderesse, il est impossible de constater quelle partie des dits frais était payable avant entrée;

Considérant que le défendeur est redevable au demandeur en la présente cause, 1o de deux cent onze piastres et onze centins, capital payé à la Compagnie Hochelaga; 2o de soixante-sept piastres et vingt centins, capital payé à la Compagnie Stanstead et Sherbrooke; et 3o de douze piastres et quarante-deux centins, frais payés à cette dernière compagnie; formant en tout deux cent quatre-vingt dix piastres et soixante-treize centins;

Rejette les défenses, et condamne le défendeur à payer au demandeur la dite somme de deux cent quatre-vingt-dix piastres et soixante-treize centins, avec intérêt, à compter du trois avril, mil huit cent quatre-vingt-quatre, jour de l'assignation, et les dépens, rejette le surplus de la demande, sans frais, mais réserve au demandeur son recours pour la partie des frais encourus avant l'entrée dans la cause No 2089, Cour Supérieure, district de Montréal, "The Hochelaga Fire Mutual Insurance Company," demanderesse, contre Alex. R. McDonald, défendeur.

La Cour de Révision à Québec, Casault, J., Caron, J., et Bourgeois, J., a, le 31 octobre 1884, unanimement renversé le jugement de la Cour Supérieure, par le jugement suivant:

JUGEMENT DE LA COUR DE RÉVISION.

A. Rodrigue McDonald et Louis Messier.

Considérant que, lors de la dissolution de la société entre le demandeur et le défendeur, le demandeur était porteur, en son seul nom, des trois polices d'Assurance Mutuelle mentionnées dans sa déclaration; qu'il avait donné ses billets de prime, et que ses polices n'étaient pas expirées, et que toutes les contributions qui pouvaient être plus tard déclarées et exigées sur les dits billets, pour pertes antérieures à l'expiration des polices étaient, dès lors, des dettes personnelles du dit demandeur, dettes que le défendeur s'était par l'acte de dissolution, obligé de payer;

Considérant que le règlement de compte, en date du dix octobre, mil huit cent quatre-vingt-deux, entre le demandeur et le défendeur, ne pouvait couvrir les répartitions pour pertes antérieures à l'expiration des polices, que si les dites répartitions avaient été déclarées et signifiées au demandeur avant cette date;

Considérant que le renouvellement ou la continuation des polices, après leur expiration, était un nouveau contrat, créant pour les contributions subséquentes, une obligation nouvelle pour le demandeur, et qui n'était pas comprise dans celles antérieures à la dissolution de la société que le défendeur s'était obligé d'acquitter;

Considérant que ces renouvellements n'étaient effectifs que sur la propriété immobilière qui n'avait pas changé de nom, mais que les polices étant au nom du demandeur seul, et celui-ci n'ayant plus aucun intérêt assurable dans les marchandises, après la cession qu'il en avait faite au défendeur, elles ne pouvaient pas protéger les intérêts du demandeur, ni même ceux du défendeur, sans un transport des polices qui ne paraissent pas l'avoir été, et qu'en l'absence de tel transport, les assurances sur les marchandises étaient nulles.

Considérant que la preuve au dossier ne permet pas, pour une des deux compagnies d'assurance, de déterminer le montant des répartitions pour pertes antérieures à l'expiration des polices, ni pour les deux, la date des répartitions, ni de leur signification au demandeur; que, pour l'une d'elles, les répartitions ne sont pas régulièrement prononcées, et que, pour ces raisons, il n'est pas possible de décider si le défendeur doit au demandeur aucune partie de la somme réclamée en cette cause; le jugement prononcé le dix-sept juin mil huit cent quatre-vingt-quatre, par la Cour Supérieure, siégeant dans et pour le district de Kamouraska est infirmé, et l'action du demandeur est renversée avec dépens, tant en première instance qu'en révision; mais, sauf le recours du demandeur, pour les répartitions qui ne lui ont été signifiées qu'après le dix octobre mil huit cent quatre-vingt deux, et qui étaient pour pertes antérieures à l'expiration des polices, si tel cas existe. (1)

La Cour d'Appel a unanimement confirmé le jugement de la Cour de Révision.

Pelletier & Bédard, avocats de l'appelant.

Alexis Dessaint, avocat de l'intimé.

(1) Le jugement de la cour de Révision est rapporté avec les remarques du juge Casault, dans 10 R. J. Q. p. 329.

COUR DU BANC DE LA REINE, 1883.

(En Appel).

QUÉBEC, 8 OCTOBRE 1883.

Présents: Sir A. A. Dorion, J. en C., Ramsay, J., Tessier, J., et Baby, J.

VITAL LESSARD

(*Demandeur en Cour de Circuit*),

APPELANT;

ET

CYRILLE GENEST

(*Défendeur en Cour de Circuit*),

INTIMÉ.

Paiements.—Offres.

JUGÉ:—Que, lorsqu'un billet est payable au domicile du créancier, et qu'après l'échéance le créancier ne soit pas en position de recevoir le paiement qui lui est offert, parce qu'il aurait déposé ce billet ailleurs, il devient ensuite payable généralement, et que si ce créancier en poursuit ensuite le montant en justice sans en avoir fait la demande au débiteur, il paiera les frais de poursuite si ce débiteur dépose le montant en cour, sans frais.

L'action de Lessard est basée sur un écrit, en date du 27 avril 1881, par lequel Genest aurait promis lui payer, à son ordre, en sa demeure, à trois mois, cent piastres avec intérêt à 6 par cent, plus tous les frais occasionnés par vente du shérif *in re*: Vital Lessard *vs.* George Grenier, le tout, pour valeur reçue. Il conclut au paiement des $100.00, avec $1.75 pour intérêts, et réclame, en outre $16.10, balance qu'il allègue être encore due sur les frais du shérif susmentionnés, formant en tout $117.85, avec intérêt de la date de l'action qui a été émanée le 8 août 1881, et entrée en Cour le 22 du même mois.

Avant l'entrée le 19 août 1881, Genest fit signifier à Lessard un avis par écrit le notifiant qu'il avait déposé ce jour-là au greffe $102.00, et qu'il lui offrait cette somme pour tout ce qu'il reconnaissait lui devoir. Lessard retira ce dépôt et il déclara par écrit, sur le dos du bref, qu'il ne poursuivait l'action que pour $16.10, balance des frais de l'action de Lessard *vs.* Grenier, et pour les frais de la présente action. Genest produisit d'abord, le 10 du même mois, un plaidoyer dans lequel il alléguait que le billet n'était pas *estampillé* légalement, mais le 10 octobre 1881, il obtint la permission de produire un nouveau plaidoyer dans lequel il disait:

1. Que ce billet avait été estampillé longtemps après avoir été fait, et qu'à sa face même il ne l'était pas d'une manière légale; 2. Qu'avant l'action, il avait payé à Lessard $35.00, montant réel et convenu entre eux, pour tout ce qui était dû à ce dernier pour tous les frais d'action et de vente des meubles dans la cause de Lessard *vs.* Grenier; 3. Qu'il avait, aussi avant l'action, payé au shérif tous les frais qui lui étaient dus dans la dite cause, à la connaissance de Lessard, qui n'alléguait pas, du reste, les avoir payés; 4. Qu'aucune demande de paiement, ou aucune présentation du billet ne lui avaient été régulièrement et légalement faite avant l'action; 5. Qu'il avait toujours eu en

main avant l'échéance du billet, lors d'icelle et depuis, la somme nécessaire pour le payer; qu'il avait même offert à Lessard, avant son échéance, de le lui payer, et que ce dernier l'ayant informé que le billet était chez son procureur actuel, lui, Genest, s'était rendu deux fois chez ce dernier pour en payer le montant, mais qu'on avait refusé de lui remettre le billet; que le 19 août 1881, il avait déposé au greffe et offert à Lessard, $100.00, pour capital et deux piastres pour intérêt, en paiement de tout ce qu'il lui redevait sur icelui, et qu'il renouvelait ces offres. Il concluait à la validité des offres et au débouté de l'action avec dépens.

Le 18 octobre 1882, la cour de circuit, à St. Joseph de la Beauce, Angers, J., a rendu le jugement suivant:

JUGEMENT DE LA COUR DE CIRCUIT.

Considérant que le défendeur a consenti, pour valeur reçue, un billet en date du vingt-sept avril mil huit cent quatre-vingt un, par lequel il a promis payer au demandeur, en sa demeure, la somme de cent piastres avec intérêt, à six pour cent, à trois mois de cette date, plus tous les frais occasionnés par la vente du Shérif *in re* Vital Lessard contre George Grenier.

Considérant qu'après l'émanation du bref de sommation en la présente cause, la défendeur a offert et consigné la somme de cent-deux piastres, pour capital et intérêt, pour payer le dit billet, sans en même temps offrir et consigner les frais encourus, et que, partant, les offres du défendeur sont insuffisantes;

Considérant que les termes "tous les frais occasionnés par la vente du Shérif *in re* Vital Lessard contre George Grenier," ne comportent pas l'obligation de payer les frais d'action, et que dans le cas de doute et d'ambiguité dans les termes d'une obligation, ils doivent être interprétés favorablement au débiteur;

Considérant qu'il a été prouvé que la somme de trente-cinq piastres, payée par le défendeur au demandeur, était pour le prix d'un cheval, voiture et harnais et frais de l'huissier, sur la vente des meubles, en la dite cause de Lessard contre Grenier, et ce, en vertu d'une convention autre que celle stipulée au billet du vingt-sept avril, mil huit cent quatre-vingt un;

Considérant que le défendeur n'a point prouvé ses défenses;

Condamne le défendeur à payer au demandeur cent piastres, montant du billet, avec intérêt à six pour cent, du vingt-sept avril mil huit cent quatre-vingt un, et dépens, et rejette le surplus de la demande du demandeur, et les défenses du défendeur.

Le 28 février 1883, la cour de Révision, à Québec, Stuart J., McCord J., et Caron J., a renversé le jugement de la cour de circuit par le jugement suivant:

JUGEMENT DE LA COUR DE RÉVISION.

Considering that the note or obligation sued upon in this cause was payable at any time within three months from the date thereof;

Considering that, although by the terms of the said note or obligation, it was made payable at the residence of the plaintiff, yet, it afterwards became payable generally, because the plaintiff, by his own act in placing the note elsewhere

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than where it was payable, and by his default to have the said note when the defendant duly presented himself, and offered to pay the amount thereof prevented the defendant from complying with the terms of the said note, as regards the place of payment;

Considering that no demand of payment was made upon the defendant, previously to the institution of the action against him, and that his tender and payment into Court of the amount of the said note or obligation, with interest and without costs, was, therefore sufficient.

Doth declare the tender and deposit set up by the defendant in his plea of perpetual exception, good, valid and sufficient.

Doth condemn the defendant to pay to the plaintiff the sum of one hundred and two dollars, being the amount of principal and interest due by him in virtue of the said note or obligation.

Doth order the Clerk of the Circuit Court in and for the District of Beauce, upon receiving a sufficient acquittance therefore, to pay over to the plaintiff the amount of the said deposit in his hands, if he has not already done so, pursuant to the consent of the defendant filed in this cause, and doth condemn the plaintiff to pay the costs of the present action, as well in the original suit as in Review.

Prétention de l'appelant. Le billet est fait payable en un lieu indiqué : la demeure de Vital Lessard, l'appelant. L'intimé s'appuyant sur l'article 2307 du Code Civil : "Si la lettre de change est payable en un lieu indiqué, soit dans le corps de la lettre, ou par une acceptation modifiée, la présentation doit se faire en ce lieu," disait qu'il n'y avait pas eu de demande de paiement, et qu'il ne pouvait y avoir eu de présentation, vu que le demandeur a admis, dans son témoignage, avoir, dès avant son échéance, remis le billet en question entre les mains de son procureur pour collection, et que l'appelant ayant ainsi déposé le billet ailleurs qu'en l'endroit convenu, ce dernier était devenu payable généralement, que la présentation devait s'en faire au faiseur personnellement ou à sa résidence, ; que, par conséquent, la première demande légale de paiement lui ayant été faite par l'action, il n'était pas tenu aux frais ; qu'ayant offert, avant l'entrée de l'action, le montant du capital et des intérêts, ses offres devaient être déclarées bonnes et valables et l'appelant condamné aux frais de l'action.

L'article 145 du Code de Procédure est bien positif à déclarer que, dans le cas d'un billet promissoire, un plaidoyer fondé sur défaut de présentation doit être accompagné d'une déposition sous serment, constatant qu'à l'époque de l'échéance, il y avait provision au lieu indiqué en le billet, pour en effectuer le paiement. Le plaidoyer du défendeur en cette cause n'étant appuyé d'aucune telle déposition, l'appelant reste donc avec une présomption légale en sa faveur que telle présentation a eu lieu, à l'endroit indiqué, contre laquelle présomption, aucune preuve, contraire ne peut être admise (Art. 1230 C. C.), tant que l'allégation du contraire n'est pas appuyée de cette déposition.

Ce billet comporte, de la part de l'intimé l'obligation de payer à l'appelant une certaine somme, en un certain lieu indiqué. Cette obligation doit être acquittée, en toutes ses parties, de la manière qu'elle a été contractée. Or, pour

vouloir l'acquitter et se mettre à l'abri de toutes conséquences ultérieures, l'intimé, à l'échéance du billet, devait se présenter au lieu indiqué pour le paiement de son obligation et en offrir l'acquittement. Et la présomption existant en faveur du créancier que la présentation de l'effet avait eu lieu à l'endroit indiqué (art. 145, C. P. C.), n'incombait-il pas à l'intimé de faire une preuve claire et positive que c'est l'appelant et non lui qui a été en défaut ? La réponse affirmative à ces questions est établie par les articles cités, et, de plus, par les articles 1152 et 2307 de notre code civil.

Pothier, édition de Bugnet, tome 2me, page 112, dit au No. 238 : " Lorsque la convention porte un certain lieu où le paiement doit se faire, ce lieu est censé convenu pour l'utilité du créancier, comme pour celle du débiteur : c'est pourquoi le débiteur ne peut obliger le créancier de recevoir ailleurs, et, au No. 240 : Le débiteur ne peut pas, à la vérité, être obligé de payer ailleurs qu'au lieu désigné ; mais, faute par lui de payer au dit lieu, on peut, si la créance est exécutoire, exécuter les biens en quelque lieu qu'ils soient, etc."

Pour se soustraire aux conséquences de cette obligation, il incombait au défendeur de prouver qu'il s'était, de fait présenté chez son créancier, à l'échéance ; non seulement il ne l'a pas prouvé, mais l'appelant, qu'il a interrogé comme témoin, jure positivement que l'intimé ne s'est jamais présenté à sa demeure pour payer le billet lors de son échéance.

On objectera que l'appelant devait, lui-même prouver qu'il a présenté le billet pour paiement, lors de son échéance. Je répondrais à cette objection par les paroles suivantes de l'Honorable Juge Casault, dans la cause de Crépeau et Moor, C. R., à la page 203 du VIIme volume des " Quebec Law Reports." " Or, dans la présente cause, le billet était fait payable au bureau du preneur " qui en poursuit le paiement, et qui en était le créancier à l'échéance. Exi- " ger qu'il en eût fait la présentation serait requérir l'absurde force d'un homme " qui appellerait un témoin pour se demander à lui-même s'il veut se payer le bil- " let de son débiteur, et se refuser ce paiement. Je dis appeler un témoin " car il lui faudrait quelqu'un pour prouver cette ridicule cérémonie qu'il ne " pourrait pas prouver lui-même."

Mais l'intimé dit à l'appelant : En portant votre billet chez votre procureur, avant l'échéance, vous avez, vous-même, changé la nature de mon obligation, et le billet maintenant, au lieu d'être payable à un lieu indiqué, est devenu payable généralement. Un billet promissoire accepté devient, du moins quant aux conditions de son acquittement, une obligation bi-latérale qui ne peut se changer ou se modifier que par la volonté expresse des parties. L'appelant réclame l'exécution de son contrat, tel que fait, et tel que prouvé par le (billet) produit. Quelle autre défense peut avoir l'intimé que de dire : " Je l'ai exécuté avant l'action, ou j'ai voulu l'exécuter, mais je n'ai pu le faire par la faute de mon créancier.

L'intimé s'appuie beaucoup sur cette partie du témoignage de l'appelant, qui dit : " Aux environs de l'échéance, le défendeur m'a offert de payer le montant du billet," mais, ajoute l'appelant, ce billet était chez mon procureur, et le défendeur m'a dit qu'il allait le payer là immédiatement." Et plus loin, il dit ;

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" Le défendeur ne s'est pas présenté à ma demeure pour payer le billet à son échéance.

Prétention de l'intimé: Il a été décidé unanimement par la cour de Révision dans la cause d'Archer *vs.* Lortie (III Quebec Law Reports, page 159), qu'un billet payable généralement et à demande, devait être présenté au prometteur, avant l'institution de l'action, et que le dépôt du capital et intérêts fait après l'entrée de l'action en cour, était suffisant, et le principal motif du jugement est que le prometteur avait droit de voir son billet avant de le payer, et de constater si c'était bien le billet qu'il avait signé; or, le billet en question était bien payable dans un lieu déterminé, mais le porteur à l'ordre duquel il était fait, l'ayant remis avant son échéance dans un lieu différent, pour en faire faire la collection par un autre, avait renoncé à se prévaloir de cette clause du contrat, et le billet, si c'en est un, était devenu, en conséquence, *un billet payable généralement.* La présentation dans ce cas devenait nécessaire, indispensable même, avant la poursuite. Art. 2306, 2307 et 2308 du Code Civil.

En effet, supposons que Genest se serait rendu chez Lessard, le jour de l'échéance, ce dernier n'aurait pu lui remettre *son billet*, et Genest aurait naturellement remporté son argent, en disant à Lessard: quand vous aurez mon billet vous me l'apporterez, et je vous paierai. Le paiement chez Lessard est devenu impossible par le fait et la volonté de ce dernier. Dès lors, Genest n'était pas obligé de payer ailleurs qu'à son domicile.

Mais cet écrit n'est pas un billet, car il contient la promesse de payer une somme indéterminée: *les frais du shérif* (art. 2344, C. C.). Dans ce cas la position de Genest est aussi favorable.

En effet l'article 1152 C. C., dans un cas comme celui-ci, nous trace la règle à suivre: Ce paiement doit être fait au domicile du débiteur. C'était donc chez Genest que la demande de paiement devait être faite. C'est aussi ce qui a été décidé par cette cour, dans la cause Rodrigue *vs.* Grondin (6 Revue Légale, page 43), en 1874.

Dans l'un ou l'autre cas, Genest ne pouvait pas être condamné à payer de frais, car les offres ont été faites avant la présentation et la demande de paiement requises. En effet, le titre de Lessard n'a été réellement présenté à Genest que le jour de l'entrée de l'action, date de sa production au greffe. C'est ce jour-là seulement que Genest a pu le voir, c'est ce jour-là qu'il a pu constater si c'était celui qu'il avait signé, et c'est aussi ce jour-là qu'il a consenti à ce que Lessard retire le dépôt.

La cour d'appel a unanimement confirmé le jugement de la cour de Révision.

Linière Taschereau, avocat de l'appelant.

Blanchet, Amyot et Pelletier, avocats de l'intimé.

SUPERIOR COURT, 1890.

MONTREAL, MARCH 19, 1890.

Present: His Honor Mr. JUSTICE DAVIDSON.

JAMES B. KEHLOR,

PLAINTIFF;

vs.

JOHN MAGOR, ET AL.,

DEFENDANTS.

On March 22nd, 1889, defendants by telegraph offered plaintiff $5.00 per barrel for 1000 barrels flour, to be delivered on 15th April following, which offer plaintiff accepted. By error plaintiff shipped the flour on March 30th and drew on defendants for the price. Defendants notified plaintiff that shipment was, to be made on 15th April only, and plaintiff admitted the mistake, offered to pay all extra charges, and by the same telegram asked defendants, "Will you accept this, or shall we take the flour and complete contract as made?" Defendants answered, "Consider this tender cancels contract altogether." On 18th April, plaintiff tendered the flour and draft to defendants, and on 8th June sold the flour for $4.25 per barrel and instituted an action to recover $875.42.

HELD: That there was no recision of the contract, and judgment rendered in favor of plaintiff for amount of difference between contract price and amount sold for.

DAVIDSON, J. This is an action to recover $875.42 by way of damages alleged to have been suffered through defendants' refusal to accept 1,000 barrels of flour sold to them on the 22nd March, 1889. It is pleaded that plaintiff, who does business at St. Louis, on the 31st March notified the defendants by letter that he had shipped the flour, and requested payment of draft at sight for its amount; that defendants on the 5th of April, to wit, long before the shipment ought to have been made, notified the plaintiff that they would not accept the flour so shipped, and that they considered the contract cancelled "by the shipment of flour on the 30th of March, 1889;" that the plaintiff did not ship the flour as provided in the contract, and thereby tacitly admitted that it was not to be carried out, and this by consent of both parties; that the plaintiff never tendered the flour, never sold it after notice to defendants, and had no right to send it forward on the 30th of March, and afterwards sell it at defendants' risk and charges.

Plaintiff admits that the first advice of the flour was too early, but claims that it and its accompanying draft were at once withdrawn, and were afterwards tendered at the proper date to defendants.

It may be best to read the telegrams which made the contract:

MONTREAL, March 22, 1889.

Kehlor Bros., St. Louis:

Offer five dollars here one thousand barrels Brilliant, shipment fifteenth.

MAGOR.

ST. LOUIS, March, 22, 1889.

Magor Bros., Montreal, P. Q.:

To promote business we will accept your offer five dollars cost and freight Montreal for export 1000 "Brilliant," shipment fifteenth. Flour to be branded your brand Criterion.

KEHLOR BROS.

Jas. B. Kehlor vs. John Magor, et al.

Trouble began with plaintiff's letter of the 30th March, which read thus:— "We have the pleasure of enclosing invoice of 1,000 barrels of Criterion flour, $4,460, as per your order of March 22, per cable. Please honor our draft at sight for the amount."

To this request defendants on the 5th April made answer: "If you refer to the contract you will find it was only to be shipped on the 15th April, consequently this is not a proper delivery on the contract, and we cannot accept it. It is strange you should make this mistake in the face of the notice by the railways which you advise us of. We don't know how your arrangement for freight will affect us, as the flour is not sold for Newfoundland yet."

Plaintiff's telegraphic reply came on the 8th: "The mistake in earlier shipment is ours. We will pay interest on draft, and settle with the railroad for any extra storage. Will you accept this, or shall we take the flour and complete contract as made?"

At this moment what is the position of affairs? Simply this. A shipment of the flour and a transmission of the draft, admittedly made too soon, a complaint to that effect by defendant, followed by plaintiff's immediate withdrawal of one and the other with the declaration that he will "take the flour and complete contract as made," or pay interest and other charges accruing up to the 15th.

Here intervenes what defendants pretend was a cancellation of the whole contract for lawful cause. On the 8th instant they telegraphed: "Consider this tender cancels contract altogether." Plaintiff's answer came on the same day: "Do we understand your telegram to mean that you will refuse to receive the flour which we purpose to ship on the 15th, according to contract, we taking possession of the shipment now en route and recalling draft? Answer immediately."

Then follows a correspondence so interesting to the different questions which now call for a judicial decision that I must read copious extracts from it:

"We are in receipt of your favor of the 5th and note contents. We regret that on the 1st you did not telegraph us when you saw the error of too early shipment: we could probably then have held the flour at a side station and made it arrive in proper time to suit you. The simple mistake made by us was in entering the shipment to be sent forward by the 15th, the same as the other sales that we have made, and it accordingly went forward with others made on what we considered the same terms. We sent you telegram to-day as follows, etc. Nothing could be fairer than we paying the storage charges at Montreal and paying you the interest if you paid the draft; and if you did not pay the draft, then we could send forward the draft for payment, and if neither of these would do, it does not alter the contract as long as there is plenty time to fulfil it."

Telegram plaintiffs to defendants, April 9:

"Please answer our despatch of yesterday immediately, it will avoid trouble."

Telegram defendants to plaintiff, April 9:

"Consider your tender cancels contract."

Telegram plaintiff to defendants, April 9:

"Your telegram received evidently means that you will not receive the flour if tendered according to contract. If this is wrong telegraph us at our expense to that effect."

Letter plaintiff to defendants, April 10:

"Referring to our last telegram, we pronounce that we have not received answer to it, and up to this time have, therefore, to conclude that you will not receive the flour if tendered according to contract. It is yet much of a question with us whether it was not tendered according to contract, as shipment 15th usually means by that time or within a reasonable closeness to it; but to avoid even that we shall make a proper tender to you, and if same is refused, we shall then take such steps as any honorable house should; it is all the same whether it would cost them more money to so do than what their loss would amount to. The decline in the market has been so slight that you cannot lose more money by accepting the flour you bought and shipped under your brand than you would by having us sell it for your account and make our claim legally for the difference. Of course, if the transaction goes through all right when we make our draft on the 15th, that will be the end of it with us, and also the end of business between us, as we have nothing to gratify us by publishing the business, although we would like to know one honorable house in Montreal whom you would like to put the correspondence before and would say that your position is a correct one."

To this letter no reply is of record; but we have one of the defendants' in answer to the plaintiff's on the 8th. It reads thus:

"Your favor of the 8th instant to hand, and contents noted. We have been in the flour and grain shipping business for twenty years, and whenever we have made a wrong tender on a contract the buyer has exercised his right to accept or reject it, and we claim that right. If you have been shipping to England on contract, we fancy you must have experienced the same. It was useless for us to say it was a mistake; that had nothing to do with it. As you appear to think we are acting sharp, we are willing to abide by the rules of the New York Produce Exchange in such cases. It is not a question of shirking a contract at all on our part. It is a question of right. We consulted three of our prominent shippers and they were of our opinion."

Letter plaintiff to defendants, April 15:

"We enclose invoice of 1,000 barrels "Criterion" flour, sold you per telegram of March 22nd, for shipment April 15th, $4,460, and beg to advise S.D. for the amount with B.L. attached, in accordance with terms of sale which please give due honor. We have arranged with the railroad company, and had the same written on the face of the B. L., to hold the flour free of storage until May 1st, which you will find a more favorable arrangement than would have been allowed by an ordinary bill of lading for a shipment leaving here April 15th, due to arrive at Montreal between the 21st and 25th."

The bill of lading and draft were tendered on the 18th and refused; then followed some unsuccessful attempts at a settlement, the sale of the flour on the 8th of June at $4.25 per barrel, and the institution of the present action for $875.42 damages.

Jas. B. Kehlor vs. John Magor, et al.

At the argument defendants urged they were right to refuse acceptance because the flour was shipped too soon, and was, moreover, without any authority billed via Detroit and Montreal, for export to Newfoundland.

The latter pretension is now for the first time heard of, for it does not appear in the pleas, and is nowhere in the correspondence made matter of complaint. On the contrary, abundant reference to the flour being "for export," or "for Newfoundland," is found in plaintiff's exhibits Nos. 2, 3, 6 and 18, and defendants' Nos. 2 and 4. Upon the question of contract the court was strongly urged to adopt the principle laid down in Bowes vs. Shand, 45 L. J., Q. B. 507; 46 L. J., Q. B. 561.

Well, take it for granted that plaintiff's shipment of the 31st March and his advice that the draft had gone forward were so far in advance of the 15th April, the date named in the contract, as to entitle defendants to refuse delivery of the one and acceptance of the other. But between the limits of this admission and a possible judgment for defendants some strongly adverse facts intervene. It must be remembered that plaintiff's whole action, so far as delivery was concerned, was to give notice on the 31st of March that the flour and draft had gone forward. The evidence does not show that either one or the other was ever tendered, and certainly no option was then forced upon defendants to accept that consignment at that time under pain of being held guilty of default in respect of their contract. On the contrary, the moment defendants wrote on the 5th of April, "If you refer to the contract you will find it was only to be shipped on the 15th April, consequently this is not proper delivery on the contract and we cannot accept it," plaintiff instantly answered, acknowledging his error, withdrawing the flour and declaring that he would "complete the contract as made," unless defendants might be willing to take it then on his paying all incidental interest and charges. It was only three days after this, by way of answer, and when they had ceased to have any cause for complaint, that defendants telegraphed, "Consider this tender cancels contract altogether."

No local usage of trade is pleaded or proven to make it appear that the forwarding of the invoice, bill of lading and draft from St. Louis on the 15th of April was not a fair compliance with the term "shipment 15th;" it is not shown that the advance shipment for storage here affected the market, and it certainly did not deteriorate the quality of the article.

On the 15th of April, the very day named in the contract, plaintiff's letter started from Chicago enclosing invoice and advising of shipment, draft and bill of lading with all charges paid up to 1st of May following. There is not a single circumstance before me to show that the actual shipment of this flour from St. Louis on the 15th was of the essence of the contract, or that "shipment fifteenth" meant other than to determine a proximate date at which defendants would receive the flour here where it was deliverable and be liable for its price. I have to hold that plaintiff did nothing which operated a recision of his contract.

With reference to the question of damages, defendant argues that he cannot at least be made responsible for the loss incurred on the sale of the flour here,

seeing that plaintiff had his refusal to receive before the 15th, and to have disposed of the flour at St. Louis would have entailed only a trifling damage.

Now, I much doubt that the correspondence shows any express, fixed and continuing purpose to refuse delivery, for we find defendants, in their last letter on the 8th of April, offering to submit to "the rules of the New York Produce Exchange in such cases." Nowhere did they communicate a "distinct and unequivocal absolute refusal to perform the promise." (Benjamin Jules No. 568.) But I let it be assumed that there was an absolute repudiation; can plaintiff even then be estopped from an attempted delivery. I think not. His remedies were two-fold. He might treat the bargain as broken and without tender maintain an action, or persist in the contract and make a tender. (Benjamin, Nos. 760, 763 and 881.)

In Phillipots vs. Evans, 5 M. and W. 475, Lord Abinger said: "The original contract was in no way modified by the notice, and the plaintiffs were not bound then to sell in order to reduce the damages." In Hochester vs. De la Tour, 2 E. and B. 678, Lord Campbell, C. J., considered that "it seems reasonable to allow an option to the injured party, either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrong-doer."

About this time the market broke badly. Plaintiff unsuccessfully offered the flour to defendants at reduced prices, but under reserve of the claim for damages, and at length sold it here for $4.25, which appears to have been the then best obtainable price. The plaintiff received $4,250 less freight, instead of $5,000 less freight, making a difference of $750; to this must be added $32.67 charges, and judgment goes for $782.67.

MacMaster & Co., attorneys for plaintiff.
Gilman & Cameron, attorneys for defendants.

COUR SUPÉRIEURE, 1891.

MONTREAL, 12 JANVIER, 1891.

Présent: TELLIER, J.

EDOUARD CASGRAIN, DEMANDEUR;

vs.

LOUIS PRÉVOST, DÉFENDEUR.

Prêt—Prescription.

JUGE:—Que la créance résultant du prêt d'une somme de deniers ne se prescrit que par trente ans, même si après le prêt le débiteur a consenti au créancier un billet promissoire qui serait prescrit par le laps de cinq années depuis l'échéance de ce billet.

JUGEMENT.

Considérant que le demandeur a mis entre les mains du défendeur les sommes de deux cents piastres et cinquante piastres qui sont réclamées par l'action, et

Ed. Casgrain vs. La. Prévost.

que, subséquemment à ces remises d'argent, le défendeur lui a souscrit des billets promissoires pour ces deux sommes, afin de constater sa dette, et son obligation de les payer, avec intérêt, à demande;

Considérant que si, lors de l'institution de l'action, il s'était écoulé plus de cinq ans depuis que ces billets avaient été ainsi souscrits, il ne s'en suit pas que la réclamation du demandeur était alors prescrite par cinq ans; que l'action du demandeur est basée sur les dettes originaires, et est soumise à la prescription de trente ans; et que, partant, l'exception de prescription plaidée par le défendeur est mal fondée; et la réponse en droit du demandeur, que la prescription quinquennale n'est pas applicable à son action est bien fondée;

Considérant que le défendeur a, sans interruption, depuis mil huit cent soixante-seize, à venir à février mil huit cent quatre-vingt-six, sauf durant une année environ, nourri, logé et entretenu le demandeur; que, durant la même période, il lui a fourni le tabac pour son usage, les hardes, effets portés au compte produit; une place de banc à l'Eglise où il le conduisait, et qu'il l'a aussi mené deux fois à St. Césaire, le tout à la demande et satisfaction du demandeur, qui demeurait au domicile du défendeur, et qui s'y faisait une vie agréable, tout en rendant, à son bon plaisir, certains petits services au défendeur, à sa famille et à sa maison;

Considérant que la pension et les choses fournies par le défendeur au demandeur l'ont été sans qu'il soit jamais intervenu entre les parties aucune convention quelconque, quant à leur paiement; que, si le demandeur croyait qu'il ne serait jamais appelé à payer, et que ces bons offices compensaient ce que le défendeur faisait pour lui, il n'y a pas de preuve que le défendeur entendait faire une gratification pure et simple au demandeur; que ce dernier n'invoque pas même la gratuité des services à lui rendus par le défendeur, et que c'est vainement qu'il soutient que son travail compensait, et au delà, la pension que le défendeur lui fournissait, et qui valait, d'après la preuve, au moins cinq piastres par mois;

Considérant que le travail fait par le demandeur, pour le défendeur, n'avait aucune valeur appréciable en argent pour le défendeur, qui le lui laissait faire afin de ne pas le contrarier; mais qu'il ne procurait aucun profit ni avantage au défendeur, qui avait un personnel suffisant pour se passer des petits services du demandeur;

Considérant que la valeur de la pension et des autres choses fournies par le défendeur au demandeur, tout en tenant compte des petits services rendus par ce dernier, serait certainement plus élevée que le montant réclamé en cette cause; et que le défendeur, aussitôt que l'occasion se fut montrée, a manifesté son intention d'en être payé, et a offert au demandeur de régler avec lui à ce sujet à l'amiable, ou bien passer par arbitres, offre que le demandeur a repoussée.

Considérant que la réclamation du demandeur ne peut être considérée, d'après la preuve, comme une demande en restitution de dépôt, vu que rien dans l'espèce ne s'opposait à la compensation invoquée par le défendeur; par ces motifs renvoie l'exception de prescription plaidée par le défendeur, et maintient la réponse en droit du demandeur à cette dernière exception, avec dépens contre le défendeur,

mais maintient l'exception de compensation plaidée par le défendeur, et, en conséquence, déclare que la réclamation de demandeur, était, dès avant l'institution de l'action, compensée et éteinte par la valeur de la pension et des autres choses fournies par le défendeur au demandeur, et partant déboute le demandeur de sa demande et action contre le défendeur, avec dépens.

Ed. Taschereau vs. L.-S. Prévost.

Brodeur & MacKay, avocats du demandeur.

Geoffrion, Dorion & Allan, avocats du défendeur.

COUR SUPÉRIEURE, 1891.

MONTRÉAL, 30 JANVIER 1891.

Présent: WURTELE, J.

BRIDGET HYNES,

DEMANDERESSE;

vs.

LA COMPAGNIE DU CHEMIN DE FER DU GRAND TRONC DU CANADA

DÉFENDERESSE;

et

MARY RYAN ET AL.,

INTERVENANTS.

Accident—Responsabilité.

JUGÉ:—Que le montant de l'indemnité accordé à la veuve et aux enfants de celui qui décède en conséquence d'un *quasi delit* doit être partagé entre eux en opposition du préjudice respectif approuvé par chacun (Art. 1056 C. C.)

JUGEMENT.

Seeing that the late Arthur Ryan, while a passenger on a train of the Grand Trunk Railway, was injured at Corbyville, in the Province of Ontario, on the eighteenth day of May, one thousand eight hundred and eighty-nine, and that subsequently, on the sixteenth day of June, one thousand eight hundred and eighty-nine, he died in consequence of the injuries which he had received.

Seeing that his widow, the plaintiff, brought the present suit against the Grand Trunk Railway Company of Canada, for the recovery of the damages occasioned by his death;

Seeing that the children of the said late Arthur Ryan intervened in the present suit, and claimed that such damages should be awarded to them as well as to the plaintiff, to be divided among them in such shares as the Court might find and direct;

Seeing that the parties agreed upon the sum of seven thousand dollars as the indemnity payable by the Grand Trunk Railway Company of Canada, and that the latter deposited the said sum in the hands of the attorneys for the plaintiff and intervenants;

Seeing that the action was thereupon discontinued against the defendant, without costs, and that the action was continued as regards the plaintiffs and intervenants to obtain a judgment apportioning the indemnity so agreed upon and paid among the parties, as the Court might find and direct;

Bridget Hynes vs. La Compagnie du Chemin de Fer du Grand Tronc du Canada et Mary Ryan et al.

Considering that the said late Arthur Ryan had a profitable business, and derived therefrom a large income, which enabled him to provide his wife and unmarried children,—two sons and two daughters,—with a comfortable home, which they have lost by his death.

Considering that the said late Arthur Ryan largely assisted his married daughters;

Considering that the widow and all the children of the said late Arthur Ryan have suffered damage by reason of his death;

Considering that his widow is the greatest sufferer, having lost the comfortable home and maintenance which she was entitled to exact from the said late Arthur Ryan during the continuance of their marriage; that his youngest child, Cecilia Ryan, who is still a minor, is the second sufferer in degree, having lost a home and maintenance, which she would have had until she was provided in marriage; that his other unmarried daughter, Mary Ryan, is the third sufferer in degree, having also, although of age, lost a home and maintenance which she would have had until provided in marriage; and that his other children come last, his married daughters having their husbands to look to, and his sons being of age and without ailment which might prevent them from working for their living;

Considering that the indemnity agreed upon and paid, and now desposited in the hands of the attorneys of the parties, should be divided among the parties entitled thereto, who are the widow and children of the said late Arthur Ryan, whose death was caused by the fault of the defendant, according to the relative damage which each suffers in consequence of his death, and that it should be divided in the ratio above mentioned. Doth apportion the said sum of seven thousand dollars as follows:—

1o.	To the plaintiff Dame Bridget Hynes, the widow of the said late Arthur Ryan	$3000 00
2o.	To Miss Cecilia Ryan, a minor	1200 00
3o.	To Miss Mary Ryan	800 00
4o.	To James Ryan, an unmarried son of the deceased	400 00
5o.	To Edward Ryan, another unmarried son of the deceased	400 00
6o.	To Alice Ryan, wife of John Bennett	400 00
7o.	To Margaret Ryan, wife of John McCloskey	400 00
8o.	To Annie Ryan, wife of Henry Sharpe	400 00
		$7000 00

And doth adjudge that Messrs. Curran & Grenier, the attorneys for the plaintiff, and Messrs. Doherty and Doherty, the attorneys for the intervenants, do retain from the said deposit made in their hands the amount of their respective taxed bill of costs, and do thereafter pay over to each of the said parties the amount hereinabove allotted to him or her, as his or her share of the said indemnity, less their relative share of the amount of the two bills of costs calculated in proportion to the amount of their respective allotments.

Curran & Grenier, avocats de la demanderesse.

Doherty & Doherty, avocats des intervenants.

COUR SUPÉRIEURE, 1891.

MONTRÉAL, 24 JANVIER 1891.

Présent :—LORANGER, J.

DAVID THOMAS TEES ET AL.,

vs. DEMANDEURS ;

ROBERT McARTHUR,

DÉFENDEUR.

Concordat.—Fraude.

Jugé :—Que le débiteur insolvable, qui compose avec ses créanciers et qui consent à un de ses créanciers des billets promissoires, en sus du montant de la composition, jusqu'à concurrence de sa créance totale, lui donnant ainsi une préférence indue sur les autres, ne pourra se faire libérer de cette obligation, en invoquant cette fraude qui ne préjudicie qu'aux autres créanciers.

JUGEMENT.

Attendu que les demandeurs réclament la somme de cinq cent quatorze piastres et vingt-huit centins, montant de dix billets promissoires que le défendeur leur a consenti, pour valeur reçue, le douze mars et le vingt-sept février mil huit cent quatre-vingt-neuf, payables à leurs échéances respectives ;

Attendu que le défendeur plaide que le quatrième jour du mois de mars de la dite année mil huit cent quatre-vingt-neuf, il a fait avec ses créanciers, au nombre desquels se trouvent les demandeurs, une composition à raison de soixante centins dans la piastre ; que les demandeurs ont accepté cette composition qui a été réglée par des billets promissoires, au désir et à la satisfaction des dits demandeurs et des autres créanciers ; que les billets qui font l'objet de la présente action, représentent la différence de quarante centins entre le chiffre total de la réclamation des demandeurs et la dite composition ; que les demandeurs n'ont donné leur consentement à la dite composition qu'à la condition que le défendeur leur paierait la dite balance de quarante centins, et leur donnerait les billets en question ; que les dits billets ont été donnés sans considération, les demandeurs ayant donné au défendeur une quittance pour tout le montant de la dite composition, et constituent une fraude, au préjudice des autres créanciers du défendeur ;

Considérant que le défendeur n'a point prouvé le fait essentiel de sa défense, savoir, que les billets en question ont été donnés aux demandeurs pour les engager à consentir à la composition mentionnée dans la défense ;

Considérant que la promesse de payer le surplus de la dite composition, n'est pas illégale, et n'est que l'engagement d'acquitter une obligation naturelle ; que si cette obligation constitue une préférence illégale sur les autres créanciers du défendeur, ceux-ci seuls, sont admis à s'en plaindre, et, qu'en le faisant à leur place, le défendeur excipe du droit d'autrui ;

Considérant que le défendeur est non recevable à se plaindre de sa propre fraude, à l'encontre des demandeurs ses créanciers.

Considérant que les demandeurs ont prouvé les allégués de leur déclaration, et que le défendeur n'a pas prouvé ceux de sa défense ;

David T. Tees et al. vs. E. McArthur.

Renvoie la dite défense, maintient l'action, et condamne le défendeur à payer aux demandeurs la somme de cinq cent quatorze piastres et vingt-huit centins courant, avec intérêt, sur le montant de chaque billet depuis la date de leur échéance, et les dépens.

McCormick, Duclos et Murcheson, avocats des demandeurs.
Greenshields et Greenshields, avocats du défendeur.

COUR SUPÉRIEURE, 1891.

MONTRÉAL, 15 JANVIER 1891.

Présent: LORANGER, J.

J. H. BROWNING

vs

LOUIS M. S. SPACKMAN.

Jugement.—Erreur dans la minute.

JUGÉ:—Que le seul jugement de la Cour est celui qui est paraphé par le juge qui l'a prononcé, et ensuite enregistré; et que la Cour n'a pas juridiction pour s'enquérir de l'exactitude de ce jugement, ni pour le changer ou le modifier. (Art. 473, 474 C.P.C.).

JUGEMENT.

Attendu que le défendeur se plaint du jugement enregistré contre lui dans les registres de cette Cour, en ce qu'il n'est pas conforme à celui qui a été prononcé Cour tenante, et allègue, qu'il (le dit défendeur) a été condamné, cour tenante, à payer au demandeur une somme de cinq piastres de dommage avec les frais de l'action, telle qu'intentée, tandis que par le jugement écrit et enregistré, il est condamné aux frais seulement de l'action.

Attendu qu'en raison des faits ci-dessus, le défendeur demande que le jugement tel que prononcé cour tenante, soit enregistré dans les registres de la Cour Supérieure suivant sa teneur, et qu'il soit enjoint au protonotaire de cette cour de faire dans les dits registres, les entrées conformes à ce jugement, biffer et effacer celles qui ne le sont pas.

Attendu que le demandeur a mis en question, avant que les parties fussent admises à l'enquête, la juridiction de cette cour à connaître du mérite de la présente requête, vu qu'elle a pour objet de changer et modifier le jugement véritable de la cour;

Considérant que le seul jugement véritable de la cour est celui qui a été paraphé par le juge qui l'a prononcé et a été ensuite enregistré; que cette cour n'a pas juridiction pour s'enquérir de l'exactitude du dit jugement, ni pour le changer ou le modifier, ce qu'elle ferait en ordonnant au protonotaire d'entrer dans les registres de la cour un jugement différant matériellement de celui qui a été paraphé et signé par le juge.

Renvoie la requête avec dépens.

Burroughs & Burroughs, attorneys for plaintiff.
Lafleur & Rielle, attorneys for defendant.

COUR SUPÉRIEURE, 1891.

MONTRÉAL, 2 JANVIER 1891.

Présent : DAVIDSON, J.

SAMUEL C. FATT, en sa qualité de curateur à la cession de biens de Curt Onton Beuthner, faisant ci-devant affaires à Montréal, sous le nom de Beuthner Bros.,

DEMANDEUR ;

vs.

ELIZABETH SHORTLEY,

DÉFENDERESSE.

Connaissement.—Transport.—Gage.

JUGÉ :—Que le transport d'un connaissement de marchandises fait à un particulier, en Mars 1888, pour garantir le paiement d'une dette contractée plusieurs mois auparavant, ne transfère aucun droit sur les marchandises qui ne sont pas mises en la possession du créancier cessionnaire du connaissement. (1)

JUGEMENT.

Seeing, plaintiff alleges, that defendant, in July or August, eighteen hundred and eighty-seven, for the accommodation of the makers, Beuthner Bros., endorsed a promissory note for five hundred dollars, and payable at demand; that, while the note was held, by, and long past due, to a third party, Beuthner Bros. endorsed to defendant, by way of security, a warehouse receipt, issued by T. M. Bryson, dated twenty-fourth March, eighteen hundred and eighty-eight, and purporting to represent goods to the value of six hundred and forty-two dollars; that Beuthner Bros. became insolvent, and plaintiff, as their curator, prays that said transfer be declared illegal and null, said warehouse receipt delivered up to him, and, in default, defendant be condemned to pay six hundred and forty-two dollars;

Seeing that defendant pleads that a transfer of security, as soon as it would be arranged, was a condition of the endorsement: that, shortly after said endorsements were handed over, and these from time to time were exchanged for others, which finally became represented by the one in question; that the said warehouse receipt has been transferred to the person who discounted the note; that the transfer was legal, and, in any event, the goods covered by it were not of the value claimed;

Considering that defendant endorsed said note in August, eighteen hundred and eighty-seven, that the said warehouse receipt was only issued on the twenty-fourth day of March, eighteen hundred and eighty-eight, and endorsed and handed to defendant, by Beuthner Bros., on the ninth day of April, eighteen hundred and eighty-eight;

Considering that it does not appear that said endorsement and transfer of said warehouse receipt were in replacement of any securities, or even in furtherance of any agreement made at the time the note was endorsed;

(1) V. Statuts Refondus du Canada, ch. 54, ss. 8 et 9; arts. 5643 et 5646 S. R. Q.; Art. 1970, 1971 et 1979 C.C.

Sam. C. Fatt vs. E. Shortley.

Considering said warehouse receipt and endorsement were as follows:

"Store 32, St. François Xavier street, 209.

"Received, March twenty-fourth, eighteen hundred and eighty-eight, from "Beuthner Bros., for account themselves, one case dry goods, No. 27, and "which will be delivered, on receipt of this warehouse receipt,—contents, etc., "unknown.

"(Signed) T. M. Bryson & Co. (Endorsed) Beuthner Bros., per G. B. Bur-"land."

Considering that, by Consolidated Statutes Canada, cap. 54, in force as regards the respective rights and liabilities here in question, no transfer of a warehouse receipt, by endorsement, to any private person, as collateral security for any debt due, so as to vest in such private person all the right and title of the endorser in the subject matter of the warehouse receipt, with right to sell in default of payment, was to be made, unless the debt was contracted at the same time with the endorsement;

Considering said endorsement of said warehouse receipt operated no delivery of, and vested no right in the goods thereby described:

Considering that the said transaction was never completed as a contract of pledge under the Code, inasmuch as the thing given in pledge was never, either actually or constructively, delivered to, or placed in possession of, the defendant;

Considering that plaintiff is curator to, and represents the estate of, Beuthner Bros.; that said Beuthner Bros. assigned in December, eighteen hundred and eighty-eight; and that, at the date of their said assignment, said goods continued to stand in the books of the warehouse-men, as the proprietors of said warehouse receipt;

Considering that plaintiff hath proved the material allegations of his declaration, dismissing said defendant's plea;

Doth condemn the defendant to deliver up to the plaintiff, in his said capacity of curator, within fifteen days from the service of this judgment, the said warehouse receipt, and, upon her default to do so within said time fixed, doth reserve to give further order to establish the exact value of the goods represented by said warehouse receipt, the whole with costs of suit.

J. P. Cooke, avocat du demandeur.

Abbotts, Campbell et Meredith, avocats de la défenderesse.

COUR SUPÉRIEURE, 1891.

MONTRÉAL, 29 JANVIER 1891.

Présent: TELLIER, J.

ARTHUR PRÉFONTAINE

vs.

JOSEPH PIGEON.

Jugement—Désistement—Inscription.

JUGÉ:—Qu'une inscription à l'encontre et pour audition, qui a eu son effet par le jugement rendu sur telle inscription, ne peut servir pour soumettre la cause de nouveau, lorsque celui qui a obtenu ce jugement s'en est désisté, mais qu'il doit y avoir une nouvelle inscription.

JUGEMENT.

Considérant qui l'inscription pour enquête et l'inscription pour audition au mérite, qui ont été faites en cette cause, ont reçu et eu tout leur effet, la première par le fait que le demandeur a été forclos de faire enquête, et que le défendeur a ensuite inscrit la cause pour audition au mérite sans faire lui-même d'enquête; et la seconde par le fait du jugement qui a été rendu le vingt-quatre octobre dernier;

Considérant que le demandeur s'est désisté du dit jugement, le vingt-sept novembre dernier, et que depuis la cause n'a jamais été ré-inscrite, ni pour enquête, ni pour audition au mérite, et les parties n'ont jamais été autorisées à faire enquête en cette instance;

Considérant que le défendeur s'oppose à la dite motion du demandeur; que ce dernier est mal fondé à demander l'instruction extraordinaire par arpenteurs dont il s'agit dans sa motion, vu qu'il n'a pas été relevé de la forclusion prononcée contre lui à l'enquête, et que cette Cour ne peut, d'office, ordonner que la cause soit renvoyée à des arpenteurs, pour son instruction, vu qu'elle n'en est pas suisie sur inscription nouvelle et régulière, renvoie la dite motion du demandeur, mais sans frais.

J. A. David, attorney for plaintiff.

Lareau & Brodeur, attorneys for defendant.

COUR SUPÉRIEURE, 1891.

MONTRÉAL, 27 JANVIER 1891.

Présent:—TAIT, J.

FRANCIS McCAFFREY, DEMANDEUR;

vs.

PETER PATERSON HALL ET AL., DÉFENDEURS;

ET

CHARLES McCAFFREY, MIS EN CAUSE;

ET

L'Honorable J. EMERY ROBIDOUX, procureur général, INTERVENANT.

Pouvoir législatif—Rivière—Navigation.

JUGÉ:—Que le Statut de Québec, 36 V., ch. 81, n'est pas *ultra vires* des pouvoirs de la législature provinciale.

JUGEMENT.

Considering that the plaintiff claims to be entitled to recover from defendants, for the use of certain booms, on the Nicolet River, during the years one thousand eight hundred and eighty-seven and one thousand eight hundred and eighty-eight, the sum of nine hundred and fifty-four dollars and eighty cents, under the authority of 36 Victoria, chap. 81 of Quebec, and as being vested in the rights of Antoine Mayrand and Charles McCaffrey to collect boomage charges given by said act to them jointly with plaintiff;

Considering that defendants plead:—

1. A general denial;

2. That said act was *ultra vires* of the Quebec Legislature;

3. That the above cited act authorized the three parties therein named to collect said charges, and that no transfer authorizing plaintiff to collect in his name alone has been signified upon defendants;

4. That plaintiff's action is prescribed;

5. That defendants repaired the booms, in one thousand eight hundred and eighty and one thousand eighty hundred and eighty-one, on the express condition that they were not to be charged for using them; and that they spent more in such repairs than the boomage charges would have amounted to, and it was agreed that such expenditure should be accounted as payment of such charges;

6. That plaintiff's claim is compensated by the sum of sixteen hundred dollars, paid out in one thousand eight hundred and eighty and one thousand eight hundred and eighty-one, at the request of plaintiff, in repairing said booms;

Considering that the attorney-general of the Province of Quebec has intervened herein, and, by his intervention, denies that said act was or is *ultra vires*, as defendants plead;

Considering that it was expressly provided by said act, that the piers and booms to be constructed should be so placed as in no way to interfere with or

F. McCaffrey vs. Peter P. Hall et al. et C. McCaffrey et l'Honorable J.E.Robidoux, proc. général.

obstruct the free intercourse and navigation of the river; that defendants have not proved that the work done under said act did in any way obstruct the navigation of said river; that, moreover, the charges authorized by said act are only collectable from those who may have voluntarily used or claimed the use of said booms, for the preservation of their lumber or effects; and that defendants did voluntarily use and claim to use said booms, for the preservation of their logs, and benefited by the use of them;

Considering, therefore, defendants have failed to establish the said act was *ultra vires* of the Legislature of Quebec, and that their second plea is unfounded and constitutes no legal defence to the present action;

Considering that plaintiff has proved that he is vested with the rights of said Mayrand and Charles McCaffrey to collect the boomage charges authorized by the act as respects Mayrand, by the deed of nineteenth April, one thousand eight hundred and seventy-three, referred to in plaintiff's declaration, by which Mayrand became proprietor of the "upper booms," subject to the obligation of maintaining the same, and subject to the express charge or reserve in favor of plaintiff; that he alone should have the right of collecting for his own benefit the charges authorized by said act from all persons using said booms, except from Mayrand, his heirs and assigns; and that, as respects Charles McCaffrey, he is a party to the present suit, and does not contest, but, on the contrary, acquiesces in plaintiff's demand, and has declared his consent to the granting of plaintiff's conclusions that no signification was necessary of said deed of nineteenth of April, one thousand eight hundred and seventy-three; that, moreover, defendants had a knowledge of said deed, and recognized plaintiff as the sole person entitled to receive the charges for using said booms, and paid him said charges for several years, and that, for all these reasons, defendant's third plea is unfounded;

Considering that defendants' fourth plea is likewise unfounded, plaintiff's action not being prescribed;

Considering that defendants' fifth and sixth pleas are not proved, that by the deed of thirty-first July, one thousand eight hundred and seventy-five, Mayrand assigned to Wm. G. Ross all that he acquired from plaintiff, but subject to this reserve, namely, the said "Antoine Mayrand, however, reserving for himself, his heirs and assigns the right of using the said assigned premises for "the preservation and passage of his own logs, free of charges, that is to say, "the same rights as were reserved to the said Antoine Mayrand, in and by "said deed from Francis McCaffrey." That said deed was also made subject to Mayrand's obligation to maintain said booms to the entire exoneration of Ross;

Considering that, by the deed of eighth April, one thousand eight hundred and eighty, said Ross assigned to defendants the property so acquired from Mayrand, and defendants held them under said deed during the seasons one thousand eight hundred and eighty and one thousand eight hundred and eighty-one, for which boomage is now claimed;

Considering that defendants did not, by said deed, acquire any right to the free use of said booms, and that as towards them Mayrand or Michael O'Shaughnessy (who acquired Mayrand's right of passing his logs free, and assumed his obligations of maintaining said booms under deed of fifteenth June, one thou-

F. McCaffrey vs. Peter P. Hall et al. et C. McCaffrey et l'Honorable J.E. Robidoux, proc. général.

sand eight hundred and seventy-seven, herewith fyled) were the persons bound for the maintenance of said booms, each of them having expressly bound himself to maintain them in consideration of the privilege of passing his logs free;

Considering that the fact that the defendants were owners of said upper booms, in one thousand eight hundred and eighty and one thousand eight hundred and eighty-one, does not relieve them from the payment of boomage charges to plaintiff now sought to be recovered, as they, defendants, acquired said booms subject to the right or reserve, in favor of Mayrand and his assigns, of free use of said booms and of plaintiff's right to collect from all other persons using the same;

Considering that plaintiff has not lost his right to collect boomage charges, by reason of not having maintained said upper booms; that said privilege was given as an indemnity for the costs of erecting said booms as well as for the maintenance thereof; that the obligation of maintaining said booms was assumed by Mayrand, and he received in consideration the right to pass his logs free, as defendants well knew, and were bound to know; that defendant's title comes through Mayrand; and that the latter or his assignee O'Shaughnessy, who assumed his obligations to maintain said booms, were obliged towards defendants to maintain said booms; that, moreover, plaintiff was never put in default to repair said booms, or to do the work the value of which defendants seek to set up in compensation against plaintiff's demand;

Considering defendants' plea of compensation is unfounded, for the reasons just stated;

Considering that pine, spruce, hemlock and tamarac logs during the years one thousand eight hundred and eighty and one thousand eight hundred and eighty-one were boomed and passed by the defendants through said booms to a number of 47,357, to wit, 26,113 in one thousand eight hundred and eighty, and 21,244 in one thousand eight hundred and eighty-one, which at two cents each, the rate fixed by the tariff, amount to nine hundred and forty-seven dollars and fourteen cents;

Considering that plaintiff has established his right to a judgment for the last mentioned sum;

Considering that the intervention of the Attorney General, having been necessitated by defendant's allegations and conclusions, should be maintained against defendants;

Doth reject defendants' plea, asking that the act of the Quebec Legislature, passed in the thirty-sixth year of Her Majesty's Reign, chapter 81, be declared *ultra vires* of said Legislature, and null and void; doth also reject all defendants' other pleas, and doth maintain the intervention of said Honorable J. E. Robidoux es-qualité with costs against defendants *distraits* in favor of L. O. David, Esquire, the attorney of said intervenant, and doth adjudge and condemn defendants jointly and severally to pay to plaintiff the sum of nine hundred and forty-seven dollars and fourteen cents, with interest thereon from the twenty-eighth day of April, one thousand eight hundred and ninety, date of service of process and costs of suit.

M. Honan, attorney for plaintiff.

L. O. David, attorney for attorney general.

COUR SUPÉRIEURE, 1891.

MONTRÉAL, 16 FÉVRIER 1891.

Présent :—JETTÉ, J.

ANATOLE CHERRIER,

DEMANDEUR

vs.

ALFRED MESSY,

DÉFENDEUR.

Notaire.—Honoraires.—Solidarité.

JUGÉ :—Que la loi prononce la responsabilité solidaire des personnes qui requièrent les services d'un notaire. (Art. 3619 S. R. Q.)

JUGEMENT.

Attendu que le demandeur, bessionnaire de Mtre. Lemire, notaire, se pourvoit contre le défendeur en recouvrement d'une somme de cent trente-neuf piastres, prix et valeur de services professionnels et d'actes reçus par le dit notaire, pour le profit et avantage du défendeur, du dix-sept au vingt-sept septembre, mil huit cent quatre-vingt-huit, suivant compte produit ;

Attendu que le défendeur conteste, disant : 1er Qu'il n'est pas tenu personnellement de la dette réclamée, les ouvrages faits l'ayant été pour Messy Frères, Sellières ou Condert Frères ; 2e Que s'il est tenu, il ne peut l'être que pour un cinquième, quatre autres personnes étant responsables avec lui, et la loi ne prononçant pas la solidarité pour une dette civile ; 3e. Enfin que les charges du compte sont trop élevées, que le notaire a déjà envoyé un premier compte, ne réclamant que quatre-vingt-cinq piastres, ce qui est encore trop, et offrant par arrangement une somme de vingt piastres qu'il consigne ;

Attendu qu'il est établi en preuve, que le défendeur était parti à l'acte préparé par le notaire Lemire, qui forme l'item principal du compte réclamé, et que bien qu'il ait opposé à cet acte une signature sociale, il y agissait néanmoins personnellement pour la formation d'une société nouvelle, et se portant fort pour son frère en même temps son associé ;

Attendu que les autres charges du compte se réfèrent à ce premier acte et s'y rattachent toutes ;

Attendu que la loi prononce elle-même la responsabilité solidaire des personnes qui requièrent les services d'un notaire ;

Vu l'article 3619, des Statuts Revisés de Québec.

Attendu en conséquence que les deux premières exceptions du défendeur sont mal fondées, les renvoie, mais quant à la qualité et à la valeur des services rendus ;

Attendu qu'en 1888 le notaire Lemire, cédant du demandeur, a remis au défendeur un compte pour les mêmes services, ne s'élevant qu'à la somme de quatre-vingt-cinq piastres ; que bien que ce chiffre soit très-élevé relativement aux services rendus, il est néanmoins jusqu'à un certain point, soutenu par la preuve ; que dans tous les cas, il ne parait pas avoir été contesté alors et qu'il y a lieu en conséquence, de le tenir pour accepté ;

A. Cherrier vs. Alfred Messy

Attendu que quant aux autres items du compte, ils ne sont pas suffisamment prouvés, le cédant, entendu comme témoin, ne pouvant se rappeler suffisamment la nature ni la durée des services mentionnés à ces items et n'en donnant aucune explication satisfaisante;

Attendu en conséquence que la troisième exception du défendeur est fondée quant au surplus de la dite somme de quatre-vingt-cinq piastres.

Maintient la dite troisième exception du défendeur, pour autant, et en conséquence renvoie la demande pour le surplus demandé, et ne condamne le défendeur à payer au demandeur que la dite somme de quatre-vingt-cinq piastres, avec intérêt du douze novembre, mil huit cent quatre-vingt-dix, jour de l'assignation, et les dépens d'une action de cette classe, distraits à Maîtres Bérard & Brodeur, avocats et procureurs du demandeur.

COUR SUPÉRIEURE, 1891.

MONTRÉAL, 23 FÉVRIER 1891.

Présent :—PAGNUELO, J.

DAME MARIE MARGUERITE JOSÉPHINE BELLAND,

DEMANDERESSE;

vs.

LA COMPAGNIE DU CHEMIN DE FER CANADIEN DU PACIFIQUE,

DÉFENDERESSE.

Voiturier.—Responsabilité.

JUGÉ :—Que le voiturier est tenu de remettre au voyageur la valise que ce dernier lui a confiée, ou de prouver que, si cette livraison est impossible, ce n'est pas sa faute, et que, s'il prétend que sa valise a disparu par cas fortuit, il doit prouver le cas fortuit.

JUGEMENT.

Attendu que la demanderesse réclame la valeur d'une valise et son contenu, qu'elle a fait transporter par la compagnie défenderesse de St. Eustache à Montréal, le 11 août (1890), et que la compagnie a fait défaut de lui remettre sur présentation du chèque ou contre-marque, qui lui avait été livré par la dite compagnie, lorsqu'elle s'est chargée de transporter la dite valise;

Attendu que la défenderesse dans son plaidoyer écrit, nie les allégations de la demande, et qu'à l'audience elle a prétendu que la dite valise avait été volée dans son hangar, malgré tout le soin qu'elle en avait pris.

Considérant qu'il appert de la preuve, que la dite valise a été transportée à Montréal le onze août, et mise dans la chambre du bagage non réclamé vers neuf heures de l'avant-midi, à la gare Dalhousie; que le douze août, lorsque la demanderesse l'a réclamée, la dite valise était disparue, et qu'aucune explication n'a été donnée de sa disparition, qu'un grand nombre d'employés sont préposés à la garde du bagage, à la gare Dalhousie en question;

Que la plupart de ces employés ont été entendus, et qu'aucun n'a pu expliquer l'enlèvement de la dite valise; que deux des dits employés n'ont pas été entendus,

Dame Marie M. J. Pelland vs La Compagnie du Chemin de Fer Canadien du Pacifique.

parcequ'ils ont laissé le service de la compagnie, et que leur résidence actuelle est inconnue ; que la seule explication de la perte de cette valise est qu'elle a été enlevée dans la journée du onze, soit par méprise de l'un des employés qui l'aurait livrée pour une autre, soit par la méprise ou le vol de quelque voyageur ou étranger.

Considérant que la défenderesse était tenue de remettre la dite valise à son propriétaire sur livraison de la dite contre-marque, et qu'elle ne peut être libérée de cette obligation, qu'en prouvant que la livraison en est devenue impossible sans son fait ou sa faute, et qu'elle était tenue de prouver le cas fortuit qu'elle allègue ; que dans les circonstances, elle n'a pas établi que la valise ait été enlevée sans le fait ou la faute de ses employés, qu'au contraire la présomption est qu'il y a eu faute de leur part.

Considérant que la valeur de la dite valise et son contenu a été prouvée être de la somme de deux cent trente-huit piastres et vingt-cinq centins ; qu'il n'y a pas lieu d'accorder d'autres dommages à la demanderesse, soit pour déclaration solennelle, consultations et pas et démarches faits par elle en cette action.

Vû les articles 1063, 1071, 1872, 1200, 1672, 1675, 1802, 1815 C. C.

Condamne la compagnie défenderesse à payer à la demanderesse, la somme de deux cent trente-huit piastres et vingt-cinq centins, avec intérêt du cinq novembre mil huit cent quatre-vingt-dix, jour de l'assignation en cette cause, et les dépens distraits à Mtre. E. L. de Bellefeuille, avocat de la demanderesse.

COUR SUPERIEURE, 1891.

MONTRÉAL, 27 FÉVRIER 1891.

Présent : LORANGER, J.

PHILOMÈNE BENOIT ET AL.,

DEMANDEURS ;

vs.

ALPHONSE OUIMET ET AL.,

DÉFENDEURS.

Substitution—Grevé.

JUGÉ :—Que le grevé de substitution est propriétaire des créances de la substitution, et a le droit d'en poursuivre le recouvrement sujet aux droits que posséderont les appelés, à l'ouverture de la substitution, et que les débiteurs de ces créances, en opposant au grevé la substitution et les droits qui en découlent pour les appelés, excipent du droit d'autrui.

JUGEMENT.

Attendu que les demandeurs réclament le montant d'une obligation qui leur a été consentie par les défendeurs, le vingt-trois juillet mil huit cent soixante et dix, et que ces derniers plaident :

1o. Que les demandeurs n'ont pas qualité pour poursuivre ; attendu que la créance appartient à la substitution de feu François Benoit, dont les demandeurs ne sont que les grevés ;

P. Benoit et al. vs. Alph. Ouimet et al.

2o. Que les demandeurs ont été payés par la réalisation de certaines sûretés collatérales qui leur ont été transportées;

3o. Que les demandeurs sont incapables de remettre ces sûretés collatérales, et, conséquemment, sont non recevables à recouvrer la dette principale;

Considérant que l'obligation a été consentie aux demandeurs, tel qu'originairement désignés dans la déclaration et le bref de sommation, et que les défendeurs ont été assignés par les créanciers envers lesquels ils se sont obligés; que, depuis l'action, il a été constaté que les demandeurs sont grevés de substitution et que la réclamation qui fait l'objet de la poursuite est tombée dans le lot d'Alfred Benoit, un des grevés et, en même temps, un des demandeurs;

Considérant qu'en sa qualité de grevé le dit Alfred Benoit est propriétaire, *animo domini*, de la créance en cette cause, et a le droit d'en poursuivre le recouvrement, sujet aux droits que posséderont les appelés à l'ouverture de la substitution, qu'en opposant la substitution et les droits qui en découlent pour les appelés, les défendeurs excipent du droit d'autrui;

Considérant que la participation de tous les créanciers nommés dans l'acte d'obligation à la présente demande, assure aux défendeurs une quittance pleine et entière;

Considérant que les sûretés collatérales transportées par les défendeurs n'ont pas été réalisées, ainsi que le prétendent les dits défendeurs; que ces sûretés consistaient en vingt-quatre parts ou actions de la Société de Construction du district de Montréal, devenue plus tard la Société de Prêt et de Crédit Foncier; que cette société a été mise en liquidation, conformément au Statut qui régit la liquidation de semblables institutions, après que les formalités voulues par la loi eussent été remplies, et plus de dix ans après l'échéance de la dite obligation; que les défendeurs doivent s'en prendre à eux-mêmes des conséquences résultants des retards qu'ils ont mis à relever les dites sûretés collatérales;

Considérant que les demandeurs offrent de déduire, par le retrait qu'ils produisent, les montants qu'ils ont réalisés, tant sur la liquidation des biens de la dite société, que sur les sûretés collatérales elles-mêmes;

Considérant qu'il appert, par le dit retrait, qu'il est maintenant dû aux demandeurs une somme de neuf cent cinquante-et-une piastres et vingt-huit centins, y compris les intérêts jusqu'au premier juin, mil huit cent quatre-vingt-dix, et que la réclamation des demandeurs est bien fondée jusqu'à concurrence de ce montant;

Considérant que les défendeurs n'ont pas prouvé les allégués de leur défense;

Renvoie la dite défense, et condamne les dits défendeurs, conjointement et solidairement, à payer aux demandeurs la dite somme de neuf cent cinquante-et une piastres et vingt-huit centins, avec intérêt du premier juin mil huit cent quatre-vingt-dix, et les dépens.

Bélique, Lafontaine et Turgeon, avocats des demandeurs.

Lacoste, Bisaillon, Brosseau et Lajoie, avocats du défendeur.

COUR SUPÉRIEURE, 1891.

MONTRÉAL, 27 FÉVRIER 1891.

Présent :—LORANGER, J.

DAVID OUIMET,

DEMANDEUR ;

VS.

LA CITÉ DE MONTRÉAL,

DÉFENDERESSE.

Cité de Montréal.—Expropriation.—Dépens.

JUGÉ :—Que dans une expropriation faite par la cité de Montréal, pour l'élargissement d'une rue, le propriétaire exproprié n'a pas droit de réclamer de la cité les frais qu'il paie à ses avocats pour comparutions devant les commissaires.

JUGEMENT :

Attendu que l'action du demandeur est pour supplément d'indemnité résultant de l'expropriation d'une boutique de plombier qu'il occupait sur la rue St. Laurent, de cette ville, dans le cours du mois de mai, mil huit cent quatre-vingt-neuf ;

Attendu que la défenderesse plaide que l'expropriation a été faite conformément à la loi, et que l'évaluation des commissaires est conforme à la preuve, n'est pas entachée d'erreur et couvre les dommages soufferts par le demandeur ; que, d'après la loi, les commissaires ne doivent accorder à l'indemnitaire que le montant de la compensation qu'ils croient juste et raisonnable, et que ce pouvoir étant discrétionnaire, la Cour ne peut l'atténuer que dans le cas seulement où il y aurait erreur ; que les dits commissaires ont sagement exercé ce pouvoir discrétionnaire ; qu'ils n'ont erré ni dans les procédés, ni dans la preuve, ni dans le *quantum* de l'indemnité ;

Considérant qu'en vertu de l'article 176, sec. 21 de la 37 Vict. chap. 51, le demandeur a une action en justice, pour supplément d'indemnité, dans le cas où les commissaires nommés pour évaluer les propriétés sujettes à expropriation ont erré dans leur sentence ;

Considérant qu'il résulte de la preuve qu'il y a erreur manifeste dans la sentence prononcée par les commissaires nommés pour s'enquérir de la réclamation du demandeur, en ce qu'il appert, par le *quantum* même de cette évaluation, qu'ils ont omis une partie de cette réclamation et que cette sentence n'est pas conforme à la preuve faite par la défenderesse elle-même ;

Considérant qu'il est en preuve que le demandeur a fait des améliorations aux prémisses qu'il avait louées, pour un montant de quatre cent cinquante-cinq piastres, et que bien que ces améliorations doivent rester au propriétaire, il est en droit de réclamer, comme il l'a fait par son action, un montant proportionné à la jouissance qu'il devait en avoir jusqu'à la fin de son bail, c'est-à-dire, la somme de cent dix piastres et douze centins ; qu'il est de plus en droit de réclamer ses frais de déménagement, et les ouvrages en plomb qu'il a faits aux dites prémisses, et qui sont devenus inutiles par suite de l'expropriation.

Considérant que le demandeur a éprouvé des dommages au montant de trois cents piastres, résultant du déplacement qu'il a subi, et de l'insuffisance du

David Ouimet vs. La Cité de Montréal.

local où il a dû s'installer pendant les six mois qui ont suivi son expulsion; que, vu l'exiguïté de ce local il a perdu l'occasion de faire, pour la Compagnie du Richelieu et d'autres clients, des ouvrages, qui, au cours de son commerce, lui rapportaient, au dire des témoins, des bénéfices d'au moins vingt-cinq pour cent;

Considérant que le demandeur a en outre droit à la différence du loyer qu'il a payé, à partir du jour de son expulsion, jusqu'au mois de mai suivant, s'élevant à la somme de cent quatre-vingt-treize piastres et cinquante deux centins;

Considérant qu'en ajoutant à ces diverses sommes celle de quarante-deux piastres, différence entre le prix de la pension de ses chevaux dans une écurie étrangère, et la valeur de cette pension, si le demandeur eût été maintenu dans les prémisses qu'il occupait, la réclamation du demandeur s'élève à la somme de mille quarante-cinq piastres et soixante et quatre centins, de laquelle, il faut déduire celle de quatre cent soixante-et-treize piastres et soixante et quatre centins, montant de la sentence des dits commissaires, laissant en sa faveur une somme de cinq cent soixante et douze piastres et soixante et quatre centins, pour laquelle il a droit a un jugement.

Considérant que le demandeur est non recevable à réclamer les frais qu'il a payés à ses avocats pour comparution devant les dits commissaires;

Considérant que la réclamation du demandeur est bien fondée, jusqu'à concurrence de ce dernier montant, et que la défenderesse n'a pas prouvé les allégués de sa défense;

Considérant que la défense en droit, réservée par la Cour est mal fondée;

Renvoie les dites défenses, condamne la défenderesse à payer au demandeur la dite somme de cinq cent soixante et douze piastres et soixante et quatre centins avec intérêt, à compter du vingt-trois mai, mil huit cent quatre vingt neuf, date de l'assignation et dépens.

M. Fortin, avocat du demandeur.

R. Roy, avocat de la défenderesse.

VICE-ADMIRALTY COURT, 1888.

QUEBEC, NOVEMBER, 1888.

Present: His Honor Mr. Justice Irvine, J. V. A. C.

In the matter of

THE DAUNTLESS et al.,

Claimants for Salvage,

vs.

THE SHIP ISMIR.

D, a tug, undertook to tow a ship I out of the Harbor of Quebec to the foot of the Traverse for $70. When they had proceeded part of the way the weather became bad, and the ship anchored and D returned to the harbor. During the night the ship dragged her anchors and went ashore. B, another tug, went to the ship in the morning, and shortly afterwards D returned to her, and after some bargaining the ship agreed to pay each of them $600 to pull the ship off and tow it back to Quebec. On a claim being made by D and B for the above amount, it was resisted on the ground that it was obtained from the master of the ship when he was alarmed for her safety, and that the claim was an exorbitant one, and the tugs should be paid only what the service was reasonably worth.

HELD:—That D's claim was a claim for salvage and not towage, but that D should have stood by the ship and was bound to do so, and render all necessary assistance, subject to the proper value of her services being afterwards paid. The Dauntless et al. vs. The Ship Ismir.

That although B was under no obligation to stand by the ship as was D, yet the master of the ship was misled by the urgency of the pilot in insisting upon his securing the services of the tugs, and that the charge was an exorbitant one.

That in the circumstances the offer of $150 each made by the ship for the services was sufficient, and would be maintained.

IRVINE, J. V. A. C.—The question to be decided in this case arises in the two suits for salvage by the tugs Dauntless and Beaver against the ship Ismir.

On the afternoon of the 11th July last, the Ismir was at anchor in the port of Quebec, ready for sea. The captain had made an arrangement with the owners of the tug Dauntless to tow his vessel to the foot of the Traverse, for which service he was to pay the sum of $70.

Between half-past six and seven in the evening, the weather being fine, the ship commenced to get up anchor, and was assisted in doing so by the tug Victor, belonging to the same owner, and was afterwards taken in tow by the tug Dauntless.

Proceeding down the river very slowly, and all the time heaving up anchor, she came to a point near Beauport shore, and at a short distance from the west end of the Island of Orleans, in eight fathoms of water. The weather in the meantime had become hazy, the wind had risen, and the pilot had judged it expedient to remain at anchor where he then was for the night.

The Dauntless was at this time also alongside the Ismir. The wind increasing, the people in charge of the Dauntless thought that their vessel might receive some injury if she remained alongside the Ismir, and as it was supposed by all concerned that she was then in a place of perfect safety, the master and agent of the Dauntless decided that it would be better for them to go to their moorings at the Louise embankment and return to the ship at the break of day. This they accordingly did.

Some blame has been attached to the persons in charge of the Dauntless for thus leaving the ship. I see no reason for finding any fault. The ship was supposed to be safely at anchor in the port of Quebec. The wind although strong was not of a nature to cause the slightest idea of danger, and it is quite evident that not only the persons in the tug but both the master and pilot of the Ismir considered that they were in perfect safety.

In the meantime the master and the pilot having gone to bed were woke up by the anchor watch informing them that the ship had gone ashore. The pilot blames the people of the ship for not having called him sooner, and the captain is of opinion that the vessel never dragged on her anchor at all, but that she went ashore simply by the water leaving her at the ebb tide.

I cannot conceive it possible that the pilot could have committed so gross a mistake as to leave a vessel at anchor in such a position, and I think the weight is in favor of establishing that the ship dragged her anchor until she came ashore on the back of the Island of Orleans. This seems to have occurred at about 1.30 on the morning of the 12th July. That there was some one to blame for an

The Dauntless et al. vs. The Ship Ismir.

accident of this kind there can be no doubt, but it is not part of my duty in this case to give any decision on that subject.

At an early hour in the morning with the daybreak, the Dauntless left her moorings and proceeded to take the vessel in tow, when she discovered that the Ismir had run ashore on the northwest point of the Island of Orleans. Before the Dauntless reached her, another tug called the Beaver, the property of the plaintiff Kaine, had left a vessel alongside of which she had been anchored during the night, and had gone to the assistance of the vessel ashore.

After some bargaining the master of the Ismir signed a contract which had been written-out by the agent of the Beaver, undertaking to pay each of the steamers $600 to get him off the place where he was aground and tow him up to Quebec. This they proceeded to do, and in less than an hour the ship, floating with the rising tide, was safely towed off by the steamers and brought to an anchorage opposite the town. The plaintiffs now claim payment under their contract, and the defendants allege that this written agreement had been obtained from the master when he was alarmed for the safety of his ship, that the charge being an exorbitant one, the contract should be annulled and the plaintiffs only paid what their services were reasonably worth.

I am of opinion that as respects the Dauntless the services rendered were salvage and not towage services, but that she was bound to stand by the vessel which engaged her, and render all necessary assistance, subject to the proper value of such services being afterwards paid, and that her agent and master were in the wrong when they insisted, as a condition for rendering these services, that they should be paid the price which they exacted. The Beaver was not in exactly similar circumstances, being under no obligation, as the other steamboat was, to go to the assistance of the vessel aground.

Upon these facts I have to decide whether the owners of the vessel are bound to adhere to the bargain made by their master, or whether they should only pay the proper value of the services rendered to them.

I am of opinion that when the master signed these contracts he thought, from the urgency with which the pilot insisted on his immediately securing the services of the tugs, that his ship was in greater, and more imminent, danger than it really was, and I am further of opinion that the charge in both cases was an exorbitant one, and I do not think it would be just to compel the owners of the ship to pay the amount which the master agreed to. I believe that the ship was really in danger, and would have been in a worse position if she had not received the assistance which the tugs gave her, but I am also of the opinion that the tugs incurred no danger whatever, and that, although their services were in the nature of salvage, the value of them should be measured to a certain extent by the value of the time of the vessels when performing ordinary towage services.

Very strong evidence has been given to show that such an amount would be much less than that which was offered to them. I think a fair criterion of the value may be gathered from the price which the Dauntless was to receive for towing this vessel to the foot of the Traverse, a distance of seventy miles. In the salvage services, as I said before, they incurred no risk, and they were not

employed at the outside more than one hour and a half. I consider a fair payment would be double the amount which the Dauntless would receive for the towage to the foot of the Traverse. The parties, however, having offered a larger sum than that, namely, $150, I am disposed to allow that amount to each of the steamers that aided the ship on this occasion.

I am well aware that a number of cases could be cited where much larger sums have been paid for services occupying an equally short time; and in the evidence in this case, occasions have been mentioned by the witnesses where much larger amounts have been paid, but some of the circumstances connected with these cases have been detailed. The risk to the tug, the value of the ship, the season of the year, the distance from the port of Quebec, all tend to increase the remuneration to which the salvor would be entitled. In this case the circumstances were all most favorable to the tugs. While they were performing the services the weather was fine; they were in immediate reach of Quebec; they lost little time, and I feel quite satisfied that they are amply remunerated by the amount which I have mentioned.

It is the general rule of Admiralty decisions in cases of salvage that amounts greater than what the actual services appear to be worth are allowed to the salvor as an encouragement to save life and property; and while I shall always be [redacted] to be guided by this rule, at the same time it must be considered that tug boats, under circumstances similar to those in the present case, should not be encouraged to extort large amounts from ships, where their aid is immediately required, but should rather act moderately and be satisfied with amounts as remunerative as those which I have allowed must be.

With regard to the costs, I am of opinion that each party should pay his own. It may be said that, applying the strict rule, the costs subsequent to the tender should be allowed against the plaintiff, but considering that the master, who was the defendant's agent, had signed an agreement for the amount demanded, I decide that salvage to the extent of $150 should be allowed each of the steamers, and that each party pay his own costs in this court.

Caron, Pentland & Stuart, attorneys for plaintiffs.

A. Cook, attorney for defendant.

COUR SUPÉRIEURE, 1891.

MONTRÉAL, 2 JANVIER 1891.

Présent: DAVIDSON, J.

MICHEL PATRICE GUY,

vs. DEMANDEUR;

GUILLAUME NAPOLÉON SCHILLER, DÉFENDEUR.

Action pour injure dans un plaidoyer.

JUGÉ:—Qu'une partie dans une cause qui est injuriée dans une pièce de procédure dans la cause peut, par une action distincte, réclamer des dommages de la partie qui l'a injuriée, et qu'elle n'est pas tenue d'attendre, pour intenter son action, la fin du procès dans lequel les injures sont proférées, mais que le défendeur, dans cette action en dommages, pourra demander la suspension des procédures jusqu'à la décision du premier procès. (1)

JUGEMENT.

Seeing that plaintiff alleges that the plaintiff's wife, the plaintiff himself to authorize her, and two of their sons, were made defendants in an action instituted in this court by said Schiller, bearing the No. 1493, whereby Schiller sought to have the will of his late brother set aside, for cause of undue influence, deceit and fraud;

Seeing the present plaintiff alleges that he is the Michel Patrice Guy referred to in an obligation which appears in the declaration filed in said cause, to the following effect: "Que la défenderesse (savoir, l'épouse du demandeur) s'est "ainsi frauduleusement emparée de l'esprit du dit Chas. E. Schiller, dans son "intérêt et dans celui de ses enfants, et au détriment du demandeur (savoir, le "défendeur dans la présente cause), du consentement et sous la direction de "son mari, Michel Patrice Guy (savoir, le demandeur dans la présente cause), "qui, déjà, avait réussi, par des moyens de captation de même nature, à s'em-"parer de la succession d'une de ses sœurs, Madame Berthelet, au détriment de "son propre enfant légitime;"

Seeing that the plaintiff claims that the charges contained in said allegation are false, malicious and libellous, and prays for five thousand dollars damages;

Seeing that the defendant, by a temporary exception, pleads that the claim is premature, seeing the action wherein the incriminated allegation appears is not yet determined, that it was a pertinent allegation made in good faith, and justifiable, is a matter of pleading whether truthful to the now plaintiff, or not, seeing that concert between the present plaintiff and his wife are charged and intended to be proved;

Seeing plaintiff answers that said reasons are insufficient to justify a temporary dismissal of the action; that the allegations complained of were not pertinent; that the said plaintiff was in Schiller's case only put *en cause* to

(1) V. Hartshorn et al. *vs.* Scott et al., C. B. R. Québec, 12 février 1810, Rapports de Pyke, p. 5, et Rapports Judiciaires Révisés de la Province de Québec, p. 55; et Whitfield et al. *vs.* Hamilton et al., C. B. R. Québec, 8 avril 1811, Rapports de Stuart, p. 40, et Rapports Judiciaires Révisés de la Province de Québec, p.

M. Pat. Guy vs. G N. Schiller.

authorize his wife, and was not personally a party, and that he is not bound to wait until said litigation is settled;

Seeing that defendant pleads like grounds of justification for said allegation in a plea to the merits, which plea was met by an answer in law;

Seeing that, by interlocutory judgment (Mathieu, judge), *preuve avant faire droit* was ordered, for the reason that the question as to whether the alleged libellous charge was pertinent or not to the setting aside of the will stood direct in dispute, and would be better known when proof has been made between the present plaintiff and defendant;

Seeing that it was further considered, by said judgment, that the Court, when hearing the merits, might, if then thought necessary, suspend judgment, until the action in which said allegation appeared should be determined;

Considering that the present plaintiff is, in name and fact, a party to said action, and amply entitled, if he saw fit to claim the suppression, or otherwise challenge or resent said incriminated allegation;

Considering that said allegation has not been demurred to, or otherwise attacked, and forms only one paragraph in a declaration, which sets forth, in great detail, the alleged wrong-doing of plaintiff's wife, and the household arrangements of her and her husband, whereby it is desired to have the late Chas. E. Schiller's will set aside;

Seeing it is advisable that the Courts charged, or to be charged, with the said litigation, should first and finally determine upon the issues between the parties, as disclosed by the pleadings and evidence therein;

Seeing that the present action was proper as a conservatory process, but that defendant is entitled to have all further proceedings herein temporarily stayed and suspended;

It is adjudged, or ordered, that the present *délibéré* be discharged, and that all proceedings herein be suspended, and stayed, until final judgment in said cause No. 1493; costs reserved.

Loranger & Co., attorneys for plaintiff.

Taillon, Bonin & Dufault, attorneys for defendant.

SUPERIOR COURT, 1888.

MONTREAL, DECEMBER 15TH, 1888.

Present: His Honor Mr. Justice Johnson.

THE MONTREAL HERALD COMPANY,

PLAINTIFFS;

vs.

THE NORTHERN ASSURANCE COMPANY.

DEFENDANTS.

HELD:—That in the absence of a positive stipulation in a policy of insurance that such policy shall terminate at noon of the last day such policy has to run, or proof of an established invariable custom, such policy will be held to cover the whole of the last day for which it is drawn.

That where a claim for a loss under a policy of insurance is made by the insured, which claim is refused from the outset by the insurer, who denies all liability, such refusal is a waiver of any condition of the policy requiring proof of loss.

The facts of this case are shown by the remarks of His Honor Mr. Justice Johnson in delivering the judgment of the Court, which are as follows:—

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This is an action upon a contract of fire insurance, by which, as witnessed by the policy dated afterwards, the defendants insured the plaintiffs' property therein mentioned against loss or damage by fire occurring "at any time between the 26th day of August, 1885, and the 26th day of August, 1886," both inclusive," and it was renewed on the same terms as witnessed by the premium receipt (plaintiffs' exhibit No. 2) of August 26, 1886.

On the 26th of August, 1887, between 7 p. m. and midnight, the property insured was destroyed by fire, and some days before that the defendants' agent had sent notice to the plaintiffs that the Policy would expire on that day.

There were nine other companies on the risk besides the defendants; and on the very day of the fire, not many hours before it broke out, another company (the Scottish Union and National Co.) gave an insurance receipt to the plaintiffs for a like sum of $3,000, to take effect, says the agent who got it, from the expiration of the risk with the Northern.

The new risk was reported to the principals by the agent of the Scottish (Mr. Kavanagh) as one of their usual risks from noon. On the day after the fire an agent of the plaintiffs called upon Mr. Ewing, inspector of the North British company, who at his request sent a circular to the agents of the other companies, including the defendantss notifying them of the loss, and requesting attendance at a meeting to consider what should be done. The agents of all the companies appear to have attended the meeting, with the exception of the defendants' agent, and they all, with the same exception, were satisfied with the proofs of loss, and paid the defendants' claim in full as far as those nine companies were concerned.

When the defendants' agent got Mr. Ewing's circular, the day after the fire, he wrote on it "not on risk," and he did this distinctly on the ground that the policy had expired at noon on the 26th. He states this with perfect frankness in his evidence; and he toook the same ground on the 9th of September, thirteen days after the fire, when Whyte, the plaintiffs' agent, asked him to furnish forms for making out the claim and proof of loss. He consistently refused to supply the forms on the same ground that his company was not on the risk. Notwithstanding this perfectly intelligible ground taken by the defendants' agent, or any difficulty or inconvenience that may have resulted from it to the plaintiffs, they nevertheless, on the 21st of September, furnished proofs of loss with statement of particulars and affidavits and certificates (exhibit 4); and in December, 1887, they issued the present action—the delay of 30 days after proofs of loss being required by condition (22) of the policy.

These are the main facts of the case as they came out in evidence before me, and upon which I must act, subject, of course, to their discussion and consideration in detail according to the views of the parties in the case.

The questions at issue for the consideration of the Court are:

1st. Whether the property was insured at the time of the loss.

2nd. If it was, are the plaintiffs precluded from recovering in this case by any of the conditions of the contract, either as regards the time or mode of compliance, or as regards waiver or renunciation by the defendants of their right to insist on them.

3rd. The amount of the loss.

Upon the first question—the precise time of loss as coming within the limit covered by the insurance, I intimated at the hearing the inclination of my opinion, which was, and still is, that where you have plain terms stating that two whole days are to be included they would be conclusive; and that anything short of a contrary stipulation, or a clearly established and invariable custom, so general and clear that the plaintiffs should be presumed to have known it, would prove the defendants' contention.

All that is proved is that a stipulation limiting the time to noon of the last day is used frequently and to a considerable extent; but nothing like a universal custom among insurers without stipulation is proved at all. The frequency, or the general use of the stipulation limiting the time to noon is one thing; a general custom so to limit it without stipulation is quite another. Indeed, the former seems even to negative the latter, for it would be useless to stipulate if the custom makes it so plainly understood without it.

These principles or observations would seem not to require much elucidation. There is a leading case, however, directly in point—the case of Isaacs vs. the Royal Insurance Co. [5 Exch. Cases, p. 296.] There were other questions in that case not arising in this one; but the point under consideration now was also expressly decided there, viz., that the whole of the day on which the policy expired was protected.

The only exception to the rule laid down in Isaacs vs. Royal Insurance Company has no application at all to the case in hand. The old rule in England had been to exclude the first day, and to include the last, and Kelly Ch. J. in giving judgment said: "All the authorities illustrate the principle that, in general, the day on which the engagement is entered into is excluded, and the last day of the term is included (this distinction cannot apply here where the words used were both days inclusive); and the whole Court was of the same opinion.

The agent's admission that the form of the Northern Company's policies had been changed so as to terminate the risk at noon since the difficulty arose in the present case, seems a practical admission that there was no binding custom, and that the stipulation should be made in order to bind the parties. The notice which the defendants' agent sent some days before the fire, that the policy would end at noon of the 26th, only intimated the will of one of the parties to the contract, and of course could not alter it without the assent of the other. If it could, he might just as well have said it would terminate at any other hour, or any other day.

Then, as to the second insurance with the Scottish Union National, I take it to be invoked to them that the plaintiffs themselves understood the limit of time to be what defendants contend for. The facts are that the plaintiff applied for an insurance in the Scottish Union, and a receipt was granted them on the day of the fire; but Mr. Robertson, jr., who acted as the plaintiff's broker, proves that it was expressly agreed between him and the agent of the Scottish that the risk in that company was only to take effect from the expiration of the

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insurance with the Northern Company. Whether that is evidence of the time at which the new risk was to run, or not, it is clearly not evidence of the intention of the plaintiffs to make the new risk run from noon.

From the evidence of Mr. Kavanagh, I think the truth of this matter can be clearly seen. The Scottish company is one of those which stipulate for the expiry of their risks at noon. They had either to alter their forms in use, or go to noon the next day, leaving the plaintiffs uninsured for twelve hours from midnight of the 26th; therefore it became matter of precise understanding that the Scottish Union risk would only commence when the Northen's risk ended. The Court, therefore, holds that the plaintiffs' property was insured by the defendants at the time of the loss.

The next question is as to the plaintiffs' compliance with the 13th condition I took the other question first, because it seemed to me more in order, though the alleged breach of the condition is what is pleaded first by the defendants. The condition 13, on the back of the policy, subject to which the contract was made, and which is declared to be part of it, is in these words: "Any person entitled to make a claim under this policy is to observe the following directions: (A) He is forthwith after loss to give notice in writing to the company. (B) He is to deliver within fifteen days after the fire, as particular an account of the loss as the nature of the case permits." Now, if I understood rightly the evidence of Mr. Tyre, which was given with the most perfect good faith and consistency, it means this, viz., that the plaintiffs (to use the terms of the condition itself) were not entitled to make a claim at all. This was the very first word on the subject after the fire, and it was certainly also his view some days before the fire, for he had sent notice several days before the 26th that the risk would terminate at noon on that day. He never swerved from that position from the moment he wrote on the notice of loss sent by Mr. Ewing "not on the risk" till the 9th of September, when he refused to furnish forms of claim to Mr. Whyte obviously on the same ground; and I must say that in my opinion he acted with perfect consistency in refusing to facilitate proofs of a loss in which he maintained that his company had no interest. But having once taken that ground, and having stuck to it all along, the position he took must have its legal consequences.

It would hardly appear reasonable or just, to say nothing of any rule of law on the subject, that the defendants should repudiate all liability, and treat the thing in that way, and at the same time expect to exact from the plaintiffs a performance of conditions which, on that view of the matter, had become superfluous. They could hardly say (using the words of the condition itself), "you are not entitled to make any claim under the policy," which is no doubt exactly what they meant, and at the same time expect the insured to prove a claim which they had no right to make. Indeed, it seems evident from the firm stand Mr. Tyre took on the subject, that if the most conclusive proofs had been forthcoming in due time and form, he would certainly have asked Mr. Whyte "what interest he could have in proving a loss, when he had already been told that he was not insured."

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I don't of course in the remotest manner attribute the slightest want of sincerity or good faith to Mr. Tyre; quite the contrary. It cannot be said that this was not a fair or proper question for him to raise, any more than it can be doubted that it has been most properly pleaded and most ably argued. All I mean to say is that the defendants' position is untenable. A man says he is your creditor under a contract of insurance, and when he asks you to pay, you repel him with the answer that he is not insured. He then sues for his money, and you turn round and tell him that the conditions of insurance are to apply nevertheless if there was one. He properly answers in such a case that you have waived your right to exact the performance of the conditions. The legal consequence of the answer of the agent so unequivocally given is, in the opinion of the Court, that compliance with the condition was waived and dispensed with, and no proof of loss was necessary.

I referred to authority on this point at the hearing. The leading decisions are all cited by May, and the result is stated in No. 469: "A distinct denial of liability and refusal to pay, on the ground that there is no liability, is a waiver of the condition requiring proof of the loss. It is equivalent to a declaration that they will not pay though the proof be furnished, and to require proof, when it can be of no importance to either party, and the conduct of the party in favor of whom the stipulation is made has rendered it practically superfluous, is but an idle formality, the observance of which the law will not sustain." "So too" (under the same number in May), "if the insurers throw any obstacles in the way of the insured in his efforts to bring the proofs within the requirements of the condition, etc., etc., in other words, the insurers will not be allowed to insist upon a deficiency which they have contributed to produce; and of course the waiver of the proof is a waiver of the condition that payment is not to be made until a limited time after the proof, so that in such a case suit may be brought at once upon the denial of liability, although the time within which, after proof of loss, the payment would be demandable may not have expired." So that under this authority the plaintiffs need not have waited thirty days after the time for proof of loss to bring their action. And under this authority too, if the condition 13 had been (which it was not) a condition that payment was not to be made until after proof of loss, even such a condition as that would have been waived; and under this authority, too, the refusal to furnish a form of claim when it was asked within the stipulated time, if held to be "an obstacle in the way of the insured in his efforts to bring the proofs within the time stipulated by the condition," would operate a waiver of the condition.

Art. 2478 of our code expressly recognizes the same doctrine; it requires the insured to conform to the conditions, "unless they are waived by the insurer." The French version is "à moins que l'assureur ne l'en dispense." Holding this to be the law, there is an end of the questions of notice and proofs of loss. The first was given, the second was dispensed with; and if you dispense with notice and proof, I do not see how you can insist upon them.

I am not required therefore to consider whether the proofs of loss (supposing any to have been required), which were actually made, would satisfy the condi-

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tion, nor yet to consider what the condition itself was, whether directory merely or operating a forfeiture. Whatever may be permitted by the artificial rules of pleading as to the right of suggesting in separate pleas, separate and inconsistent things, I must look at all the facts proved in this case, and I see that the foremost pretension of the defendants before they came into court was that they were not on the risk, and there is a manifest contradiction and injustice in saying that, and then practically saying they are on the risk, and that certain conditions attaching to it have not been fulfilled.

It is very true that the court holds now that the defendants were on the risk, but they took their own ground at their own peril, and when it goes, their case goes with it, as far as waiving the condition is concerned: for the question is no longer whether they were or were not, but whether they, by saying and insisting they were not, dispensed with the performance of the condition.

There remains only the question of the extent of loss. Of course, it is not a question of law at all, but one of mere dry fact resulting from the proof. The defendants contend that the value of the property lost does not exceed the sum of $26,700, which has already been paid to the plaintiffs by the nine other companies with whom they were insured.

Four witnesses swear that the value of the property was $40,000 at the time of the fire. One witness (Mr. Richard White), from having seen only on paper the kind and quantity of it, would value it at over $35,000; and six swear it was a total loss.

The property was insured in the whole of the risks, ten in number, for $30,000 odd, of which $3,000 with the defendants. Nine companies paid as for a total loss $27,600. The defendants say that Salter valued the assets shortly before Mr. Mitchell purchased at $27,000, but they ignore that he valued them, for the purpose of purchase by another, at a low cash estimate of what they would have been worth to the purchaser after they should have been removed; and that for the purpose of his valuation, he first made a deduction of five per cent. for wear and tear, and then the further deduction of 25 per cent. more, in order to arrive at that low cash value. Mr. Salter's valuation, therefore, shows that the property in his estimate was worth nearly $39,000, and that his reduction of 25 per cent. had reference to leaving a large margin for safety for his principal, Mr. Graham.

After Salter's valuation, the plaintiffs got new type from one source to the value of $5,400. If from Salter's valuation after he had deducted 5 per cent. for wear and tear, leaving the exact figures $38,950, we deduct another 5 per cent. for wear and tear up to the time of the fire, we have the value up to date of fire $37,003; to this, if we add the value of the new type $5,400, we have total value of property according to Salter's and Crossby's evidence $42,403, which more than confirms plaintiff's witnesses, Stewart, Perry, Eaton and Crossby; and even allowing all that the defendants contend for under the pretension of salvage, and the safe, worth $700, which ought to have been deducted, we still have a large difference in plaintiffs' favor between the proved value, $42,000 in round numbers, and the $29,700 which all the insurance paid and unpaid would come to.

It is not necessary to say anything as to the right to treat as salvage property more or less damaged, without any deduction of the cost of saving it, or proof of any kind of what the cost was.

On the whole, I feel no doubt that the evidence as to extent of loss is conclusive in favor of plaintiffs. I have not found either that Mr. Darling's evidence, though he is a very able man no doubt, throws much light on the value of the property lost. He did not go to value property, and he had no means, or only very imperfect means, of doing so, if he had had that purpose. This is clear from the testimony of Salter and Crossby, and even Darling himself.

It appears clear, too, that all the other companies paid in full on basis of the value of loss—the same as has been proved in this case. This, though not absolutely conclusive against the defendants in this case, gives us at all events the opinion of all the other companies, nine in number, that were on the risk, and ought to be a tolerably safe guide. I therefore give judgment for plaintiffs for $3,000, interest and costs.

JUDGMENT.

The Court, considering that the plaintiffs' action is brought to recover the sum of $3,000, amount for which they allege that the property mentioned in their declaration as loss by fire was worth at the time of the loss thereof, under a contract of insurance between plaintiffs and defendants, alleged and proved under the policy and receipt, plaintiffs' Exhibits 1 and 2;

Considering that defendants plead, first, the 13th condition of the policy, to which the plaintiffs answer that the said condition was waived and dispensed with by the defendants;

Considering that defendants plead, secondly, that at the time of the loss, the said property had ceased to be insured at the hour of noon of the same day on which the loss occurred, and that it is the binding custom of insurers that fire risks should cease and expire at that hour on the last day for which property is insured; both of which assertions the plaintiffs deny;

Considering that the defendants' plead, thirdly, that the plaintiffs have not sustained any loss exceeding $26,700, already paid them by other insurance companies for the same loss;

Considering that it appears clearly from the terms of the policy continued by receipt as aforesaid, that the contract of insurance in this case was to cover the whole of the day of the 26th of August, and that the terms of the policy in that respect were that the sum thereby assured was to be paid subject to the conditions thereof, if the property therein described, or any part thereof, should be destroyed by fire at any time between the 26th day of August, 1885, and the 26th day of August, 1886, both inclusive, or at any time afterwards, so long as the premium agreed upon was regularly paid; and that the said stipulation was continued in force from the 26th of August, 1886, to the 26th of August, 1887, in the said terms;

Considering that the loss in this case occurred on the 26th of August, 1887, before midnight, and that no binding custom such as the defendants plead has been proved;

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Considering, moreover, that the proof made of a second assurance on the 26th August, 1887, shows that such second assurance was only to take effect after the expiration of the risk in this case, and is not evidence that the plaintiffs considered the insurance in this case would expire at noon on that day;

Considering that an agent of the plaintiffs notified the defendants in writing in sufficient time under said condition 13, of the said loss, and that the defendants by their agent Tyre, replied and signified distinctly to the said plaintiffs' agent, that the defendants were not liable at all, by writing on the said notice the words "not on risk," and considering that the defendants thereby dispensed with the performance of the said condition 13;

Considering that the plaintiffs have made full and complete proof of loss as alleged by them, and that the defendants have not shown by sufficient evidence that the said loss was less than the sum of $29,700, total amount of all insurances on the said property, and whereof nine other insurance companies have already paid the plaintiffs $26,700;

Doth dismiss defendants' pleas, and doth condemn the said defendants to pay and satisfy to the plaintiffs the said sum of $3,000, with interest thereon from the 30th November, 1887, date of service of process, and costs of suit, distraits, to Messrs. Macmaster, Hutchinson, Weir & MacLennan, attorneys for plaintiffs.

Macmaster, Hutchinson, Weir & MacLennan, attorneys for plaintiffs.
Bethune & Bethune, attorneys for defendants.

SUPERIOR COURT, 1888.

MONTREAL, OCTOBER 31ST, 1888.

Present:—His Honor Mr. Justice JOHNSON.

J. B. CREVIER ET AL., PLAINTIFFS;

vs.

THE ONTARIO AND QUEBEC RAILWAY CO., DEFENDANTS.

By a deed between C, a proprietor, and O, a Railway Company, of a piece of land for the purposes of the Railway, it was stipulated *inter alia* that O should provide two crossings for the use of C, but no time was specified within which the work should be done. On 21st July, 1887, C brought an action against O for $400 damages for neglect to make the crossing, and alleging a protest on 7th of June previous, requiring O to make the crossing. O pleaded they were not put in default, and that C had suffered no damage. Evidence showed that one crossing had been made before date of action, the other commenced as soon as the protest was served, and said crossing completed about the 6th July.

HELD:—That no damages could accrue under the law (Art. 1070 C. C.) until the Railway Company was put in default.

That as no damages were proved to have been suffered after the protest, plaintiffs' action must be dismissed.

JOHNSON, J.—The plaintiffs were proprietors of two farms at St. Ann's already intersected by the Grand Trunk Railway, and they sold to the defendants' company a strip 1,028 feet long by a width of 80 feet, and the deed contained the following clause:—

"The Company shall erect and maintain on each side of the railway, proper fences as provided by the Consolidated Railway Act of 1879 and its amendments; and further, shall construct for the use and convenience of the vendors, their heirs and assigns, and at a place to be decided upon by the Company, two crossings with gates and fastenings, to enable the vendors, their heirs and assigns, to cross the railways at any time; and said crossings to be maintained by the Company, who shall not be bound to construct any other crossing across the said property," etc.

The present action was served on the 21st July, 1887, and alleged $400 damages due for neglect to make the crossing, and for obstructions of iron and other material hindering the plaintiffs' use of the gates on the G. T. R.; and it also alleges a notification and protest of the seventh of June previous, requiring the crossings to be made; and [illegible] their continued neglect to make them after the protest, or to remove the alleged obstructions to their use of the gates on the Grand Trunk Railway.

The plea of the defendants was that they were not put in default to execute their obligations, and that the plaintiffs have suffered no damage.

The deed of sale under which the defendants undertook to make the crossings did not fix any time within which they were to be made. One crossing was made at the eastern end of the plaintiffs' land as soon as it was occupied by the railway.

As soon as the protest was served the defendants set about making the second crossing, and continued with all reasonable diligence till it was finished, some time previous to the 6th of July. No damages could accrue under the law (1070 C. C.), since there was no delay fixed by the terms of the contract.

The defendants' obligation is no greater under the deed than under the Railway Act, except as to the number of crossings. They contend that their obligation as to crossings is similar to that as to fences and gates under sec. 13 of the R. S. of C., c. 109; and I incline very much to think they are right, as sub-sections (*a*) and (*b*) 4 seem clearly to extend to farm crossings. If that were so, then the defendants would have been entitled to three months' delay after being required in writing to do the work; but giving no direct ruling upon that, still no damages are proved to have been suffered after the protest, and the plaintiff upon this latter ground alone would have no case.

The evidence as to some debris of rock being scattered by blasting is irrelevant to the issue. The action asked for damages for not making the crossing, and for leaving iron and other obstructions near the gates. It says nothing about damage suffered during the construction of the work.

JUDGMENT.

"Considering that the plaintiffs, proprietors of two farms mentioned in their declaration, and whereof they sold to defendants a strip 1028 feet long by 80 feet wide, demand by their action damages from the defendants for not having made one of two crossings which they, the defendants, bound themselves to make by the deed of sale of the said strip of land, of the 13th Sept., 1886, the said deed not, however, containing any stipulation as to the time within which the said crossings were to be made;

J. B. Crevier et al. vs. The Ontario and Quebec Railway Co.

"Considering that the said action was served upon the 21st of July, 1887, and alleges a notification and protest of the 7th June, 1887, requiring the said crossing to be made, and further alleges the neglect of the defendants to make the same, and to remove certain obstructions or iron and other materials in the way of the plaintiffs' use of the gates then already subsisting on the line of the Grand Trunk Railway of Canada;

"Considering that the said notification and protest do not any more than the said deed mention any time within which the said crossing was required to be made;

"Considering that the defendants plead that they were not put in default to execute their obligations; and that the plaintiffs have suffered no damages;

"Considering that as soon as the said protest was made in June, 1887, the defendants set about making the second crossing (the first having been made long previously), and continued with a reasonable speed and dilligence until it was finished in the early part of July;

"Considering that no damages could accrue to the plaintiffs under the said deed, or under the law (as well by Art. 1070 of the Civil Code as by sec. 13 of the Revised Statutes of Canada, ch. 109) until due notice given;

"Considering that no damages are proved to have been suffered since the protest aforesaid;

"Doth dismiss said plaintiffs' action with costs distraits to Messrs. Abbotts & Campbell, attorneys for defendants.

F. A. Archambault, attorney for plaintiffs.

Abbotts & Campbell, attorneys for defendants.

COUR SUPÉRIEURE, 1891.

MONTREAL, 19 FÉVRIER 1891.

Présent:—MATHIEU, J.

No. 1703.

NAPOLÉON DÉPATIE, DEMANDEUR;

vs.

DAME A. L. GIBB ET AL., DÉFENDEURS;

ET

No. 558.

NAPOLÉON DÉPATIE, DEMANDEUR;

vs.

JOHN L. MORRIS, DÉFENDEUR.

Procédure—Jonction de Causes.

JUGÉ:—Que lorsque deux demandes sont connexes et ont pour but de réclamer la même créance, on doit les réunir afin d'éviter des jugements contradictoires.

JUGEMENT.

Considérant que les deux demandes sont connexes, et ont pour but de réclamer la même créance, et qu'il nous parait opportun de les réunir, afin d'éviter des jugements contradictoires;

Considérant que, si le demandeur établit qu'il a fait l'ouvrage tel que mentionné dans la déclaration, il obtiendra jugement contre celui qui l'a employé, ou contre le propriétaire des maisons; Nap. Dépatie vs. Dame A. L. Gibb et al.

Considérant que, si les dites causes n'étaient pas réunies, il pourrait se faire que l'action du demandeur en premier lieu intentée serait déboutée, parceque le tribunal considérerait que le défendeur dans la dernière action est le seul obligé, et qu'ensuite le tribunal, présidé par un autre juge, serait d'opinion que ce n'est pas le défendeur en la deuxième instance qui est obligé, et que le demandeur se trouverait ainsi privé de tout recours; Nap. Dépatie et vs. L. Morris.

Considérant que la réunion de ces causes ne nous parait devoir causer aux défendeurs aucun préjudice, vu qu'ils pourront, malgré cette réunion, également faire valoir leurs moyens de défense, et que la question des dépens sera soumise à l'adjudication du tribunal, lors du jugement sur le mérite;

Accorde la motion du demandeur, et déclare les dites deux instances réunies, à toutes fins que de droit, à la condition, toutefois, que le demandeur, lorsque la contestation sera liée avec le défendeur, dans la dernière instance, fasse comparaître de nouveau les témoins déja entendus pour qu'ils soient transquestionnés par le défendeur Morris, les dépositions déjà prises dans la première instance ne devant pas servir dans la dernière, sans que le défendeur dans cette dernière instance ait l'occasion d'examiner ces témoins, et réservant, en outre, à tous autres égards les droits respectifs des parties.

David & Demers, attorneys for plaintiffs.

Morris & Holt, attorneys for defendants.

COURT OF QUEEN'S BENCH, 1890.

MONTREAL, NOVEMBER 27TH, 1890.

Present: Sir A. A. DORION, C.J., TESSIER, J., BABY, J., BOSSÉ, J., and DOHERTY, J., ad hoc.

JAMES DOUGLAS WELLS,
(*Defendant and Contestant in the Court below,*)
AND
APPELLANT;

CHARLES S. BURROUGHS,
(*Plaintiff and Opposant in the Court below,*)
RESPONDENT.

HELD:—That the judgments of the Court of Queen's Bench are executory without being enregistered in the office of the Court which rendered the judgment from which the appeal is taken.

That where notice of taxation of a bill of costs has been duly given, but the bill appears from the date of cancellation of the stamps to have been taxed on a subsequent date, such taxation will be held to have been done regularly, unless the party objecting to it proves that it was irregularly done.

That where an execution issues, based on a bill of costs, which has been taxed without notice and such execution is opposed, the opposition will be maintained; and where more than one bill is in question, and a retraxit is produced for the one which has been taxed without notice, costs will be awarded on the opposition up to the date of the retraxit only.

The original action from which the proceedings arose was dismissed by the judgment of the Superior Court, Terrebonne, on the 8th of July, 1884, which

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judgment was confirmed in appeal on the 22nd of February, 1887, with costs against the then appellant Burroughs, in favor of the then respondent Wells. There was no motion made for distraction of costs.

On the 16th of May, 1888, the present appellant issued an execution for his judgment costs, and seized a number of town lots at Lachute belonging to respondent, twenty-two out of four hundred, which he was on the point of selling, and did in fact sell on the following day, the purchasers retaining the amount of the execution.

On the 10th of July, 1888, the respondent filed an opposition to annul, alleging among other grounds that appellant's attorney owed him a larger sum than the amount seized for, which was therefore extinguished by compensation, and that in any case the execution was illegally issued, there being no judgment in appeal of the 22nd of February, 1887, filed or registered in the Court below, and that no notice of taxation of the bills of costs had been given, the allegations of the opposition being as follows:—

"1o. Because he was not indebted to respondent Wells in the sum of "$340.33 mentioned in the *procès-verbal;*

"2o. Because by the judgment of the Superior Court (enregistered) plaintiff's "action had been dismissed with costs *distraits* to J. Palliser, appellant's "attorney;

"3o. Because such costs had never been taxed *contradictoirement*, and had "never been taxed or certified by the prothonotary, and no bill of costs had been "under that judgment filed or lodged of record, at the time of the issuing of said "execution, and had not at time of producing opposition either been taxed or "placed of record;

"4o. Because costs were personal to Palliser, the attorney of record, who "was indebted to said Burroughs in a sum of $780.00, and that said Burroughs "had a right so set up in compensation such indebtedness against any costs that "said Palliser might, in virtue of his distraction of costs, have against said "Burroughs, and that execution should not in consequence have issued to pay. "Wells;

"5o. Because there was not at time of issuing said execution any judgment "of the Court of Queen's Bench enregistered or filed in the said Superior "Court;

"6o. Because there was not at time of issuing said execution any bill of costs "from the said Court of Queen's Bench taxed *contradictoirement*, or taxed or "certified by the Clerk of that Court, nor was there any bill of costs of any "kind from that Court lodged or filed of record *even up to date of filing "opposition;*

"7o. That said opposant had on the 4th July, 1887, signed a notice of tax-"ation of a bill of costs for the 14th July, 1887, but the same had never been "presented *on that day* for taxation; that opposant had certain good and valid "objections to several items in said bill, a great number of which had been paid "and others of which were not taxable against said opposant."

The appellant contested this opposition, demurring to that part which alleged

compensation, and denying specially, as well *en droit* as by a separate plea *en fait*, the whole of the allegations of the opposition, except as to the bill of costs in the Court below, which according to the then practice at the bar had been taxed without notice, and of which appellant made retraxit.

From the evidence it appeared that the Record in the Queen's Bench, together with a certified copy of the judgment, had been transmitted to the Superior Court at Ste. Scholastique, on the 26th July, 1887, for which the following receipt was given by A. Raby, then deputy prothonotary.

COURT OF QUEEN'S BENCH.

(APPEAL SIDE.)

C. S. BURROUGHS,

AND APPELLANT;

JAMES D. WELLS,

RESPONDENT.

"Received from L. W. Marchand, Esquire, Clerk of Appeals for Lower Canada, the record and proceedings in the above cause, together with a certified copy of the judgment therein rendered by the said Court of Queen's Bench (Appeal Side), on the twenty-second day of February, in the year of our Lord one thousand eight hundred and eighty-seven."

Prothonotary's Office, Ste. Scholastique, the 26th day of July, 1887.

(Signed), ALPHONSE RABY,
Depty. Prothy. S. C.

The judgment above referred to was however only registered in Ste. Scholastique in September, 1888.

It also appeared from the evidence that notice of taxation of the Bill of Costs in the Court of Queen's Bench had been received by Burroughs for the 14th July, 1877. On its face, the bill appeared to have been taxed on the 25th July, 1877, but no notice appeared on the bill for that date, no proof was put of record to show whether the bill was taxed in presence of the parties or not.

By the judgment of the Superior Court the appellant's demurrer as to compensation was maintained, and all the allegations having reference to it were rejected and struck from the opposition, but the opposition itself was maintained, and the execution held to have been illegally and prematurely issued (1) because no judgment in Appeal of the 22nd of February, 1887, was received or registered in the Court below until after the issue of the execution, and (2), because the Bill of Costs in appeal had been taxed without notice, the judgment being as follows:—

La cour ayant entendu les parties par leurs procureurs respectifs sur le mérite de l'opposition afin d'annuler du dit demandeur opposant et de la contestation d'icelle, produite pour le défendeur saisissant, ayant de plus examiné la procédure, la preuve, les admissions et consentements, et généralement tous les précis du dossier de la présente cause et de celle portant le No. 277 pendante entre les

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mêmes parties, les dites causes étant réunies pour les fins de la preuve et de la plaidoirie, et sur le tout délibéré ;

Attendu que le dit défendeur saisissant a, pendant l'instance, produit en désistement quant à la somme de $96.52, montant de ses frais taxés en Cour Supérieure, limitant la saisie par lui pratiquée en cette cause en la somme de $242.41, montant de ses frais taxés en Cour d'Appel ;

Considérant que lors de l'émission du bref d'exécution de bonis et de terris dont l'opposant demande l'annulation, savoir, le 16 mai 1888, le jugement de la Cour du Banc de la Reine siégeant en Appel, prononcé le 22 fevrier 1887, n'avait pas encore été enrégistré au greffe de la présente Cour Supérieure siégeant à Ste. Scholastique, et que même aucune copie duement certifiée n'en avait été déposée au greffe susdit, mais qu'il appert que le dit jugement n'a été déposé et enrégistré au dit greffe que dans le mois de septembre 1888, savoir, environ quatre mois après l'émission du dit bref d'exécution et deux mois après la production de l'opposition du demandeur, ainsi que le tout constaté par le certificat et par le témoignage du Protonotaire de cette Cour ;

Considérant que le document produit à l'enquête par le défendeur contestant, comme son exhibit "Y" était copie d'un prétendu reçu en date du 26 juillet 1887, par lequel il apparaîtrait qu'un certain Alphonse Raby, député protonotaire de cette cour, aurait à la dite date reçu du greffier des appels le dossier de la présente cause, ainsi qu'une copie certifiée du jugement en appel, qui n'est pas un document authentique, et ne pourrait être certifié comme tel par le greffier des appels ; que l'original du dit reçu n'a pas été produit, et qu'aucune preuve n'a été faite à l'appui du dit document qui n'a pas lui-même aucune force probante, et qui ne saurait prévaloir contre le certificat officiel et contre le témoignage du Protonotaire de cette Cour ;

Considérant d'ailleurs que le fait que le dit A. Raby aurait reçu la dite copie de jugement à la date que comporte le dit prétendu reçu n'est pas conclusif dans l'espèce, attendu que le dit A. Raby peut avoir reçu la dite copie sans en faire le dépot et l'enrégistrement au greffe de cette cour, et que seuls ce dépot et cet enrégistrement pouvaient également constater que le dit jugement avait été duement reçu par la cour de première instance chargée par la loi (Art. 1176, C. P.) de le faire exécuter ;

Considérant que la dite cour de première instance ne pouvait procéder à l'exécution du dit jugement avant le dépot et l'enrégistrement régulier d'icelle au greffe de la dite cour ;

Considérant de plus qu'il n'appert pas que le mémoire de frais en appel du dit défendeur contestant, et que ce dernier veut prélever au moyen de l'exécution qu'il pratique, ait jamais été taxé contradictoirement avec le dit opposant ; qu'au contraire, il appert seulement que le dit opposant avait reçu avis de taxation pour le 14 juillet 1887, et que le dit mémoire n'a été taxé que le 25 juillet 1887, sans qu'il soit constaté à quelle date il a été présenté pour taxation au greffier des appels ;

Considérant que la date de l'oblitération du timbre judiciaire, dont le dit mémoire est revêtu, et la date même de la dite taxation, ainsi que les termes

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d'icelle (qui n'énoncent pas que l'opposant a été entendu ni que le dit mémoire a été présenté le 14 juillet, suivant l'avis donné à l'opposant) démontre *prima facie* que le dit mémoire n'a été présenté pour taxation que le 25 juillet 1887, sans avis à la partie adverse et sans ajournement antérieur ;

Considérant que pour ces deux raisons le dit bref d'exécution de bonis et de terris a été émis illégalement, prématurément et sans droit par le Protonotaire de cette cour, à la démande du défendeur saisissant, et que l'opposition du demandeur opposant invoquant ces moyens de nullité est bien fondée ;

Considérant qu'il devient inutile d'entrer dans l'examen des autres moyens allégués dans l'opposition ;

Considérant quela défense en droit du défendeur saisissant a partie des allegations de l'opposant, sur laquelle défense en droit la cour, par son jugement du 19 mars dernier, a ordonné *preuve* avant faire droit, frais réservés, étant bien fondée pour partie, savoir, quant au moyen énonçant, en réponse à la prétension contraire de l'opposant, que le créancier saisissant peut toujours pratiquer en son propre nom une saisie pour les frais auxquels la partie adverse a été condamnée, même lorsque ces frais ont été distraits en faveur des procureurs du saisissant, mais considérant que la dite défense en droit était mal fondée quant au second moyen y invoqué, savoir, celui reprochant à l'opposant d'alléguer surcharge dans un mémoire de frais duement taxé, attendu que le dit opposant, niant dans son opposition la taxation reguliére du dit mémoire, pouvait en loi alléguer la surcharge et l'exagération d'icelui ;

Maintient le premier moyen de la dité défense en droit du défendeur contestant, rejette comme illégales toutes les allégations de l'opposition ayant trait à la distraction de frais obtenue par M. Palliser procureur du défendeur, et la compensation que l'opposant prétend pouvoir opposer à ce dernier, et rejette la dite défense en droit quant au surplus, sans frais, rejette au mérite la contestation du défendeur saisissant, maintient, pour les raisons deja deduites, l'opposition afin d'annuler du dit demandeur opposant, déclare illégale l'émission du dit bref d'exécution *de bonis et de terris*, annule la saisie pratiquée en vertu du dit bref et en donne main levée à l'opposant, avec dépens contre le dit défendeur saisissant distraits à Messieurs Burroughs, procureurs du demandeur opposant, y compris les frais réservés durant l'instance autre que ceux de la défense en droit et sauf ceux déjà adjugés.

From the above judgment the present appeal was taken.

On behalf of the appellant it was contended *inter alia* that the receipt of the deputy prothonotary was authentic, and made proof in itself of the fact of the record in appeal having been duly transmitted to the Superior Court, and that there was no proof of record to the contrary.

That as regards the taxation of the bill of costs, there was nothing to show that it had not been duly taxed in presence of the parties, and in the absence of such proof the legal presumption was that it had been rightly taxed.

The respondent relied on the judgment of the Court below, and prayed that it be confirmed.

By its judgment of date the 27th November, 1890, the Court of Queen's

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Bench reversed the judgment of the lower court, in so far as it relates to registration of the judgment of the Court of Queen's Bench and taxation of the bill of costs, the judgment being as follows:—

JUDGMENT OF COURT OF QUEEN'S BENCH.

La cour, vû le retraxit produit en Cour Supérieure par le demandeur susdit saisissant, par lequel il renonce à la saisie par lui faite pour la somme de $96.52;

Considérant que les jugements de cette cour sont exécutoires sans qu'il soit besoin de les enregistrer au greffe de la cour dont est appel, et que lors de l'émanation du bref de *fieri facias* en question en cette cause, le jugement de cette cour y mentionné était exécutoire;

Considérant que la taxation des frais en appel et du montant y mentionné par ledit bref de *fieri facias* est apparemment régulière, et que l'opposant a failli [illegible] preuve à l'encontre de la taxation du mémoire des dits frais, que son opposition [illegible] fondée en autant qu'elle s'applique aux dits frais en cour [illegible] Supérieure mais bien fondée quant à la dite somme de $96.52, frais encourus en Cour Supérieure mais non taxés, et pour lesquels le demandeur a produit sa dite retraxit;

Considérant qu'il y a erreur dans le dit jugement de la Cour Supérieure siégeant à Ste. Scholastique, le 14 Juin 1889, dont est appel;

Cette cour modifie le dit jugement, et procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, maintient la dite opposition afin d'annuler quant à la dite somme de $96.52, avec dépens d'icelle opposition jusqu'à la date de la production du dit retraxit en faveur du dit opposant, renvoie la dite opposition quant au surplus avec dépens contre le dit opposant à compter de la date du dit retraxit, et les dépens en appel contre l'intimé en faveur de l'appelant, et il est ordonné que le dossier soit remis en Cour Supérieure, siégeant à Ste. Scholastique.

Dissentient, l'Hon. Juge Tessier.

J. Palliser, attorney for appellant.

Burroughs & Burroughs, attorneys for respondent.

COURT OF QUEEN'S BENCH, 1889.

MONTREAL, NOVEMBER 27TH, 1889.

Present: Sir A. A. DORION, C.J., TESSIER, CROSS, BABY, CHURCH and BOSSÉ, J.J.

THE MAIL PRINTING CO.,
(Defendants in the Court below),
APPELLANTS;

vs.

THE COMPANY OF JESUS,
(Plaintiffs in the Court below),
RESPONDENTS.

Exception à la forme—Motion to reject part of pleading.

HELD:—By His Honor Mr. Justice Cross (dissenting), that where, as in the present case, an Act of Incorporation is in such general terms, that persons all over the world might claim to be incorporated under it, and their acts might be contrary to Imperial laws, the defendants who were attacked by such corporation should be allowed the utmost latitude in urging their objections to the constitutionality of such Act of Incorporation.

HELD:—By His Honor Mr. Justice Church (concurring with Mr. Justice Cross on the merits), that as regards the procedure adopted, a portion of a pleading could be struck out on a motion.

HELD:—By Sir A. A. Dorion, C.J., for the majority of the Court. That the allegations of a pleading might be attached by a motion.

That the defendants had all their rights under the first three heads of the exception which had been admitted, and which alleged that the Society was not incorporated; that it had no right to appear in Court; and that its Act of Incorporation was *ultra vires*.

That a pleading must be founded upon facts distinctly stated, and not upon inferences drawn from facts.

That in the present case the allegations of the exception which referred to vows and to rules and regulations, but did not state what these vows and rules and regulations were, should be rejected.

This action was brought by La Compagnie de Jésus, against the *Mail* Printing Company of Toronto, to recover $50,000 damages for alleged libel. The plaintiff was described in the writ as "La Compagnie de Jésus, corps politique et incorporé, ayant son principal établissement en la cité et le district de Montréal."

The defendant pleaded an exception to the form, denying the quality assumed by the plaintiff and disputing its right to sue as a body politic and corporate, for the reasons enumerated at length in the exception, which alleged the plaintiff's Act of Incorporation, 50 Victoria, chapter 28 (Quebec), to be unconstitutional and *ultra vires* of the Legislature of the Province of Quebec. The exception to the form was as follows, the portions in italics being those objected to by the plaintiffs, as stated below:—

The said defendant, without entering into the merits of the present action and demand for exception to the form, saith: that the summons and declaration in this cause are irregular, informal, null and void, and ought to be so declared by this Honorable Court and be set aside, and the defendant freed from further answering the same for the following among other reasons:—

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1. Because the said plaintiff, the so-called Compagnie de Jésus, or Society of Jesus, is not a body politic and corporate, as is falsely alleged in the writ and declaration in this cause;

2. Because said Society hath no right to and cannot appear in this Court and plead in said name of "Compagnie de Jésus;"

3. Because the act of the Legislature of this Province (50 Victoria, chapter 28), under which alone the said plaintiff can make any pretence to be a corporation, was and is *ultra vires* of the said Legislature, and was never of any legal force or effect;

4. Because all the members of the said Society whom the said act purports to erect into a corporation are, by the laws of the British Empire in force in this Province and by the laws of the Province, absolutely without civil rights, *and by the solemn vows which they have taken as such, including a vow of unconditional, absolute, and passive obedience to the General or Superior of their Order or Society, and by the rules and regulations of their Society, they are incapable of exercising any civil rights in this Province, or of performing any of the necessary functions of members of an aggregate corporation, such as the said act purports to create,* and the said Legislature is incompetent to constitute them a corporation or declare them a corporate body in this Province;

5. *Because the rules and regulations of the said Society to which the said Act purports to give the force of law, and the ecclesiastical rules binding upon said Society, and all the members thereof, prevent the said Society or any of its members from holding property or exercising any of the functions or franchises which the said Act purports to confer upon them;*

6. Because the said Act is repugnant to Imperial statutes and laws having the force of law in this Province and *inter alia* to the statutes relating to and affecting said Society, and to the statute relating to the Queen's supremacy (1st Elizabeth, Chapter 1) and to the Quebec Act (George III., Chapter 83), *and in effect purports to give the force of law to rules and regulations of the said Society, which require all the members thereof to give primary allegiance and obedience to a foreign power and authority, to wit, to the General of their Order and to the Pope;*

7. Because the said Legislature has only the right to incorporate "Companies with Provincial Objects," and the objects of the said Society are not provincial;

8. Because the said Legislature not having the general right to incorporate companies or to create corporations, but only the above mentioned limited or restricted right, the objects of corporations purporting to be created by it should appear in the Act or instrument of incorporation; and the said Act (50 Victoria, Chapter 28) does not disclose, define or set forth the objects of the said Society, and does not in any way restrict it to Provincial objects, but, on the contrary, impliedly purports to authorize it to follow and pursue objects that are not Provincial;

9. Because the said Act purports to declare a foreign and alien Society, whose objects are necessarily extra provincial, a corporate body;

10. *Because the objects of the said Society are not provincial, but extend beyond the Province of Quebec and even beyond the Dominion of Canada and the British Empire,*

into every quarter of the globe; and the said Society, by its constitution and the rules which govern its very existence, has a solidarity among its members throughout the world, and an indivisibility which prevents its being in any sense "Provincial" within the meaning of the British North America Act. And the said Society and every member thereof, by solemn vows and obligations, and all that it or they can possess, are unconditionally subject to a head or General who is an alien, and not resident within this Province or the British Empire, and who, under the rules and regulations of said Society, could not become a British subject, or conform himself to the laws of the Empire in force in this Province;

11. *Because the constitution and objects of the said Society are inconsistent and incompatible with the constitution of this Province and of the Dominion of Canada, which is similar in principle to that of the United Kingdom of Great Britain and Ireland;*

12. Because the objects of the said Society are the teaching, promulgation and propagation of the following doctrines and principles, which are inconsistent and incompatible with, and contrary to and subversive of the constitution of this Province, and of the Dominion of Canada, and of the United Kingdom, and of the Supremacy and prerogative of the Queen, and which said Legislature is not competent to authorize, that is to say, *inter alia*:—

A. That the Church of Rome is superior to the State, and that the Legislature of Quebec has no right to legislate upon all the subjects assigned to it by the British North America Act and the constitution, without the permission and consent of the authorities of the said Church;

B. That the Pope of Rome has the right to depose Sovereigns, and that he has the right to absolve subjects from their allegiance;

C. That the Legislature of this Province has not the exclusive right to make laws as to "The Solemnization of Marriage in this Province," as assigned to it by the British North America Act, but that it is subject with respect thereto to the Church and the Pope of Rome;

D. That the Legislature of this Province has not the exclusive right to make laws relating to civil rights in this Province subject to the constitution of this Province and to the Dominion of Canada, and that, so far at least as affects the rights of those professing the Roman Catholic religion, and especially the Clergy of said Church and the members of said Society, the said Legislature is subject to said Church and to the Pope;

E. That the Legislature of this Province has not the exclusive right to make laws for the said Province relating to education, subject only to the provisions of the constitution, and especially to section 93 of the British North America Act, but that it is still further subject with respect thereto to the said Church and to the Pope;

F. That the Dominion Parliament has not the exclusive legislative authority to make laws for Canada as to "Marriage and Divorce," but that it is subject with respect thereto to the said Church and to the Pope;

G. That in the case of conflict between the civil laws in force in this Province and those of the said Church, the latter must prevail;

H. That as to the subjects mentioned in the foregoing clauses—C, D, E and

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F, the authority of the said Church and the Pope is above that of the civil power, and is supreme, and in so far as the legislation of the latter conflicts with the former it is not le[illegible]

I, That in [illegible] dispute between the civil power and the said Church as [illegible] two domains or jurisdictions, the said Church and the Pope have authority to decide such conflict or dispute, and such decision is binding upon the civil power;

K, That the said Church has the right and power to avail herself of force, and to apply external coercion, to enforce the foregoing subjects, doctrines and principles.

13. *Because the objects of the said Society are the teaching and promulgation throughout the world of the doctrines and principles set forth and animadverted upon in the printed works Defendants Exhibits A, B, C, D and E herewith fyled, which said four last mentioned exhibits, entitled "Compendium Theologiæ Moralis," and "Casus Conscientiæ," were and are a recognized guide and text-book of said Society everywhere, and said doctrines and principles were and are contrary to the Imperial Statutes; 1 Elizabeth, Chapter 1: 14; George III, Chapter 83, the British North America Act, and other Imperial Acts and laws in force in this Province, and are moreover subversive of the rights and prerogatives of Her Majesty the Queen, and of all moral principles which form the foundation of civil society and laws.*

Wherefore defendant prays that the said pretended Act of Incorporation, 50 Victoria, Chapter 28, be declared *ultra vires* of the Legislature of the Province of Quebec, and null and void, and that defendant's present exception be maintained, and the plaintiff's action hence dismissed; with costs *distraits* to the undersigned Attorneys.

MACLAREN, LEET, SMITH & SMITH,
Attorneys for Defendant.

Montreal, 29th April, 1889.

On the 6th of May, the plaintiff presented a motion, that allegations four, five, six, ten, eleven and thirteen of the exceptions to the form, together with the exhibits produced in support of the latter allegation, should be struck out and rejected from the record as informal, irregular, vague, indeterminate and not sufficiently *libellées*. The question was argued before His honor Mr. Justice Loranger. By its judgment rendered on the 14th May, the Court granted this motion, and struck out the allegations objected to with the exception of the opening sentences of allegations four and six, which were allowed to remain, the judgment being as follows:—

La Cour, après avoir entendu les parties par leur procureurs respectifs sur la motion produite le six de Mai courant par la demanderesse, pour faire rejeter les allégations portant les numéros quatre, cinq, six, dix, onze et treize de l'exception à la forme de la défenderesse comme étant vagues et indéterminés, avoir examiné la procédure, et délibéré;

Accorde la dite motion, rejette la partie de l'allégation numéro quatre de la dite exception à la forme, qui se lit comme suit: "And by the solemn vows "which they have taken as such, including a vow of unconditional, absolute and "passive obedience to the General or Superior of their order or society, and by

"the rules and regulations of their society, they are incapable of exercising any "civil rights in this province or of performing any of the necessary functions of "members of an aggregate corporation such as the said act purports to create;" rejette en entier allégation numéro cinq de la dite exception à la forme, ainsi que la partie de l'allégation numéro six, qui se lit comme suit: "And in effect pur- "ports to give the force of law to rules and regulations of the said society, which "require all the members thereof to give primary allegiance and obedience to a "foreign power and authority, to wit, to the General of their order and to the "Pope;" et rejette en entier les dites allégations numéros dix, onze et treize de la dite exception à la forme, avec dépens distraits à Messieurs Trudel, Charbonneau et Lamothe, avocats de la demanderesse.

From this judgment the defendant obtained leave to appeal to the Court of Queen's Bench, which Court confirmed the judgment of the Court below, the Honorable Messrs. Justice Cross and Church dissenting, the remarks of the dissenting judges as well as those of Chief Justice Dorion in delivering the judgment of the Court being as follows:—

CROSS, J. (diss.).—I do not think that all the allegations of the defendants' pleas should have been allowed to stand, but I would have been disposed to discriminate and allow part of the rejected allegations to stand.

The incorporation of the Company of Jesus was somewhat different from any precedent with which I am acquainted. It is an incorporation of the reverend fathers of Jesus, and the statute makes no one responsible for the organization It is pretended that they are a very extensive body and that they are a foreign body, not coming within the jurisdiction of the local parliament here.

The allegations seem to show that the Jesuits are a body who cannot take the oath of the Statute of Elizabeth. If, as is pretended by the defendants (appellants), they are absolutely excluded from political existence by the laws of the Empire, then the logical sequence would be that they cannot have an incorporation by the Legislature of Quebec.

Of course, the Jesuits cannot exist in England; they are proscribed by the statute. I do not know how they stand in other European countries, but in England there is a statute expressly declaring that the Jesuits cannot have any standing. I do not see why the parties should not be entitled to raise the question whether this body was incorporated for provincial objects, and their incorporation been expressly limited to existence in Canada, then the door might have been closed in respect of anything further. But when they were incorporated generally, and when persons all over the world might claim such incorporation, and their acts might be contrary to Imperial laws, the defendants should have the utmost latitude for urging their particular view of the case.

Besides these general remarks, I might observe that some of the clauses which were objected to are nothing but amplifications of those which had been allowed to stand. The objection to these is not well founded.

CHURCH, J.—I concur in the observations, and largely in the conclusions, of Mr. Justice Cross. The first question is whether the course taken was regular, whether the clauses could be stricken out on motion. On this point I am with

The Mail Printing Co: vs. The Company of Jesus.

the respondents. The second question is, whether the allegations of the exception are so clearly set forth that the plaintiff was in a position to answer them. On this point I concur in a portion of the judgment of the Court below. The first three clauses have been allowed to stand. The fourth was subject to modification, but not such as has been made by the judgment appealed from. The fifth has been wholly stricken out; but as the rules and regulations have been referred to in the act, what was sufficiently definite for the purposes of the act was sufficient for an investigation by a court of justice.

As to the sixth clause, I agree to all that the judge retained, but consider that too much has been stricken out. Nos. 7, 8 and 9 were not touched. No. 10 was a reiteration of No. 4, and should not have been stricken out. As to No. 11, I think the judgment was right. No. 12 remained intact. No. 13 had been stricken out, and, I think, very properly so.

DORION, Ch. J., for the majority of the court. The allegations might be attacked by a motion. As to the incidental question which has been raised, that the constitutionality of an act of incorporation cannot be attacked by a plea, my own opinion is different; but it is not necessary to decide that question here, and the court pronounces no opinion upon it.

The first three have been admitted: the defendants have all their rights under these heads—that the society was not incorporated; that it had no right to appear in court; and that the act was *ultra vires*. Of the fourth, part has been struck out, and properly so. Pleadings must be founded upon facts distinctly stated, and not upon inferences drawn from facts. This had been distinctly held in the case of the Queen *vs.* Newman, in which the pleas were twice rejected for vagueness, with liberty to plead again. So, too, in the Queen *vs.* Bradlaugh, the same doctrine has been followed.

In the present case, the references to vows and to rules and regulations were properly stricken out. What were the vows and what were the rules? No one knew. They should have been stated. How can the court say whether the plaintiffs were deprived of their civil rights by their vows? The vows were not given. This was not correct pleading.

JUDGMENT IN COURT OF QUEEN'S BENCH.

The Court of Our Lady the Queen, etc., considering that there is no error in the judgment appealed from, to wit, the judgment rendered in the Superior Court for Lower Canada sitting at Montreal, on the 14th day of May, 1889, doth affirm the same with costs to the respondent against the appellant, said costs to be taxed in this court as in a cause of the first class. (The Honorable Justices Crown and Church, dissenting.)

Maclaren, Leet, Smith & Smith, attorneys for appellants.

Trudel, Charbonneau & Lamothe, attorneys for respondents.

COURT OF REVIEW, 1890.

MONTREAL, 30TH DECEMBER, 1890.

Present: JOHNSON, C.J., JETTÉ and MATHIEU, J.J.

EMMA LAMONTAGNE,

PLAINTIFF;

AND

L. J. LAMONTAGNE,

DEFENDANT.

HELD:—Confirming the judgment of the Court below, that an action on the part of a wife separate as to property from her husband, to set aside her mother's will, is not an act of administration, and that the husband must be a party to such action.

That if the husband is not a party to such action, or a written consent from him produced, the action must be dismissed, although it alleges that the wife is duly authorized by her husband, and the defendant fails to appear and contest it, and the subsequent authorization of the husband would not cover the nullity caused by the absence of his authorization when the action was taken.

The judgment from which the inscription in review was taken was rendered by His Honor Mr. Justice Pagnuelo in the Superior Court, Montreal, the 10th November, 1890, and was as follows:—

La Cour ayant entendu la demanderesse par son avocat sur le mérite de cette cause, le défendeur ayant fait défaut de comparaître après avoir reçu signification de l'action, examiné la procédure, et délibéré;

Considérant que la demanderesse demande l'annulation du testament de sa mère, Dame Hermine Lovernoge, fait le 25 juillet 1888, devant maîtres P. Perrault et Philéas Mainville, notaires;

Considérant que la demanderesse séparée de biens d'avec son époux, Emmanuel St. Louis, n'est pas assistée de son dit époux, se déclarant seulement autorisée par lui à porter la présente action;

Considérant que cette déclaration est insuffisante, et que toute la procédure en cette cause est nulle d'une nullité absolue.

Vu l'article 176 C.C. renvoie la dite action sauf à se pourvoir.

In review the above judgment was confirmed, the remarks of His Honor Chief Justice Johnson and Mr. Justice Jetté being as follows:—

The plaintiff describes herself in this case as Emma Lamontagne, wife of Michel St. Louis, and separated from him as to property, and duly authorized for the purposes of the case. She brought her action to set aside her mother's will.

The defendant, after accepting service, made default to appear; and after proof the case was inscribed for hearing by default, and judgment was rendered dismissing it, with costs against the plaintiff.

The grounds of the judgment were that the plaintiff only stated herself to be authorized by her husband, and her proceedings were therefore an absolute nullity, under art. 176 C.C., which declares that "a wife cannot appear in judicial

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proceedings without her husband or his authorization, even if she be a public trader, or not common as to property; nor can she, when separated as to property, except in matters of simple administration."

The plaintiff inscribes for review. There are three things that appear to me to be certain in this case: The first is that if the action is a matter of mere administration of the wife's rights, no authority or assistance of the husband is necessary at all; secondly, if it is beyond simple administration, the authority is necessary; and thirdly, if the authority of the husband is required at all, he must be joined in the action, or at all events his authority must not only be averred to exist (as it is here), but it must be shown and proved to exist, either by his presence or appearance in the case, or by giving his consent in writing.

The first point is plain from the express terms of the article 176. The second and third are established by the authority of Pothier—upon which the article 176 is taken, and also by article 177, which is expressly that the husband must be a party, or give a written consent.

Here the plaintiff alleged she had the authority, but she did not show it either by her husband's presence (and "she cannot appear without him in judicial proceedings," says article 176), nor did she prove by any writing the authorization which she asserted as a fact.

The learned judge below had either one of two things to do; he had a right to dismiss the action which he did; he had also the power which I have often, if not generally, seen used in default cases, of sending the record down among what we used in my bar days to call the sick list.

The plaintiff might then possibly have produced a written authorization from her husband, duly executed before notary prior to the institution of the action, and the case could have been judged on its merits.

The answer to this, I apprehend, would be bad, if it rested only on art. 183, saying that the absence of the husband's authority is a nullity which nothing can cover; for while it must be admitted that nothing could cover such a nullity while it existed, there is nothing in the law to prevent the nullity from being removed and made to disappear by a pre-existing and authentic authority of the husband. I cannot, however, say I will reverse this judgment because the judge might have given an opportunity which he has not given, and which no positive law obliged him to give. I must look at the judgment as the act of the court, and either good or bad in itself.

This brings us at once to the question of what are, to use the words of the law, matters of simple administration? This is not a question which ought to suffer practically any doubt.

All the books I have consulted are barren upon the subject of what are and what are not within the precise definition of simple administration, but enough is said to show us what the best writers mean by it. I would only refer to Troplong, Cout. de Mariage, from numbers 1404 to 1418 inclusively. The whole subject is, of course, beautifully treated, and at No. 1414 he cites Brodeau sur Loucet, who attempts, with Troplong's perfect assent, something like an enumeration of what acts of simple administration are. "Femme séparée de

biens peut, sans le consentement de son mari, disposer de ses meubles et du revenu des meubles, peut faire vaux à ferme, donner quittances, est obligée, à l'effet de la séparation, pour sa nourriture et entretien ; mais non pour autre sujet, ni par aucune obligation, donation ou contrat qui affecte l'immeuble, et emporte aliénation perpétuelle." And further on, at No. 1417, he says: "Il ne serait pas raisonnable que la femme peut l'engager pour quelque cause que ce soit. Elle n'est libre que pour administrer ; elle ne l'est pas pour se ruiner, elle et ses enfants. Enfin, et pour se servir des expressions de la Cour de Cassation, la faculté accordée à la femme séparée de disposer de son mobilier et de l'aliéner doit être restreinte aux actes qui ont pour cause l'administration de ses biens."

In fact, when upon a practical subject of this kind, one feels any difficulty, I have generally found that the books do not irradiate us much; and being thrown on my own judgment to say whether this action brought by the wife to set aside her mother's will is an act of simple administration or not, I do not hesitate to say it is not, for if she were to lose her case, then there would be *chose jugée* against her and her children.

It is just a case where (to use Troplong's words, or rather Brodeur's, whom he cites) she should not be allowed "*se ruiner elle et les enfants.*" Besides, what about costs? If this lady, after running the gauntlet in all the courts, ending with the Privy Council, finds herself saddled with a thousand or fifteen hundred pounds of costs, for which her property real and moveable is liable, where is the *défense d'aliéner*, for she might as well part with her real estate herself as to have the power to do what may make the sheriff sell it.

I think the real distinction is that administration extends only to necessary things for the management and exercise of the rights she has, to go beyond that, and engage her estate by bringing actions right and left, not to get in rents and income and debts already belonging to her, but in order to realise distant expectations and things she has not got is to my mind contrary to the rule of the law. I feel obliged, therefore, to confirm the judgment.

JETTÉ, J.—La cause maintenant soumise à la décision de cette Cour présente des questions d'un si grand intérêt, au point de vue des principes du droit, que je me permettrai d'exprimer les motifs de mon concours dans le jugement qui vient d'être rendu par l'hon. juge en chef.

Et d'abord établissons, comme point de départ des observations qui vont suivre, que notre Code Civil pose, comme règle fondamentale, dans la matière qui nous occupe : *l'incapacité de la femme mariée.* Sous quelque régime qu'elle ait contracté mariage,—communauté, exclusion de communauté, ou séparation de biens—la femme, comme règle, est incapable.

On compare quelquefois cette incapacité à celle du mineur, mais elle est bien différente.

La loi ne déclare le mineur incapable, qu'à raison de sa faiblesse, de son inexpérience, elle le protège contre ceux qui pourraient profiter de cette inexpérience, et elle le rend incapable de faire des contrats désavantageux. Mais elle

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ne le prive pas de toute capacité, au contraire, et chaque fois que le mineur agit sagement, et fait un contrat favorable, la loi tient ce contrat pour bon, et lie celui qui s'est obligé envers le mineur.

L'incapacité de la femme ne découle pas de la même source, c'est dans la puissance maritale que l'on en trouve le principe. C'est parce que la femme est soumise à la puissance maritale qu'elle est incapable. Aussi ne peut-elle rien faire sans l'autorisation de son mari, ni un contrat désavantageux, ni même un contrat favorable. Ainsi elle ne peut accepter une donation sans autorisation.

Or, sous quelque régime qu'elle soit mariée, la femme est soumise à la puissance maritale et par conséquent elle est incapable.

Mais à cette règle, la loi fait une exception : elle lui permet, lorsqu'elle est séparée de biens, de faire—sans autorisation—non pas tous les actes ou contrats mais simplement ceux qui concernent *l'administration* de ses biens.

Ces principes étant posés, voyons maintenant comment ils s'appliquent dans l'espèce qui nous est soumise.

Trois questions se soulèvent en cette cause :

1o. Quelles sont les actions qu'une femme séparée de biens peut intenter, sans autorisation de son mari ou de la justice ?

Subsidiairement :

La demande *en nullité de testament* est-elle une de ces actions ?

2o. En quelle forme se donne l'autorisation lorsqu'elle est requise ?

3o. Le défaut d'autorisation peut-il être couvert par une intervention ou ratification subséquente du mari ?

1o. Quelles sont les actions qu'une femme séparée de biens peut intenter, sans autorisation de son mari ou de la justice ?

L'art. 176 du C. C. répond à cette question :—

" La femme ne peut *ester en jugement* sans l'autorisation ou l'assistance de " son mari, quand même elle serait non commune ou marchande publique. " *Celle qui est séparée de biens* ne le peut faire non plus, *si ce n'est dans le cas " où il s'agit de* SIMPLE *administration.*"

Cet article est le seul, dans tout le Code, qui détermine la capacité de la femme *à ester en justice.*

Lorsqu'il s'agit de la capacité de *contracter* il en est autrement : le Code l'énonce dans trois articles séparés : les arts. 177, 1318 et 1422.

Or, il y a une différence assez marquée dans la rédaction de ces divers articles. Ainsi, tandis que l'art. 177 reproduit exactement l'ancien droit, et parle simplement des actes *d'administration,* comme étant les seuls permis à la femme séparée de biens, l'art. 1318—qui reproduit à la lettre l'art. 1449 du C. N. dit que la femme séparée reprend la LIBRE administration de ses biens, et qu'elle peut *disposer* de son mobilier et *l'aliéner*, et l'art. 1422 ; copie de l'art. 1536 du C. N. dit que : " Lorsque les époux ont stipulé, par leur contrat de " mariage, qu'ils seront séparés de biens, la femme conserve L'ENTIÈRE admi- " nistration de ses biens meubles et immeubles, et la *libre* jouissance de ses " revenus."

Les articles 1318 et 1422 semblent donc aller plus loin que l'art. 177, ils affirment plus énergiquement la capacité de la femme *pour contracter.*

La même différence a été signalée en France entre l'article 217—qui correspond à notre article 177—et les articles 1449 et 1536.

Troplong (Contrat de Mariage, 2e vol., No. 1410), appréciant la disposition qui permet à la femme séparée de disposer de son mobilier et de l'aliéner, dit: "Donner à la femme l'autorisation de disposer librement de ses revenus et de "son mobilier, et d'aliéner ce mobilier sans autorisation, c'est, ou créer une "exception au droit commun, écrit dans l'article 217, ou, au moins, se servir "d'une rédaction qui ne cadre pas avec l'art. 217, et qui, prise à la lettre, "pourrait faire antinomie avec cette disposition. Et comme la jurisprudence "ne pouvait admettre une exception non motivée à l'article 217, qui est un "ARTICLE PRINCIPE, comme elle ne pouvait non plus supposer une antinomie, "elle a donc eu recours à la conciliation, et elle décide que l'art. 1449 ne doit "s'entendre que des *aliénations de mobilier qui portent le caractère d'actes "d'administration* et non de celles dont le caractère est plus grave pour la "femme, et qui sont le résultat d'engagements personnels non autorisés par le "mari." (Voir Nos. suivants jusqu'à 1421.)

Demolombe (vol. 4, 164) dit: "Le principe est donc que la femme même "séparée de biens *ne peut*, sans autorisation, contracter aucune obligation "étrangère à l'administration de sa fortune;

"Ni des emprunts;

"*Ni même un* BAIL, s'il ne pouvait pas être considéré comme un acte d'ad-"ministration."

La doctrine et la jurisprudence s'unissent donc, en France, pour restreindre la portée des arts. 1449 et 1536 du C. N.—c'est-à-dire de nos articles 1318 et 1422—et pour faire prévaloir la disposition de l'art. 217 qui, comme le dit si bien Troplong, est un *article principe.*

Je ne vois aucune raison pour ne pas adopter ici la même interprétation, car nous avons aussi notre *article principe*, dans l'art. 177, qui affirme même l'incapacité de la femme d'une manière plus absolue que ne le fait l'art. 217 du C. N., car il contient de plus les mots: *ni autrement contracter*, qui ne se trouvent pas au Code français.

Mais les observations qui précèdent ne s'appliquent qu'à la capacité de la femme considérée au point de vue des contrats ou des obligations. Revenons maintenant à ce qui fait plus exactement le sujet de notre examen: la capacité de la femme pour *ester en justice.*

Sous l'ancien droit, on n'avait fait aucune différence entre la capacité de s'obliger et celle d'ester en justice. Le C. N., au contraire, inaugure un système tout différent, et tout en maintenant la capacité de la femme séparée quant aux obligations relatives à l'administration de ses biens, il lui enlève absolument la capacité d'ester en justice sans autorisation, même pour des demandes se rapportant à cette administration. Ainsi l'art. 215 du C. N. dit: "La "femme *ne peut ester en jugement, sans l'autorisation de son mari*, quand "même elle serait marchande publique, ou non commune, ou *séparée de biens.*"

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Il est évident que notre Code n'a pas été aussi loin; cependant, comme je le faisais observer il y a un instant, il a sous ce rapport déterminé la capacité de la femme séparée de la manière la plus précise, en la limitant aux actes de SIMPLE ADMINISTRATION. Et nous n'avons sur ce point qu'*un seul texte*, celui de l'art. 176. Le doute qui peut s'élever quant à l'interprétation de l'article 177 combiné avec les articles 1318 et 1422 n'a donc pas place ici, puisque le texte de l'art. 176 est unique et d'une clarté incontestable.

Il suffit donc de déterminer ce que comprennent ces expressions: *actes de* SIMPLE *administration.*

Rolland de Villargues nous dit (vo. Actes d'administration): "Ces expressions sont particulièrement employées en jurisprudence pour désigner les actes qui sont nécessaires seulement *pour la conservation d'une chose*, ou qui n'ont d'autre objet que *d'en tirer le produit ordinaire qu'on doit naturellement en attendre*, par opposition aux actes de propriété."

Ferrière—Coutume de Paris (2e. vol., art. 224): "La femme séparée de biens d'avec son mari ne peut point vendre, ni disposer de ses biens; elle en a seulement l'administration, sans qu'elle ait, pour cela, besoin de l'autorité de son mari, en sorte qu'elle peut faire *baux à loyer* de ses immeubles, *bailler quittance*, et *s'oblige* pour *sa nourriture et entretènement*, mais elle ne peut pas aliéner, ni hypothéquer, etc."

Et nous avons vu que *Demolombe* dit que *même le* BAIL ne serait pas permis à la femme si, pour une raison quelconque, il ne pouvait pas être considéré comme acte d'administration.

Inutile donc de chercher davantage, et nous pouvons arriver de suite à l'appréciation de l'acte qui fait ici l'objet de l'action que la femme a intentée.

Une action en nullité de testament peut-elle être considérée comme un acte de *simple administration?*

Une demande en nullité de testament de la part de celui qui, sans ce testament, serait héritier, est évidemment une action qui a pour but immédiat ou ultérieur une généralité de choses, une universalité, l'ensemble des droits ou biens composant une succession que l'on veut obtenir.

Or, comment une telle demande pourrait-elle être considérée comme un acte de *simple administration?*

Guyot: Rep., vo. Autorisation V, dit: "La séparation judiciaire.....dispense-t-elle la femme du besoin de l'autorisation? Non, pour tout ce qui est de *simple administration*.

"Mais à l'égard de *l'aliénation de ses immeubles* elle est *aussi dépendante* que s'il n'y avait point de séparation.

".....Ne serait-il question que d'accepter une donation, la femme ne pourrait le faire sans l'autorisation de son mari: de même *elle ne peut accepter, ni répudier, une succession sans lui.*"

Mais on dit: il ne s'agit pas ici d'accepter ni de répudier une succession, il s'agit simplement de faire disparaître un obstacle que la femme trouve sur sa route; et lorsque ceci sera fait, elle aura recours à l'autorisation de son mari pour accepter ou répudier la succession.

Eh! bien, je demande comment la femme pourra accepter cette succession, si elle perd son procès actuel, et s'il est jugé contre elle que le testament est valable et qu'elle n'a rien à prétendre? Est-ce qu'elle n'aura pas virtuellement aliéné son droit? Evidemment, et c'est ce que déclare *Merlin* (vo. Aut. maritale, sec. 7, No. V): "La femme, dit-il, qui porte une action *concernant la propriété d'un bien met ce bien en péril, car si elle perd* ELLE ALIÈNE. C'est "pourquoi elle ne peut poursuivre sans autorisation."

Dalloz, Rep., vo. Cout. de mar., Nos. 1970, 1971.

Je conclus donc sur ce point que l'action en nullité de testament n'est pas un acte de simple administration, que la femme separée ne peut intenter une telle action sans autorisation.

2o. L'autorisation étant requise, en quelle forme doit-elle se donner?

L'article 177 du Code nous donne les deux seuls modes d'autorisation de la femme par le mari:

1o. Le concours du mari dans l'acte; et 2o. le consentement *écrit* du mari.

La demanderesse a soutenu à l'audition de la cause qu'elle était autorisée, et que ce qui le démontre c'est la déclaration qu'elle fait elle-même dans son action qu'elle est autorisée. Or, il est évident que le Code exige plus que cette déclaration de la femme elle-même, puisqu'il requiert le concours du mari dans l'acte, c'est-à-dire sa présence comme partie dans la cause, ou à défaut son consentement *écrit*.

Et *Merlin* (Rep. vo. Autor. marit., sec. 6, art. 3, §4) dit sur ce point: "*Inutilement la femme se serait-elle dite autorisée* par son mari, si l'autorisation n'était pas constatée soit par sa *signature apposée à l'acte même qui en contiendrait* l'énonciation, soit par un *acte antérieur et séparé*, cette énonciation ne ferait preuve ni contre le mari, *ni contre la femme elle-même*."

Ailleurs, l'auteur dit encore: "Si la femme a plaidé soit comme demanderesse, soit comme défenderesse, sans autorisation, et qu'il est intervenu un jugement à son désavantage, *ce jugement peut être annulée*." (C. N. 225.)

Nous irons plus loin, et nous dirons que sous l'empire de notre Code, non-seulement ce jugement pourrait être annulé, mais qu'il est *radicalement nul*. Et c'est ce que nous allons établir en examinant la 3e question.

3o. Le défaut d'autorisation peut-il être couvert par une intervention ou ratification subséquente du mari?

Il est de principe que l'autorisation maritale ne peut se donner qu'à deux époques déterminées, *avant* ou *au moment même* de l'acte que le mari autorise. L'autorisation doit donc être *antérieure* ou *concomitante*; postérieure elle est sans effet. L'art. 176 dit: le concours du mari dans l'acte, c'est-à-dire son *autorisation actuelle*, ou son consentement par écrit, c'est-à-dire son consentement *antérieur*.

Et l'article 183 du C. C. nous donne la sanction de cette règle en disant:

"Le défaut d'autorisation du mari, dans les cas où elle est requise, comporte "une *nullité que rien ne peut couvrir* et dont se peuvent prévaloir tous ceux "qui y ont un intérêt né et actuel."

Cet article reproduit exactement l'ancien droit, et il va beaucoup plus loin que les dispositions du Code Napoléon sur ce point.

Emma Lemontagne and L. J. Lamontagne.

Dalloz—Rep. vo. *Mariage*, No. 773, dit : .... " La Coutume de Paris était " très rigoureuse à cet égard. Elle réputait les obligations que la femme con- " tractait, sans autorisation, *radicalement nulles*, même après la mort du mari, " et même elle reconnaissait aux tiers le droit d'invoquer cette nullité ; enfin, " *elle n'admettait pas que cette nullité peut être couverte par une ratification* ; " en sorte que la ratification donnée par la femme après le décès du mari n'eût " valu que comme *obligation nouvelle*."

Pothier—Puissance mar., No. 5, dit la même chose : " L'autorisation du " mari étant requise pour habiliter la femme à contracter, tant qu'elle est sous " puissance de mari, elle est, sans cette autorisation, absolument incapable, la " nullité des contrats et autres actes qu'elle a faits sans cette autorisation est " une *nullité absolue qui ne peut être purgée ni couverte* par la *ratification* " que la femme ferait de cet acte depuis sa viduité. Cette ratification ne peut " donc rendre valable l'acte qui a été fait sans l'autorisation de son mari ; *elle* " *ne peut valoir que comme un* NOUVEAU CONTRAT, *qui ne peut avoir d'effet* " *que* DU JOUR QU'ELLE EST INTERVENUE."

Il ne peut donc y avoir aucun doute sur ce dernier point. La loi frappe de *nullité absolue* l'acte de la femme non autorisée par le mari. Cet acte de la femme la loi l'ignore, c'est une nullité, c'est le néant, et on ne ratifie pas le néant!

La demanderesse, dans cette instance, n'a donc qu'une seule voie à suivre : recommencer son action, mais avec l'autorisation de son mari.

Judgment confirmed, Mathieu J, dissenting.

F. X. Archambault, Q. C., attorney for plaintiff.

The defendant did not appear.

COUR DE CIRCUIT, 1891.

(Dans et pour le Comté de Huntingdon).

13 MARS 1891.

Présent: BELANGER, J.

LOUIS NAPOLÉON MASSON,

DEMANDEUR ;

vs.

CHARLES P. McGOWAN,

DÉFENDEUR ;

ET

LE DIT CHARLES P. McGOWAN,

DEMANDEUR INCIDENT.

Officier public.—Action en dommages.—Avis de poursuite.—Compensation.

JUGÉ :—Que la question de savoir si un officier public peut invoquer sa qualité, et se plain du défaut de l'avis mentionné dans l'art. 22 C.P.C., ne se présente qu'au cas où il aurait commis de bonne foi, l'acte dont on se plaint et que la bonne ou mauvaise foi est une question qui affecte le mérite et ne peut être décidée qu'avec le mérite de la cause. (1)

L. N. Masson vs. Charles P. McGowan et Le dit Chas. P. McGowan.

Qu'en vertu de l'article 151 C.P.C., un défendeur a droit d'opposer à la demande principale une demande incidente, quoiqu'elle ne découle pas de la même source.

Que le défendeur ne peut opposer en compensation à une demande claire et liquide des dommages non liquidés, même lorsqu'il les réclame par une demande incidente qui est jugée en même temps que la demande principale (2).

JUGEMENT.

La Cour, ayant entendu les parties en cette cause, tant sur la motion du défendeur, demandant le rejet de partie des allégations du demandeur, dans sa réponse au deuxième plaidoyer du défendeur, sur la motion du demandeur incident, demandant le rejet de partie des allégations ou moyens invoqués par le défendeur incident, dans et par son plaidoyer en droit, et dans son second plaidoyer, sur la défense en droit plaidée par le défendeur incident à l'encontre de la demande incidente du défendeur incident, que sur le mérite de la demande principale et de la demande incidente, vu et examiné les plaidoiries écrites, tant sur la dite demande principale que sur la dite demande incidente, ainsi que les dites motions, les pièces produites de part et d'autre, et la preuve, et sur le tout délibéré :—

Procédant à adjuger d'abord sur les dites motions ;

Considérant que les dites motions sont mal fondées en droit, attendu que la question de savoir si le demandeur principal et défendeur incident peut invoquer sa qualité d'officier public, et se plaindre du défaut de l'avis mentionné à l'article 22 du Code de Procédure Civile, ce n'est qu'au cas où il aurait commis l'acte dont se plaint le défendeur et demandeur incident, tant dans sa défense à l'action que dans sa demande incidente de bonne foi, et que la connaissance du fait de savoir s'il a agi en cela de bonne foi ou de mauvaise foi est une question qui affecte en même temps le mérite, tant de la cause principale que de la cause incidente, et partant, qui ne peut être soulevée et décidée qu'avec le mérite de la cause ;

Renvoie les dites motions avec dépens ;

Et procédant à adjuger sur la dite défense en droit ;

Considérant que la dite défense en droit est mal fondée, attendu qu'en vertu de l'article 151 du dit Code, le demandeur incident avait droit dans l'espèce, d'opposer à la dite demande principale la dite demande incidente, quoiqu'elle ne découle pas de la même source que la dite demande principale ; attendu de plus qu'il n'apparaît pas par la dite demande incidente que le dit défendeur incident, en commettant l'acte ou les actes dont il est question dans la dite demande incidente, a agi en sa qualité d'officier public, et attendu, enfin, qu'il ne suffit pas que le dit défendeur incident ait agi en sa qualité d'officier public pour avoir droit à l'avis mentionné au dit article 22 du dit Code, mais qu'il faut qu'il ait agi de bonne foi, tandis qu'il est allégué formellement qu'il a agi, non seulement illégalement mais malicieusement et de mauvaise foi ;

(1) V. Pacaud vs. Quesnel, 10 J., p. 207 ; S.R.B.C., ch. 101, s. 8 ; Morriset vs. La Corporation du village de Bienville, 5 R.J. Q., p. 362 ; La Corporation de la paroisse de St. Joachim vs. Valois et al., 7 J., p. 83 ; Les commissaires d'école vs. St. Pierre et al., 2 L. N., p. 243 ; Ferland et vir vs. Latour, 6 R.L., p. 77.

(2) V. art. 1188 C.C., Verret vs. Magor, 17 R.L., p. 94.

L. N. Masson vs. Charles P. McGowan et Le dit Chas. P. McGowan.

Renvoie la dite défense en droit avec dépens ;

Et procédant à adjuger sur le mérite tant de la demande principale que de la dite demande incidente ;

Considérant qu'à la date de l'institution de l'action principale en cette cause, le défendeur principal était endetté envers le demandeur principal en la somme de cent cinquante piastres, pour deux quartiers de loyer échus le premier Novembre dernier, en vertu du bail consenti par le demandeur principal au défendeur principal, et de sa continuation, passé à St. Anicet, le 14 Mai 1887, devant Mtre. J. J. Crevier, notaire, de l'immeuble décrit au dit bail, en la déclaration du dit demandeur principal, comme suit : (*Désignation de l'immeuble.*)

Considérant que le plaidoyer de compensation plaidé à la dite action par le défendeur principal est mal fondé en droit, attendu que la demande compensatrice contenue au dit plaidoyer est pour dommages non liquidés et ne découlant pas de la même source que la dite demande du demandeur principal, et attendu d'ailleurs, que le dit défendeur principal n'a pas établi en preuve les allégués essentiels de son dit plaidoyer, et nommément, que le refus du conseil municipal de St. Anicet de confirmer le certificat pour licence d'auberge présenté par le dit défendeur principal fut dû à l'assertion qu'aurait faite le dit demandeur principal, dans une séance du dit conseil, que le dit bail allait expirer au mois de Mai suivant et ne serait pas renouvelé ;

Considérant que le dit demandeur incident n'a pas non plus établi en preuve les allégués essentiels de sa dite demande incidente, et nommément qu'il ait souffert aucuns dommages à raison des paroles imputées au dit demandeur principal dans et par la dite demande incidente ;

Renvoie le dit plaidoyer de compensation ainsi que la dite demande incidente, avec dépens ; Déclare le dit bail résilié et annulé de ce jour, à toutes fins que de droit, et ordonne et enjoint au dit défendeur principal de remettre et livrer la possession du dit immeuble et de ses dépendances au dit demandeur principal, sous cinq jours de la signification à lui être faite du présent jugement, et qu'à défaut par lui de ce faire dans ce délai, et ce délai passé, ses meubles, effets et animaux garnissant le dit immeuble et ses dépendances, soient mis hors des dites prémisses, mis sur le carreau, sous l'autorité de cette cour ;

Condamne le défendeur principal à payer au dit demandeur principal la dite somme de $150 avec intérêt du 22 Décembre 1890, avec dépens, déclare la saisie-gagerie pratiquée en cette cause sur les dits meubles, effets et animaux du dit défendeur principal bonne et valable, et tenante, aussi avec dépens contre le dit défendeur principal. (1).

McCormack, Duclos and Murchison, avocats du demandeur.

D. A. Robertson, avocat du défendeur et demandeur incident.

(1) Le jugement fut porté en révision, et la Cour de Révision l'a confirmé sans en adopter les motifs. Elle a seulement jugé que le défendeur n'avait prouvé ni son plaidoyer de compensation ni sa demande incidente.

COURT OF REVIEW, 1890.

MONTREAL, DECEMBER 30TH, 1890.

Present :—JOHNSON, C.J., WURTELE and OUIMET, J.J.

JOHN GOLDIE,

PLAINTIFF;

vs.

STANISLAS FILIATRAULT,

DEFENDANT.

G. brought an action to revendicate a safe in the possession of F, which he alleged to be his property, but which F claimed he bought from one L. F, by his plea alleged that he was misled by L, who represented himself to be the owner, and that he would give up the safe on being repaid $38, railway fare, and $203 amount paid to L for the safe. The judgment of the lower Court dismissed G's action.

HELD :—(In Review) Reversing the judgment of the Court of first instance, that the dealings between the parties did not come within the rules relating to commercial matters. That as L was not the owner of the safe he could not give a good title to F.

That if F were misled by L, his recourse for what he paid was against L only, and the fact of his having paid L could not defeat G's right to recover back his property.

The facts of this case appear from the summary given above and from the remarks of His Honor Mr. Justice Johnson in delivering the judgment of the Court, which are as follows :—

JOHNSON, C.J.—This is a revendication by the plaintiff of a safe which he alleges to be his property, in the hands of a third party who says he bought it in good faith from one Legris, who had possession, and whom he dealt with as being the owner.

Of course if Legris was the owner, having the right to sell, there would be an end of the plaintiff's case, but the defendant's plea does not allege that he acquired from the owners, but merely that he was misled by Legris' representations, and by seeing his name painted on the safe when it was at the station or the freight house of the railway, into thinking him to be the owner; and he offers to give it up upon the plaintiff's reimbursing him $38, the charges of the railway, and $203, which he says he has payed Legris. The question of good faith, therefore, is entirely immaterial; it would only be helpful if this were a case of loss or theft of the safe, when, if it were bought in good faith in a fair or market, or from a trader dealing in such things, the owner could not reclaim it without reimbursing the purchaser. This is the express law laid down by art. 1489. Again, if the thing, though not lost or stolen, has been sold by Legri. to the defendant, the sale may be valid, if it is a commercial matter, or if the seller afterwards become owner of the thing. These are the express words of the art. 1488; but neither one condition nor the other is alleged. There is confusion a[illegible] o the law applying to articles that have been stolen, which this safe is not pretended to have been, and as to the condition [illegible] transaction being a commercial matter, which again it is not alleged to [illegible] and without pretending to the

John Goldie vs. Stanislas Filiatrault.

benefit of either articles 1488 or 1489, a mere right of retention is set up until reimbursement of what he has paid.

When we come to the judgment upon the whole case, it appears equally unsatisfactory; it gives the defendant all that he claimed, for a reason that did not entitle him to ask it; that is, it dismisses the plaintiff's action entirely, though the defendant only pretended to a right of retention till he was repaid; and it did not give to the plaintiff what the defendant admitted he had a right to, viz., restitution upon that condition.

Here then are the two parties to the case: the plaintiff saying, "the safe is mine," the other answering: "no, I bought it thinking my vendor had a right to sell; but take it back if you like, on paying me what it cost me." The judgment then tells the plaintiff he has no right of property at all, and puts him out of court entirely, upon the ground that he misled the defendant into dealing with Legris as owner, by having Legris' name upon this safe when he filled his order, and sent it to him by rail.

If the defendant was deceived or was ignorant that Legris was not the owner of the safe, which I much doubt, he had his action against him under art. 1487, and he had nothing else. He could not acquire a title to the property, if it was still the plaintiff's property, by any deception practised by Legris. The only question then would be whether, in his contract with Legris or afterwards, the plaintiff had done anything that could have the effect of making him part with his right of property in the safe. I do not find that he has. Legris made his own [illegible] when he sent his order; and plainly stipulated that the right of property should remain in the plaintiff till the safe was paid for. This is admittedly true [illegible] very terms of the defendant's plea. Then, as to the name being put on the safe, it is not, it could not, be seriously urged, I think, that the plaintiff meant anything more than to oblige his customers by doing that. Indeed, I do not understand that matter to be urged as a renunciation of title, but merely a tending to mislead; but, as I said just now, if Legris misled him by appealing to any such evidence as that, the defendant had his recourse; and more than that, if the defendant means to urge Legris' ownership, and consequent right to sell, he should have pleaded it.

The position taken by the defendant at the hearing was the same as that taken by the *mis en cause* in the case of the Canadian Subscription Co. *vs.* Donelly and Shallow, *mis en cause*, Montreal Law Reports, 6, sec. 348, viz., that a promise of sale with tradition is equivalent to sale. I would overrule that here, as we did there, on the ground that it is not a promise of sale, but an actual sale with a suspensive condition which did not operate title in the purchaser until he had fulfilled it. If the question of good faith arose at all I should be decidedly against the defendant, but it does not arise in the present case, the point being not whether a thing lost or stolen has been bought in good faith, as under article 1489, for the defendant's plea alleges nothing of the kind, it only says he bought in good faith from a person he believed to be owner, which would certainly not give him a title unless this was a commercial transaction (which is not even contended), falling under article 1488.

I think this case is identical with that of the Canadian Subscription Co. *vs.* Donelly, as far as the right of the vendor to sell what was not his is concerned. If it does not fall within the exception of articles 1488, 1489 and 1490, the plaintiff has not lost his property, and may revendicate. In Donelly's case we alluded to a principle emitted by the Court of Appeal in B[illegible] *vs.* Lemieux, to the effect that while the contract was subsisting th[illegible] be no revendication; but that was convincingly overruled both i[illegible] du Sacré Cœur, and also later in McLellan *vs.* Grange, [illegible] found in Donelly's case that there was the equivalent of [illegible]sition, if it had been necessary, which we did not say it was.

I think, therefore, upon the whole of t[illegible] plaintiff should have judgment, and the holding below be reversed. [illegible]ntiff's title, as between himself and Legris, is perfect. If the defendant can show any title, it can only be by showing that he comes within the exceptions having the effect of transferring property of which the vendor was not owner.

Judgment reversed, and defendant ordered to deliver up the safe within fifteen days, upon being reimbursed the sum of $38, which he paid the railway as the plaintiff could not have got it back without paying that, and costs.

A. R. Oughtred, attorney for plaintiff.

Ouimet & Co., attorneys for defendant.

COURT OF QUEEN'S BENCH, 1889.

MONTREAL, 28TH MAY, 1889.

Present:—TESSIER, CROSS, CHURCH, BOSSÉ, and DOHERTY, J. J.

WILLIAM BARWELL, ET AL.,

(Defendants in the Court below),

APPELLANTS;

AND

A. S. WALLBRIDGE,

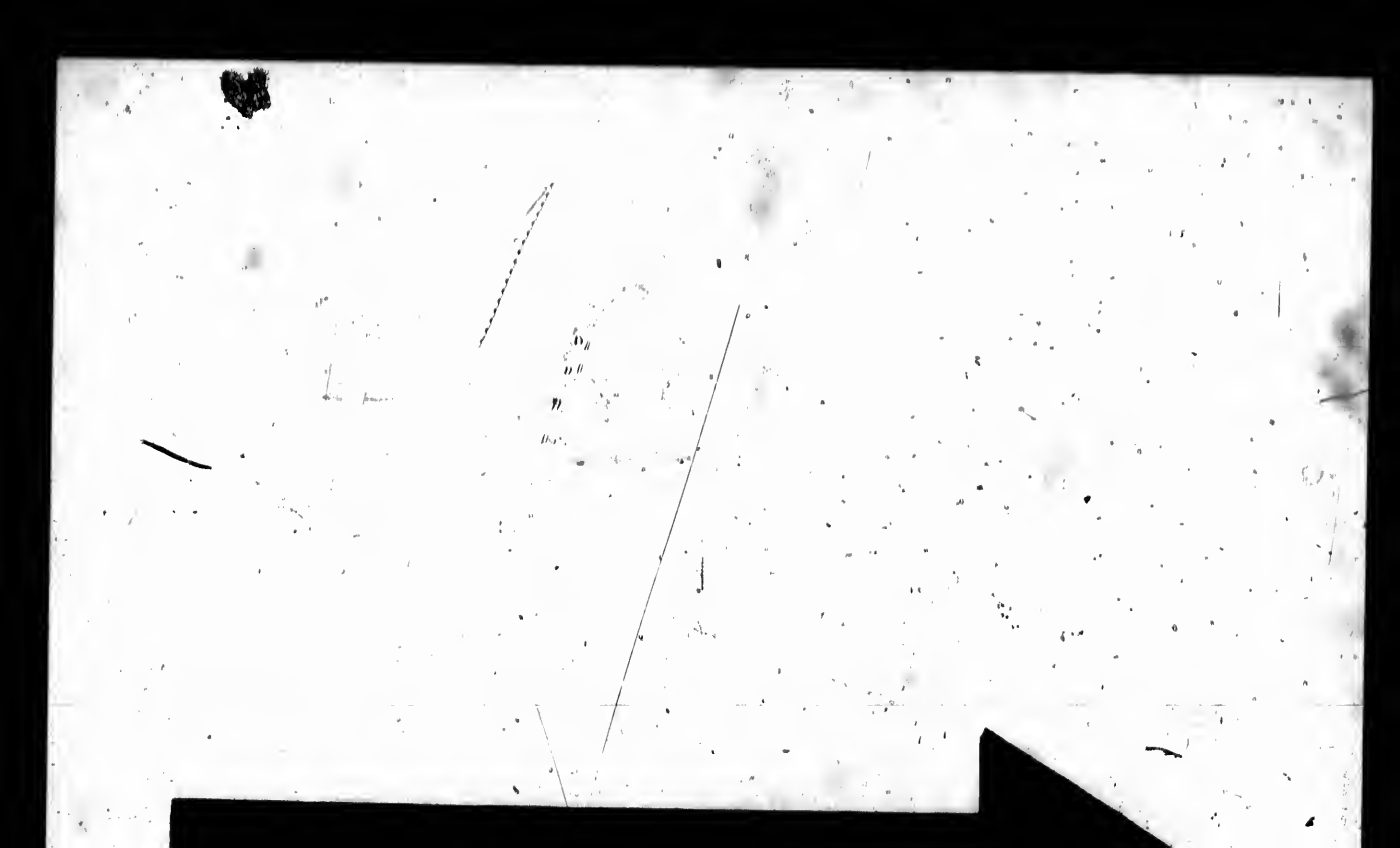
(Plaintiff in the Court below),

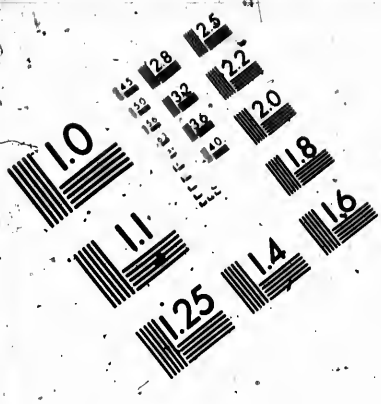
RESPONDENT.

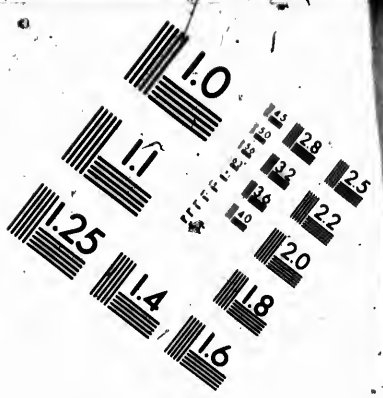
HELD:—That where trustees had taken possession of a railway under certain statutory powers, which authorized them to do so in the event of default on the part of the railway company to pay interest on the bonds of the road for a period of 90 days after it became due, which default had occurred; such trustees were not to be considered pledgees of the road, and they were not liable for necessary supplies furnished to the road before they took possession, even although such supplies were furnished at a time when the Company was in default to pay such interest, and the trustees could have taken possession of the road under the said Statute.

This was an appeal from the following judgment of the Superior Court, Montreal, rendered by his Honor Mr. Justice Jetté, on the 17th November, 1887,

"Attendu que le demandeur se pourvoit contre les défendeurs, en leur qualité de syndics (trustees) de la Compagnie du Chemin de Fer du Sud-Est (The South Eastern Railway Company), pour leur réclamer une somme de sept mille







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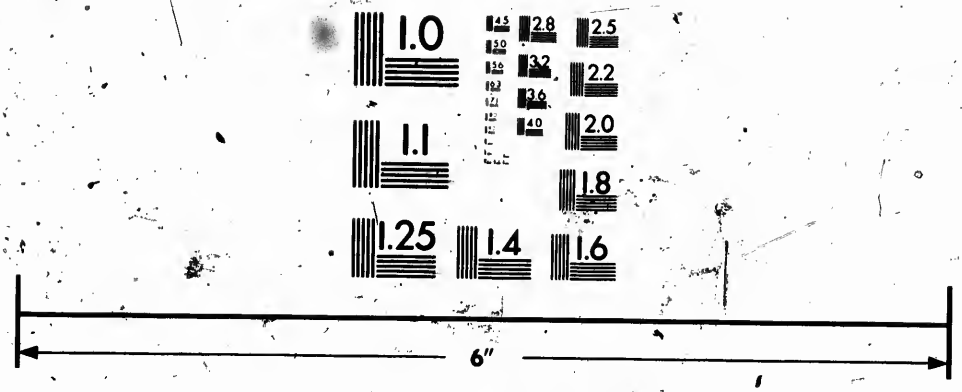

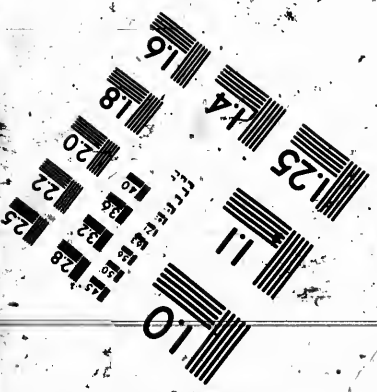

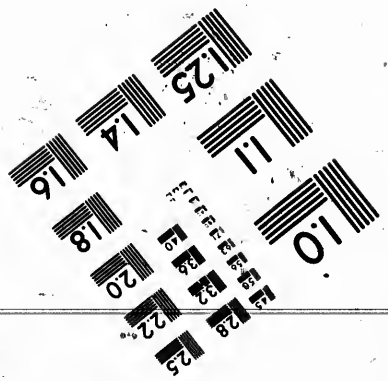

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Wm. Farwell et al and A. S. Wallbridge.

neuf cent soixante et dix piastres et quatre-vingt-huit centins, pour laquelle il a obtenu jugement le seize novembre mil huit cent quatre-vingt-trois, contre la dite Compagnie, mais dont il n'a pas été payé ; attendu que le demandeur allègue au soutien de sa demande, et qu'il appert au statut passé aux fins ci-après mentionnées, qu'en mil huit cent quatre-vingt, la législature a autorisé la dite Compagnie de chemin de fer à règler des engagements antérieurs, au moyen d'une émission de bons hypothécaires, au chiffre de deux millions de piastres, garantis par l'affectation de tous les biens de la Compagnie, et le transport et cession de sa franchise et de tous ses biens, droits, revenus, profits, privilèges, etc., à des syndics ou fidei-commissaires choisis pour la protection des intérêts des porteurs de ces bons ; permettant aussi de régler et de déterminer avec les dits syndics qui d'eux ou de la Compagnie aurait l'administration du dit chemin, pendant l'existence de la dette ainsi créée, et, si telle administration restait à la Compagnie, de pouvoir l'en priver, au cas de non paiement de l'intérêt des bons, pendant plus de quatre-vingt-dix jours ;

" Attendu que le demandeur allègue, en outre, que le douze août mil huit cent quatre-vingt-un, un acte de fidei-commis (trust-deed) fut fait, par la Compagnie, aux termes de cette loi, transférant le dit chemin à des syndics, et tout en laissant l'administration à la Compagnie, autorisant ses syndics à s'en emparer, au cas prévu de non-paiement de l'intérêt des bons, et que le cinq octobre mil huit cent quatre-vingt-trois, à la demande de George Stephen, porteur de 1350 de ces bons, et à qui il était dû cent quatre-vingt mille piastres, pour intérêt échu depuis plus de quatre-vingt-dix jours, les syndics du dit chemin, pour le temps d'alors, en enlevèrent l'administration à la Compagnie, et ont exploité le dit chemin depuis, tant par eux-mêmes que par les défendeurs, qui sont aujourd'hui ceux chargés de l'exécution de ce fidei-commis ;

" Attendu enfin que le demandeur allègue que le transport de la franchise et de la charte et des biens et droits de la dite Compagnie comportait obligation, pour les syndics, de maintenir le dit chemin en opération ; que les travaux par lui faits et les matériaux par lui fournis étaient nécessaires pour l'exécution de cette obligation, et que, par suite, les défendeurs, ès qualité, en ont bénéficié et sont tenus de l'en indemniser ;

" Attendu que les défendeurs plaident : 1o. Qu'il y a chose jugée, sur la demande, par suite d'un jugement du six mai mil huit cent quatre-vingt-quatre, renvoyant une action semblable mue entre les mêmes parties ; 2o. que la garantie que la législature a autorisée, par la loi de mil huit cent quatre-vingt en faveur des porteurs de bons représentés par les syndics, ne constitue qu'un droit hypothécaire sur le chemin et les biens de la Compagnie, avec premier privilège avant tous les autres créanciers, et n'a pas eu pour effet de dépouiller la Compagnie de la propriété du dit chemin, ni du droit de l'exploiter à sa guise, tant que la dette ou les intérêts n'étaient pas échus, et que la prise de possession par les syndics n'était autorisée que pour assurer l'application des revenus au paiement des intérêts arriérés, mais sans obligation ni responsabilité quant aux dettes antérieures contractées par la Compagnie elle-même ; et que la créance du demandeur ayant pris naissance pendant l'exploitation du chemin par la Compagnie, et avant la

prise de possession par les Syndics, ceux-ci n'ont ni le pouvoir ni l'obligation de payer cette dette.

" Adjugeant, d'abord, sur l'exception de chose jugée ;

" Considérant que bien que le jugement invoqué par les défendeurs ait été prononcé sur une demande mue entre les mêmes parties, ayant le même objet et fondée sur la même cause, il appert néanmoins au dit jugement que cette première demande n'a été renvoyée que sauf recours ; et que cette réserve laissait subsister en entier le droit du demandeur de se pourvoir de nouveau contre les défendeurs ;

" Considérant que les défendeurs ne se sont pas plaints de ce jugement, et l'ont au contraire accepté, et qu'ils sont par suite liés par l'acquiescement qu'ils y ont donné ;

" Considérant, en conséquence, que les défendeurs sont mal fondés à invoquer le dit jugement du seize mai mil huit cent quatre-vingt-quatre, comme ayant réglé définitivement la contestation soulevée entre eux et le demandeur ;

" Renvoie la dite exception de chose jugée, avec dépens ;

" Adjugeant sur le fond ;

" Attendu que le transport et cession de biens de la dite Compagnie de Chemin de Fer du Sud-Est à des syndics, pour la garantie du paiement en capital et des intérêts des non-hypothécaires par elle émis, que la loi de 1880 a autorisé, constitue un véritable nantissement ou antichrese, avec cette modification, que les syndics pouvaient laisser à la Compagnie l'administration des biens dont ils étaient néanmoins les nantis, tant que l'intérêt des bons était payé ;

" Attendu qu'en droit le créancier antichresite est tenu à la conservation de la chose ou du bien dont il est nanti ;

" Vu l'article 1973 du Code Civil ;

" Attendu que la maintenue en opération d'un chemin de fer est une des obligations que la loi impose à toute compagnie, pour la conservation de sa charte, franchise, droits et privilèges ;

" Attendu qu'il est établi, dans l'espèce, que les travaux faits par le demandeur et les matériaux par lui fournis, et dont il réclame maintenant le paiement, étaient nécessaires pour la maintenue en opération du chemin de fer de la dite Compagnie ; et que, par suite, ces travaux et ouvrages du demandeur ont servi et été utiles pour la conservation et protection des droits de la Compagnie et de l'existence même de la chose donnée en nantissement ; attendu qu'en faisant ces travaux, le demandeur a accompli une obligation qui incombait aux créanciers nantis, et leur a procuré un bénéfice dont il est fondé à leur demander compensation ;

" Attendu, en outre, ainsi qu'il appert au dossier, qu'il était dû au porteur de bons Stephen, dès le deux avril mil huit cent quatre-vingt-deux, soixante mille piastres d'intérêt ; que le deux octobre suivant, il lui était dû soixante mille piastres de plus ; et que le deux avril mil huit cent quatre-vingt-trois, il lui était dû une autre somme de soixante mille piastres, ces diverses sommes formant réunies celle de cent quatre-vingt mille piastres ; que c'est pendant que ces intérêts étaient en souffrance, savoir, de mai huit mil huit cent quatre-vingt-

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deux, à septembre mil huit cent quatre-vingt-trois, que le demandeur a été requis, par la compagnie, de faire les travaux nécessaires qu'il a accomplis, et que, par suite, l'avantage résultant de ces travaux a bénéficié exclusivement les porteurs de bons, dont le gage a été ainsi conservé et les intérêts sauvegardés;

"Attendu, enfin, qu'en stipulant à l'acte de fidei-commis du deux août mil huit cent quatre-vingt-un, que la dite compagnie conserverait l'administration du dit chemin, tant que l'intérêt sur les bons serait payé, les syndics sont censés avoir autorisé les dépenses nécessaires à l'exploitation du chemin; que, dans tous les cas, l'exécution de travaux nécessaires à l'exploitation de ce dit chemin constituait un acte de gestion utile de la chose dont les dits syndics étaient nantis, et engageait leur responsabilité, et qu'en conséquence les dits défendeurs sont mal fondés à se refuser au paiement de la créance du demandeur dont le chiffre et l'opportunité ne sont pas contestés;

"Renvoie l'exception au fond et défense des défendeurs, ès-qualité, et les condamne à payer au demandeur la dite somme de sept mille neuf cent soixante-dix piastres et quatre-vingt-huit centins, avec intérêt sur cinq mille neuf cent vingt et une piastres et seize centins, du vingt-cinq septembre mil huit cent quatre-vingt-trois, et sur deux mille quarante-neuf piastres et soixante et douze centins, du trois octobre mil huit cent quatre-vingt-trois, jusqu'à paiement, et les dépens."

The Court of Queen's Bench, Mr. Justice Tessier dissenting, reversed the above judgment, for the reasons set forth in the remarks of the judges and the considerants of the judgment, which are as follows:—

Cross, J.—The South Eastern Railway Company was incorporated by the Act of Quebec, 29 and 30 Vic., cap. 100. It was given authority to issue mortgage bonds to the amount of $750,000, and was subsequently amalgamated with the Richelieu, Drummond & Arthabaska Counties Railway company.

In 1880 the Act 43 and 44 Vic., cap. 49, was passed, which announced in its preamble that bonds had been issued by the [illegible]-mentioned railway company to the extent of $150,000 and £640,000 sterling, and by the last-mentioned railway company to the extent of $410,000. That the amalgamated company had been unable to pay the interest on the bonds, and that their earnings were insufficient for the purpose. That the great majority of the bondholders had agreed to accept therefore new bonds to carry first mortgage and charge upon the entire property of the company. Whereupon it was, among other things, enacted that it should be lawful for the company to issue mortgage bonds, not to exceed in all two millions of dollars, and for the purpose of securing payment of the same and the interest thereon, to convey the railway franchise and all property rights and interest owned, possessed or enjoyed by it, and the tolls, income, profits, improvements and renewals thereof, and all additions thereto, to trustees, in trust for that purpose, such bonds and conveyance to be executed and issued at any time under the authority of a vote of the shareholders passed at any meeting of such shareholders legally called, the trustees to be designated by the shareholders at such meeting, to be made in such form and to be executed in such manner as the shareholders at such meeting should direct; and the com-

pany and the trustees were therein among other things authorized to stipulate as to who should have the possession, management and control of the franchise and other property therein conveyed, and receive the tolls and income thereof, and how the same should be applied and disposed of while such bonds should be outstanding as well before as after default should be made in the payment thereof or of any of the coupons thereto attached, and might also stipulate therein how, in the event of such default being made, the company might be divested of all interest, equity of redemption, claim or title on or to the said railway franchise and other property therein conveyed, and how the same might become vested absolutely in the said trustees, or the holders and owners of the said bonds and interest thereon, and might make such other provisions therein—not contrary to law—as might be considered necessary or convenient for the purposes of such trust.

By section 5, the trustees were authorized and empowered as such trustees, when as often as default should be made in the payment of said bonds or the interest coupons thereto attached, to take possession of, and run, operate, maintain, manage and control the said railway and other property conveyed to them as fully and effectually as the company might do the same.

By section 6, in the event of default being made in the payment of the bonds or any of the coupons thereto attached, and upon the performance of all things on the said conveyance stipulated and set forth as being necessary to divest the company of all interest, right of redemption, claim or title in or to said railway and other property therein conveyed, the company should be absolutely divested of all interest, right of redemption, claim or title in or to the said railway franchise and other property, and the same should thereupon immediately be and become vested absolutely in the said trustees or the holders and owners of the said bonds, as in the said conveyance might be provided.

By section 7, it was declared that such conveyance should be to all intents valid, and create a first lien, privilege and mortgage upon said railway. It was further, by section 10, expressly declared that neither the then present proprietors of the said railway company nor those contemplated by the said act should have the power to close or cease running any part of the said road.

Trustees appear to have been regularly named according to the provisions of this act, and, with due authority of the company and the trustees, representatives of the bond holders. A deed was executed, bearing date the 12th of August, 1881, purporting to be the conveyance contemplated by the above cited act, making provision for the issue of the bonds authorized by the said act, and conveying its railway franchise and all property rights and interest owned, possessed or enjoyed by it, and the tolls, income, profits, improvements and renewals thereof and all additions thereto, and by said deed, which was styled indenture of mortgage, it was among other things provided that until default be made in the payment of the said bonds or in the payment of some portion of the interest thereon, and such default should continue for the space of ninety days, the company would be entitled and have the right to retain the possession of all the railway property rights and interest thereby conveyed, and to run,

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operate and manage the same, and to take and receive all and singular the tolls, receipts, income and profits of the same, and the business thereof for their own use, benefit and advantage, in all respects, as fully and absolutely as if the said indenture had not been made, anything therein contained to the contrary notwithstanding. And if default should be made in the payment of the said bonds or any of them, or the interest thereon or any part thereof, and such default should continue for the space of ninety days, then and so often as any such default should happen and should continue for the term aforesaid, the trustees would be entitled and have the right to take and receive the immediate possession of said railway and all the property rights and interests thereby conveyed, or intend to be, and to run, operate and manage the same, and to take and receive all the tolls, receipts, income and profits of the same and the business thereof.

Another provision was also thereby made for the final forfeiture of the equity of redemption, and all title of the company to or in said railway franchise and property, in the event of the net earnings of the road being insufficient to pay the interest on the bonds, and the default of payment thereof continuing for the space of six months. Bonds were duly issued according to the provisions of said act.

The railway company remained in the possession, control and management of the road, and in receipt of the revenues thereof up to the 5th of October, 1883, when default having been made in the payment of interest on the bonds, a default which had continued for a considerable time beyond the ninety days specified in the conveyance or indenture of mortgage, the trustees took possession of the road, assumed the management thereof and the receipt of the revenue.

The respondent, Wallbridge, who is a manufacturer and furnisher of railway supplies, had in the meantime been furnishing the railway with supplies and doing repairs for the company to a large amount in value, for which he had not been paid. He sued the railway company for his amount, and on the 10th November, 1883, obtained judgment against the company for $7,970.88, besides interest and costs.

He endeavored to enforce payment of that judgment by execution against goods and lands. To the former there was a return of *nulla bona*, and to the latter there was an opposition by the trustees claiming the real estate. He, thereupon, on the 15th May, 1884, brought an action against the trustees, assuming that they were liable for what he had furnished to the company.

This action, after proof and hearing on the merits, was, on the 29th November, 1884, dismissed, *sauf recours*, however, as expressed in the judgment.

The present action was instituted by him on the 14th September, 1886, for the same account for which he had got judgment against the railway company, and for which he had sued the trustees in the action that was dismissed. The present action, however, contains additional allegations, to the effect that the work and supplies furnished by Wallbridge were necessities without which the railroad could not have been operated, and that the trustees, being bound to run the road, were liable for these supplies; also, that they added to the value of the

road of which the trustees had the benefit; and the trustees being bound to run the road, the railway company were their agents in doing so.

To this action the trustees pleaded, first, *chose jugée;* second, that the conveyance or indenture of mortgage was executed strictly in conformity to the provisions of the statute 43-44 Vic., c. 49, and operated as a mortgage and trust lien on the road, with power to take possession after default made, as declared in the statute and as regulated by the deed which they had conformed to, and that they could not be liable for supplies furnished by Wallbridge before they got possession, his claim being all for furnishings prior to that date, and until they got possession the road was run by and in the interest of the railway company.

The facts were established as above narrated and alleged in the pleadings by admissions and otherwise, the decision of the case turning chiefly on the interpretation to be given to the statute and the deed of conveyance or indenture of mortgage, of which a copy is produced.

The judge of the Superior Court seems to have held that the deed in question, as interpreted by our law, amounted to what was well known in the Roman law as an antichrese, recognized also in our system, although rarely practised, operating in effect as a pledge put into the hands of the trustees, and vesting them with the proprietorship from the date of the deed. Being therefore pledges, they were, from the date they became so bound to see to the conservation of the pledge, consequently liable for necessary supplies from the date of the indenture in question; he consequently condemned the trustees, now appellants, by his judgment to pay the amount sued for.

I am unable to take the same view of the case. The statute is not happily worded, but I think the substance of its meaning is sufficiently apparent. It provides, sec. 1, for what is therein termed a conveyance of the property and franchises of the road, but evidently not for an immediate transfer of possession, because in sec. 5 provision is only made for that possession in case of default being made in the payment of the bonds or interest, and sec. 6 provided that a further step may be taken by the trustees to wholly defeat and forfeit the equity of redemption and any reversionary rights which the railway company might still be supposed to have in the property, notwithstanding the first default, this second forfeiture to be put in force in case the revenues of the road in the hands of the trustees should prove insufficient to pay the interest on the bonds.

It is true that by sec. 4 the company and the trustees were empowered to stipulate in the conveyance as to who should have the possession, management and control of the said franchise and other property therein conveyed, and receive the tolls and income thereof, and how the same should be applied and disposed of while such bonds were outstanding, as well before as after default. And, although not under any obligation positively to provide for who should receive the revenues until default should be made, they nevertheless did so provide on said conveyance as indenture of mortgage, that, until default was made and continued for ninety days, the railway company would be entitled to possession to operate and manage the road, and to take and receive all and singular the tolls, receipts, income and profits of the same, which was reasonable, seeing that the road was then being run at the risk and for the profits of the railway company.

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It is also urged that the trustees are bound to run the road, and, therefore, liable for the necessary supplies for that purpose; but the provision in the statute is not that the trustees shall be bound to run the road, but that neither the proprietors at the time of the passing of the statute, 24th July, 1880, viz., the railway company, nor those contemplated under the act, viz, the bondholders or their representatives, should they become proprietors, should have the power to close or cease running any part of the said road.

It, of course, applied to the trustees from the time they got possession, and only from that time.

It is very obvious to whom Wallbridge gave credit and who was his debtor. What is proved by the suit he first brought against the railway company? They were his direct and his only direct debtors, and in suing them it seems to me he exhausted his direct remedy. He could not pretend that he furnished both the company and the trustees, one of them only could be his debtor, and he declared who that was by his suit. They represented interests quite opposed to each other. It would, of course, be quite different if he could show that he had a privilege like the privilege of vendor for the unpaid price of a thing which he could identify and follow, and show that nothing had occurred to defeat his privilege. He might then follow the specific thing, and require its possessor to make option to relinquish it to be sold for his benefit, or in default to pay his claim.

To return to the operation of the conveyance or indenture of mortgage executed in favor of the trustees, it may be noted that by sec. 4 it was permitted to be made in such form and executed in such manner as the shareholders at their meeting should direct; it was to be to all intents valid, and create a first lien, privilege and mortgage upon the railway and other property thereby conveyed.

It is not surprising that under the circumstances the form of an English mortgage should have been chosen, one that is still every day practised with regard to lands in the Townships, and which is perfectly valid and sanctioned by statutory enactment [see Con. Stat. for L. C., cap. 35, sec. 4] in the light of which all difficulty should disappear as to the interpretation of the form used and the intention of the parties; besides, the statute now in question permits of any form being used that the shareholders might approve of.

It seems to me that much misapplied learning has been expended to interpret the deed in question. It may be a hardship for Wallbridge to suddenly find his security disappear. The statute is an extraordinary one, but the insolvency of the company was imminent. The very statute should have warned him of the danger of trusting to a broken reed; had the railway been sold at sheriff's sale it seems to me he must have lost his debts. It is to be regretted that for recent necessary supplies he should not have had security or refused to furnish, but losses are every day made in that same way. I can take no other view of this case than that Wallbridge's action is misdirected. He has no direct action against the trustees. The judgment he has obtained against them is erroneous; it must be reversed and his action dismissed.

CHURCH, J.—I am of opinion that there is more ground for the judgment of the majority of the Court in this case than in that of the Ontario Car & Foundry Company, and I do not enter a formal dissent in the present case as I shall do in the other, but I concur in this judgment with great reluctance and doubt. The railway was a going concern, and the statute provided that whoever had possession of the road should continue to operate it. The trustees did not take possession when they might have done so, and it seems to me they occupy a position different from that which they would have occupied if they had taken possession of the road on the first default. The trustees and the Company were both reponsible for the operating of the road, and it has been shown that the supplies furnished and the work done by Wallbridge were necessary to the operating of the road.

JUDGMENT.

The Court, considering that the work done by the respondent, and the materials by him provided, for which he claims payment by his present action, were not by him done or furnished to or for the appellants, but to and for the South Eastern Railway Company, to whom the respondent gave credit, and not to the appellants;

Considering that the respondent, in a former action, brought his suit against the said South Eastern Railway Company for the same causes of action for which he has brought the present action, and in the said former action obtained judgment against the said South Eastern Railway Company for the said causes of action, and has not made good or proved any cause of action against the appellants;

Considering, therefore, that there is error in the judgment rendered in this cause by the Superior Court at Montreal, on the 19th day of November, 1887, the Court of our Lady the Queen, now here, doth cancel, annul and set aside the said judgment; and, proceeding to render the judgment which the said Superior Court ought to have rendered, doth dismiss the said action of the said respondent Alexander Solomon Wallbridge, with costs, as well of the said Superior Court as of this Court, costs in this Court to be taxed as in a cause of the first class; the Hon. Mr. Justice Tessier dissenting.

Judgment reversed.

J. O'Halloran, Q. C., attorney for appellant.

Lafiamme, Lafiamme, Madore & Cross, attorneys for respondent.

COURT OF REVIEW, 1889.

MONTREAL, NOVEMBER 30TH, 1889.

Present :—JOHNSON, C. J., GILL and WURTELE, J. J.

ONÉSIME VINETTE,

PLAINTIFF;

vs.

JOSEPH PANNETON,

DEFENDANT;

AND

REV. JOHN JONES,

MIS EN CAUSE.

Lessor and Lessee Privilege on effects of Sub-Tenant.

HELD :—That where a lease contains a prohibition to sublet, the privilege of the lessor extends to all the effects of the sub-tenant which may be found on the premises.

That where the lessee has furnished the leased premises sufficient to secure the rent of the same, the lessor cannot prevent the lessee from making such disposition of the remainder of his effects as he may see fit.

The facts of this case are shown by the remarks of his Honor Mr. Justice Johnson in delivering the judgment of the Court, which are as follows :—

JOHNSON, J.—This action was taken on the 29th October, 1888, with process of *saisie gagerie par droit de suite*, for $175, being for the rent not yet due, but to come due monthly from October to April.

The defendant had removed his effects from the premises he had rented from plaintiff to the premises of the *mis en cause*, where they were seized. There is no doubt that at the time of this seizure the premises leased from plaintiff remained amply furnished with household effects and with merchandise belonging as well to the defendant as to his sub-tenant, Mrs. Cameron, and sufficient to secure the plaintiff's rent up to 1st May, 1889.

The tenant of a house must furnish it sufficiently to secure the rent. That is the general principle, no doubt; this obligation, of course, includes the other general one not to take the effects away. But the meaning and object of the law are not to deprive the tenant of all disposition of his effects, but merely to secure the landlord; and it is not necessary that the value of the things put into the house should be equal to the whole amount of rent for the entire term agreed on.

" Les lieux sont suffisamment garnis, says Bourjon (11, liv. 4, tit. 4, ch. 3, sec. 3, No. 31), lorsqu'ils sont meublés suivant la condition du locataire, quoique les meubles ne montent pas à la valeur des loyers qui écherront pendant tout le cours du bail; c'est au propriétaire à veiller par terme." Les auteurs modernes partagent cette opinion ; suivant eux, il suffit en général que les meubles puissent répondre du terme courant, de celui à échoir et des frais de vente judiciaire. (17 Duranton, 157 ; 4 Duvergier, 15 et 16 ; 2 Troplong, 531 ; Agnel, 291 sc.)

The reason of the thing is still more plainly stated by Marcadé, vol. 6, art. 1752, No. 1: Le locataire doit, à peine de voir prononcer sa résolution du bail, garnir les lieux de meubles suffisants. Mais quand les meubles seront-ils réputés suffisants? Faut-il, parceque l'art. 2102, 1o, donne privilège au bailleur pour tout ce qui est échu et tout ce qui est à échoir, dire que le mobilier doit être assez considérable pour répondre de toute la durée de la location? Evidemment non, car le propriétaire n'est nullement forcé de laisser accumuler tous les loyers, et s'il est raisonnable qu'il n'agisse pas rigoureusement à défaut de paiement d'un seul terme, il est raisonnable aussi qu'il n'attende pas trop longtemps, et il ne peut pas le plaindre quand le mobilier du locataire est suffisant pour produire, par la rente qui en serait faite, le montant de deux ou trois termes en sus de frais de vente.

Duvergier and Troplong are still more favorable to the tenant as regards the quantity of effects necessary to be kept in the house: "Il suffit qu'ils soient d'une valeur propre à répondre du loyer pendant le terme courant et le terme prochain, avec frais," etc.

Now, the effects, which defendant left in the first house as belonging to himself, were not of themselves sufficient to secure all the rent; but, when the seizure was taken, she owed one hundred and twenty-six dollars, that is to say, she would be liable for that under the whole of her term, less, however, the sum of $18, which the defendant remitted. Therefore, she owed $108, which, being by her agreement with defendant payable in advance, were not then exigible.

The only question here now then is whether these effects of the sub-tenant were subject to the landlord's privilege; because, if they were, there was an end of his recourse by *de suite* in the other premises.

By his lease the defendant bound himself not to sublet. It is very true that he pleads there was no *tacite reconduction*, but a new verbal lease not prohibiting him from subletting; but he proves nothing of the kind; he only proves an alteration of $5 in the rent, and the addition of something else to the premises leased, but in all other respects the old lease remained the same.

By our jurisprudence, and by commentators upon art. 162 of the *Coutume de Paris*, it would [illegible] the articles 1621 nor 1639 of our Code that would apply to the position of the sub-tenant in the present case; but it would be articles 1619, 1620, 1622, 1994 and 2005 C. C. that would apply, and that the plaintiff might invoke against her.

The notion was taken on 29th of October, 1888, and at that date the defendant had received nothing from his sub-tenant. She only made her first payment on the 1st of November; and it is proved that the defendant on the 2nd November paid the plaintiff $25 for the rent of the month of October then due.

I will not now review the articles of our Code, nor the commentaries on the French Code in *pari materia*. All that has been done over and over again in this court, with the result of placing beyond doubt, first, arts. 1619 and 1620 C.C. that the lessor has a privileged right upon the moveable effects found upon the property leased, a general right irrespective of the particular owners, and subject to exception in cases of ownership by momentary or transitory lodgers.

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Article 1621 extends this right to the effects of sub-tenants to the extent of their indebtedness to the principal tenant. Art. 1638. The tenant has the right to sublet in the absence of contrary stipulation between him and his lessor. Art. 1639. The sub-tenant is held to the principal lessor for the amount only of the rent which he may owe at the time of seizure; and he cannot set up payments made by anticipation. Anticipation, however, does not mean stipulated payment in advance; the article expressly says so. Articles 1638 and 1639 of our Code are identical with articles 1717 and 1753 C. N.

When there is prohibition to sub-let, the under-tenant is placed as regards the principal lessor in the position of any ordinary third party. See Lorrain, Code des Loc. et Loc., p. 178, No. 474, and also Agnel 550. Ferrière, commenting on art. 162 Cout. de Paris, says precisely the same thing. (See Ferr. comm. pp. 1060 et seq.).

It stands to reason that, if a sub-tenant can only get back his effects by paying the price for his occupation, he could not oppose to the principal lessor payments already made to the sub-lessor. A principal lessee cannot liberate the effects of his under-tenant by violating the stipulation that he shall not sub-lease. (Agnel Manuel des Prop., p. 247, No. 550.) And this was held in Arnoldi *vs.* Grimard, 5 R. Leg. 748, October, 1874.

There are numerous other reported cases throwing clear light on the points of this case, but I will only cite one more, viz., that of Boyer *vs.* McIver, 21 L. C. J., p. 160, decided by the late Mr. Justice Dorion, and unanimously confirmed in review by Mackay, Torrance and Rainville, J. J. I have a very long list of the reported cases in the same sense, and I only find one where the contrary was held by a judge sitting alone, the case of Barry *vs.* Bowker and Crawford et al., opposants, reported in 14 R. Leg., p. 289.

There were probably some peculiar circumstances in that case to take it out of the general rule, and which do not appear in the report, for it seems difficult to give a sub-tenant the benefit of articles 1, p. 21, and 1639, where he is neither recognized by the law nor by the parties to the lease.

In the present case the action of the plaintiff was met by the defendant admitting the lease, and alleging that, since May, 1888, he had leased at $25 a month by verbal agreement, and had a right to sub-let. That at the time of the seizure there were enough effects of the defendant's and of the sub-tenant's to secure the rent; and that he had notified the plaintiff in September, 1888, that he had sub-let, and intended to remove, but would leave plenty to answer for the rent. The truth of this plea, with the exception I have noted, is proved; and under the facts and the law of the case, the court below found that the plaintiff's privilege extended to all the effects in the premises, including those of the sub-tenant to the extent of her debt to her immediate lessor. It further found that, at the time of the seizure, the sub-tenant owed $126, from which $18 must be deducted, and that for the balance there was more than sufficient.

The plaintiff contends that in reality the sub-tenant owed nothing, because she was to pay monthly in advance. This is certainly not law. She owed under her contract in the manner stipulated, that is to say, monthly in advance. That

of course it is true that nothing was exigible at the time of seizure. She had only promised to pay.

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Judgment is confirmed with exception of the money that makes the subtenant's debt $120 instead of $108.

Loranger & Co., attorneys for plaintiff.

G. A. Morrison, attorney for defendant.

COURT OF REVIEW, 1890.

MONTREAL, DECEMBER 30TH, 1890.

Present:—JOHNSON, C.J., GILL AND TAIT, J.J.

HECTOR BOURASSA, PLAINTIFF;

vs.

ZOTIQUE THIBAUDEAU, DEFENDANT;

AND

JOHN S. HONEY ET AL., TIERS SAISIS;

AND

CHARLES THIBAUDEAU, INTERVENANT;

AND

HECTOR BOURASSA, CONTESTANT.

On 18th February, 1888, T was capiased by B, and before the return of the writ gave the bail required by Art. 828 C.P.C., by a deposit of $200 made by his brothers C & O, under the following consent: "Les parties consentent et acceptent le dépôt d'une somme de deux cents dollars fait par C et O pour payer le montant du jugement à intervenir sur la demande en capital, intérêt et frais, s'il ne donne pas caution au désir de l'article 824 ou 825 du Code de P. C. 1er mars 1888." T then contested the capias, but his petition was dismissed, and he made an abandonment. On 7th March he gave bail under Arts. 824 and 825, by permission of the Court, reserving the rights of the parties. On 10th March, B seized the $200 in the hands of the Prothonotary for his costs on dismissal of petition on which C & O intervened, claiming the money, each for $100. The issue on the intervention of C was proceeded with, and C proved that the money belonged to him, but B claimed that it had been forfeited through the failure of T to furnish bail before the 1st March, 1888, judgment maintaining C's intervention.

HELD:—(In Review) by his Honor Mr. Justice Tait dissenting, that the above consent involved the forfeiture of the deposit through the failure of T to give said bail by the 1st of March, 1888.

HELD:—By the majority of the Court, that there was no express renunciation of T's right to give bail after the said 1st March, and that such renunciation would not be presumed.

That the said bail could be furnished at any time before judgment.

The facts of this case appear from the above summary, and from the remarks of the Honorable Mr. Justice Tait, dissenting, and of His Honor Chief Justice Johnson in delivering the judgment of the Court.

TAIT, J. (dissenting)—On the 11th of February, 1888, the defendant was arrested under a writ of capias, returnable 1st of March following.

H. Bourassa vs. Z. Thibaudeau and John S. Hotsey et al. and C. Thibaudeau and H. Bourassa.

The writ was returned by consent, on the 16th of February, and, a petition to quash having been presented, the defendant proceeded to his proof thereon on the 18th of February, and on the same day it was agreed that the defendant, who had remained in prison, not having furnished to the sheriff the security required by article 828 C. C. P. to entitle him to his provisional discharge, should be liberated on making a deposit of $200, which deposit was accepted by the plaintiff, subject to certain conditions which are embodied in a writing then signed and accepted by the parties, and approved by the Court to the following effect:—"Les parties consentent et acceptent le dépôt d'une somme de deux cents dollars fait par Onésime et Charles Thibaudeau, pour payer le montant au jugement à intervenir, sur la demande en capital, intérêt et frais, s'il ne donne pas caution au désir de l'article 824 ou 825 du Code de P. C. le 1er mars 1888." In virtue of this writing, and upon making the deposit in the hands of the Prothonotary, the defendant was liberated.

On the 22nd of February the petition to quash was dismissed with costs. The defendant did not furnish security on or before the 1st March, but on the 7th of March obtained from the Court permission to furnish security, the Court reserving to plaintiff his rights in these words, viz.: "Mais sans préjudice cependant au droit du demandeur de le faire payer de sa créance en capital, intérêt et frais sur la somme de $200 déposée le 18 février précédent."

On the 9th of March the defendant gave security before the Prothonotary under article 825 C. C. On the 10th of March the plaintiff caused a writ of attachment after judgment to issue in the hands of the Prothonotary for the costs on the petition to quash.

The Prothonotary, in answer to the writ, declared that he has in his hands a sum of $200, deposited according to the terms of the writing of the 18th of February. Upon an inscription for judgment upon this declaration, Charles Thibaudeau filed an intervention, claiming half of the $200 deposited as his property, and upon a contestation of this intervention an issue has been raised as to the true meaning of this writing.

On the one hand, the intervenant says that the $100 he claims was deposited by him to pay the amount of the judgment in principal, interest and costs, if the defendant did not give security according to articles 824 or 825; that he did give security according to article 835, and consequently the deposit is released.

The intervenant treats the agreement as if it did not contain any condition as to limit of time for giving this security; as if the words "the 1st of March, 1888," had no force or effect whatever, whereas the plaintiff contends that, by the terms of this writing, the deposit was to be used to pay the amount of the judgment in capital, interest and costs, if the defendant did not give security the 1st March, 1888; that it was not furnished on or before the 1st of March, and that the plaintiff is therefore entitled to have the deposit applied in the manner directed by the writing.

The question the Court is called upon to decide is whether the writing in question constitutes a conditional obligation, and if the condition has failed, *est défaillée*, by reason of defendant's default to furnish security on the 1st of March.

We have a conditional obligation defined by our article 1079, "An obligation is conditional when it is made to depend upon an event future and uncertain, either by suspending it until the event happens, or by dissolving it according as the event does or does not happen." And article 1082 provides: "If there be no time fixed for the fulfillment of a condition, it may always be fulfilled; and it is not deemed to have failed until it has become certain that it will not be fulfilled."

Let me repeat the writing of the 18th February: "The parties consent and accept the deposit of a sum of two hundred dollars made by Onésime and Charles Thibaudeau, to pay (pour payer) the amount of the judgment to be rendered in this cause, in capital, interests and costs, if he does not give security according to articles 824 or 825 of the Code of Civil Procedure on the 1st March, 1888." The meaning of this seems to me to be clear and unambiguous, viz., that, if the defendant did not give security, either according to article 894 or according to article 825 of the C. C. P., on the 1st March, 1888, the plaintiff would be paid his judgment in principal, interest and costs out of the deposit of $200.

The object of the deposit is declared to be "pour payer le montant du jugement," etc., and the condition is "s'il ne donne pas caution, etc., le 1er mars, 1888." The giving of security within the time fixed was something entirely within the control of the defendants,—he could give it or not as he pleased. If he did not furnish it then the deposit was to be applied to pay the plaintiff's judgment.

Larombière, at article 1168, No. 13, says:—"La particule si elle caractérise la condition elle en est l'expression par excellence." It appears to me we have here a conditional obligation. Now, security was not given either before or on the 1st of March, and it does seem to me that defendant was too late to give it after that date. It is to be remembered that the court, in allowing him to put it in on the 9th of March, did so without prejudice to the right of the plaintiff to be paid his debt in principal, interest and costs out of the deposit. The delay was fixed here by the parties. They had a perfect right to make such a stipulation; it was not contrary to law or inconsistent with good morals, and, as I view the authorities, when a delay is fixed for the accomplishment of an obligation, this delay is *de rigueur;* and, if the obligation is not accomplished within the delay fixed, the condition fails, *est défaillée*, and the court even has no authority to extend the time.

I refer to 26 Demcombe, Nos. 330, 332, 339, 340, 343; 17 Laurent, Nos. 68, 69, 73; and I would also refer to the case of MacMaster and Moffatt (M. L. Reports, Q. B., p. 387), where a condition as to time, in a mere verbal agreement, was strictly enforced.

The reasons advanced in support of the judgment under revision, which maintained the intervention, may be summarized as follows:—(1). That the writing of the 18th February constitutes only a simple arrangement between the parties to substitute a deposit for personal security, and there is nothing to show that the intervenant intended to assume a different obligation than he would have contracted if had entered into an ordinary security bond. (2). That the

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writing permits the defendant to furnish thereafter, either according to article 824, or according to 825; and the delay fixed (1st March) can only be considered as applying to the security to be given under article 824, which cannot be given after a fixed time, and not as applying to the security to be given under article 825, which can be given at any time before judgment; that the security given by the intervenants on the 9th of March before judgment, under article 825, was valid, and their obligation under the writing of 18th of February became of no effect.

No doubt the arrangement made was a derogation from the law by substituting a deposit in place of a security bond, but none the less is the agreement so made the law of the parties. The arrangement here made was that the defendant was to be liberated from prison upon his brother's making a deposit of $200 to pay plaintiff's judgment if defendant should not give security on the 1st March, 1888, in accordance with art. 824 or 825 C. C. P. There is no law prohibiting such an arrangement, and I think it should be enforced in *forma specifica*.

Laurent, at No. 69, vol. 17, says: "Lors donc que l'acte détermine la manière, le temps, les circonstances de la condition, le juge ne pourra rien y changer, car les contrats sont les lois que le juge est appelé à exécuter et qu'il n'a pas le droit de modifier. Larombière art. 1177 (No. 3). Lorsque le terme dans lequel la condition doit s'accomplir a été clairement et nettement fixé, il n'y a pas à interpréter l'acte, ou à rechercher l'intention vraisemblable des parties. La clarté de l'expression oblige alors à s'en tenir à la rigueur de son sens littéral."

Here the defendant was set at liberty with the consent of the plaintiff and of the court, upon the condition mentioned in this writing.

The intervenants cannot plead ignorance of the condition upon which their brother obtained his discharge. Their intention to be bound by this writing is sufficiently manifested by the fact that they made the deposit. The delay fixed was an essential condition of the obligation, and the intervenants cannot deprive the plaintiff of the benefit of that condition by saying that they did not intend to contract any different obligation from that they would have contracted if they had entered into an ordinary surety.

Now, as the time fixed (1st March), applying only to article 824 and not to article 825, I can see nothing in the writing to justify making such a distinction. It is true that, by article 824, the defendant may obtain his discharge, upon giving security that he will not leave the province, and that, if he does so, such securities will pay the amount of the judgment, and that this bail cannot be received after the expiration of the eighth day from the day fixed for the return of the writ of capias, unless with leave of the court, and that by article 825 he may also obtain his discharge at any time before judgment, by giving security that he will surrender himself when required by the court within the delay fixed by the article, and that in default the sureties will pay, etc. But by this writing I think the parties made a law for themselves as regards the time or delay within which security should be given, and in this respect they derogated from the time fixed by these articles.

The plaintiff consented to derogate from the law when he accepted a deposit instead of a bond. Defendant consented to derogate from the law as to the delay within which he could give security under these articles when he made it a condition that, if he did not give security in accordance whith either the one or the other of them on the 1st March, 1888, the deposit would be available for the payment of plaintiff's judgment.

The reference in the writing to these articles is to show the nature of the security the defendant could give. He had the option to give a bond by sureties under article 824 not to leave the province, or one under article 825 to surrender himself, but in either case it had to be given on the 1st of March. Suppose the writing had contained no reference to article 824, but had simply said: "if he does not give security according to article 825 on the 1st of March, 1888," would the court be justified in saying that this limit as to time meant nothing, and that defendant had as long as he wished to put in security, provided he did it before judgment? I cannot think such a construction would be a right one, and I fail to see that the insertion of article 824, to which it is admitted the delay fixed does apply, should lead us to conclude that that article alone, and not article 825, was intended to be affected by the time fixed. Suppose (as the plaintiff puts it in his factum) that final judgment had been rendered before the 1st of March, would that have deprived defendant of the right of giving security under article 825 on the 1st of March, notwithstanding that by it security must be given before judgment? It appears to me the defendant would have successfully answered to such an objection that by the agreement he had the right to give security on the 1st of March.

If the defendant could, under the circumstances I have mentioned, give the bond required by that article after judgment in virtue of the condition in this writing, and I venture to think he could, why should not the plaintiff have the benefit of the condition also, and be able to say that security given after the 1st of March is too late? I do not understand that we are called upon to decide as to the validity of the proceedings by which the plaintiff has attached this money. We are now only deciding the issue raised on the intervention, that is, whether or not the intervenant, Charles Thibaudeau, has a right to claim back the $100 he furnished towards the deposit made under the writing of the 18th February. I think this writing constitutes a conditional obligation, that the condition as to time is clearly determined, that it is not unlawful, and that the court is bound to enforce it; and my conclusion, therefore, is that the intervenant has lost any claim to the money, and that the judgment under revision, instead of maintaining his intervention, should have dismissed it.

JOHNSON, Ch. J.—On February 18, 1888, the defendant was capiased at the suit of the plaintiff, and before the return of the writ gave the bail required by article 828 C. P. C., by making a deposit of $200, through his two brothers, Charles and Onésime Thibaudeau, instead of giving their bond.

The defendant afterwards contested the capias, but his petition was dismissed, and thereupon he made an abandonment of his property. Then, on March 5, the defendant gave notice to the plaintiff that on the 7th he would give bail as

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required by articles 824 and 825, which was done by permission of the Court reserving the rights of the parties.

The next day (March 10) the plaintiff, to get his costs on the dismissal of the contestation of the capias, attached in the Prothonotary's hands the $200 deposited by the defendant's brothers, and upon the officer's declaration prayed judgment ordering him to pay over the money.

The two bondsmen, or rather depositors, thereupon intervened, each asking one half the money for himself, and the discharge of the garnishment.

These interventions were contested by plaintiff, alleging that the condition on which the deposit was allowed to be made was that the new bail should be given on the 1st of March; otherwise, that the money was to be applied to pay debt, interest and costs; and that the defendant, having made default to put in bail within the stipulated time, the condition should be exacted, and the bail was too late.

The intervention of Chs. Thibaudeau was the only one proceeded with, and he proved that $100 of the deposit belonged to him. The judgment held that Charles Thibaudeau was entitled to get his money, and ordered payment accordingly. The plaintiff now inscribes, and the only question for the court is the effect of the written consent of the parties of the 18th February, by which money was to take the place of a bond.

The terms of the consent are: "Les parties consentent et acceptent le dépot d'une somme de deux cents dollars fait par Onésime et Charles Thibaudeau, pour payer le montant du jugement à intervenir sur la demande en capital, intérêt et frais, s'il ne donne pas caution au désir de l'article 824 ou 825 du Code P. C., 1 mars 1888." The grammar of this need not be criticized, since the meaning is plain. Both parties consented that the money was to stand instead of bail; both parties contemplated the right to give bail either under article 824 or 825 C. P., and a time was fixed within which the defendant was to exercise his right.

The bail under these two articles is different. The first makes the sureties liable if the defendant leaves the province without paying debt, interest and costs; and it must be put in within eight days from the return.

Bail under the other article is very different. It can be put in at any time before judgment; and the condition of it is that the debtor will surrender himself to the sheriff within a month from service of an order of the Court; and, in default of his so doing, the sureties are liable.

The plaintiff, in his contestation of the intervenant's claim for his $100, contends that the terms of the consent of the 18th February are to be construed to deprive the defendant of the right to give the bail prescribed by art. 825 after the 1st of March.

It is possible that the plaintiff may have so intended; but to preclude the other party from his right under the law to give bail under art. 825 at any time before judgment, something more was required; and certainly there is no express renunciation by the defendant of his right to do so. I quite agree that the parties may make their own law; but, having made it in their own way, we

must say what it means; and we must interpret this agreement to do a thing in a given time, without express stipulation that it was not to be done afterwards, according to the rules of law governing defaults to execute obligations.

The general rules expressed in art. 1067 C.C.: "The debtor may be put in default either by the terms of the contract when it contains a stipulation that the mere lapse of time for performing it shall have that effect," etc. Here we have no such stipulation, but merely a fixation of the time without anything further.

In my opinion the agreement is to be interpreted as meaning that the money was there to dispense with a bail bond, which might be given up to the 1st March; but the question of what were the defendant's rights under a stipulation, merely fixing a time without precluding bail afterwards, there can be no doubt what were his rights.

The art. 1067 cited already settles them, and the defendant was not precluded, unless it was stipulated that he should be. There are only two exceptions to this rule: the first is under art. 1068, where he would have been in default if the thing stipulated could only have been done in the time mentioned; which is the very reverse of the case here, for it could have been done at any time before judgment; and the other exception is under 1069, and applies to commercial contracts only, where, the time of performance being fixed, its expiration puts the obliged party in default, without any further stipulation.

The case of McMaster et al. *vs.* Moffatt (M. L. R., 1 Q. B., p. 387), which was cited, has no application whatever to the present one. No one is presumed to renounce. There is a bail bond under article 825 in the record. The plaintiff has no right to money in preference to bail. The law gives him none. It is the privilege of the defendant to offer money if he likes, but the plaintiff cannot exact it.

Judgment confirmed.

Augé & Lafortune, attorneys for plaintiff.
Dùhamel, Rainville & Marceau, attorneys for defendant.

COURT OF REVIEW, 1891.

MONTREAL, JANUARY 31st, 1891.

Present: Sir FRANCIS JOHNSON, C.J., JETTÉ AND MATHIEU, JJ.

EUCLIDE PERNARD, INSOLVENT;

AND

J. P. M. BEDARD, CURATOR;

AND

ALPHONSE JEANNOTTE, CREDITOR CONTESTING.

HELD:—Confirming the judgment of the Lower Court, that Section VI of the Code of Civil Procedure provides certain penalties for the commission of the acts mentioned therein, while Section VII provides for coercive imprisonment to compel debtors to perform the acts required of him, and which he has omitted to perform, and that the said provisions of said Sections are entirely distinct from each other and different in their applications.

The remarks of the Chief Justice Johnson, in rendering the judgment of the Court, show the facts of the case.

JOHNSON, CH. J.—Judgment was given on the 30th of May, 1890, maintaining a creditor's contestation of a *cession de biens*, and holding the insolvent guilty of offences under articles 773 and 776 of the Code of Procedure, and, as a consequence, condemning him to one month's imprisonment.

The insolvent inscribes the case here, and he contends, first, that this is by law a merely coercive imprisonment from which the party can liberate himself by performing the duty for the violation of which the imprisonment was awarded.

I really do not think this question is arguable, or, rather, I should not have thought so but for the long argument to which we listened on the subject.

Under sec. VI of the Code, which treats of the abandonment, from 763 to 780, inclusively, we have in article 773 the willful omission of property worth $80, the secreting within thirty days before the suit, and fraudulent misrepresentations in the debtor's statement; every offence under these three clauses subjecting the offender, under article 776, to condemnation to an imprisonment not exceeding one year.

Then comes the next section of the Code (VII), which is concerned with a different subject, viz., coercive imprisonment, and from such imprisonment there are means provided by art. 793 to obtain a discharge in certain cases.

The insolvent's counsel here endeavored to assimilate punishment for offences committed under art. 773, and punishable under art. 776, with the other and perfectly distinct subject of imprisonment of a coercive kind under the varieties of contempt of court constantly occurring and susceptible of purgation by compliance. A mere survey or examination of the laws applying to these two separate subjects ought to be sufficient to dispose of this first point raised here by the insolvent; but the same view that I have just enunciated was distinctly

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though incidentally taken in Ogilvie *vs* Farnan in review (M.L.R., 5 S. C. 380), and there have been other cases besides decided in the same way.

In Ogilvie *vs.* Farnan the debtor had made his abandonment; it had been contested, and he had been punished by four months' imprisonment for secretion, the sentence having expired when he petitioned for discharge under art. 793. What was held was that he was entitled to his discharge because the period of his incarceration had expired, and that, having abandoned his property belonging by law to his creditors, and there being no longer coercive imprisonment for debt in such a case, he was entitled to liberation, and so would the present defendant be, if in like circumstances he applies for discharge after the expiration of his term of imprisonment.

Now, as to the second branch of the case under the evidence, I am bound to say, after two days of suffering in the performance of a duty improperly imposed, that is, I mean after deciphering and reading everything in many hundred pages of vile writing of what is called the evidence of twenty-two witnesses on the one hand and thirty-seven on the other, that the debtor's case is a great deal worse than even his creditor puts it. His too successful attempt to rob his creditors of the value of ten car loads of hay, his fraudulent preference of the bank and of his own father, and his shameful as well as false excuse of having lost some $400 at cards, as an answer to the charge secreting that amount, are all incontestably proved; and it is sheer impudence and an obstruction of justice for such a man to instruct another to deceive any professional gentleman into offering such a defence as has been made to the contestation of this debtor's statement under his abandonment. The only fault I should be disposed to find with his judgment is that it is far too lenient, as indeed all the proceedings seem to have been, including the opportunity given to amend the debtor's statement, an opportunity which he would not or could not use for reasons that are only too plain on the face of this record. Judgment confirmed, with costs against the inscribing party.

JETTÉ, J., concurring,—I wish to direct attention to the impropriety of the language used by counsel in the factum. In one place it was said: "the learned judge pretends." The judge does not pretend; he declares the law.

In another place it was said: "it is complained in the judgment." The judge should not be called into the argument as a party. He weighs the respective pretensions of the parties, and arrives at a decision. This style of argument is extremely objectionable.

JOHNSON, Ch. J.—I am glad that attention had been directed to this subject. For my own part (and I say it with pain), I am so accustomed to the deterioration of manners of the present day that such breaches of decorum are constantly escaping my notice.

Judgment confirmed.

L. P. Brodeur, attorney for insolvent.
Mercier & Co., attorneys for contestant.

SUPERIOR COURT, 1885.

MONTREAL, JANUARY 31st, 1885.

Present:—THE HONORABLE MR. JUSTICE JETTÉ.

VICTOR BARBEAU, ET AL., PLAINTIFFS;

vs.

THE PRESIDENT AND SYNDICS OF LAPRAIRIE COMMON, DEFENDANTS.

On the 19th May, 1694, the Jesuit Fathers, who were then the Seigneurs of the Seigniory of Laprairie, ceded to the inhabitants of the parish of Laprairie de la Madeleine, of la Cote de la Tortue and of la Fourche and Fontarabie, a piece of land to be used by them as a common, but without any right to alienate any part of said land or to use it for any other purpose than that of a Common.

By the Statute 2 George 4, C. 8 (1822), a Board, consisting of a president and four members, was created for the purpose of administrating the Common, which Board was constituted a corporation under the name of the "Président et Syndics de la Commune de Laprairie de la Madeleine."

On the 8th October and 15th November, 1883, the defendants, who then held the office of president and syndic above referred to, acting in their said quality, leased to one Julien Brosseau a part of the said Common for a period of nine years.

The plaintiffs, who were proprietors, having rights in the said Common, brought the present action against the defendants, alleging *inter alia* that the defendants had no authority to grant the said lease, praying that it be annulled and set aside.

Defendants pleaded a variety of pleas, and, among others, that they had the right to make any regulations which they believed necessary for the maintaining of the said Common in a proper condition, and to raise the necessary revenues for this purpose; that the Syndic had frequently leased to divers partners, and even to said Brosseau, certain parts of said Common, for the purpose of obtaining such revenue, and that with the knowledge and consent of those having rights in said Common.

HELD:—Dismissing defendants' pleas, that the only effect of the Statute 2 George 4, C. 8, was to provide for the administration of the Common, without in any way changing the nature or destination of the property, which was governed exclusively by the original title under which it was conceded.

That the powers conferred on the President and Syndics of said Common by said Statute can only be validly exercised for the purpose provided for and contemplated by the said Act of Concession.

That the lease granted by the said President and Syndics was contrary to the intention of the said Act of Concession and the purposes for which the said Common was established.

That any similar leases previously granted by the said President and Syndics and invoked by the defendants did not constitute a valid defence to plaintiffs' action.

The facts of this case appear from the above summary and from the considerants of the judgment, which are given below, and which are as follows:—

JUDGMENT.

La cour, après avoir entendu la plaidoirie contradictoire des avocats des parties sur le fond du litige mû entr'elles, pris connaissance des écritures des dites parties pour l'instruction de leur cause, examiné leurs pièces et productions respectives, entendu et dûment considéré la preuve, et sur le tout délibéré;

Attendu que par acte le 19 mai 1694, devant M. Ad. Léonard, notaire royal, les Révérends Pères Jésuites, alors seigneurs de la seigneurie de Laprairie, ont donné et concédé aux habitants de la paroisse de Laprairie de la Madeleine, de la Côte de la Tortue et de celle de la Fourche et de Fontarabie, un espace de terrain désigné au dit acte pour leur servir de commune et pour par eux en jouir comme à eux appartenant, mais sans qu'ils en puissent vendre part ni partie, ni l'employer à autre usage qu'une commune;

Attendu que les demandeurs sont propriétaires de terres et habitants de la dite paroisse de Laprairie, et ont comme tels droits et intérêt dans la dite commune aux termes de la concession susdite;

Attendu que par le Statut 2 George 4, Chap. 8 (1822), il a été pourvu à ce que l'administration et gestion de la dite commune furent confiées pour le bénéfice des ayant-droit, à un président et quatre syndics, choisis et nommés; que les dits habitants furent déclarés constitués pour ces fins de la dite administration, en corporation et corps public sous le nom de "Président et Syndics de la commune de Laprairie de la Madeleine," et que le dit acte, bien que temporaire, a été continué en force depuis;

Attendu que les défendeurs sont actuellement les présidents et syndics dûment nommés et choisis pour l'administration de la dite commune;

Attendu que par les résolutions du 8 octobre et du 15 novembre 1883, les défendeurs, en leur dite qualité, ont décidé de louer au lieutenant-colonel Julien Brosseau partie du terrain de la dite commune de la contenance indiquée aux dites résolutions, et ce pour le terme de neuf années;

Attendu que les demandeurs se sont pourvus par leurs présentes pour demander l'annulation des dites résolutions, alléguant que les défendeurs n'avaient aucun droit de les passer, et qu'elles sont illégales et nulles;

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

1o. Que les demandeurs sont non recevables en icelle, n'alléguant pas qu'ils se sont conformés à la loi pour obtenir les droits de commune qu'ils prétendent avoir;

2o. Que les défendeurs n'ont jamais été propriétaires et n'ont jamais eu un droit de commune dans la dite commune de Laprairie;

3o. Que par la loi qui les constitue en corporation, les défendeurs ont droit de passer tous règlements qu'ils croient utiles pour l'entretien de la dite commune, et de faire sur les revenus, rentes ou produits d'icelle toutes dépenses nécessaires à cette fin, mais que la dite commune ne rapporte aucun bénéfice, et nécessite des dépenses considérables pour des travaux indispensables;

Que pour parvenir à rencontrer ces dépenses, les syndics, depuis la création de la corporation, ont loué à plusieurs reprises des parties de la dite commune, et ce dans l'intérêt des communistes, à leur connaissance et de leur consentement;

Que c'est dans le même but que les défendeurs ont loué au dit Brosseau; et que pour mieux sauvegarder l'intérêt de tous, ils lui ont loué une partie stérile et impropre au pâturage;

Enfin, que depuis l'organisation de la dite corporation une partie du village de Laprairie, celle appelée le Fort-Neuf, a même été construite sur des terrains faisant partie de cette commune et concédés par les syndics d'alors;

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Que par suite, en agissant comme ils l'ont fait, les défendeurs n'ont pas dépassé les pouvoirs qui leur sont conférés par la loi ;

Considérant qu'aux termes du titre de concession de la dite commune, tout habitant de la paroisse de Laprairie y a droit, et est par suite intéressé à son administration ;

Considérant que les demandeurs ont prouvé qu'ils sont habitants et propriétaires dans la dite paroisse, et qu'ils ont en conséquence intérêt et qualité pour porter la présente demande ;

Considérant que le seul effet du Statut de 1822 (2 Geo. 4, Chap. 8) a été d'organiser une administration pour la gestion de la dite commune, sans aucunement changer la nature de cette propriété ou sa destination originaire, qu'elle reste déterminée et régie exclusivement par le titre de concession d'icelle, et que les pouvoirs d'administration conférés par ce statut ne peuvent être valablement exercés que pour les fins prévues par le dit titre de concession, et non autrement ;

Considérant que les résolutions attaquées par les demandeurs sont évidemment contraires à l'intention du dit titre et à la destination et au but pour lequel a été établie cette commune, et que les actes similaires de syndics antérieurs invoqués par les défendeurs ne sauraient donner aucune valeur à ceux dont se plaignent les demandeurs ;

Considérant en outre que les défendeurs n'ont pas prouvé que le terrain par eux loué en vertu des résolutions susdites fut improductif et impropre au pâturage.

Renvoie en conséquence les exceptions et dépenses des défendeurs, et accordant les conclusions de la demande, déclare que les défendeurs étaient sans autorité pour passer les résolutions susdites du 8 octobre et du 15 novembre 1883, et casse et annule les dites résolutions à toutes fins que de droit, avec dépens contre les dits défendeurs, dont distraction à Maîtres Robidoux & Fortin, avocats des demandeurs.

Judgment for plaintiffs.

Robidoux & Fortin, attorneys for plaintiffs.
Loranger & Co., attorneys for defendants.

COUR SUPERIEURE.

MONTRÉAL, 13 MARS 1891.

Présent : DAVIDSON, J.

ISIDORE PROULX DIT CLÉMENT,
Interdit requérant pour être relevé de l'interdiction,
ET
WILLIAM PROULX DIT CLÉMENT,
Curateur au dit interdit, requérant en appel.

Interdiction—Appel.

Juok:—Que le curateur à l'interdit ne peut, sans autorisation du juge, appeler de la sentence le relevant de l'interdiction.

JUGEMENT.

The Court, having heard the parties by their counsel, upon the answer in

law of said Isidore Proulx, to the petition in appeal, filed in this cause, examined the proceedings, and deliberated ; I. Proulx dit Clément et Wm. Proulx dit Clément.

Considering that interdiction cannot be removed without observing the formalities prescribed for obtaining it (C. C. art. 336) ;

Considering that a judgment imposing interdiction can only be revised by a Court, on petition of the person interdicted, or any of his relations (C.C. art. 332) ;

Considering, moreover, that the curator is invested with like powers to those of a tutor (C C. art. 343), and that a tutor cannot appeal from a judgment " until he is authorized " by the judge or the prothonotary on the advice of a family council (C. C. art. 306) ;

Considering that the only quality disclosed by petitioner in his petition is that of curator, and that as such he is without right or authority to appeal from or seek the revision of the judgment complained of ;

Doth maintain the said answer in law and doth dismiss the said petition in appeal with costs.

F. D. Monk, attorney for plaintiff.

Laflamme, Madore & Cross, attorneys for defendant.

COUR SUPÉRIEURE, 1891.

(En Révision.)

MONTRÉAL, 30 MAI 1891.

Présents :—Mathieu, J., Wurtele, J., et Tellier, J.

FRANCES MARY RUSSELL,

vs.

TELESPHORE LATOUR.

Procédure—Substitution de Procureur—Péremption d'instance.

Jugé :—Que la substitution de procureur permise par le tribunal, sans que la motion pour substitution ait été signifiée à la partie adverse, est valide, et qu'une motion pour péremption d'instance, faite par le procureur du défendeur ainsi substitué, sans que le demandeur ait eu avis de cette substitution, est valide. (1)

Le 14 mai 1886, la demanderesse poursuivit le défendeur, devant la Cour de Circuit pour le com é d'Ottawa, à Hull. Cette action était rapportable le 9 juin suivant. Le même jour, 9 juin, le défendeur comparut par J. E. Beauset, son avocat. Le 24 novembre suivant, la demanderesse produisit un avis de plaider dont Mr. Beauset, avocat du défendeur, avait reçu copie. Le 29 novembre, le défendeur fit son plaidoyer, par le ministère du Mtre Beauset, et en fournit copie aux avocats de la demanderesse. Le 5 mai 1887, Mtre C. B. Major fit motion qu'il fut substitué à Mtre Beauset, comme avocat du défendeur. Cette motion fut produite, et accordée le même jour du consentement de Mtre Beauset. Le 12 septembre 1890, le défendeur, par le ministère de Mtre Major, son avocat, fit motion pour péremption d'instance, alléguant que la dernière procédure utile en cette cause était en date du 24 novembre 1886. Le défendeur

(1) Un défendeur qui a cessé d'être représenté par son avocat, qui a été nommé juge, ne peut, sans avoir comparu personnellement, faire une motion pour péremption d'instance (arts. 201, 202, 203, 204, et 455 C.P.C., Johnson *vs.* Rimmer et Lockwood *et al.*, Interventants, C.S.R. Montréal, 31 mars 1869, Mondelet, J. Torrance, J., et Beaudry J., 43 J. p. 131).

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produisit, avec sa motion, un certificat du Greffier de la Cour de Circuit, constatant que la dernière pièce de procédure produite était une demande de plaidoyer produite le 24 novembre 1886. La demanderesse a contesté cette demande pour péremption, qui a cependant été maintenue par jugement du 28 novembre 1890, Mathiot J. Le jugement est en ces termes :

La Cour, après avoir entendu les parties sur la présente motion, en autant qu'il appert par le dossier en cette cause, qu'il s'est écoulé plus de trois ans depuis le dernier acte de poursuite ou de procédure en cette cause, à venir au 13 septembre dernier, date de la signification de la présente requête. Déclare l'instance en cette cause périmée, et renvoie l'action en cette cause sauf à se pourvoir.

La demanderesse inscrit en révision ; elle dit que la motion pour péremption a été faite par un avocat qui n'était pas régulièrement procureur du défendeur.

Il paraît que, lors de l'audition de la motion pour péremption, l'avocat du défendeur, Major, remit au greffier la motion de substitution du 5 mai 1887, qui paraît avoir été accordée, comme susdit, et le plaidoyer ; ces deux documents n'étaient pas au dossier, lorsque le certificat du Greffier a été donné à l'avocat du défendeur, et c'est pour cela que le défendeur, dans sa motion pour péremption, alléguait que la dernière procédure était la demande de plaidoyer produit le 24 novembre 1886.

La demanderesse soutient que, si cette motion de substitution a été accordée, elle doit être considérée comme non avenue, quant à elle, vu qu'elle ne lui a jamais été signifiée. La motion pour substitution paraît avoir été accordée par la Cour, du consentement de l'avocat Beauset. Cela appert sur le dos de la motion, et est certifié par les initiales du Greffier de la Cour.

La motion de substitution doit-elle être considérée comme non avenue, parce qu'elle n'aurait pas été signifiée à la partie adverse ? C'est la prétention de la demanderesse. Le défendeur, au contraire, soutient que la demanderesse n'a aucun intérêt à avoir signification d'une substitution de son procureur. La partie peut, en tout temps, révoquer son procureur, sauf son obligation de lui payer ses honoraires et déboursés (art. 205 C. P. C.) ; mais lorsqu'elle le révoque elle doit en nommer de suite un nouveau. Par la substitution, la partie retire son mandat d'un procureur, et le confie à l'autre. La loi ne paraît pas exiger que cette révocation ou substitution soit signifiée à la partie adverse. Elle ne paraît pas même exiger qu'elle soit permise, [illegible] mentionné par la Cour. Seulement, la règle de pratique 19 dit que [illegible]able ou une copie certifiée de chaque comparution qui sera produite pour un défendeur sera signifiée, le même jour, au procureur du demandeur. Le défendeur, le jour du rapport, ou le jour juridique suivant, se constitue un procureur. Ce procureur doit comparaître, et signifier à la partie adverse une copie de sa comparution. Si le défendeur, au cours de l'instance, juge à propos de révoquer ce procureur qu'il s'est dûment constitué, et d'en constituer un autre, ce dernier doit comparaître et signifier sa constitution à la partie adverse, pour se conformer aux exigences de la règle de pratique. Faut-il qu'il produise un acte de comparution distinct d'une autre pièce de procédure, ou cette comparution peut-elle être incluse dans une autre pièce de procédure ? Je ne vois rien qui le défende. Le défendeur a

substitué à son avocat Beauset un autre avocat. Ce dernier est comparu devant la cour, et a, en même temps qu'il comparaissait, fait une motion demandant que l'instance qui était périmée fut déclarée telle. L'avocat Major n'était pas tenu de comparaître le jour même de la substitution. Il pouvait le faire, ou attendre, comme il l'a fait. Il a comparu en faisant sa motion pour péremption, et bien qu'il n'y a pas de comparution distincte, cette motion comporte une comparation, en même temps que la demande de péremption. On nous a cité l'article 462 C.P.C. Cet article dit que toute pièce de la contestation doit être signifiée à la partie adverse, à défaut de quoi elle n'est pas censée régulièrement produite. La substitution d'un procureur n'est pas une pièce de la contestation. C'est l'acte du défendeur qui provoque son procureur et s'en constitue un autre. Le procureur substitué n'a qu'à faire une chose d'après les règles de notre procédure, c'est de comparaître à la place de celui qui représentait d'abord la partie. C'est ce qui a été fait dans cette cause. Je suis donc d'opinion que le jugement doit être confirmé.

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Il en serait autrement si le procureur avait, de son gré, cessé d'occuper pour le défendeur, ou s'il avait cessé ses fonctions; parce que alors nous aurions l'article 455 qui dit que la péremption n'a pas lieu dans ce cas. Mais, dans le cas actuel, le défendeur, vis-à-vis de la demanderesse, était censé représenté par l'avocat Beauset jusqu'à ce que substitution ait été signifiée au demandeur, par la comparution de Major.

La Cour de Révision a unanimement confirmé le jugement de la Cour de Circuit.

Rochon et Champagne, avocats de la demanderesse.
Thomas Fortin, avocat du défendeur.

COUR SUPÉRIEURE, 1891.

MONTRÉAL, 23 FÉVRIER 1891.

Présent :—PAGNUELO, J.

SAMUEL GEORGE McELRAINE, PLAINTIFF;

vs.

THE BALMORAL HOTEL COMPANY, DEFENDANTS.

Hôtelier—Responsabilité.

JUGÉ :—Que l'hôtelier à qui des effets sont confiés par un voyageur n'est pas responsable de la perte de ces effets survenue dans un incendie.

JUGEMENT.

Considérant que le demandeur réclame de la défenderesse la valeur de certains habits et effets personnels qu'il avait laissés avec d'autres dans une valise, à la garde de la Compagnie défenderesse, le trois juin mil huit cent quatre-vingt-dix, et qui ont été soustraits de sa valise en son absence ;

Considérant qu'il est établi par la preuve faite en cette cause, que le demandeur est un commis voyageur, et que depuis environ trois ans il avait établi ses

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quartiers généraux à l'hôtel de la défenderesse, à Montréal, où il passait environ quatre mois par année en différents temps; qu'à son départ il avait l'habitude de confier ses valises à la garde de la défenderesse, qui lui en donnait un reçu sous forme de chèque, que cet usage a aussi été suivi par la dite Compagnie défenderesse à l'égard de cinq ou six autres voyageurs de commerce, ce qui la constituait dépositaire nécessaire, comme si les dits voyageurs eussent continué d'y loger à son hôtel; que le trois juin mil huit cent quatre-vingt-dix, le demandeur, après avoir passé une semaine au dit hôtel, a confié à la garde de la défenderesse deux valises et une boîte à chapeau, pour lesquelles des chèques lui furent donnés avant son départ; qu'à son retour, vers le milieu d'août suivant, le demandeur a présenté ses trois chèques, et ses valises lui furent remises, mais que l'une d'elles avait été ouverte, et les effets mentionnés dans la déclaration en avaient été soustraits; que dans l'intervalle, savoir, le vingt-huit juillet, un incendie considérable avait eu lieu dans le dit hôtel, qui a commencé vers trois heures et s'est continué jusqu'à huit ou neuf heures du matin, qu'il créa une confusion générale dans l'hôtel rempli de voyageurs, et qui fut envahi par les pompiers et le public; qu'il s'en est suivi un tumulte et un sauve-qui-peut général, durant lequel les employés de l'hôtel ont perdu tout contrôle, et ont été forcés de faire appel à la police, entre les mains et la garde de qui l'hôtel fut laissé durant toute la journée; que les pompiers ont brisé toutes les portes des chambres, y compris les chambres spéciales où étaient emmagasinés les effets des voyageurs; que le lendemain le gérant trouva dans le magasin de l'hôtel des valises dont la serrure avait été forcée, celle du demandeur était du nombre; qu'il mit immédiatement ces valises dans une chambre à coucher, dont il ferma la porte à clef, et les remit au demandeur dans le même état qu'il les avait trouvées le lendemain de l'incendie; que la dite valise a dû être ouverte et les effets enlevés le jour de l'incendie, alors qu'il était impossible aux employés de l'hôtel, par suite d'un accident de force majeure incontrôlable, d'empêcher le vol de beaucoup d'effets appartenant aux voyageurs; que le dit incendie a été purement accidentel, et que la défenderesse n'est pas responsable de la perte des effets du demandeur, qui a eu lieu dans ces circonstances. Vu les articles 1200, 1802, 1814, 1815 C. C., renvoie la présente action avec dépens.

Hutchinson & Oughtred, attorneys for plaintiff.

Greenshields & Greenshields, attorneys for defendant.

POLICE MAGISTRATE'S COURT, MONTREAL, 1891.

MONTREAL, APRIL 10TH, 1891.

Present: M. C. DESNOYERS, MAGISTRATE.

SHEWAN

vs.

DRUMMOND.

Game Laws—Close Season—Possession of Deer after expiration of season—Deer killed in Ontario—Game Laws Revised Stat. Que., sections 1395 to 1420.

The defendant was charged under sections 1405 and 1407 with having in his possession at Montreal, on the tenth day of March, 1891, during the prohibited season, three carcasses of deer.

It appeared that the deer were in the possession of defendant, but that they had been killed in Ontario and sent to him from there.

HELD:—That the possession of game (in the present instance, deer) during the prohibited season does not in itself constitute an offence under the Game Laws of this Province; that these laws do not apply to game killed in Ontario and imported into this Province during the close season, inasmuch as there is no direct prohibition to import; that the game of which the possession is prohibited under said laws must necessarily be game taken in this Province in contravention of the Provincial Game Laws, as taken during the prohibited season or in an illegal manner.

An information was laid by A. W. Shewan (acting for the Montreal Fish and Game Club) against the Honorable George A. Drummond, for having illegally in his possession on the tenth of March, 1891, three carcasses of deer.

The case was heard on April 1st, 1891.

It appeared on the hearing that the deer in question were killed on the preserves of the Long Point Company, near Port Dover, Lake Erie, in the Province of Ontario, about the end of October, 1890, during the open season in that Province. After being killed the carcasses were placed in a refrigerator at Port Dover owned by one Ansley and used by the Long Point Company for keeping its game, and kept there frozen until the tenth day of March, 1891, when they were shipped by Ansley on the orders of the president of the Company, Mr. Edward Harris, of Toronto, to the defendant, a member of the Company or Club as at present.

They were shipped by the American Express Company, on the tenth of March, arriving in Montreal on the morning of the 11th, and were delivered to the defendant on that day. The receipt of the deer from the Company and the possession by the defendant was admitted.

W. S. Walker for the prosecutor asked for judgment. A. D. Taylor for the defendant. The object of the Game Laws of this Province is clearly to protect game in this Province only. The Game Laws are found in the Revised Statutes of Quebec, sections 1396 to 1420. Under these Laws, the taking and killing of game during certain seasons (different for the different kinds of game and fish) is prohibited, and certain modes of taking and killing are also prohibited. These provisions can clearly only apply to this Province. The possession of game during the prohibited season does not in itself constitute an

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offence. The defendant admits that he had the deer in question in his possession on the eleventh of March, which is undoubtedly during the close season for deer, as declared by section 1396, but claims that this constitutes no offence against our Game Laws.

Sections 1405 and 1407 are the only sections that can apply; section 1405 provides that the gamekeeper shall seize animals, etc., found in the possession or custody of any person during the close season, and bring them before any justice of the peace, who shall, if proved that the law has been broken, declare them confiscated.

If the law has been broken; what law? surely the law of this Province prohibiting the taking of game during certain seasons and in certain ways. Has this law been broken in the present case where the deer were lawfully killed in the Province of Ontario? Clearly not, and therefore the deers were not liable to confiscation. Section 1407 enacts that every person found guilty of having had or having actually in his possession any articles so confiscated or liable to be confiscated shall in each case be condemned * * * but the deer in question were not liable to confiscation, because the law of this Province was not broken, and there has clearly been no offence. In the absence of an express provision that the possession in this Province during the close season of game, no matter where taken, within the Province or without, which would really be a prohibition to import into the Province as well as to kill in the province during the prohibited season, there can be no offence in the present case. The case of Guyer and the Queen, 23 Q. B. D. 100, is in point.

Under the English Act the possession of game by a licensed dealer after ten days from the close of the season, and by any person after forty days from its close, is prohibited. The charge was that the defendant, a licensed dealer, had in his possession exposed for sale during the prohibited season two partridges. It appeared that the partridges had been killed in Russia three months previously, and kept frozen, and imported into England shortly before they were bought by defendant, and exposed by him for sale. The defendant was convicted by the Magistrate, but on appeal the conviction was quashed. The case is almost identical with the present, and is of special force, as the English Law, as to the possession, uses the word "of any game;" our Act, as pointed out, enacts that the possession, not of "any game," but "of any game liable to be confiscated," is an offence. If the English Act does not cover "foreign" birds of game, our law certainly does not apply to deer killed in the Province of Ontario.

W. S. Walker, in reply. The possession of the deer which is admitted was in itself an offence. There is no distinction in section 1405, and the defendant cannot in any way justify his possession. As to section 1407, all deer are liable to confiscation during the close season. If the importation of game during the close season is allowed, it will open the door to all kinds of contravention of the law. There have already been convictions in other cases similar to the present, that is, similar in so far as that the game in question came from Ontario.

April 10th, 1891. Judgment was rendered, dismissing the case.

M. Desnoyers: This case is one for infraction of the Game Laws. The inform-

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ation is laid by A. N. Shewan, charging the defendant with having in his possession at Montreal, on the tenth of March last, during the prohibited season, three carcasses of deer. The defendant admits having had the deer in his possession, but claims that as the deer were not taken or killed in this province he has not committed any offence against our Game Laws. It was clearly proved that the deer in question were killed on the preserves of the Long Point Company on Long Point Island, Lake Erie, in the Province of Ontario, last autumn, during the open season in that Province, were kept frozen at Port Dover all winter, and on the tenth of March last shipped to Montreal, on the order of the president of the Long Point Company, as a present to the defendant, a member of the Club. The question to decide is whether the Game Laws of this Province have been contravened. I do not find that under the Statute the possession of game during the prohibited season constitutes by itself an offence. The possession must be an illegal possession, as section 1405 clearly shews. It provides that on the seizing of any animals or birds, found in the possession of any person during the close season, the animals or birds shall, if it is proved that the law has been broken, be confiscated. Had the deer in question been seized, could they have been declared confiscated? They were not taken during the close season or by illegal means in this Province, and therefore our law has not been broken. The deer consequently could not have been declared confiscated. This being the case, section 1407 clearly does not cover the case, for it enacts that any person found guilty of having or having had in his possession any animals or birds confiscated, or liable to be confiscated, shall be condemned. Here the deer were not confiscated or liable to be, and therefore their possession by the defendant was not an offence under the Statute.

I have read the report of the case of Guyer, cited by defendant's pleading with great interest. The case is strikingly like the present. The questions as to whether the English Statute applies to foreign birds of game is learnedly treated by Mr. Justice Hawkins, with whom the Lord Chief Justice Coleridge concurred. I cite one passage from the judgment in that case.

"Moreover, it seems to us that it might well be contended that a partridge which never was alive in England, but was bred and killed in Russia, cannot be truly said ever to have been an English bird of game within the contemplation of an Act of Parliament, which, so far as regards the killing or taking of game birds out of season, could only refer to birds killed or taken on English ground, and, as regards the traffic in game out of the prescribed season, must be intended to refer to such birds only as are protected by the close season. Foreign birds clearly are not protected by the English close season.

"Why, then, should the possession of such birds lawfully killed abroad be forbidden by our law? Of course, if Parliament had expressly declared that no partridge, English or foreign, should be possessed by a person in England during a limited period of time, the law so made, reasonable or unreasonable, must be observed; but it certainly has not so declared."

In the present case I can come to no other conclusion than that no offence against our Game laws appears, and that the case must be dismissed. Without

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an express provision of law prohibiting the possession in this Province of game wherever taken during a certain season of the year, or prohibiting the importation of game during the close season, the facts of this case would not warrant any conviction.

The case against D. T. Irish, agent of the Canadian Express Company, charged with favoring a contravention of the Game Law by carrying the same deer, which was heard at the same time, was also dismissed.

The prosecutor subsequently gave notice of appeal from the above judgments, but abandoned them.

W. S. Walker, for prosecutor.

Taylor & Buchan, for defendant.

COUR SUPÉRIEURE, 1891.

MONTRÉAL, 4 FÉVRIER 1891.

Présent: MATHIEU, J.

MICHAEL GUERIN,

REQUÉRANT RATIFICATION DE TITRE;

ET

NAPOLEON O. C. CRAIG,

OPPOSANT.

Ratification de Titre—Composition.

JUGÉ:—Qu'une opposition d'un créancier hypothécaire, dont les droits ne sont pas constatés par le titre dont la ratification est demandée, ou par le certificat du Régistrateur produit après le huitième jour qui précède celui fixé par la présentation de la demande est irrégulière et sera rejetée sur motion.

JUGEMENT.

La Cour, parties ouïes, tant sur la motion du requérant pour faire rejeter l'opposition que sur la motion de l'opposant pour que le requérant soit tenu de déclarer s'il conteste la dite opposition;

Sur la motion du requérant demandant que l'opposition à fin de charge de l'opposant Craig soit rejetée, vu qu'elle a été produite après les délais fixés par la loi;

Considérant que par l'article 957 du Code de Procédure Civile, les créanciers hypothécaires, dont les droits ne sont pas constatés par le titre dont la ratification est demandée ou par le certificat du régistrateur, sont tenus de produire leur opposition le ou avant le huitième jour qui précède celui fixé pour la présentation de la demande à peine de déchéance;

Considérant que le jour fixé pour la présentation de la demande était le quatrième jour de décembre, et que la dite opposition à fin de charge n'a été produite que le vingt-trois décembre dernier;

Considérant que si le requérant n'avait pas produit son titre du bureau du Protonotaire comme il était tenu de le faire, l'opposant doit pouvoir se prévaloir de ce défaut, mais que cela ne l'autorisait pas à produire après les délais fixés par le Code ou d'un juge une opposition à fin de charge comme il l'a fait;

A accordé et accorde la dite motion, et rejette la dite opposition sans frais;

Sur la motion de l'opposant demandant que le requérant soit tenu de déclarer s'il entend contester son opposition ; M. Guérin et N. O. C. Craig.

Considérant que cette opposition vient d'être rejetée par l'adjudication ci-dessus, et que la dite motion ne peut être accordée ;

A renvoyé et renvoie la dite motion sans frais.

J. A. St. Julien, attorney for plaintiff.

Hutchinson & Oughtred, attorneys for defendant.

COUR SUPÉRIEURE, 1891.

MONTRÉAL, 7 MARS 1891.

Présent : DE LORIMIER, J.

COLIN McIVER,

DEMANDEUR ;

vs.

SAMUEL COULSON,

ET

DÉFENDEUR :

JAMES R BARCLAY,

MIS EN CAUSE.

Société—Transport de créance—Signification.

Jugé:—Que l'associé dans une société en nom collectif, qui, lors de sa dissolution, devient le cessionnaire d'une créance de la société contre un tiers, n'est pas tenu de faire signifier son transport à ce tiers avant de le poursuivre.

JUGEMENT.

Attendu que par la présente action le demandeur allègue en substance, que, vers le vingt mars mil huit cent quatre-vingt-trois, le demandeur était membre d'une société commerciale faisant affaires à Montréal, sous la raison sociale de McIver et Barclay, laquelle était composée du demandeur et de James R. Barclay, courtier de Montréal ; que, à cette date, la dite société prêta au défendeur la somme de deux mille trois cent cinquante-neuf piastres et quarante-et-un centins, par leur mandat ou chèque sur la Banque de Toronto, à l'ordre du défendeur ; que le défendeur a de fait reçu le montant du dit chèque ; que les intérêts légaux sur cette somme à venir au vingt-quatre juin mil huit cent quatre-vingt sept formaient une somme de six cent treize piastres et trente-sept centins, laquelle ajoutée au capital formait un total de deux mille neuf cent soixante-et-douze piastres et soixante et dix-huit centins ; que la moitié de cette somme capitale avait été empruntée par le défendeur pour le bénéfice du demandeur, l'autre moitié pour le défendeur ; que le vingt-quatre juin mil huit cent quatre-vingt-sept, il a été payé en à compte du capital ci-dessus, aux dits McIver et Barclay, treize cent vingt-cinq piastres, par le produit de la vente de vingt-cinq parts en actions de la Dundas Cotton Co., qui étaient la propriété conjointe du demandeur et du défendeur, et qui avaient été transportées à la dite société pour sûreté collatérale du paiement du dit prêt ; que, à la dite date, il restait dû sur le capital et les intérêts, seize cent quarante-sept piastres et soixante et dix-huit centins, dont la moitié, huit cent vingt-trois piastres et quatre-vingt-neuf centins, restait due par le dit défendeur à la dite société ; qu'il faut ajouter à cette somme deux mois d'intérêts calculés au vingt-quatre août mil huit cent quatre-

Colin McIver vs. S. Coulson et J. R. Barclay.

vingt-sept, donnant une somme de huit piastres et vingt-cinq centins, laquelle ajoutée à celle de huit cent vingt-trois piastres et quatre-vingt-neuf centins forme un total de huit cent trente-deux piastres et quatorze centins, que le défendeur devait alors à la dite société ; que, à cette dernière date, le défendeur a payé en à compte de cette somme celle de cent trente piastres, ce qui a alors laissé une balance de sept cent deux piastres et quatorze centins, à laquelle il peut ajouter l'intérêt, savoir, cent quatorze piastres et quatre centins, donnant un total de huit cent seize piastres et dix-huit centins, balance due par le défendeur sur le dit prêt ; que la dite société a été dissoute, et que le demandeur a été chargé de la balance sus-mentionnée, et que le dit James R. Barclay a transporté ses droits au demandeur contre le défendeur en cette cause ; que le demandeur est subrogé aux droits de la dite société, que le défendeur a reconnu devoir et promis payer cette dite somme ; que le dit James R. Barclay est mis en cause pour voir déclarer le demandeur seul propriétaire de la dite créance ; en conséquence, le demandeur conclut à ce que le défendeur soit condamné à lui payer la dite somme de huit cent seize piastres et dix-huit centins, avec intérêt et dépens ;

Attendu qu'à cette action le défendeur a plaidé par une défense en faits ; deuxièmement par un plaidoyer de prescription, alléguant que la créance du demandeur est éteinte et prescrite par le laps de cinq ans ; troisièmement par un plaidoyer, que le transport de Barclay au demandeur n'a jamais été signifié au défendeur ; quatrièmement, par une exception, alléguant que la somme en question ne lui a jamais été prêtée, qu'il l'aurait reçue pour acheter les vingt-cinq parts ou actions sus-mentionnées pour la société McIver & Barclay ; et qu'il n'a jamais eu transport de ces actions en sa faveur, qu'elles avaient été transportées directement à la dite société par le courtier Mecker, de qui elles avaient été achetées ;

Vu les documents produits, et examiné la preuve ;

Considérant que le demandeur a établi d'une manière légale et suffisante que le vingt mars mil huit cent quatre-vingt trois, la dite société McIver et Barclay a de fait avancé au défendeur une somme de deux mille trois cent cinquante-neuf piastres et quarante-et-un centins, suivant chèque ou mandat de la dite société à l'ordre du défendeur sur la Banque de Toronto ;

Considérant que le défendeur, examiné comme témoin, admet n'avoir eu ni reçu le montant du dit chèque par le fait qu'il admet l'avoir déposé à son crédit ;

Considérant qu'il est en preuve que le défendeur, le vingt mars mil huit cent quatre-vingt-trois, possédait virtuellement en son nom, dans les livres de M. Mecker, courtier de Montréal, vingt-cinq parts ou actions dans le Dundas Cotton Company ;

Considérant qu'il est en preuve que, du consentement du défendeur, ces parts ont été ensuite placées on transportées dans les livres du dit courtier, au nom de la dite société McIver et Barclay ;

Considérant que la prétention du défendeur, à l'effet que la transaction en question n'a eu lieu qu'uniquement pour l'accommodation de la société McIver et Barclay, n'est supportée d'aucune preuve ; qu'au contraire, telle prétention est

combattue par les faits de cette cause, par les admissions mêmes du défendeur, et par les états de compte qui ont été rendus à ce dernier, et que sans ces admissions, ces prétentions du défendeur, quelque plausibles qu'elles puissent être, doivent être au point de vue de la preuve considérées comme non justifiées ;

Considérant que le défendeur, interrogé comme témoin, admet la possibilité du fait qu'il avait pu avoir, le vingt mars mil huit cent quatre-vingt-trois, reçu de la dite société McIver et Barclay un avis l'informant que cette dernière entendait tenir les susdites parts comme garantie collatérale du susdit prêt ;

Considérant que le défendeur admet avoir par la suite reçu de la dite société divers états de compte, montrant que, de fait, les dites parts étaient tenues en garantie collatérale du dit prêt, par la dite société McIver et Barclay ; que le défendeur ne s'est jamais plaint de ce fait, et que, par conséquent, il doit être censé avoir accepté ces états de compte comme corrects ;

Considérant que si la transaction en question avait eu lieu uniquement pour l'accommodation de la dite société McIver et Barclay, ainsi que le défendeur, il serait difficile d'expliquer pourquoi cette société aurait donné avis au défendeur qu'elle tenait les parts en question comme garantie collatérale du dit prêt, et pourquoi cette société aurait ensuite fourni des états de compte au défendeur, l'informant encore du même fait et de la balance de son débit ;

Considérant qu'il est en preuve que les parts en question ont été vendues suivant leur valeur réelle et le cours ordinaire des affaires pour le compte et crédit du défendeur ;

Considérant que, après cette vente, la balance du compte du défendeur a été préparée suivant le cours ordinaire des affaires, et que le défendeur a été crédité du montant provenant de la vente des dites vingt-cinq parts ; que, contrairement aux allégations de la défense, à l'effet que le défendeur ignore ce que sont devenues ces parts ou actions, il est en preuve qu'un état de compte lui a été rendu, montrant le résultat de telle vente, et constatant la balance à son débit, et qu'il ne s'est jamais plaint ni du fait de cette vente ni de l'inexactitude du dit état de compte ;

Considérant qu'il est établi que, le vingt-quatre août mil huit cent quatre-vingt-sept, le défendeur a payé sur et en déduction de la dite créance une somme de cent trente piastres, laquelle a été placée au crédit du défendeur dans les livres de la dite société, ainsi qu'établi par le témoin Barclay ;

Considérant que le défendeur, interrogé comme témoin, admet lui-même avoir payé ce montant, mais prétend que c'était pour obliger le demandeur personnellement ;

Considérant que cette prétention du défendeur n'est aucunement corroborée, et que rien ne fait voir qu'il ait jamais redemandé cette somme au demandeur, en sorte qu'il doit être présumé avoir voulu, par ce paiement, réduire d'autant la dite créance ;

Considérant que ce paiement ainsi justifié a eu pour effet d'interrompre la prescription du mandat ci-dessus mentionné ;

Considérant que le demandeur n'était tenu de faire signifier au défendeur le droit par lui acquis, à raison du partage ou du règlement de la société McIver

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et Barclay, ni que ce partage n'a été que déclaratif des droits du demandeur, et que le défendeur n'a aucun intérêt à se plaindre, vû que le dit Barclay est mis en cause, et reconnaît que le demandeur est le seul et unique créancier du défendeur ;

Considérant que le demandeur a établi les allégations matérielles de sa demande ;

La Cour renvoie les défenses du défendeur, maintient l'action du demandeur, et condamne le défendeur à payer au demandeur la somme de huit cent seize piastres et dix-huit centins courant, avec intérêt du quinzième jour d'avril mil huit cent quatre-vingt-dix, date de l'assignation, et condamne le défendeur aux dépens.

M. Honan, attorney for plaintiff.

Chapleau & Co., attorneys for defendant.

Greenshields & Co., attorneys for *mis en cause*.

COUR SUPÉRIEURE, 1891.

MONTRÉAL, 24 JANVIER 1891.

Présent :— LORANGER, J.

MICHAEL THOMAS BRENNAN, DEMANDEUR ;

vs.

WILLIAM GEORGE IDLER, DÉFENDEUR.

Louage—Résiliation de Bail.

Jugé :—Que lorsqu'une maison louée est insalubre par suite de l'humidité causée par un drainage insuffisant, et est à cause de cela jugée inhabitable par les médecins, il y a lieu à la résiliation du bail à la demande du locataire.

JUGEMENT.

Attendu que le demandeur, par bail du quatre février dix-huit cent quatre-vingt-huit, a loué du défendeur une maison située au coin de la rue Craig et de la rue Ste Elizabeth, de cette ville, pour deux années, à compter du mois de mai suivant ; qu'à son expiration le dit bail a été continué par tacite reconduction ; que le demandeur allègue que les dites prémisses sont devenues inhabitables en raison de l'humidité provenant de la cave et des mauvaises odeurs qui se répandent dans la maison ; que le défendeur a été souvent mis en demeure de mettre les dites prémisses en état convenable pour être habitées par le demandeur et sa famille, mais a toujours négligé de le faire ; que le demandeur a dû, vû que la maladie est entrée dans sa famille en raison de l'insalubrité des dites prémisses, les abandonner ;

Attendu que le demandeur pour ces faits demande la résiliation du bail et des dommages au montant de trois cents piastres ;

Attendu que le défendeur plaide que les prémisses en question ont toujours été en état convenable, et qu'il a fait, avant l'action, à la demande du demandeur, les réparations jugées nécessaires par le demandeur lui-même ; que s'il y a eu humidité dans la cave des dites prémisses, cela est dû à la négligence du demandeur qui a mal entretenu les conduits d'eau ;

Considérant qu'il résulte de la preuve, que dans le mois de novembre dernier l'humidité provenant de la cave des prémisses en question s'est répandue dans toute la maison, et a rendu les dites prémisses insalubres, au point qu'elles ont été jugées inhabitables par les médecins qui en ont fait la visite ; qu'il est en preuve

que l'épouse du demandeur a été malade, et que cette maladie a été aggravée par l'insalubrité des dites prémisses, et que, sur l'avis de son médecin, elle a dû abandonner le toit de son mari pour aller se faire traiter à l'hôpital;

Considérant que les prémisses en question sont assises sur un sol bas et en déclivité; que l'humidité qui se répand dans la maison provient de l'insuffisance d'une drainage convenable;

Considérant qu'il est en preuve que les dites prémisses ne pouvaient pas être habitées sans danger immédiat pour le demandeur et sa famille, et que le demandeur était justifiable de les abandonner comme il l'a fait;

Considérant que le défendeur a été mis en demeure régulièrement de faire les réparations nécessaires pour mettre les lieux en état de salubrité; qu'il a fait certaines réparations, mais que ces réparations étaient impropres à couvrir le vice dont se plaint le demandeur;

Considérant que pour ces causes il y a lieu à la résiliation du dit bail;

Vû l'article 1641 du C.C;

Considérant que le demandeur n'a pas prouvé sa réclamation pour dommages;

Considérant que le demandeur a prouvé les allégués de sa déclaration, et que le défendeur n'a pas prouvé ceux de sa défense;

Renvoie la dite défense, maintient l'action, casse, annule et résilie, à toutes fins que de droit, le bail du quatre février dix-huit cent quatre-vingt-huit, intervenu entre les parties en cette cause, le tout avec dépens.

Beique & Co., attorneys for plaintiff.

McMaster & Co., attorneys for defendant.

COUR SUPÉRIEURE, 1891.

MONTRÉAL, 27 FÉVRIER 1891.

Présent:—LORANGER, J.

ELIZABETH LANGEVIN,

PLAIGNANTE;

vs.

LOUIS PERRAULT,

DÉFENDEUR.

Mis en demeure—Dommage.

Jugé:—Que lorsqu'une partie qui a un contrat admet qu'elle ne l'a pas exécuté, son admission rend inutile la mise en demeure préalable à la réclamation en dommage.

JUGEMENT.

Attendu que la demanderesse se pourvoit en recouvrement de dommages résultant de l'inexécution d'un contrat intervenu le huit août dix-huit cent quatre-vingt-neuf, entre elle et le défendeur, par lequel ce dernier s'est obligé de lui fournir, moyennant la somme de douze piastres par mois, le courant électrique nécessaire pour éclairer à la lumière incandescente, le jour et la nuit, les prémisses occupées par la demanderesse;

Attendu que le défendeur plaide qu'il s'est conformé au contrat, et que s'il y a eu interruption de temps en temps dans l'éclairage, cela est dû au fait qu'il a dû réparer les machines électriques pour les mettre en ordre et en bon état de fonctionnement; que ces réparations sont nécessitées par la nature même de ce

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genre d'industrie, et étaient prévues par la demanderesse comme par tous les clients du défendeur; que la demanderesse n'a pas fait les mises en demeure voulues, et est non recevable dans sa demande en réclamation de dommages, et le défendeur ajoute que, lors de l'action, la demanderesse lui devait plus de vingt piastres pour loyer, laquelle somme était plus que suffisante pour compenser les dommages réclamés;

Considérant que, par contrat sous seing privé du huit août dix-huit cent quatre-vingt-neuf, le défendeur, représenté par son procureur dûment constitué, s'est engagé à fournir à la demanderesse, pour le prix de douze piastres par mois, depuis le milieu d'août dix-huit cent quatre-vingt-neuf, jusqu'au premier août dix-huit cent quatre-vingt-dix, le courant électrique pour éclairer à la lumière incandescente, le jour et la nuit, les prémisses qu'elle occupait sur la rue des Commissaires, portant les numéros 127 et 129, les dimanches y compris;

Considérant que les prémisses en question étaient, aux époques mentionnées en la déclaration, employées par la demanderesse comme buvette et restaurant, et qu'il résulte de la preuve qu'elles étaient très achalandées;

Considérant que le défendeur, interrogé comme témoin, admet qu'il n'a fourni le courant électrique pour éclairer les prémisses en question le dimanche qu'à quatre heures de l'après-midi, à partir du mois d'août jusqu'au jour de l'action, c'est-à-dire jusqu'au vingt-huit novembre dix-huit cent quatre-vingt-neuf;

Considérant qu'il est établi que dans cet intervalle de temps il s'est présenté, chaque dimanche, au restaurant de la demanderesse, un grand nombre de personnes pour y prendre leurs repas, et qu'elles ont dû se retirer, vu l'insuffisance de lumière dans les lieux en question;

Considérant que l'admission du défendeur qu'il n'a pas exécuté son contrat rendait inutile la mise en demeure préalable à la réclamation en dommages;

Considérant que la demanderesse a prouvé sa réclamation jusqu'à concurrence de la somme de cent piastres;

Condamne le défendeur à payer à la demanderesse la dite somme de cent piastres avec intérêt du trente novembre dix-huit cent quatre-vingt-neuf, date de l'assignation, et les dépens.

LeBlanc & Co., attorneys for plaintiff.

Geoffrion & Co., attorneys for defendants.

COURT OF REVIEW, 1888.

MONTREAL, DECEMBER 29TH, 1888.

Present:—JOHNSON, C.J., TASCHEREAU and WURTELE, J.J.

RICHARD M. SCOTT, PLAINTIFF

vs.

HELEN R. McCAFFREY, ET VIR, DEFENDANTS;

AND

HELEN R. McCAFFREY, ET VIR, OPPOSANTS.

HELD:—By His Honor Mr. Justice Johnson (dissenting), that an opposition to the execution of a judgment for more than is due will not lie without alleging that the excess is not due and owing.

That a party in a case cannot oppose the execution of a judgment for a debt by alleging merely want of due and formal taxation of costs.

HELD:—By the majority of the Court, that the costs on an action must be taxed with due notice to the opposite party before execution can issue.

That if an execution issues without such taxation with notice, an opposition will lie to such execution.

JOHNSON, J. (dissenting).—Execution issued for debt, interest and costs in this case, the costs having been taxed by the Prothonotary without notice to the opposite party of presentment for taxation.

The defendant (*femme séparée*) filed her opposition *afin d'annuler* against the seizure, on two grounds: 1. That the costs had not been taxed *contradictoirement* 2. Informality respecting the appointment of a guardian to the seizure.

The plaintiff contests generally as to fact and as to law.

The case is not without importance in practice. There are several questions to be looked at. 1. Have the statute of 1849 and the Code (art. 479) changed the law, which before then certainly required notice of taxation? I incline to think they have not, particularly in view of the decision in Lewis et al. *vs.* McGinley et al., in Review at Quebec (6 Que. L. R. 61), where the judgment of Ch. J. Meredith and Casault and Caron J.J. unanimously held that the power given the prothonotary under art. 479 was the same as that previously exercised by the Court before the statute of 1849.

I do not think, either, that we need trouble ourselves about the practice, which was very extensively contrary to that view of the law, and is expressly admitted in the record to have been the practice in the district of Bedford. The real questions with me are different; admitting the law to be as stated in Lewis et al. *vs.* McGinley, and in a previous case of Audet *vs.* Asselin, and Asselin Opposant (15 L. C. R., p. 272, before the Code, when there could really be no question about it), our first duty, I think, is to apply the law to the facts of this case.

The act of 1867, the old rule of practice requiring notice, the present law, if rightly declared in Lewis *vs.* McGinley, must all have some reason—some sense

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and meaning with a view to an object. The reason of the rule appears plain. It exists to protect the party from injustice. It is of course the debtor's interest to see that the costs are rightly taxed, and that he is not made to pay too much. The purpose and reason of the rule was to secure that and nothing more. In the present case the opposant does not even allege, nor is it even in any way suggested, that the costs are wrongly taxed as regards amount. Every cent of them may be rightly due for aught that the opposant says to the contrary. In other words, the reason of the law entirely fails. The opposant has no grievance, no interest he asks us to protect, or to which we can apply the law in her favor; and if we did so, we should be holding that the law required a useless notice; and in all cases (even where the amount was admitted) we should have to disregard the rule *cessante ratione cessat ipsa lex*.

In the case of Audet *vs.* Asselin the opposant expressly alleged what his interest was. He said the costs were excessive and he did not owe them; and I feel very sure that without that allegation his opposition would not have been entertained. But whether the costs are rightly or wrongly taxed, or not taxed at all, what has that to do with the debt for which the execution principally issued? The opposant does not oppose only for the overcharge, nor ask that to the extent of the costs the diminution of the whole sum be levied by the writ, which might and ought to have been done under Art. 581 C. P., which provides for opposing a sale for more than is due. The position taken by the debtor here is quite different from that; what he says is simply, "the costs are not legally taxed and therefore not legally executory; and the consequence of that is you can't recover your debt." I know no law and I recognize no reason for that. In the case of Lewis and McGinley the execution issued for costs only, but it could not be supposed that if the debt had been included in the writ, what was only a good answer as to costs would have stopped a levy for the debt and interest.

In Audet *vs.* Asselin the execution was for both debt and costs, and the opposition was maintained on the single ground that the costs had not been duly taxed, but the reasoning of the learned judge and the authority of the ordinance of 1667, which he cited (Art. 2, title 33), seem to me to be at variance with each other, and the text would lead me to an opposite conclusion. The text is: "Les saisies et exécutions ne se font que pour chose certaine et liquide," from which it was deduced that the debt was not a thing certain, because the costs were not ascertained.

If that case is to be held to decide that an opposition would not lie as against costs alone, I totally dissent from it as plainly against the Art. 581, which lays down in expres words, that if part only of the debt is not due, the opposition has the effect of preventing the sale for more than is due. But in truth it decided nothing of the kind, but only that execution could not issue separately for different parts of a judgment. In my opinion the execution for the debt was not vitiated by the addition of something else that was not due. The contrary seems to me, with all respect for those who hold it, a wrong application of a technical rule—a case of *summum jus summa injuria*.

What more than anything else probably gave rise to the practice, as far as it has gone, of not giving notice of taxation was the provision in article 479, giving the right to get the taxation revised within six months. That was, I think, an erroneous view, and at any rate was open to great abuse, as a party might without notice get his bill taxed, and then wait till the six months expired before taking his execution. In the present case, however, the opposant was exposed to no injustice on account of the costs; the six months had not expired, and when the writ stated what the costs were, there was the recourse by revision if it was wrong, or by opposition to the extent of the costs only under article 581.

The second ground of the opposition as to the name, domicile and quality, etc., of the guardian, not being mentioned in the *procès verbal*, I hardly look upon as serious; but if it were, the facts disclosed in the *faits et articles* which are confessed would meet the requirements of the law.

There is one other observation I ought to make. A judgment of a court of justice is entitled to respect and to execution. If there is one thing more than another that is a drag upon commercial credit, it is the practical worthlessness of judgments whose execution can be indefinitely delayed on technical pretexts. We all see it. Nobody doubts it; and yet it is, although most abusively practised, entirely against the spirit of our law; for while actions are presumed to be in good faith, oppositions are not. On the contrary, their good faith must be shown, and even sworn to. I cannot hold as in good faith (I use a legal term merely, for the opposant, of course, acted on advice) a proceeding which delays execution of judgment for a debt and costs, the first of which is authenticated beyond dispute, and the second not even denied.

I would therefore hold: First, that you cannot oppose the execution of a judgment for more than is due without alleging that the excess is not due and owing.

Second, that you cannot oppose at all the execution of a judgment for a debt by alleging merely want of due and formal taxation of costs.

To say that an execution issued in part for what is not due is bad *in toto* (as in the present case) seems to me saying that the law expressed in Art. 581 is useless, for it applies expressly and exclusively to such a case. Of course I agree that you cannot multiply executions, but that would only mean that after the costs were taxed you could not execute for them at the expense of the defendant. I would therefore dismiss this opposition.

TASCHEREAU, J.—A party to a case is entitled to notice of taxation. The usage to the contrary which existed in the district of Bedford cannot deprive the party of the right to notice.

The practice in Montreal now requires notice.

To permit execution for the principal, apart from the costs, would multiply executions. The majority of the court are of opinion to confirm the judgment.

WURTELE, J.—In the district of Quebec it has been the practice to require notice of taxation, whereas in Montreal, Ottawa and Bedford, notice has not been

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insisted on. The effect of the present judgment will be to establish a uniform practice.

Judgment confirmed, Johnson, J., dissenting.

Baker & Martin, attorneys for plaintiff.

Amyrauld, attorney for defendants.

COURT OF QUEEN'S BENCH, 1889.

MONTREAL, 28TH MAY, 1889.

Present:—TESSIER, CROSS, CHURCH, BOSSÉ and DOHERTY, J.J.

WILLIAM FARWELL ET AL.

(*Defendants in the Court below*)

APPELLANTS;

AND

THE ONTARIO CAR & FOUNDRY CO.

(*Plaintiffs in the Court below*)

RESPONDENTS.

HELD:—That where trustees had taken possession of a railway under certain statutory powers which authorized them to do so in the event of default on the part of the railway company to pay the interest on the bonds of the road for a period of 90 days after it became due, and which default had occurred, such trustees were not to be considered pledgees of the road, and they were not liable for supplies furnished to the road before they took possession, even although such supplies were necessary for the running of the road, and even although such supplies were furnished at a time when the Company was in default to pay such interest, and the trustees could have taken possession of the road under the said statute.

This appeal was taken from the following judgment of the Superior Court, Montreal, rendered by his Honor Mr. Justice Mathieu, the 22nd June, 1888.

"La Cour, &c. Attendu que par le chapitre 49 des Statuts de Québec de 1880, 43-44 Victoria, intitulé 'Acte pour amender les actes concernant la compagnie du chemin de fer du Sud-Est, et pour autoriser la dite compagnie à émettre des nouveaux bons hypothécaires,' il a été décrété que la compagnie pourrait émettre des bons hypothécaires jusqu'à concurrence de la somme de $12,500 par mille, et que dans le but de garantir le paiement des dits bons et des intérêts sur iceux, elle pourrait transporter la franchise de son chemin de fer, et toutes les propriétés, droits et intérêts qu'elle possédait ou dont elle jouissait, et les droits de péage, le revenu, les profits, améliorations et le renouvellement d'icelui, et toutes les additions qui pourraient y être faites, à des fidéi-commissaires nommés à cet effet, et qu'il pourrait être stipulé dans le dit transport, qui devrait avoir la possession, gestion et le contrôle de la dite franchise et autres propriétés ainsi transportées;

"Attendu qu'en vertu du dit statut, la dite compagnie de chemin de fer émit les dits bons, et par un acte en date du 12 août 1881 transporta son chemin à des fidéi-commissaires nommés en vertu du dit statut, et il fut stipulé au dit acte que la dite compagnie garderait cependant la possession du dit chemin, tant qu'elle ne ferait pas défaut, pour le temps y mentionné, dans le paiement des

dits bons ou des intérêts dûs sur iceux; mais que dans le cas où elle ferait défaut dans le paiement des dits intérêts, pendant le temps mentionné au dit acte, les dits fidéi-commissaires pourraient prendre la possession du dit chemin;

"Attendu que pendant que la dite compagnie était ainsi en possession de ce chemin, après en avoir transporté la propriété aux dits fidéi-commissaires, elle acheta de la demanderesse pour l'usage du dit chemin dont elle était en possession comme susdit, mais qui appartenait aux dits fidéi-commissaires en propriété en vertu de la convention susdite, une certaine quantité de chars, pour le prix desquels la demanderesse a poursuivi la dite compagnie et obtenu jugement contre elle, et dont elle réclame le montant des dits fidéi-commissaires dans la présente cause;

"Attendu que vu le défaut de la dite compagnie de faire le paiement des intérêts sur les dits bons, tel que convenu par le dit acte, le 12 août 1881, les dits fidéi-commissaires ont, le 5 octobre 1883, demandé la possession du dit chemin, qui leur a été cédé par la dite compagnie;

"Vu les articles 1043 et 1046 du Code Civil;

"Attendu qu'il est constant que les chars dont la demanderesse réclame le prix en la présente cause étaient nécessaires pour l'exploitation du dit chemin, et qu'ils ont donné une plus value à ce chemin;

"Attendu que du fait de la livraison et vente de ces chars est résulté entre la demanderesse et les dits fidéi-commissaires le quasi contrat *negotiorum gestorum*, dont les effets sont réglés par le dit article 1046 du Code Civil, bien que cet achat n'ait été fait que de l'ordre de la dite compagnie, et que la demanderesse n'a traité d'aucune manière avec les dits fidéi-commissaires à ce sujet;

"Attendu que l'action que donnait à la demanderesse contre la dite compagnie de chemin de fer l'obligation que cette dernière avait contracté envers elle n'exclut pas l'action directe que le quasi-contrat lui donne contre les fidéi-commissaires, jusqu'à concurrence de la plus value, pour le remboursement de ce qui peut lui rester dû;

"Considérant qu'on peut aussi appliquer à cette action les principes de l'article 417 du Code Civil, qui décrète que lorsque des améliorations ont été faites par le possesseur, le propriétaire doit en payer le coût, si elles étaient nécessaires;

"Considérant que les défenses des dits défendeurs sont mal fondées, et que l'action de la dite demanderesse est bien fondée;

"A renvoyé et renvoie les dites défenses, et a maintenu et maintient l'action de la demanderesse, et a condamné et condamne les dits fidéi-commissaires à payer à la dite demanderesse la somme de $45,556.97, pour balance du prix des dits chars, avec intérêt sur cette somme à compter du 30 décembre 1886, date de la signification du bref de sommation en cette cause, et les dépens distraits, etc."

In appeal the above judgment was reversed, Mr. Justice Tessier and Mr. Justice Church dissenting. The remarks of the judges and the considerants of the judgment of the Court are given below, and are as follows:—

Wm. Farwell et al. and The Ontario Car & Foundry Co.

Cross, J.—This case arises from a claim against the same railway, the South Eastern Railway Company, under the same legislation referred to in the case of Farwell et al. and Walbridge, which it is unnecessary again to pass in revision.

It appears that the Ontario Car & Foundry Company had sold to the South Eastern Railway Company a large amount of rolling stock, consisting of box, platform and cattle cars, for which there was due to it a sum of $45,556,97. The sales and deliveries of these cars had all taken place prior to the assumption of possession by the appellants under the conveyance or indenture of mortgage, of date the 12th August, 1881, of the South Eastern Railway, with its property, franchises and appurtenances, and the Ontario Car & Foundry Company had brought three several actions against the said railway company for different deliveries of said cars, and in each of the cases had obtained judgment against the South Eastern Railway Company for sums, aggregating, in the whole, the sum of $45,556.97.

It appears that each of these cases was accompanied by conservatory seizure and a claim for the privilege of an unpaid vendor, which does not seem to have been maintained.

The present action was instituted against the appellants, the trustees for the bondholders, the South Eastern Railway Company being also therein implicated as a *mis en cause*. The conclusions taken were: 1st. That the delivery of possession of the case by the South Eastern Railway Company to the trustees, the appellants, should be declared fraudulent, null and void, and be set aside. 2nd. That the indenture of mortgage of the 12th August, 1881, the resolution of the shareholders authorizing the same and the foreclosure, and taking possession thereunder on the 5th of October, 1883, be also declared fraudulent, null and void, and be severally set aside in so far as respects the said cars. 3rd. That the South Eastern Railway Company should be summoned to hear said transfer, indenture and foreclosure set aside, and hear the final judgment. 4th. That said trustees be adjudged and condemned to pay the said Ontario Car & Foundry Company $45,556.97 damages as and for the use and detention of the said cars from the 5th October, 1883. 5th. That the South Eastern Railway Company be ordered, enjoined and prevented from using said cars, until the said Ontario Car & Foundry Company should have been paid the said sum of $45,556.97 with interest, and condemned to deliver up said cars within fifteen days of the final judgment, to be sold in satisfaction of said claim, and in default of compliance that said trustees then should be jointly and severally condemned to pay the Ontario Car & Foundry Company the said sum of $45,556.97 with interest. And 6th, That the South Eastern Railway Company should be condemned to pay interest on $10,712.94.

It will be observed that no money condemnation is here asked for the price or value of the cars, the only direct money condemnation that is asked is damages for the detention of the cars. The principal object of the action seems to have been to have the cars sold, and their proceeds awarded to the Ontario Car & Foundry Company.

It is sufficient to say that the South Eastern Railway Company and the trustees

disputed these pretensions of the Ontario Car & Foundry Company. The learned judge of the Superior Court, in rendering the judgment now appealed from, granted none of the conclusions of the Ontario Car & Foundry Company, but granted them what they did not ask for, namely, a direct condemnation for the price and value of the cars.

The learned judge seems to have held that the trustees became proprietors of the South Eastern Railway from the date and in virtue of the indenture of date the 12th August, 1881, since which date the cars had been furnished; that they were necessary for the running of the road, and had augmented its value; that although furnished directly to the South Eastern Railway Company, it nevertheless gave rise to the contract *negotiorum gestorum*, the South Eastern Railway Company becoming the *gestor negotiorum* of the trustees acting for them and binding them by the transaction; that the actions of the Ontario Car & Foundry Company against the South Eastern Railway Company did not exclude their action against the trustees, and they were entitled to recover for the value they had added to the road.

I cannot coincide with the learned judge's views. I do not think the conclusions taken in the action warranted any direct condemnation as pronounced by the learned judge. I think the judgments taken against the South Eastern Railway Company by the Ontario Car & Foundry Co. exhausted the direct recourse of that company against the South Eastern Railway Company, and showed who was the debtor and to whom credit had been given; that if any recourse remained to the Ontario Car & Foundry Company, it was a recourse *in rem* to follow the cars they had sold and have their proceeds awarded by privilege to them, the Ontario Car & Foundry Company—a recourse which they seemed to have asked for as well in this action as in their former actions, where it had been refused them, and cannot for various reasons be awarded them in this action on the present appeal: 1. Because it was denied them in their former actions. 2. Although again demanded in the present action, it has not been awarded by the judgment appealed from, and as the Ontario Car & Foundry Company have not appealed from the judgemnt, they have no conclusions on which it could be granted on this count. 3. Article 2,000 of the Civil Code shows that this privilege would not be good against the pledgee; and the trustees, by taking possession on the 5th October, 1883, converted what up to that time was a lien into a pledge, which would be an obstacle to the Ontario Car & Foundry Company following the cars they had sold into the hands of the trustees.

I think these reasons are sufficient to entitle the appellants to a reversal of the judgment appealed; it is therefore reversed, and the action of the Ontario Car & Foundry Company dismissed.

TESSIER, J., who was not present at the rendering of the judgment, recorded his dissent.

CHURCH, J., dissenting.

I consider that the trustees might and should, as a matter of equity and justice, when they took possession of the property, have made up their minds either to pay for it or to abandon it to the plaintiffs. The possession of the trustees

Wm. Farwell et al. and The Ontario Car & Foundry Co.

was possession not only of the bondholders but of the company, and the plaintiffs could follow the property into their hands.

I have come to the conclusion that the trustees were the agents of both parties —agents of the company and agents of the bondholders; that they were bound to keep the road in operation; that to do so it was necessary to purchase the cars; that they were purchased when the company was in a state of insolvency; that this insolvency was not known to the plaintiffs, now respondents; and, moreover, that the company was insolvent to the knowledge of the bondholders; that this knowledge was concealed from the public; that the trustees did not take the proceedings which the statute allowed them to take; that a large sum of interest had accrued. Then after two years' inaction, the bondholders swooped down, took possession of the road and also of the property which the company had bought during the period which had elapsed since the default to pay interest. It appears to me that that is a condition of things which the law never contemplated. Under the circumstances of this case, and seeing the manner in which the Act has been drawn, it is, to my mind, repugnant to reason and to justice that the trustees should take possession of property purchased after the insolvency of the railway company. My opinion is that the trustees might, and should, as a matter of justice and equity, when they took over this property, either have made up their minds to pay for it, or should have returned it to the plaintiffs. The possession of the trustees was possession not only of the bondholders but of the company, and the respondents had a right to follow their property into their hands. I think the judgment should be in that sense.

Bossé, J.—I regard the question chiefly as one of procedure. The action concluded for the setting aside of the deed of 1891 for fraud, and then asked damages for the detention and use of the cars, and that the cars be placed in the custody of a guardian, and sold in satisfaction of the claim. This was the only conclusion. Could the Court come to the aid of the party and declare that there was a privilege? Under our system the Court cannot go beyond the conclusions and give a plaintiff what is not asked.

The judgment of the Court is as follows:—

"The Court, etc.

"Considering that the respondents failed to prove that they sold or delivered to the appellants any of the railway cars or property in respect of which the present action has been brought; and considering that on the contrary it appears that the said railway cars and property were, by, the said respondents, sold and delivered to the South Eastern Railway Company, to whom the respondents gave credit for the same, and not to the appellants;

"Considering that the judgment rendered by the Superior Court, at Montreal, on the 22nd day of June, 1888, in this cause, did not award the respondents any privilege upon or special recourse against the said railway cars and property, or the proceeds thereof, and that the respondents have not appealed from said judgment, or taken any conclusions before this Court on which any such privilege or recourse could be awarded to them, and further that such privilege and recourse appear to have been denied them in previous actions;

"Considering also that after the appellants had taken possession of the railroad on which the said cars and property had been placed, and to which they had become attached and accessory under and in virtue of their mortgage thereon, and the statute in that case made and provided, the same became a pledge in their hands, debarring the respondents from claiming or enforcing any privilege they might otherwise have had thereon, or upon the proceeds thereof;

"Considering, therefore, that there is error in the said judgment so rendered by the said Superior Court, at Montreal, on the said 22nd of June, 1888;

"The Court of Our Lady the Queen, now here, doth cancel, annul and set aside the judgment; and proceeding to render the judgment which the said Superior Court ought to have rendered, doth dismiss the said action of the said respondents, with costs as well of the said Superior Court as of this Court, said costs to be taxed in this Court as in a cause of the first class."

Dissentiente The Hon. Justices Tessier and Church.

Judgment reversed.

J. O'Halloran, Q.C., attorney for appellants.

Laflamme, Laflamme, Madore & Cross, attorneys for respondents.

(J. K.)

NOTE.—The above judgment was confirmed by the Supreme Court of Canada, June 13, 1890.

COURT OF REVIEW, 1888.

MONTREAL, NOVEMBER 30TH, 1888.

Present:—JOHNSON, C. J., TASCHEREAU AND MATHIEU, J.J.

DAME CLOTHILDE TRUDEAU ET VIR., PLAINTIFFS;

vs.

JOSEPH TRUDEAU ET AL., DEFENDANTS;

AND

CHARLES T. CHARBONNEAU, MIS EN CAUSE.

HELD:—That a judge who has appointed a notary to make an inventory of a succession has power to revoke such appointment on sufficient grounds being shown.

JOHNSON, J.—Judgment brought into review was a judgment by which it was denied that a previous appointment by the same judge of a notary to make inventory of a succession could be revoked.

The appointment had been made upon the petition of certain heirs, and without due notice to the others, who, therefore, were not present but who subsequently petitioned to have another appointment made.

This latter petition was rejected, on the ground that I have mentioned; and it seems to have been considered that the second petitioner ought to have appealed from the first judgment.

That, however, could not be done, he was not a party to the first petition; moreover, upon principle, I see nothing to prevent a judge who has given

Dame Clothilde Trudeau et vir vs. Jos Trudeau et al. and Charles T. Charbonneau.

authority to a notary to inventorize a succession, from revoking the appointment on sufficient grounds.

We cannot now give final judgment, for the *mis en cause* was not allowed to go to proof—so that we cannot see whether the second petition ought to have been granted or not; but we can direct the Court below to proceed with the evidence and consideration of the case. We annul the judgment inscribed with costs.

Girard & Co., attorneys for plaintiffs.
Paradis & Co., attorneys for defendants.

COURT OF REVIEW, 1890.

MONTREAL, DECEMBER 30TH, 1890.

Present:—JOHNSON, C.J., JETTÉ AND MATHIEU, J.J.

MYER LIGHTSTONE, PLAINTIFF

vs.

HYMAN BERCOVITCH, DEFENDANT.

B who was arrested on a capias at the instance of L gave bail to the sheriff under Art. 828 C. P. C., on the expiration of which he failed to give special bail under Art. 824 C. P. C. L took judgment on 16th June by default, copy of which was served on B and his sureties, who were required to pay the amount of the judgment. On 11th July B petitioned to be allowed to appear and put in special bail, on the ground that he had instructed his attorney to do so, and that it had not been done through inadvertance on the part of his attorney; the petition, which was supported by an affidavit of B, was contested by L, but granted by the Court.

IN REVIEW, HELD:—That the judgment granting the petition was not an interlocutory but a final judgment.

That a defendant arrested under a capias can put in special bail at any time, even after a judgment, and although the bond to the sheriff has been assigned to a third party who has brought an action on it.

That the affidavit of the petitioner is sufficient to support such a petition if it is not contradicted.

The judgment from which this Inscription in Review was taken was rendered by His Honor Mr. Justice Pagnuelo on the 7th November, 1890, and was as follows:—

La Cour, ayant entendu les parties sur la requête du défendeur présentée le onze juillet dernier, et demandant la permission de fournir un cautionnement spécial, en vertu de l'article 824 C. P. C., examiné la procédure, pièces et preuve produites, et sur le tout délibéré;

Considérant qu'un défendeur arrêté sur capias peut dans le rapport de l'action dans les huit jours qui suivent fournir un cautionnement qu'il ne laissera point la province du Canada, et que le cas échéant les cautions paieront le montant du jugement, en capital, intérêt et le délai ci-dessus fixé, sur permission du tribunal pour motifs suffisants, article 924 C. P. C.;

Considérant que le cautionnement fourni en vertu de l'article 824 a l'effet de libérer le défendeur de la prison, aussi bien que de remplacer le cautionnement fourni en vertu de l'article 828 au moyen duquel il a pu obtenir son élargissement avant le rapport du bref; attendu que le défendeur a prouvé, par sa déposition non contredite qu'il avait chargé son avocat de fournir un cautionnement sous l'article 824 C. P. C., et de contester le capias dans le délai requis par la loi, mais que, par inadvertance ou malentendu, son avocat n'a pas comparu, lors du rapport du capias, qu'il a laissé entrer jugement par défaut contre lui, le six, donnée en vertu de l'article 828, par un nouveau cautionnement sous l'article 824; que ce motif est suffisant pour justifier le défendeur du retard apporté dans le cautionnement à donner en vertu de l'article 824;

Permet au défendeur de fournir, sous huit jours, bonnes et suffisantes cautions, suivant l'article 824, qu'il ne laissera pas la Province du Canada, et que, le cas échéant, les cautions paieront le montant du jugement, en capital, intérêt et frais. Le tout aux frais et dépens du défendeur, y compris les frais de la dite requête.

Le demandeur a porté la cause en révision, et la Cour de Révision a unanimement confirmé le dispositif du jugement de la Cour Supérieure, par le jugement suivant, qui permet au défendeur de fournir un cautionnement sous l'article 824, sans préjudice au recours du demandeur contre les cautions qui avaient fourni le cautionnement sous l'article 828.

In Review the above judgment was confirmed for the reasons given in the remarks of His Honor Chief Justice Johnson in rendering the judgment of the Court and in the considerants of the judgment, both of which are given below.

JOHNSON, Ch. J.—The judgment under review granted a petition made by the defendant to be permitted to give special bail under art. 824 C. P.

The capias issued on the 29th May, 1890, and on the 21st the defendant gave bail to the sheriff under art. 828, the condition of which was that if he did not, on or before the 3rd of June, or within eight days thereafter, give the special bail under art. 824, the bond was to remain in full force and effect.

This delay expired on the 11th of June without the special bail having been offered. The plaintiff took judgment by default on the 16th of June for the amount demanded by the action, and the capias was maintained, and a copy of the judgment was served upon the debtor and his sureties, who were required to pay the condemnation money, the plaintiff having previously got an assignment of the bond from the sheriff.

On the 11th of July the defendant petitioned to be allowed to appear and put in special bail, on the grounds which he supported by his affidavit, that he had instructed his attorney to put in special bail within the prescribed delay—which from inadvertence on the part of the attorney, however, had not been done; and he further asked to be allowed to put in special bail, notwithstanding the expiration of the delay fixed in the sheriff's bond.

The plaintiff contested the petition; and he said: 1st, that the expiration of the delay fixed in the sheriff's bond was final, and gave him an absolute

M. Lightstone vs. H. Bercovitch.

right against the sureties; 2nd, that under the principle of law embodied in Art. 1083 C. C., when an obligation is contracted under a condition that an event will not happen within a given delay, the condition is fulfilled by the expiration of the time without the occurrence of the event; and, 3rd, the plaintiff contested the petition by denying the truth of the fact, which it alleged, viz., that the defendant's attorney had been instructed and had failed to put in special bail.

After a hearing, at which the plaintiff's counsel was not present, but was allowed instead to send up written notes of argument, judgment went granting the petition; and the plaintiff, coming here to have that judgment reviewed, is met first by the objection that it was an interlocutory, and not susceptible of review, and the plaintiff cites a case of Nash et al. *vs.* Sternberg, where the Court of Appeals denied to a defendant leave to appeal from a judgment, refusing to let him put in fresh bail after his first surety had surrendered him; and as there is no review where there is no appeal, he argues there can be no review here. But we are clearly of opinion that in the present case it was a final judgment; and certainly under article 116 it was a judgment which could not be remedied by the final judgment, for it was not rendered during the course of the case, but a month after final judgment had been given. Therefore, we look to the merits of the case.

There is no doubt whatever that the jurisprudence is settled, as far at least as two judgments of the Court of Appeals can settle it—judgments concurred in by judges of such authority as Duval, Meredith, Badgley, Aylwin and Caron, J.J.,—that a defendant arrested under a capias can put in special bail at any time, even after judgment, although the bond to the sheriff has been assigned to a third party who has brought an action on the same. There are numerous other cases holding the same thing; but I allude especially to these two (the case of Campbell, appellant, and Atkins et al., respondents, reported in 9 L. C. R., p. 74; and Sewell, appellant, and Vannevar, respondent, reported in 9 L. C. J., p. 265), because they are perfectly exhaustive of every point that could be urged on one side or the other; and they enter minutely into the history of the law of bail and the successive enactments affecting and developing it in this country.

The case before us comes directly under the authority of these leading decisions. We have no doubt of the existence of the right which the defendant claimed to put in special bail after judgment with the leave of the Court. The only thing that could be doubtful was whether cause was shown to justify the Court in granting the petition.

The defendant's affidavit was produced as to the fact that he had instructed his attorney; and no contradiction of it whatever was attempted. In the case of Sewell *vs.* Vannevar, I see there was no other proof of the facts alleged in the petition than the defendant's own affidavit.

As to the argument founded upon the general law as embodied in our article 1183 C.C., that a liability stipulated to arise by the non-arrival of a certain

event in a given time arose in this case, there is no difficulty as to that being the law of contracts generally speaking; but whether in particular instances otherwise and specially provided for, as is the present case, of a bail bond to be given within eight days, unless the delay is otherwise extended by the Court, the liability to the plaintiff of the sureties under the first bond still exists is not a question that is before us now as between those parties, and need not now be decided. All we do now is to hold that the petition to put in bail after the delay expired was properly granted. What the effect of that may be as between the plaintiff and the first sureties who are not before us may present itself as between those parties hereafter. If it does, we will consider it at the proper time. As one of the judges observed in Sewell *vs.* Vannevar, the plaintiff is not injured by the defendant being allowed to put in special bail.

As our law stands, the relief of debtors and the punishment of fraud have been substituted for the barbarity of life imprisonment, while the plaintiff's rights extend to a complete discussion of his debtor's property, and to keeping him in the jurisdiction for that purpose. We express no opinion, however, beyond the right of the petitioner to put in special bail after the eight days, and we confirm the judgment which gave that right, and nothing else.

JUDGMENT IN REVIEW.

Attendu qu'un défendeur arrêté sur capias peut même, après l'expiration du huitième jour, à compter du jour fixé pour le rapport du bref de capias, mais sur permission expresse du tribunal accordée pour des motifs suffisants, obtenir son élargissement en fournissant cautionnement qu'il ne laissera pas la Province du Canada, et que ce cas échéant, ses cautions paieront le montant du jugement, en capital, intérêt et frais ;

Attendu que le défendeur a prouvé, dans l'espèce, par sa déposition non contredite, qu'il avait chargé son avocat de fournir ce cautionnement, et de contester le capias, dans le délai fixé par la loi ; mais que, par inadvertance ou malentendu, son avocat n'a pas comparu lors du rapport du capias, a laissé prononcer jugement par défaut contre lui le six juin dernier, et n'a pas renouvelé le cautionnement donné en vertu de l'article 828, par un nouveau cautionnement, en vertu de l'article 824 ; et que ce motif est suffisant pour faire admettre le défendeur au bénéfice de la disposition finale de l'article 824 du Code de Procédure Civile ;

Attendu, en conséquence, qu'il n'y a pas d'erreur dans le jugement dont la révision est demandée, en tant que ce jugement permet au défendeur de fournir à ses frais et dépens, sous huit jours, bonnes et suffisantes cautions qu'il ne laissera pas la Province de Québec, et que, le cas échéant, les cautions paieront le montant du jugement, en capital, intérêt et frais ;

Adoptant simplement les motifs ci-dessus resumés du jugement dont la révision est demandée, et sans prononcer au-dela ;

Confirme, quant à ce que dessus le dit jugement du sept novembre dernier, et permet au dit défendeur de fournir le dit cautionnement sous huit jours de cette date, condamne le demandeur aux dépens de cette Cour de Révision.

J. Crankshaw, attorney for plaintiff.

J. P. Cooke, attorney for defendant.

COUR SUPÉRIEURE, 1891.

JOLIETTE, 18 MAI 1891.

Présent :—DE LORIMIER, J.

MAZURETTE

vs.

BOIVIN.

ET

RIVARD,

Mis en cause.

Art. 642 C. P. C.—Venditioni exponas—Droit d'un premier saisissant.—Quand le Shérif est tenu de noter un bref de saisie.

Jugé :—1o. Qu'aux termes de l'art. 642 du C. de P. Civ., le Shérif ne peut être appelé à noter un bref de saisie, contre un immeuble déjà sous saisie en vertu d'un premier bref, qu'en autant qu'il est encore porteur de ce premier bref de saisie ;

2o. Que le demandeur qui, ayant fait saisir deux immeubles, est empêché de procéder à la vente du second immeuble saisi, par le fait que le montant réalisé par la vente du premier immeuble est en apparence suffisant pour couvrir sa créance et un bref noté, peut ensuite procéder à la vente de ce second immeuble, par voie de *venditioni exponas*, dès qu'il est constaté qu'il peut être payé sur le produit du premier immeuble vendu ; qu'il peut ainsi procéder, bien que depuis le rapport du shérif, au bureau du protonotaire, de ses procédés sur la vente du premier immeuble, un créancier, dont le bref avait été noté, ait fait, lui aussi, saisir ce second immeuble en vertu d'un *alias* bref de saisie, émané après le rapport du shérif ;

3o. Qu'un bref de *venditioni exponas*, qui est un ordre de vendre, n'est pas en règle générale un second bref de saisie, dans le sens de l'art. 642 du C. de P. Civile.

Ayant entendu les parties, par leurs conseils respectifs, sur le mérite de la motion du demandeur, demandant l'émanation d'une règle enjoignant au shérif de ce district de suspendre ses procédures sur le bref de *venditioni exponas* en cette cause, examiné les procédures et délibéré ;

Attendu qu'il résulte des documents et des plaidoiries des parties, les faits suivants : Dans une cause de cette Cour, No. 2092, Solomon Venne, contre le dit Siméon Boivin, un bref de *fieri facias de terris* ayant été émané, le shérif de ce district saisit deux immeubles, comme appartenant au défendeur ; le demandeur en cette cause ayant ensuite obtenu jugement contre le défendeur, fit noter un bref de saisie contre les mêmes immeubles ; par la vente du premier immeuble saisi, une somme, en apparence suffisante, fut réalisée pour satisfaire le montant porté aux brefs ci-dessus ; le shérif dût, en conséquence, suspendre ses procédés et faire rapport au protonotaire ; le demandeur en cette cause fit émaner un *alias fieri facias*, qu'il déposa alors entre les mains du shérif ; ce dernier saisit de nouveau le deuxième immeuble du défendeur, et en annonça la vente pour le dix-neuf juin prochain ; le demandeur Venne s'étant assuré que sa créance ne serait point satisfaite par le produit de la vente du premier immeuble, fit ensuite émaner un bref de *venditioni exponas* qu'il

Masurette vs. Boivin et al. Rivard.

déposa entre les mains du shérif, ce dernier annonça alors la vente du deuxième immeuble du défendeur pour le vingt-sept mai courant; le demandeur produit aujourd'hui la motion soumise, par laquelle il demande qu'une règle émane, enjoignant au shérif de ce district de ne pas procéder à la vente du dit immeuble, en vertu du dit bref de *venditioni exponas*, de noter ce bref de *venditioni exponas* sur *l'alias fieri facias*, émané en cette cause par le demandeur, et de procéder à la vente du dit immeuble en vertu de ce dernier bref;

Considérant que, lorsque le demandeur en cette cause a fait émaner un bref *d'alias fieri facias*, le shérif de ce district n'étant plus porteur du premier bref de saisie émané à la poursuite du dit Venne, que le shérif s'était dépossédé de ce bref, par le rapport d'icelui fait au bureau du protonotaire de cette Cour;

Considérant que, lorsque le demandeur requérant a fait émaner ce second bref de saisie, ou *alias fieri facias*, il était en droit de le faire, vu que le shérif n'était plus alors en position de noter aucun bref de saisie aux termes de l'art. 642 du C. de P. Civile (25 Juriste, p. 93);

Considérant, néanmoins, que le demandeur exerçait ainsi ses droit à ses risques, et sans pouvoir nuire au dit Salomon Venne, premier saisissant, qui pouvait, plus tard, procéder à l'émanation d'un bref de *venditioni exponas*;

Considérant que le dit Salomon Venne, ayant constaté que le produit de la vente du premier immeuble, par lui saisi, était insuffisant pour satisfaire la demande, était en droit de faire émaner, ainsi qu'il l'a fait, un bref de *venditioni exponas*, enjoignant au dit shérif de procéder à vendre le deuxième immeuble déjà saisi en la dite cause;

Considérant que le bref de *venditioni exponas* n'est pas un bref de saisie qui peut être, en règle générale, noté aux termes de l'art. 642 du Code de Procédure Civile, mais est un ordre péremptoire de vendre en exécution d'une saisie antérieurement pratiquée et subsistante;

Considérant que les parties, ayant toutes deux procédé régulièrement (le mérite de la procédure du requérant par voie de nouvelle saisie, alors que son premier bref était déjà noté ne devant pas être examiné en cette cause), doivent être laissées dans leurs droits respectifs, la vente devant avoir lieu à la poursuite du plus diligent et suivant le cours ordinaire de la loi; et que, dans ces circonstances, il n'y a pas lieu d'ordonner la suspension des procédures sur le bref de *venditioni exponas*, ni que ce bref soit noté par le shérif sur celui émané en second lieu par le demandeur requérant;

Considérant que la motion du demandeur est mal fondée.

La Cour renvoie la dite motion, avec dépens.

M. Tellier, procureur du requérant.

M. Dugas, procureur de Salomon Venne.

COUR DU BANC DE LA REINE, 1891.

(EN APPEL.)

MONTRÉAL, 23 MAI 1891.

Présents: SIR A. A. DORION, J. en C., BOSSÉ, J., DOHERTY, J. A., et CIMON, J. A.

SAMUEL NORDHEIMER,

(*Défendeur en Cour Inférieure*),

APPELANT;

ET

MARGARET HUTCHINSON

(*Demanderesse en Cour Inférieure*),

INTIMÉE;

ET

LORNE CAMPBELL, ET AL.

(En leurs qualités de légataires fiduciaires et exécuteurs testamentaire de la dite Margaret Hutchison),

INTIMÉS PAR REPRISE D'INSTANCE.

Responsabilité.—Propriétaire.—Mur mitoyen.

JUGÉ:—Que le propriétaire d'une maison incendiée, et dont l'un des murs endommagés et qu'il a négligé de démolir s'écroule, quelques jours après l'incendie, est responsable des dommages résultant de cet écroulement au propriétaire voisin, et causés par sa négligence. (1)

Le 28 septembre 1889, la Cour Supérieure, à Montréal, Taschereau, J., a rendu le jugement suivant:

JUGEMENT.

Attendu que la demanderesse poursuit les dits défendeurs, Albert Nordheimer et Samuel Nordheimer, réclamant d'eux, conjointement et solidairement, la somme de deux mille cinq cent cinquante-deux dollars et soixante-sept centins, pour dommages résultant des faits suivants allégués dans la déclaration, savoir, que la demanderesse est propriétaire du lot de terre situé dans le quartier ouest de la cité de Montréal, connu sous le numéro officiel 187, du dit quartier, et que les défendeurs sont co-propriétaires du lot voisin, connu au plan et livre de renvoi officiels, comme le No. 188, du dit quartier ouest; que ces deux lots de terre s'étendent de la rue St. Jacques à la rue des Fortifications; que la partie du dit lot de terre qui a front sur la rue St. Jacques est bâtie d'une hauteur à peu près égale, tandis que la partie du terrain qui a front sur la rue des Fortifications est bâtie à une hauteur inégale; que le mur de division entre les dites pro-

(1) V. art. 1055, C.C.; 5 Larombière, Théorie des Obligations, sur art. 1386; 16 Laurent, N. 257; V. aussi la cause de Nordheimer et Alexander, C. B. R., Montréal, 26 juin 1889, 33 J., p. 175.

priétés sur la partie ni a front sur la rue des Fortifications est d'une fronteur d'environ cinquante-neuf pieds; que la bâtisse des défendeurs en cet endroit est de cinq ou six étages et s'élève jusqu'au sommet du dit mur, tandis que la bâtisse de la demanderesse, en cet endroit, n'a qu'un étage, et ne s'élève qu'à une hauteur de vingt-neuf pieds environ; que le dit mur de séparation est commun entre les parties, jusqu'à la dite hauteur de vingt-neuf pieds; que le surplus du dit mur appartient exclusivement aux défendeurs, et est employé uniquement par eux; qu'un incendie a détruit en partie les bâtisses sur la dite propriété des défendeurs, le ou vers le dix-sept septembre mil huit cent quatre-vingt six, lequel incendie a originé dans les dites bâtisses des défendeurs; que le mur de division entre les propriétés des parties resta debout après l'incendie, mais qu'il menaça de s'écrouler en différents endroits, dans la partie supérieure; que les défendeurs furent avertis et notifiés par l'inspecteur des bâtisses de la Cité de Montréal, et par d'autres personnes, entr'autres par Charles Alexander, locataire de la demanderesse, de prendre les mesures nécessaires pour empêcher tout accident par l'écroulement possible d'une partie du dit mur; que les défendeurs promirent d'y voir, et de démolir incontinent la partie supérieure du dit mur qui menaçait ruine; mais qu'ils ont négligé et fait défaut de le faire; que dans la soirée du vingt-quatre décembre, mil huit cent quatre-vingt six, la partie supérieure du dit mur s'est écroulée sur une hauteur d'environ quatorze pieds, près de la rue des Fortifications, écrasant la toiture de la bâtisse, et l'intérieur de la bâtisse de la demanderesse, qui n'avait en cet endroit qu'une hauteur de vingt-neuf pieds comme susdit; que cette partie du dit mur s'est ainsi écroulée par suite de la négligence et de la faute des défendeurs de démolir la partie supérieure du dit mur, endommagé par l'incendie et menaçant ruine, et qu'ils sont, en conséquence, responsables des dommages soufferts par la demanderesse à ce sujet; que l'écroulement du dit mur a causé à la bâtisse de la demanderesse des dommages d'au moins deux mille cinq cent cinquante-deux dollars et soixante-sept centins, qu'elle a payés pour la reconstruction de sa dite bâtisse, indépendamment de tous dommages causés au locataire de la demanderesse, Charles Alexander, tant dans son mobilier que par les pertes souffertes dans son commerce, et autres dommages, et indépendamment de toutes pertes de loyer que la demanderesse pourrait souffrir, s'il y a lieu;

Attendu que les défendeurs se sont conjointement défendus, ont nié les allégations de la demande, et par plaidoyer spécial ont allégué, en substance, qu'ils n'ont pas eu avis que le mur en question, qui est un mur mitoyen, fût dans une condition dangereuse et à la veille de tomber; que l'inspecteur des bâtisses, loin de le signaler comme dangereux, avait déclaré qu'il était encore solide, mais que, pour éviter toute difficulté, il avertirait les défendeurs d'avoir à le démolir; qu'il dit en effet aux dits défendeurs qu'il allait leur donner tel avis, mais qu'il ne leur donna pas; que des experts, consultés par les défendeurs et par les compagnies d'assurance intéressées, avaient déclaré que le dit mur n'était pas en danger immédiat de tomber; que, si le mur s'est écroulé, cela a été par force majeure et imprévue, par suite d'une tempête d'une violence

N. Nordheimer et M. Hutchinson et L. Campbell et al

S. Nordheimer et M. Hutchinson et L. Campbell et al.

extraordinaire, qui s'est fait sentir dans la nuit du vingt-quatre décembre mil huit cent quatre-vingt-six, et que la chûte du dit mur ne pourrait être imputée à la faute ou à la négligence des défendeurs;

Attendu que la demanderesse a répondu généralement à la défense des défendeurs, et spécialement comme suit: que la dite demanderesse prend acte des admissions contenues dans le dit plaidoyer que le dit inspecteur avait verbalement averti les défendeurs que le mur était dangereux, et que les experts susdits ont procédé à estimer le dit mur, pour déterminer le montant des dommages que les défendeurs avaient droit de recouvrer à ce sujet des compagnies d'assurance, lequel fait établit que le dit mur n'était pas mitoyen, mais était la propriété des défendeurs;

Attendu que la demanderesse a plus tard déclaré discontinuer son action contre le défendeur, Albert Nordheimer, et a dûment donné avis de ce désistement;

Considérant que la demanderesse a dûment établie en preuve les allégations de sa déclaration, quant au défendeur Samuel Nordheimer, seul propriétaire du dit immeuble No. 188, du quartier Ouest, de la Cité de Montréal;

Considérant que la défense n'est pas justifiée par la preuve;

Donne acte aux parties du désistement susdit, en conséquence met le dit défendeur, Albert Nordheimer, hors de cour, sans frais; rejette les défenses du dit défendeur, Samuel Nordheimer, et le condamne à payer à la demanderesse la dite somme de deux mille cinq cent cinquante-deux dollars et soixante-sept centins, avec intérêt, à compter de ce jour, et les dépens.

La Cour d'Appel a unanimement confirmé le jugement de la Cour Supérieure.

T. P. Butler, avocat de l'appelant.

Taillon, Bonin et Dufault, avocats de l'intimée.

COUR DU BANC DE LA REINE, 1890.

MONTRÉAL, 31 MAI 1890.

PRÉSENTS: BABY, J., BOSSÉ, J., DOHERTY, J. A., et CIMON, J. A.

LA BANQUE D'ÉCHANGE DU CANADA (*en liquidation*)

ET

ARCHIBALD C. CAMPBELL ET AL., LIQUIDATEUR;

ET

JAMES A. HATHAWAY ET AL.,

(*Reclamants en Cour de Première instance*). APPELLANTS;

ET

EDWARD CHAPLIN

(*Contestant en Cour de Première instance*). INTIMÉ.

Banque—Pouvoir du Président.

JUGÉ: Qu'après qu'une banque a suspendu ses operations, il n'est plus au pouvoir du président et gérant de la Banque de contracter, en son nom, aucune obligation. Le 14 septembre 1883, James W. Craig, comptable de la Banque d'Echange du Canada, adressa une lettre à Hathaway et Jackson, de Boston, les informant que sur présentation de cette lettre, le chèque de James McShane sur la banque serait bon, jusqu'à concurrence de la somme de $40,000. James McShane ayant fait des arrangements avec Hathaway et Jackson pour deux envois de bétail en Angleterre, dont l'un a été fait le 18 septembre, et l'autre le 25 du même mois, leur donna son chèque le dix-sept du mois de septembre pour la somme de $36,375. La banque ayant suspendu ses paiements le quinze septembre, le lendemain du jour où la lettre de crédit avait été donnée, le chèque ne fut pas payé. Le dix-huit du même mois, Craig, le président et gérant de la banque, télégraphié à Hathaway et Jackson de charger le prochain vaisseau pour McShane, et que la Banque les garantissait de toutes pertes. Hathaway et Jackson, n'ayant pas été remboursés de toutes leurs avances à McShane pour ces deux envois, et du prix total de leur bétail, ont produit une réclamation aux liquidateurs de la banque, leur réclamant une somme de $7,965.01, pour balance de leurs avances sur ces deux envois. Chaplin a contesté cette réclamation, disant que lorsque le premier envoi a été fait, et lors de la remise par McShane à Hathaway et Jackson, de son chèque, le dix-sept septembre, Hathaway et Jackson connaissaient la suspension des opérations de la banque, et que le président et gérant de la Banque, Thomas Craig, n'avait pas le pouvoir de l'obliger, le dix-huit septembre, lorsqu'il a envoyé cette dépêche à Hathaway et Jackson, vu que la Banque avait alors suspendu ses opérations.

La Cour a maintenu la contestation de Chaplin, par le jugement suivant:

JUGEMENT.

"Having heard the parties, by their respective Counsel, upon the merits of "the claim fyled by James A. Hathaway and others, and of the contestation "thereof, by said Edward Chaplin, examined the proceedings, proof of record "and evidence, and deliberated:

"Considering that the said claimants claim that the said bank is bound "to indemnify them for an alleged loss made by them upon two shipments of "cattle from Boston to Liverpool, upon steamships 'Bavarian' and 'Iberian,' "on the eighteenth and twenty-fifth days of September, one thousand eight "hundred and eighty-three;

La Banque d'Echange du Canada et Archibald C. Campbell et al., et James A. Hathaway et al., et Edward Chaplin.

" Considering that claimants have failed to prove, by sufficient evidence, " that the alleged loss occurred ; the only witness examined on that point being " Arthur E. Jackson, who has no personal knowledge of such loss, and only " testifies thereto from the account sales received by claimants from their " Liverpool agents ;

" Considering that the said bank suspended payment on the fifteenth day of " September, one thousand eight hundred and eighty-three, and that the claim- " ants were aware of such suspension, and said cattle had not been shipped when " they received the letter of date fourteenth September, one thousand eight hun- " dred and eighty-three, signed by James U. Craig, and the cheque for thirty- " six thousand three hundred and seventy-five dollars and fifty cents ; and also " when the telegram of the eighteenth September, one thousand eight hundred, " and eighty-three, was sent and received by them ; and that Thomas Craig, who " signed said telegram, had no authority to give the guarantee which he " purports to have given by said telegram, and said Bank is not bound thereby ;

" Considering claimants have failed to prove the material allegations of their " claim, and that the contestant has proved the material allegations of his con- " testation ;

" Doth maintain said contestation, and doth reject and dismiss said claim, and " doth enjoin the liquidators of the said bank not to collocate the said claimants " upon any dividend sheet prepared by them."

Hathaway & Jackson ont appelé de ce jugement ; mais la Cour d'Appel, l'ont confirmé, le 26 septembre 1891, par le jugement suivant, qui décide que la preuve de la perte des réclamants n'a pas eté faite, et refuse de décider les autres questions de la cause.

JUGEMENT DE LA COUR D'APPEL.

Considérant que les appelants, réclamants en Cour de première instance, n'ont pas prouvé les allégations principales de leur réclamation, et, notamment, que la perte dont ils demandent le remboursement a été par eux soufferte, en tout ou en partie, et qu'en autant il n'y a pas erreur dans le jugement dont est appel, cette cour, pour la raison susmentionnée, et sans adjuger sur les autres questions soulevées, confirme le dit jugement rendu par la Cour Supérieure, à Montréal, le 31ème jour de mai 1890. (Dissentiente L'Honorable Juge Ernest Cimon, qui est d'avis d'accorder l'appel de maintenir la réclamation des appelants, pour quatre mille trois cent cinquante-deux piastres et quatre vingt-douze centins et de la renvoyer pour le surplus.

Chapleau, Hall, Nicolls et Brown, avocats des appelants.
Greenshields et Greenshields, avocats de l'intimé.

COUR DE CIRCUIT, 1891.

JOLIETTE, 30 JUIN 1891.

Présent :—DE LORIMIER, J.

LUDGER MIREAULT

vs.

URGEL LAPOINTE.

Vente.—Fraude.

JUGE :—Qu'il y a responsabilité de la part d'un vendeur, qui, par artifice, réussit à cacher à l'acheteur un défaut apparent, de nature à diminuer la valeur de la chose vendue. Que l'acquéreur, entre autres recours, a celui de l'action en diminution du prix de vente.

JUGEMENT.

Considérant qu'il est établi, par la preuve en cette cause, que, vers la fin d'avril dernier, le demandeur aurait acheté du défendeur une jument, pour les prix et somme de soixante et cinq piastres ;

Considérant que, lors de telle vente, le défendeur savait que la dite jument avait, depuis longtemps, une oreille fendue et déchirée, sur une longueur de deux à trois pouces, et que ce défaut était de nature à détourner les acheteurs à empêcher la vente de la dite jument ;

Considérant qu'il est établi que, deux jours avant la vente au demandeur, le défendeur et son fils ont réuni les parties de l'oreille de la dite jument, au moyen d'une ligature, de manière à rendre beaucoup plus difficile pour les acheteurs de s'apercevoir du dit défaut ;

Considérant que cet acte du défendeur, sans être précisément dolosif et frauduleux de sa part, n'en avait pas moins pour conséquence de cacher au demandeur un vice autrement très apparent, et à l'induire à acheter cette jument, alors que, peut-être, il ne l'aurait pas achetée, si le dit défaut apparent n'eut pas été ainsi habilement caché ;

Considérant qu'il y a, en loi, une différence entre le fait, de la part d'un vendeur, de ne pas attirer l'attention d'un acheteur sur un défaut apparent, et qu'un vendeur n'est pas tenu de faire, et le fait, de la part de ce vendeur, d'user d'artifice pour cacher à un acheteur de bonne foi un défaut autrement apparent ;

Considérant que l'acte d'un vendeur qui, par artifice, réussit à cacher un défaut autrement apparent, et dont la connaissance eut pu détourner un acheteur, est un acte d'un caractère dolosif en loi, qui ouvre un recours en faveur de l'acheteur, comme dans le cas d'un défaut redhibitoire ou caché ;

Considérant que, dans l'espèce, il est établi que le demandeur éprouve un préjudice réel du susdit acte du défendeur, qu'ayant revendu la dite jument, il n'a pu compléter librement cette transaction, précisément à cause de ce défaut ; qu'il a offert de remettre cette jument au demandeur, et de perdre tous ses frais de transport, ce que ce dernier a injustement refusé ;

Considérant que le demandeur a établi sa demande jusqu'à concurrence de dix piastres ;

Lud. Mireault vs. U. Lapointe. Renvoie les défenses du défendeur, et condamne ce dernier à payer au demandeur la dite somme de dix piastres, avec intérêt de l'assignation, et les frais.

M. Cornellier, avocat du demandeur.
M. Tellier, avocat du défendeur.

COUR SUPÉRIEURE, 1891.

JOLIETTE, JUIN 1891.

Présent :—DE LORIMIER, J.

EDOUARD MIGNÉ
vs.
FRANCIS KELLY, ET DIVERS OPPOSANTS,
ET
LA BANQUE D'HOCHELAGA.
OPPOSANTE COLLOQUÉE ;
ET
LE DEMANDEUR,
CONTESTANT.

Licence ou permis de coupe de bois sur les terres de la Couronne.—Enregistrement.—Droit de Banques.

JUGÉ :—1o. Le droit accordé par une licence ou permis de coupe de bois, sur les terres de la Couronne, en vertu des Statuts R. C., ch. 23, s. 1, et suiv., aujourd'hui Statuts Refondus de Québec, art. 1309, et suiv., est un droit immobilier, susceptible d'être hypothéqué, sous réserve des clauses résolutoires contenues au permis ;

2o. Les titres émanant directement de la Couronne, et spécialement, les permis de coupe de bois employés par le Commissaire des terres de la Couronne, en vertu des Statuts ci-dessus cités, ne sont pas soumis à la formalité de l'enregistrement ;

3o. Une banque, qui est déjà créancière hypothécaire sur un immeuble, peut valablement payer avec subrogation une créance enregistrée antérieurement à la sienne, et qui la prime.

La Cour, ayant entendu les parties, par leurs conseils respectifs, sur le mérite de la collocation en faveur de la Banque d'Hochelaga, et de la contestation qui en est faite par le demandeur, examiné les procédures, admissions et documents au dossier, et, sur le tout, délibéré ;

Attendu que le demandeur conteste le sixième item du jugement de destitution, fait et préparé en cette cause, par lequel la Banque d'Hochelaga est colloquée au montant de $4,362.88, alléguant en substance ce qui suit : 1o. que la dite collocation est illégale, vû que les biens vendus, et sur lesquels la dite banque est colloquée, comme créancière hypothécaire, sont des biens mobiliers, non susceptibles d'être hypothéqués ; 2o. que les titres originaires ou les licences relatives aux biens vendus n'ont jamais été enregistrés ; 3o. que la transaction, ou le titre, en vertu duquel la dite banque est colloquée, est illégal et contraire aux dispositions des lois relatives aux banques en cette province ;

Attendu que la dite banque d'Hochelaga a répondu à la dite contestation, alléguant que la collocation en sa faveur est valide et légale ;

Ed. Migué vs. Frs. Kelly et Divers Opposants et La Banque d'Hochelaga et Le Demandeur.

Attendu qu'il appert aux documents en cette cause que les biens dont il s'agit consistent en limites de bois, dont une moitié indivise a été vendue en cette cause, et que ces limites ont été originairement concédées, suivant les formalités et conditions ordinaires, l'une, le 31 juillet 1884, à W. Copping et Cie., société composée alors de W. Copping, du défendeur, et de Dame Honorine Grenier, veuve de Andrew Kelly; la deuxième, le 16 mai 1884, au défendeur, et à la dite Dame veuve Kelly; et la troisième le 13 mai 1888, au défendeur, et à la dite Dame veuve Kelly; que, par acte de vente du 20 novembre 1884, consenti devant Mtre. A. Magnan, notaire, à Joliette, enregistré au bureau d'enregistrement de Joliette, le 27 juin 1885, la dite Dame Honorine Grenier, veuve Kelly, a cédé au défendeur et à W. Copping, le tiers des dits biens, et ce, pour le prix et somme de $7,500.00, payables par paiements égaux et annuels de mille piastres chacun, à commencer le deux de janvier 1889; la dite banque, ayant ensuite obtenu divers jugements contre le défendeur, les fit enregistrer contre les biens en question, le trois avril 1889, et à des dates subséquentes; par acte de quittance, avec subrogation, consenti par la dite Dame veuve Kelly, le 31 décembre 1889, enregistré le 3 janvier 1890, cette dernière subrogea la dite Banque dans tous ses droits, privilèges et hypothèques lui résultant, en vertu du susdit acte de vente, et, spécialement, dans la balance du susdit prix de vente;

EN DROIT: Considérant que les droits de coupe de bois ci-dessus mentionnés sont des droits réels et immobiliers, susceptibles en loi d'être hypothéqués, sujets néanmoins aux conditions résolutoires contenues aux licences elle-mêmes (18 Juriste, p. 261.—C. C. 2038); et que, dans ces circonstances, les titres invoqués par la dite banque sont suffisants en loi;

Considérant que les titres originaux, émanant directement de la Couronne, ne sont pas soumis aux règles ordinaires, quant à l'enregistrement (C. C. 2084; 1 Jurist, p. 55; 14 Québec, p. 271), et que les autres titres invoqués par la dite banque ont été d'ailleurs, régulièrement enregistrés;

Considérant que, lorsque la dite banque fut subrogée aux droits de la dite Dame veuve Kelly, pour le paiement de la susdite balance du prix de vente des dits biens, savoir, le 31 décembre 1889, la dite banque était déjà créancière hypothécaire sur les dits biens, par l'hypothèque judiciaire résultant de l'enregistrement de divers jugements en sa faveur, lesquels enregistrements avaient été faits et effectués dès le trois avril précédent, en ensuite à des dates subséquentes mais antérieures encore à la date de la dite quittance avec subrogation;

Considérant que, dans ces circonstances, la dite banque était justifiable, pour protéger sa dite créance, de se faire subroger aux droits d'un créancier antérieur et qui la primait (28 Jurist, p. 274; Sts. Rev. C., ch. 120, s. 48);

Considérant que le demandeur contestant n'a point prouvé les allégations de sa contestation.

La Cour maintient la collocation en faveur de la dite Banque d'Hochelaga, et renvoie la contestation du demandeur avec dépens contre ce dernier.

M. Dugas, avocat du demandeur contestant.

M. Tellier, avocat de la banque colloquée.

COUR DU BANC DE LA REINE.

(EN APPEL)

MONTRÉAL, 25 JUIN 1891.

Présents:—BABY, J., BOSSÉ, J., DOHERTY, J. A., et CIMON, J. A.

THE ACCIDENT INSURANCE COMPANY OF NORTH AMERICA
(*Défenderesse en Cour Inférieure*)

APPELANTE;

ET

DUNCAN McFEE ET AL.
(*Demandeurs en Cour Inférieure*),

INTIMÉS.

Assurance contre les accidents—Employé de chemin de fer.

JUGÉ:—Que la condition, dans une police d'assurance contre les accidents, en faveur d'un employé de chemin de fer, que l'assuré ne devra pas embarquer et débarquer des convois lorsqu'ils sont en mouvement, contrairement aux règlements de la compagnie de chemin de fer, ne s'applique pas à l'employé qui, par la nature de ses fonctions, qui sont connues de l'assureur, est obligé d'embarquer et de débarquer des trains lorsqu'ils sont en mouvement.

Le 21 juillet 1886, l'appelante a assuré Donald E. McFee, surintendant de chemin de fer, contre les accidents, pour la somme de $5000. Le 21 juillet 1887, cette police fut renouvelée pour un an. Une des conditions de la police était en ces termes:

"The insured must, at all times, observe due diligence for personal safety and protection, and in no case will this insurance be held to cover either death or injuries occurring from voluntary exposure to unnecessary or obvious danger of any kind (unless to save human life), nor death nor disablement from injuries received in violating, *or in consequence of having violated the rules or by-laws of any Company*, Corporation (municipal or commercial) or firm; *nor from getting, or attempting to get, on or off any railway train or other conveyance, using steam as a motive power, while the same is in motion;* nor while engaged in the commission of, or in consequence of having committed any act of unlawful, vicious or immoral nature, or in any quarrel or embroilment connected therewith, or [illegible]able thereto, or resulting from, or attendant upon being in any place of unlawful, immoral or vicious resort; or in flight from justice, or being an outlaw or fugitive from justice."

Le 15 décembre 1887, pendant que la police était en force, Donald E. McFee fut tué par un convoi sur lequel il embarqua pendant qu'il était en mouvement; il essaya d'embarquer sur le train lorsqu'il partait de la station de Sherbrooke. Les intimés, ses frères et sœurs, ont poursuivi la compagnie en recouvrement du montant de l'assurance, et la Compagnie a plaidé que Donald E. McFee avait été tué lorsqu'il essayait d'embarquer sur un train en mouvement, et qu'alors il était en contravention à une des conditions de la police, et qu'il n'y avait pas d'action contre elle.

Les demandeurs ont répondu que, par la nature de ses fonctions, il était tenu d'embarquer et de débarquer sur les trains pendant qu'ils étaient en mouve-

ment, et que la compagnie connaissait cela, et que cette condition de la police ne s'appliquait pas à lui.

Le 30 novembre 1889, la Cour Supérieure à Sherbrooke, Brooks, J., a rendu le jugement suivant :

JUGEMENT.

Considering that plaintiffs have established that they are the legal representatives of the late Donald E. McFee deceased ; that said Donald E. McFee had been, for many years prior to his death, insured against accidents with defendants, for the sum of five thousand dollars, to wit, since the month of March, one thousand eight hundred and seventy-seven ;

That, in renewal of the policy theretofore issued to said late Donald E. McFee, to wit, on the twenty-first day of July, one thousand eight hundred and eighty-one, the defendants did, upon the application of the said late Donald E. McFee, issue and deliver to said late Donald E. McFee the policy set up in plaintiff's declaration as plaintiff's Exhibit No. 1, whereby defendants insured said late Donald E. McFee against injury from accidents, either disabling him from the performance of the usual business, or causing death within ninety days from such accident, said policy having been granted him as superintendent of the International Railway, which insurance was continued for the subsequent year, on payment of the premium ;

That, on the fifteenth day of December, one thousand eight hundred and eighty-seven, at Sherbrooke, in said District, the said late Donald E. McFee received injuries to his person, resulting from violence accidentally occasioned, and of which there were external and visible signs, and from which injuries he did instantly die ;

And considering that said accident and injuries so received by said insured were incident to the occupation of said late Donald E. McFee, as superintendent of the International Railway, and were covered by the policy issued to and in his favor, and that defendants received due proof of the death, as aforesaid, of said late Donald E. McFee ;

And considering, further, that defendants have failed to establish the material allegations of their pleas filed in this cause, and particularly that said late Donald E. McFee, on the said fifteenth day of December, one thousand eight hundred and eighty-seven, voluntarily exposed himself to unnecessary and obvious danger, or that the condition, as to getting on or off a train or other conveyance using steam as a motive power, while the same was in motion, applied to said late Donald E. McFee, the occupation of said late Donald E. McFee requiring him so to do, in the performance of his duties as superintendent of said International Railway Company, and so known to defendants and their officers, doth dismiss the pleas of said defendants, and doth adjudge and condemn defendants to pay to plaintiffs the sum of five thousand dollars, with interest thereon from the twentieth day of March, one thousand eight hundred and eighty-eight, and costs of suit.

La Cour d'Appel a unanimement confirmé le jugement de la Cour Supérieure.

Hatton et McLennan, avocats de d'appelante.

Ives, Brown & French, avocats des intimés.

COUR SUPÉRIEURE.

MONTRÉAL, 29 SEPTEMBRE 1865.

Présent : MATHIEU, J.

NICOLAS BRICAUT DIT LAMARCHE

vs.

JEAN-BAPTISTE BRICAUT DIT LAMARCHE.

Donation entre vifs—Aliments.

JUGÉ :—Que si, dans un acte de donation, le donataire s'est obligé à faire vivre un Tiers, et à l'entretenir, dans sa maison, à la charge par ce dernier de travailler pour lui, suivant ses forces et capacités, il pourra être condamné à payer à ce Tiers une pension viagère, en argent, s'il est prouvé que la vie commune est devenue impossible entre eux, quoique les circonstances et la conduite des parties n'aient pas changé depuis la donation.

Attendu que, par acte de cession et abandon, passé devant Pinet, notaire, et son collègue, le 30 avril 1849, Nicolas Bricaut dit Lamarche et Charlotte Beaudry, son épouse, cédèrent et abandonnèrent au défendeur certains meubles et immeubles, à la charge de certaines obligations, en faveur du demandeur, qui est le frère du défendeur, lesquelles obligations sont mentionnées comme suit au dit acte de cession : "Comme aussi sera tenu et obligé, le "cessionnaire, de prendre soin de son frère Nicolas, de le nourrir à sa table, et "comme lui-même, le loger, coucher et entretenir de hardes, chaussures et "coiffures, décemment, suivant qu'il l'a toujours été par ses père et mère, tant "et aussi longtemps que le dit Nicolas Bricaut dit Lamarche voudra rester avec "le cessionnaire, et même de le soigner en maladie ; mais sera tenu et obligé le "dit Nicolas Bricaut dit Lamarche de travailler pour le cessionnaire suivant "ses forces et capacités, tant qu'ils resteront ensemble" ;

Attendu que le demandeur, par son action instituée le 20 mars dernier, allègue qu'il a toujours demeuré avec le défendeur, depuis le décès de son père arrivé le 21 janvier 1865, et le décès de sa mère arrivé le 28 juillet 1863, jusqu'au 2 ou 3 janvier dernier, jour où le défendeur l'a, sans raison et par malice, chassé de son domicile, refusant de lui fournir aucun aliment et de le faire vivre, comme il y est tenu, malgré les demandes réitérées du demandeur et les offres de ce dernier de se conformer au dit acte de cession, et réclame du défendeur une pension de $18 par mois, à compter du 1er janvier dernier ;

Attendu que le défendeur a plaidé à cette action qu'il n'est tenu aux obligations ci-dessus mentionnées qu'à la condition que le demandeur se conforme lui-même aux obligations qui lui sont apposées, et que, parmi ces obligations, se trouve celle de travailler pour le défendeur, suivant ses forces et capacités, tant qu'ils resteront ensemble ; que le demandeur a entièrement failli à cette obligation, et a toujours refusé et négligé de travailler pour le défendeur, tout en travaillant ailleurs et pour d'autres personnes, et gagnant un salaire qu'il gardait ; que le demandeur fait un usage immodéré de liqueurs enivrantes ; qu'il arrive à la maison du défendeur en état d'ivresse ; et que, dans cet état,

Nicolas Bricaut dit Lamarche, vs. Jean-Baptiste Bricant dit Lamarche.

il tenait des propos blasphématoires, obscènes et scandaleux, devant la famille du défendeur ; que le demandeur étant un objet de scandale pour la famille du défendeur, parce que, dans ses moments d'ivresse, il exposait sa personne, et qu'il était aussi un sujet de crainte pour le défendeur, vu qu'il l'avait menacé de mort ; qu'ayant souvent averti le demandeur de mieux se conduire, et de remplir les obligations qui lui étaient imposées, le défendeur, vu le refus d'obtempérer à ses avis, fût forcé de le mettre hors de son domicile, et conclut au renvoi de l'action ;

Considérant qu'il résulte de la preuve faite en cette cause que le demandeur ne tient pas une bonne conduite, et qu'il fait un usage immodéré des boissons enivrantes, mais que, cependant, sa conduite ne paraît pas plus mauvaise qu'elle ne l'était du vivant de ses père et mère ;

Considérant qu'on peut présumer que les père et mère du demandeur ont pris en considération la conduite de ce dernier, et son usage immodéré des boissons enivrantes, et la probabilité d'une conduite analogue à l'avenir, lorsqu'ils ont donné leurs biens au défendeur, sans rien laisser, ou, du moins, à peu près rien, au demandeur, si ce n'est l'obligation sus mentionnée du défendeur à son égard ;

Considérant que le défendeur a gardé avec lui le demandeur pendant plus de vingt ans, depuis le décès de leur père et mère, quoique la conduite du demandeur fût toujours à peu près la même, et qu'il paraît que le refus du défendeur de recevoir son frère, et d'accomplir à son égard les obligations par lui contractées, a été suggéré par le fils du défendeur ;

Considérant qu'il paraît évident que la vie commune, entre le demandeur et le défendeur et sa famille, est devenue impossible, à cause de la mauvaise conduite du demandeur, et des altercations, difficultés et chicanes fréquentes qui ont eu lieu entre eux par le passé jusqu'à ce jour ;

Considérant que le demandeur offre, par son action, de retourner demeurer avec le défendeur, aux conditions stipulées dans le dit acte, et que le défendeur, par son plaidoyer, refuse de le recevoir ;

Considérant que, sous les circonstances, il y a lieu d'établir en argent les obligations du défendeur à l'égard du demandeur, prenant en considération l'âge de ce dernier et sa capacité de travailler encore actuellement et pour quelques années ;

Considérant que le demandeur a, sous les circonstances prouvées en cette cause, le droit d'avoir du défendeur une pension viagère, pour tenir lieu de l'obligation susdite du défendeur à son égard, laquelle pension cette cour, prenant en considération l'âge du demandeur et sa capacité de travailler encore pour quelques années, ainsi que les moyens du défendeur, établit à la somme de $6 par mois pour la 1ère année, à compter du 1er octobre prochain, $7 par mois pour la 2e année, $8 par mois pour la 3e année, $9 par mois pour la 4e année, $10 par mois pour la 5e année, $11 par mois pour la 6e année, et $12 par mois pour la 7e année et toute année subséquente pendant la vie du demandeur ;

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A renvoyé et renvoie les défenses du défendeur, et a maintenu et maintient l'action du demandeur, et a condamné et condamne le défendeur, etc.

Loranger et Beaudin, avocats du demandeur.
Mercier, Beausoleil et Martineau, avocats du défendeur.

COUR SUPÉRIEURE.

MONTRÉAL, 7 SEPTEMBRE 1885.

Présent : MATHIEU, J.

THOMAS O'CONNOR ET UXOR,

DEMANDEURS ;

vs.

LA CITÉ DE MONTRÉAL,

DÉFENDERESSE.

Corporation Municipale.—Trottoirs, Dommages.

JUGÉ :—Qu'une Corporation municipale est responsable des dommages causés à un individu, comme résultat d'une chute faite sur un trottoir, si l'accident n'est pas dû uniquement au mauvais état du trottoir résultant de la température, sans négligence de la part de la Corporation, mais est causé par une différence de niveau sur le trottoir, qui a existé pendant un temps assez long pour constituer la corporation en négligence. (1)

(1) Dans la cause de Grenier *vs.* la Corporation de Montréal, C.S. Montréal, 29 novembre 1873, Mackay J., 5 Revue Légale, page 195, il a été jugé, dans une poursuite en dommage contre la Corporation, résultant d'une chûte faite sur le trottoir en hiver, que la Corporation n'était pas responsable, vu que l'accident paraissait avoir été causé par la chute d'une petite neige sur le trottoir glacé, et que la Corporation n'avait pas reçu avis du mauvais état du trottoir ; et que le laps de temps qui s'était écoulé depuis la chûte de la neige n'était pas suffisant pour constituer la Corporation en négligence de ses devoirs.

Dans la cause de Lulham *vs.* La Cité de Montréal, et la Cité de Montréal, Demanderesse en garantie, *vs.* le Recteur et les Syndics de Christ Church, Défendeurs en garantie, C.S. Montréal, 10 mars 1883, Torrance J., 6 Legal News, page 93, il a été jugé que, pour qu'une action en dommage, résultant d'une chute faite sur un trottoir en hiver, soit maintenu contre la Corporation, il faut la preuve évidente de négligence de la part de la Corporation; et que s'il est prouvé que, généralement, le trottoir, à l'endroit où la chute a eu lieu, est tenu dans un ordre convenable, quoiqu'il puisse être quelquefois dangereux, par le fait des influences du climat, la Corporation ne sera pas tenue responsable. Ce jugement a été confirmé le 19 mai 1884, par la Cour du Banc de la Reine, en appel, Sir A. A. Dorion, juge en chef, Monk J., Tessier J., Cross J., Baby J.

Dans la cause No. 1498, C. S. Montréal, 16 juin 1883, Loranger J., Jane Orr, Demanderesse *vs.* La Cité de Montréal, Défenderesse, il a été jugé que l'obligation des municipalités, quant à l'entretien des voies de communications publiques, s'apprécie suivant les lieux et la nature du climat, et qu'elles ne peuvent être tenues responsables des accidents qui arrivent par suite de causes climatériques que dans le cas où elles auraient négligé de remettre les lieux en bon état dans des délais raisonnables.

Voici les considérants de de jugement: Considérant que le mauvais état du trottoir, à l'endroit où l'accident dont se plaint la demanderesse est arrivé, aurait été causé par un dérangement subit et inattendu de la température, qu'il n'est pas prouvé que le mauvais état des lieux ait duré assez longtemps pour que le fait ait pû être porté à la connaissance de la

défenderesse; considérant que l'obligation des municipalités, quant à l'entretien des voies de communications publiques, s'apprécie suivant les lieux et la nature du climat, et qu'elles ne peuvent être tenues responsables des accidents qui arrivent par suite de causes climatériques que dans le cas où elles auraient négligé de remettre les lieux en bon état dans des délais raisonnables;

Considérant que la défenderesse ne peut être recherchée en justice, pour les causes mentionnées dans la déclaration, qu'à raison de la négligence qu'elle aurait mise à l'entretien convenable du trottoir, à l'endroit où l'accident en question est arrivé; que la demanderesse n'a prouvé aucune négligence de la part de la défenderesse.

Maintient la défense de la défenderesse, et déboute l'action de la demanderesse.

JUGEMENT.

Attendu que les demandeurs réclament de la défenderesse une somme de $1,000 pour dommages à eux causés, et résultant d'une chute que la demanderesse aurait faite, le 27 février 1884, sur le trottoir de la rue St Joseph, vis-à-vis le No. 63 de la dite rue, lequel trottoir était en mauvais ordre, parce qu'on y aurait laissé la neige s'amonceler, ainsi que la glace vive et dangereuse pour les piétons, suivant l'allégation des demandeurs;

Attendu que la défenderesse a plaidé à cette action, en niant les allégations de la déclaration, et alléguant spécialement qu'elle n'avait jamais été notifiée de l'existence de neiges amoncelées ou de glace vive et dangereuse pour les piétons, à l'endroit indiqué dans la déclaration des demandeurs, et qu'à tout événement, l'état du trottoir ne pouvait être dû qu'à des causes climatériques qui se produisent à l'époque de l'hiver où l'accident est arrivé, et non à la condition du trottoir même;

Attendu que les faits suivants ont été prouvés en cette cause:

Le 27 février 1884, qui était le *mercredi des Cendres*, la demanderesse, qui est âgée d'environ quarante ans, se rendit de sa demeure à l'Eglise Ste Anne, dans la Cité de Montréal, en compagnie d'Ellen Griffin, et passa, vers sept heures du soir, sur le trottoir du côté nord de la rue St Joseph, maintenant la rue Notre Dame, dans la cité de Montréal, et entre les Nos. 61 et 63 de la dite rue, elle glissa sur le trottoir, tomba, et se fit une blessure assez grave au front, dont elle conserva la marque en permanence. L'endroit où la demanderesse est tombée se trouvait vis-à-vis une porte de cour, et le propriétaire de ce terrain avait laissé s'accumuler, à cet endroit, sur le trottoir, une quantité plus considérable qu'ailleurs de neige et de glace, dans le but de faciliter l'entrée des voitures dans la cour; le trottoir, d'un côté, était plus élevé que l'autre d'environ six pouces, et la glace du trottoir était alors vive, ce qui rendait ce passage dangereux pour les piétons. La demanderesse a tombé, et dans sa chute a entraîné Delle. Ellen Griffin qui l'accompagnait. On a transporté la demanderesse chez un pharmacien, et ensuite chez le docteur, qui lui a donné ses soins. Elle a été très malade, et pendant quelque temps le docteur a considéré que sa vie était en danger. Le docteur était obligé de lui faire deux, trois et même quatre visites par jour, pendant quelques semaines, et elle resta sous ses soins jusque vers le milieu d'avril 1884. Elle fut à peu près trois mois sans pouvoir travailler, et son mari, le défen-

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deur, fut aussi empêché de travailler pendant environ deux mois, parce qu'il était obligé d'en avoir soin. La demanderesse porte encore au front les marques de sa chute, et ces cicatrices paraissent être permanentes. La demanderesse est une femme forte et bien constituée, et elle paraît complètement rétablie, quoiqu'elle se plaigne quelquefois de douleurs à l'endroit où elle fut blessée, comme susdit, lesquelles douleurs peuvent être le résultat de l'érysipèle qu'elle a eu après cette chute, à l'endroit de ses blessures, et qu'il fut occasionné par cette chute. Le compte du médecin est de $70.00;

Considérant que la quantité de neige et de glace qu'on a laissée s'accumuler sur le dit trottoir, vis-à-vis la porte de cour, et la différence du niveau qui semble avoir existé tout l'hiver entre un côté du trottoir et l'autre, et qui, dans tous les cas, existait dans le temps où l'accident eût lieu, paraissent avoir été la cause déterminante de cet accident;

Considérant qu'il résulte de la preuve faite que, si le trottoir, en face des maisons ou bâtisses portant les Nos. 61 et 63 de la rue St Joseph, et vis-à-vis la porte de cour, qui se trouve entre ces deux maisons, eût été tenu d'un niveau régulier, l'accident n'eût pas eu lieu;

Considérant que cet accident ne peut être attribué purement à des causes climatériques qui se produisent à l'époque de l'hiver où l'accident est arrivé, mais qu'il est le résultat de la négligence de la défenderesse à faire entretenir le trottoir dans un état de niveau régulier, de manière à n'offrir aucun danger inusité aux piétons qui y passaient;

Considérant que la défense de la dite défenderesse est mal fondée, et que l'action des demandeurs est bien fondée jusqu'à concurrence de la somme de $300, qui paraît être les dommages prouvés par les demandeurs en cette cause,

A renvoyé et renvoie la défense de la dite défenderesse, et a maintenu et maintient l'action des demandeurs, et a condamné et condamne la défenderesse à payer aux dits demandeurs la dite somme de $300.

Donald Downie, avocat des demandeurs.

Rouer Roy, avocat de la défenderesse.

COUR SUPÉRIEURE.

(EN CHAMBRE.)

MONTRÉAL, 9 NOVEMBRE 1885.

Présent: MATHIEU, J.

GEORGE VERMETTE vs. LA CITÉ DE MONTRÉAL ET AL.

Injonction.

Jugé:—Que, lorsque l'émanation d'un bref d'injonction provisoire semble, sous les circonstances mentionnées dans la requête, demandant l'émanation de ce bref, devoir causer au défendeur plus d'inconvénients qu'il n'en pourrait résulter au requérant par le refus de ce bref, il ne doit pas être permis.

JUGEMENT.

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Je, soussigné, l'un des juges de la Cour Supérieure pour la Province de Québec, après avoir entendu le requérant sur sa requête produite le cinq novembre courant, demandant qu'il soit ordonné aux défendeurs mentionnés dans la requête de comparaître pour répondre à cette requête, et d'ordonner l'émanation d'un bref d'injonction contre les défendeurs, leur ordonnant de suspendre toutes actions, opérations et travaux relatifs à l'hôpital des variolés, dans les limites de la municipalité du Village de St. Louis du Mile End, leur défendant, en outre, d'y transporter et interner les personnes atteintes de maladie contagieuse, "la variole," et qu'ordre soit donné à la défenderesse, la Corporation du Village St. Louis du Mile End, d'empêcher le transport [illegible] séjour, dans les limites de son territoire, des malades atteints de [illegible] et venant de la cité de Montréal, et que le bref d'injonction soit déclaré bon et valable, et qu'ordre soit donné aux dits défendeurs de démolir [illegible] hôpital des variolés, et que défense soit faite aux défendeurs de transporter et faire transporter, interner et faire interner, dans le dit hôpital, aucune personne atteinte de la variole, et venant de la cité de Montréal, ainsi que sur la requête du requérant, produite le 6 novembre courant, demandant que le bref d'injonction soit adressé au bureau local de santé de la cité de Montréal, et aux membres d'icelui, aussi bien qu'à la cité de Montréal et aux autres défendeurs mentionnés dans sa première requête, et, aussi, après avoir entendu les défendeurs, la cité de Montréal, et le bureau central de santé, et les membres d'icelui, par leurs avocats et procureurs respectifs, et, sur le tout, mûrement délibéré;

Considérant que l'émanation d'une injonction provisoire semblerait, sous les circonstances mentionnées dans les dites requêtes, devoir causer aux défendeurs, et aux personnes y concernées, plus d'inconvénients qu'il n'en pourrait résulter au requérant, par le refus, pour le présent, de cette injonction provisoire, et que, sous les circonstances, il [illegible] pas lieu d'accorder cette injonction provisoire pour le présent;

Considérant, cependant, que les allégations des dites requêtes sont suffisantes pour justifier l'émanation d'un bref d'assignation, ordonnant aux défendeurs de comparaître, pour répondre à la demande du requérant, et voir ordonner, s'il y a lieu, les injonctions requises par le requérant lors de la décision sur le mérite des prétentions du dit requérant,

J'ordonne, en vertu des articles 998 et suivants, et 1023 du Code de Procédure Civile et des dispositions du chapitre 14 des Statuts de Québec de 1878, 41 Victoria, qu'il émane un bref de sommation, assignant les défendeurs mentionnés dans les dites requêtes à comparaître mercredi, le 18ème jour de novembre courant, devant moi ou tout autre juge de la Cour Supérieure, dans la salle d'audience, division de pratique, au Palais de Justice, en la cité de Montréal, pour répondre à la requête du requérant, qui sera signifiée avec le bref demandant une injonction contre les défendeurs, leur ordonnant de

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suspendre toutes actions, opérations et travaux relatifs au dit hôpital des variolés, dans les limites de la municipalité du Village St. Louis du Mile End, et leur défendant, en outre, d'y transporter et interner les personnes atteintes de la maladie contagieuses la variole, et ordonnant à la Corporation du Village de St Louis du Mile End d'empêcher le transport et le séjour, dans les limites de son territoire, des malades atteints de la variole, et venant de la cité de Montréal, et demandant qu'il soit ordonné aux dits défendeurs de démolir l'hôpital des variolés mentionné dans les requêtes, dans les limites de la municipalité du Mile End, et défendant aux défendeurs de transporter et faire transporter, interner et faire interner, dans le dit hôpital aucune personne atteinte de la variole, et venant de la cité de Montréal.

Augé & Cie., pour le requérant.

Lacoste & Cie., et R. Roy, pour les défendeurs.

COUR SUPÉRIEURE

MONTRÉAL, 29 MARS 1887.

Présent: MATHIEU, J.

Dans l'affaire de *Dame Emma Victorine Dufresne*, ès-qualité insolvable, et *Louis Tourville*, requérant, et *Frédéric Louis Palardy*, intervenant.

Cession de biens.—Mineurs.—Succession.

JUGÉ:—Que les dispositions des articles 763 et suivants C. P. C., savoir: la section 6 du ch. 2 du titre 3 de la seconde partie du Code de Procédure ne s'appliquent pas à la liquidation des biens d'une succession appartenant à des mineurs, même lorsqu'il est constaté que cette succession est insolvable; mais que cette liquidation doit se faire sous les dispositions du Code Civil.

JUGEMENT.

Attendu que, le onzième jour de novembre dernier, Louis Tourville, marchand de la cité de Montréal, a fait à Dame Emma Victorine Dufresne, de la paroisse de Contrecœur, veuve de feu Arthur Jean Marion, en sa qualité de tutrice à ses enfants mineurs, issus de son mariage avec le dit Arthur Jean Marion, qui est décédé le 29 août dernier, une demande de cession de biens, et que, le 12 novembre dernier, la dite Emma Victorine Dufresne, ès-qualité, a fait, au bureau du Protonotaire de la Cour Supérieure, à Montréal, une cession de ses biens, et qu'un gardien provisoire a été nommé, le même jour, par le protonotaire, conformément à l'article 768 du Code de Procédure Civile;

Attendu que, sur requête du dit Louis Tourville, une assemblée des créanciers de la dite Emma Victorine Dufresne, ès-qualité, a été convoquée pour le 26 novembre dernier;

Attendu que, le dit jour, 26 novembre dernier, Frédéric Louis Palardy, subrogé tuteur aux dits enfants mineurs, issus du mariage de feu Arthur Jean Marion et de la dite Emma Victorine Dufresne, a présenté une

Dame Emma Victorine Dufresne, et L. Tourville, et F. L. Paradis.

requête, alléguant que la dite Emma Victorine Dufresne, ès-qualité, avait fait la dite cession de biens avant la confection de l'inventaire et l'expiration des délais légaux pour délibérer sur l'acceptation de la succession, sans autorisation et sans droit, et sans avis du conseil de famille; que cette cession de biens comportait une acceptation de la succession de leur père par les dits mineurs, ce que la tutrice n'était pas autorisée à faire, et demandant à intervenir, et à ce que la dite cession de biens fût déclarée illégale;

Attendu que, le 20ème jour de janvier dernier, sur avis d'un conseil de famille, le dit Frédéric Louis Palardy a été nommé tuteur aux biens des dits enfants mineurs, en remplacement de la dite Emma Victorine Dufresne, et que cet acte de tutelle a été enrégistré au bureau d'enrégistrement du comté de Verchères, le 23 janvier dernier, et que, le 27 janvier dernier, il a, en sa dite qualité de tuteur, présenté une requête à cette cour, alléguant l'illégalité de la dite cession de biens, et demandant à intervenir et à ce que la dite cession de biens fût déclarée illégale;

Attendu que, le premier jour de février dernier, le dit Louis Tourville a présenté une requête, demandant la convocation d'une assemblée des créanciers de la dite défenderesse, ès-qualité, aux fins de nommer un curateur à la dite cession de biens;

Considérant que la nomination du requérant Palardy, comme tuteur, ne peut être mise en question, et décidée sur les procédures produites dans cette affaire; mais qu'il y a lieu de présumer que, pour cette affaire, le requérant Palardy représente les mineurs;

Considérant que, les dispositions des articles 763 et suivants du Code de Procédure Civile, savoir: la section six du chapitre deux du titre troisième de la seconde partie du Code ne s'appliquent pas à la liquidation des biens d'une succession appartenant à des mineurs, même lorsqu'il est constaté que cette succession est insolvable, mais que cette liquidation doit se faire sous les dispositions du Code Civil;

A maintenu et maintient la requête du dit Palardy, en sa qualité de tuteur aux biens des dits mineurs, produite le 27 janvier dernier, et a déclaré et déclare la cession de biens faite par Dame Emma Victorine Dufresne, ès-qualité de tutrice, le 12 novembre dernier, illégale.

Ethier & Pelletier, pour Dame E. V. Dufresne.

Girouard & Cie., pour le requérant.

SUPERIOR COURT, 1888.

MONTREAL, 19TH DECEMBER, 1888.

Present: HIS HONOR MR. JUSTICE DAVIDSON,

MOISE LEFORT,

APPELLANT;

vs.

C. AIMÉ DUGAS,

RESPONDENT;

AND

LOUIS JACKSON,

PROSECUTOR IN THE COURT BELOW.

Sale of Liquor to an Indian.—Conviction.—Appeal Held.

That on an appeal from a conviction under the Indian Act, the Judge hearing the appeal must receive evidence, and such appeal is in fact and effect a new trial.

That at the trial of such appeal the respondent should proceed first with his evidence.

That an exception containing a clause enacting an offence ought to be negatived in the information; but if such exception is contained in a subsequent clause or section, it is a matter for defence, and need not be negatived.

DAVIDSON, J.—This is an appeal from a conviction under the Indian Act. By section 94, everyone who supplies to any Indian or non-treaty Indian any intoxicant shall, on summary conviction before any judge, police magistrate, etc., upon the evidence of one credible witness other than the informer or prosecutor, be liable, as therein provided.

By section 98, it is enacted that no penalty shall be incurred when the intoxicant is made use of in case of sickness, under the sanction of a medical man or under the directions of a minister of religion.

By section 108, no appeal shall lie from any conviction, except to a judge of the Superior Court, etc., and such appeal shall be heard, tried and adjudicated upon by such judge or chairman without the intervention of a jury. No such conviction shall be quashed for want of form, and no warrant of commitment shall be held void by reason of any defect therein, if it is therein alleged that the person has been convicted, and if there is good and valid reason to sustain the same.

It was argued at the outset, on behalf of the prosecutor, that the appeal should be limited to a legal argument, and that I was not authorized to re-hear the evidence. My opinion was to the contrary, and further consideration has confirmed me in that belief.

The above section imposes upon me the duty not only of hearing and adjudicating, but of trying the appeal as well, and that, too, without the intervention of a jury. Were the reference upon matters of law alone, no specific exclusion of a jury would have been needed.

So far as the Indian Act is concerned, all reference to appeals begins and ends with section 108, which affords but little assistance as to procedure. For this, in largest part, we have to turn to the Summary Convictions Act. Here we find the original jurisdiction of the judge declared in emphatic form, and it is expressly

enacted that "the court shall try, and be the absolute judge, as well of the fact as of the law, in respect to such conviction or decision; and any of the parties to the appeal may call witnesses and adduce evidence, whether such witnesses were called or evidence adduced at the hearing before the justices or not."

Once these sections are admitted to be applicable,—and I hold they are.—there is no longer room for even argument. Evidence must be received. Hence, although, as a matter of statute, this is styled an "appeal," as a matter of fact and of effect it is to all intents and purposes a new trial.

I had then to decide which party, appellant or respondent, should begin. The Queen's Bench adopts the practice of calling upon appellant to show cause why the conviction should not be sustained. When Crown counsel, I followed the precedents, but always doubted their correctness. I was not disposed at my first trial of this kind to break away from a practice having so high authority for its existence. There is no evidence upon the record which the appellant can attack by argument or disturb by witnesses. He is forced to call the prosecutor, so that the appellate judge may hear the evidence on which the conviction is based, and then has to attempt the destruction of apparently his own evidence by counter-proof as to facts or credibility.

Four or five statutes were required to perfect the legal absurdities which attach to this remedy, in itself desirable and capable of an easy and symmetrical procedure. Seeing that they have been, unfortunately, carried into the Revised Statutes, we have to be the more ready to remove every possible embarrassment. Under the English practice the respondent begins (Paley Q. S. 370, Saunders 356, Arch. Q. S. 106); and in any case which may come before me hereafter, I shall adopt this course,—save as to objections on the face of the conviction which appellant may wish to urge.

Objections were taken (*a*) to the information upon which the arrest was made, because it failed to negative the exception contained in section 98, that the liquor was not supplied "in a case of sickness under the sanction of a medical man, or under the directions of a minister of religion;" (*b*) to the conviction, because in attempting to set out the exception it ceased to agree with the information; and (*c*) because in any event it omitted the essential condition precedent which alone gave authority to ministers of religion or doctors.

I held at the trial, and still hold, that an exception contained in the clause enacting the offence ought to be negatived; but if it be in a subsequent clause or section, it is matter for defence, and need not be negatived. R. *vs.* Hall, 1 T. R. 320; Steel *vs.* Smith, 1 B. & Ald. 94; Dwarris on Stat. 119. A statute of last session also deals with this very point, 2 R. S., c. 108, sec. 88.

If the exception were pleaded, it might be proper, although not essential, to negative it in the conviction. If the conviction is to stand in the present case, I have authority to and will demand the technical omission which it shows.

We are brought, as a consequence, to a discussion of the evidence. An Indian named Pierre Montour swore before me, that on the afternoon of the 10th of July a number of men were standing on the eastern side of the station at Caugh-

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nawaga. As the bell for vespers rang, all left but the witness and appellant; the latter, so it is asserted, led the way into his office in the station, and gave the witness two drinks from a bottle which was taken from a cupboard; then they talked together until it was dark. Before the judge of sessions, Montour swore that it was whiskey which he drank. Lefort was convicted for supplying an intoxicant to an Indian, "to wit, whiskey." Before me Montour swore that he knew whiskey and rye, and that what he received was not either of them. All he can swear is that what he received went to his head and visibly affected him.

In this and other essential respects I have to consider evidence contradictory to that sworn to before Judge Dugas or not put before him at all. Curotte asserts that the crowd did not leave appellant and Montour together, because the latter went direct to Curotte's house. Curotte left for Lachine at 3 o'clock, returned at 4, and found Montour still there. He had not even the appearance of having taken liquor. Mr. J. B. Jacques, a thoroughly respectable witness, swore that he would not believe Montour under oath. He was allowed to step out of the box without being asked even a simple question. Montour's brother-in-law, Jacques Montour, swore to a like belief, and gave as his reason the witness' capacity for telling falsehoods.

It is not necessary to deal with other details of the case. Had the same evidence come before me as Judge Dugas heard, I would not quash because of a belief that I might have arrived at a different conclusion as to the facts. It would have needed a violent conviction that the judgment was opposed to law or proof, or both. I quash the conviction because Montour has denied before me what he swore to before the convicting judge, and because two witnesses, not before heard, declare Montour's reputation to be such that they would not believe him under oath.

The only witness who is put forward to support the charge is thus discredited. Evidence like that of Curotte then comes in to impress one very strongly. Had proof such as I heard been put before Judge Dugas, he would have doubtless dismissed the complaint. I may add that I concur with him in the opinion, that although the alleged facts came to be known through statements of Montour, his evidence has to be considered as evidence "other than the informer or prosecutor." He has no interest in the result. I should take Jackson to be the informer, informant and possibly prosecutor. Conviction quashed without costs up to its date, but with costs of appeal in favor of appellant.

JUDGMENT.

Whereas Moïse Lefort, late of Caughnawaga, in the District of Montreal, constable, was, on the 21st day of October last past, convicted before Calixte Aimé Dugas, Esquire, Judge of the sessions of the Peace, in and for the said District, for that within the space of three calendar months before the tenth day of August in the year aforesaid, the date of the information in this matter, to wit, on the tenth of July in the year aforesaid, upon the Indian Reserve of Caughnawaga, in this District, the said Moïse Lefort did unlawfully supply to one Peter Onakawakiti *alias* Pierre Montour, an Indian, a certain intoxicant,

to wit, whisky, contrary to the provisions of the Indian Act, the said intoxicant not being made use of under the sanction of a medical man nor under the direction of a minister of religion, and it was thereby adjudged that the said Moise Lefort should, for such his offence, forfeit and pay a fine of fifty dollars, to be applied according to law, and also to pay to Louis Jackson aforesaid the sum of $11.30 for his costs; and that in default of not paying the said sums, that the same should be levied by distress and sale of the goods and chattels of the said Moise Lefort; and if said sale proved to be insufficient, that said Lefort be imprisoned in the house of correction in the said City of Montreal, for the space of one calendar month, at hard labor.

And whereas the said Moise Lefort appealed to one of the Justices of the said Superior Court against the said conviction or order, in which appeal the said Moise Lefort was the appellant and the said Calixte Aimé Dugas, Esquire, and said Louis Jackson of Caughnawaga, aforesaid, farmer, the informant, were the respondents, and which said appeal came on to be tried and was heard before us.

We, the undersigned judge of the said Superior Court, do consider, adjudge and order that the said conviction should be and the same is hereby quashed, and we further order that the said respondent, Louis Jackson, shall pay to the said appellant the sum of $10.00 as for his costs incurred by him in the said appeal, which said sum is to be paid to the prothonotary of the said Superior Court forthwith, and to be by the said Prothonotary paid over to said appellant; and if the said sum for costs be not paid forthwith, then order that the said sum be levied by distress and sale of the goods and chattels of the said Louis Jackson.

Given under our hand and seal the day and year first above mentioned at the City of Montreal in the District of Montreal aforesaid.

John S. Hall, attorney for appellant.

COURT OF REVIEW, 1889.

MONTREAL, 26TH APRIL, 1889.

Present:—JETTÉ, WURTELE AND DAVIDSON, J.J.

THE BRITISH AMERICAN LAND COMPANY, PLAINTIFFS;

vs.

YATES ET AL., DEFENDANTS.

Review.—Deposit for Costs.

HELD:—That where there are several defendants who sever in their defence in the Court below, and inscribe in Review separately, each of such defendants must make a deposit for costs with his inscription.

That such defendants may join in one inscription in Review, although they may have pleaded separately in the Court below, and in such case only one deposit is required.

That in a petitory action, a deposit of forty dollars must be made whatever may be the amount in question.

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The facts of this case appear from the remarks of the [illegible] Judges who presided, and which remarks are given below.

DAVIDSON, J.—Each of these cases comes up on a motion to compel the inscribing party, who, with one deposit and by one inscription, seeks a revision of the judgment complained of, to make a double deposit, where the defendants pleaded separately.

It is well that the question, which is not of infrequent occurrence, should be settled with some degree of definiteness. Article 497 C. P. enacts that review cannot be obtained until the party demanding it has deposited in the office of the Prothonotary of the Court which rendered the judgment a sum of $20 if the amount of the suit does not exceed $100, or of $40 if it exceeds $100, or if it be a real action. In Spelman *et al.* and Robidoux, 2 L. C. J., p. 237 (1858), one of the appellants had pleaded that he had not received value for the note sued on, and the other by a separate defence that his endorsement was a forgery. The defences, though joined in one writ, and it was held good by the Court, even in the face of a motion that they should have taken separate appeals. The same Court affirmed a like principle in Dionne and Ross, 3 L. N. 209 (1881), where the appellant had filed two oppositions in the Court below, one claiming part of the property, by one title, and the other claiming the balance by another title.

At Quebec it is the practice, where defendants have pleaded separately, to compel the plaintiff, if he is the inscribing party, to make as many deposits as there are separate contestations (Perraud *vs.* Perrou, 7 Q.L.R. 319, 1881), but to allow defendants who, although pleading separately, have been condemned by one judgment to reunite in their inscription in review (Villeneuve *vs.* Coude and Pelletier *vs.* Bouchard, 15 Q.L.R. 8, 1889).

In this Court the practice is not yet made certain.—Clément *vs.* Blouin *et. al.* (16 L. C. J., p. 156, 1868), and Morrison *vs.* Wilson *e contra* (16 L. C. J., p. 196, 1872), it was held that where an inscription in review is made by defendant of a judgment deciding at once the merits of a principal demand and of an incidental demand, only one deposit is necessary. The reverse was decided in Allaire *vs.* Allaire, M. L. R., 2 S.C. 252 (1886), and this conflict of authority is the more striking, as the late Mr. Justice Torrance sat in all three cases.

Of more pertinent local decisions there are the following:—Where two defendants had raised separate contestations in the Superior Court, and in Review made one inscription and one deposit, held that on plaintiff's motion a double deposit would be ordered (16 L. C. J., 156, 1868). In Lacombe *vs.* St. Marie, 15 L. C. J., 268, (1871), the defendants who expressed a desire to continue separate defences, were allowed to exact separate deposits from the inscribing plaintiff. Like decisions were given in Namee *vs.* Jones *et al.* (4 L. N. [illegible], 1881), and the unreported case of [illegible] *vs.* Perrault. In Tremblay *vs.* [illegible], also unreported, the defendant's motion to compel a double deposit was rejected, on the ground that defendants had reunited their interests by fyling one appearance in Review.

The apparent confusion of these authorities is, perhaps, not so great as at first sight appears. The Queen's Bench decisions are not largely analagous, because in that Court the bail bond covers all costs, while here the adverse party has only the security of a fixed deposit. Nor do the conflicting decisions as to incidental demands come fairly within the present discussion.

We have to consider the question from two points of view—the rights or privileges of the attorney, and the interests of the suitor. Now, the mandate of the attorney ends with the judgment attacked, and no continuing rights exist to be asserted whether the same or another lawyer appears. Therefore, this feature need not disturb us. Nor does a plaintiff seem to have any right to exact a separate deposit. His demand is one as against the defendants, and by his one original writ he makes it jointly against them. It appears to us that they alone, if a single judgment be rendered, have a *prima facie* right to determine whether their interests may be best served by uniting or again fighting separately in Review. If that right be abused or uselessly exercised, the plaintiff might, as in other cases, obtain a fusion of the proceedings. This principle carries with it the alternative duty on the part of the plaintiff to make a deposit against such defence.

WURTELE, J.—The points now before us are governed by Article 497 of the Code of Civil Procedure, and all we have to do is to apply it to the cases.

The article requires that a party demanding a review should make a deposit, which, it says, "is intended to pay the costs of the review incurred by the opposite party if the Court should grant them."

We have only to see what costs the inscribing party might be condemned to pay, and we find the marks to guide us to a solution in each case which may present itself. When there are several defendants, and they have severed in their defence, and the plaintiff inscribes for a review, he may have to pay a separate bill of costs to each defendant, and he should therefore make a deposit to secure the payment to each defendant of the costs to which he may become entitled.

When the defendants, having severed in their defence, inscribe separately, they may each become individually liable for costs to the plaintiff, and each should give to him the security required by the article. When, however, the defendants, after having severed in their defence, join in one inscription, there is only one review; and as there is only one case, the plaintiff can only have one bill of costs against all the defendants, jointly and severally, and he is consequently only entitled to one deposit.

JETTE, J.—La question que nous avons à décider dans ces trois causes n'est que d'une importance secondaire, car aucun principe n'est en jeu; et que la règle que nous avons à appliquer, soit dans un sens ou dans l'autre, les conséquences ne peuvent être bien graves.

Cependant, quelle que soit cette règle, il est désirable qu'elle soit uniforme et surtout établie, afin que les parties sachent à quoi s'en tenir. Me plaçant à ce point de vue, je n'hésite pas, bien que je sois loin d'être satisfait de la logi-

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que des précedents cités, à me soumettre à la règle qui paraît obtenir le plus sûrement à l'uniformité.

Les arrêts rapportés dans nos recueils judiciaires paraissent avoir établi les trois propositions suivantes :—

1o. Lorsque l'inscription en révision vient de défendeurs qui ont séparé leurs défenses en Cour Supérieure, ces défendeurs peuvent cependant se joindre dans une seule demande de révision et de ne faire qu'un seul dépôt ;

2o. Si au contraire c'est le demandeur qui inscrit en révision d'un jugement qui a donné gain de cause à des défendeurs qui avaient plaidé séparément, ce demandeur sera tenu de faire autant de dépots qu'il a de contestateurs distincts ;

3o. Enfin, même dans le cas d'inscription de révision par le demandeur, si les défendeurs qui avaient plaidé séparément se sont réunis en révision par une seule et même comparution, le demandeur ne sera pas forcé de faire plus d'un dépôt.

Dans la première des causes qui nous sont soumises, celle de la British American Land Company *vs.* Yates *et al.*, les deux défendeurs, après avoir plaidé séparément, se sont réunis pour demander la révision du jugement qui porte contre eux une seule et même condamnation.

La demanderesse par deux motions distinctes demande le rejet de cette inscription.

1o. Parceque les défendeurs ayant contesté séparément ils ne pouvaient se réunir pour demander la révision et ne faire qu'un seul dépôt ;

2o. Parceque ce dépôt n'est que de $20, et que l'action étant réelle il aurait dû être de $40.

Appliquant à ces motions la première règle établie par la jurisprudence, comme je viens de le constater, nous devons dire que le premier motif invoqué par la demanderesse n'est pas fondé puisque les défendeurs pouvaient se réunir pour ne faire qu'une seule demande de révision et un seul dépôt.

Quant au second moyen allégué au soutien de la demande de rejet de l'inscription, l'insuffisance du dépôt vu la nature de l'action, la demanderesse a raison.

L'action est pétitoire et par conséquent réelle, et la loi dans ce cas exige un dépôt de $40. (C. P. C. art. 497.)

La demanderesse doit donc avoir gain de cause sur ce second point, mais suivant en cela la pratique invariable de cette Cour en pareil cas, nous accordons huit jours de délai aux defendeurs pour completer leur dépôt ; et comme la demanderesse aurait pu attoindre son but par une seule requête au lieu de deux, les défendeurs paieront à ses avocats les frais d'une motion seulement.

Dans les deux autres causes, Gaudry *vs.* Gaudry et Bulger *vs.* Bulger *et al.*, ce sont les demandeurs qui inscrivent en révision. Or, dans les deux cas les défendeurs ont plaidé séparément, et en révision ils produisent des comparutions distinctes, et requièrent des demandeurs double dépôt pour garantir les frais sur chaque contestation.

La seconde règle passée ci-dessus s'applique donc à ces deux causes, et les demandeurs devront faire le double dépôt demandé dans le même délai de huit jours.

Hall, White & Cate, attorneys for plaintiff.
J. L. Terrill, attorney for defendants.

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NOTE.—The above judgment included besides the above case the cases of Gaudry *vs.* Gaudry and Bulger *vs.* Bulger *et al.*, which were similar to that of the British American Land Co. *vs.* Yates.

COURT OF QUEEN'S BENCH, 1889.

(APPEAL SIDE.)

MONTREAL, 28TH MAY, 1889.

Present:—TESSIER, CROSS, CHURCH, BOSSÉ AND DOHERTY, J.J.

THE MONTREAL STREET RAILWAY COMPANY,

APPELLANTS;

AND

W. F. RITCHIE,

RESPONDENT.

Damages.—Probable Cause.—Proof of.

R, for himself and on behalf of a number of shareholders in M, an incorporated Company, applied for a writ of injunction to prevent the payment of a dividend. The writ was granted and long enquête made, and the injunction dissolved by the judgment rendered in the case. M, therefore brought an action for damages against R, to recover *inter alia* an amount of about $2,000 claimed to have been expended for fees of experts, counsel, etc.

HELD:—Confirming the judgment of the Court below, that the affairs of the Company M having been shown to be in an unsatisfactory condition, anyone interested in it had a right to make an enquiry into its position, and R had probable cause for so doing.

This was an appeal from a judgment, Johnson, J., dismissing an action of damages brought by the company against Ritchie, for the issue of a writ of injunction to restrain the company from declaring and paying a dividend. Ritchie, acting for himself and on behalf of a number of shareholders, applied for an injunction to prevent the payment of a dividend. The suit was unsuccessful, the injunction was dissolved, and the company then took an action of damages against the plaintiff in the injunction case, and this action was dismissed by Mr. Justice Johnson, on the ground that absence of probable cause had not been shown by the plaintiffs; on the contrary, the report of the company was misleading, and justified the institution of the proceedings complained of. It was from this judgment that the present appeal was taken.

CROSS, J. *diss.*—The members of the court are substantially agreed. They are unanimously of opinion that the action was not taken maliciously, but the company has been put to considerable expense in getting accountants and experts to examine into the valuations, and they have also expended a considerable amount in counsel fees before they could succeed in getting the injunction discharged.

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The question is, whether those charges should enter into the damages which are [illegible] to the company. I am of opinion that they should. When [illegible] responsibility of asserting that a company is in a bad position, [illegible] money to explain things, the expense should fall upon the party who takes the risk of the proceedings. The authorities, in my opinion, bear out this view of the case. Under the circumstances I would be of opinion to allow a moderate indemnity to the company for fees of counsel, accountants and experts; but the majority of the court entertain a different opinion, and the judgment will therefore [illegible]

Cuthbert, J.—The members of the Court differ merely as to the facts and circumstances of the claim. The respondent caused a writ of injunction to issue to restrain the company from declaring a dividend.

There can be no doubt that the appellants were perfectly informed of the circumstances on which the respondent relied. These circumstances had been the subject of discussion at various meetings, and were matters in regard to which the directors of the company could not be ignorant.

No attempt was made to clear up matters of fact. The judge before whom the injunction was sought, after hearing the parties, thought proper to grant the writ of injunction. That fact was about the best answer to the position of the parties before the Court. The injunction issued; a long *enquête* was made; there was a great effort on the part of the petitioner to justify the position he had assumed, but the injunction finally was dissolved. Now the company claim damages; they brought before the court an account for expenditure amounting to nearly $2,000. There was $450 for expert evidence from four accountants.

The company had a capital of $600,000, and was carrying on business presumably with a staff sufficient for their requirements. The experts examined could not be so well informed in regard to their affairs as their own officers. Yet this additional expense has been incurred. Nine hundred dollars were paid to attorneys. Six or seven hundred dollars were paid the experts for valuation of assets. All this seems to be the best evidence that the affairs of the company were in such a state that the respondent had reason to make an enquiry into them.

The Court would not have been indisposed to allow a moderate sum for counsel fees, etc., if it had been satisfied with the question of the company's affairs. But it appears that the administration of the company was in a very unsatisfactory condition. There was an item of $165,000 left year after year in an absolutely unintelligible condition.

I have looked carefully over the evidence, and I think that anyone interested in the company was justified in enquiring into its position, under the circumstances which have been proved. The judgment will therefore be confirmed with costs.

Bossé J.:—L'action de l'appelante est pour dommages résultant de l'émanation d'un bref d'injonction, et la déclaration contient les allégués ordinaires de malice et d'absence de cause probable. Cette Cour est unanime à déclarer que

l'appelante n'a prouvé ni malice, ni absence de cause probable de la part de l'intimé dans les procédés qu'il avait pris pour obtenir le bref d'injonction, mais l'un des membres de la Cour serait d'avis néanmoins d'accorder à l'appelante certains montants payés à ses avocats et experts et non compris dans les frais taxés en sa faveur sur le jugement qui a cassé le bref d'injonction. Pour ma part, je ne vois pas en vertu de quel principe l'intimé peut être condamné à une réclamation, si l'on admet qu'il a agi sans malice et avec cause probable. Les avocats de l'appelante ont prétendu à l'audience que le seul fait de la dissolution de l'injonction rendait l'intimé passible des dommages causés par l'émanation du bref, parce qu'il avait dû fournir un cautionnement pour garantir l'appelante de frais et dommages qui pourraient résulter de l'injonction, et l'on a cité quelques autorités américaines à l'appui de cette prétention. Mais je ne vois rien dans la loi qui puisse justifier une telle distinction. Le principe qui a de tout temps été appliqué aux actions en dommages pour poursuites malicieuses est que le demandeur doit alléguer et prouver malice et absence de cause probable, et ce principe doit s'appliquer à un bref d'injonction comme à toute autre procédure civile. Le cautionnement ne change pas la position; il ne fait que garantir le paiement des frais et dommages, si tels frais et dommages sont plus tard accordés. Dans la cause actuelle nous voyons que les fait tels que connus lors de l'émanation de l'injonction, justifiaient la procédure et que plus tard, à la preuve seulement et après une longue audition des livres de la compagnie, le véritable état des affaires inconnu jusqu'à lors, a été établi.

Dans ces conditions nous trouvons que l'intimé n'a fait qu'user de bonne foi de son droit; qu'il y avait cause probable, et, partant, qu'il n'y avait pas lieu à autre chose qu'à la peine ordinaire du téméraire plaideur, à savoir, le paiement des frais de l'injonction.

DOHERTY J. :—I concur in the judgment of the Court. The appellants' claims for damages could only be maintained by proving that the injunction proceedings were taken against them maliciously and without reasonable or probable cause. As to malice, it was contended on the part of the appellants that sinister motives must be inferred from the fact that the respondent was only a *prête-nom* for others, and acquired a legal interest in the Company merely for the purpose of qualifying himself to take the action. But even admitting that Mr. Ritchie acted in the interest of others, who, for some reason or other, did not choose to appear as petitioners in the suit, I am unable to come to the conclusion that this *per se* would imply malice. A *prête-nom* under our law is only a tacit mandatory holding the legal title and incurring the legal responsibility in the place and stead of his mandator. Of course, he is subjected to the disabilities of his mandator, and any defence which might have been set up against the latter can also be urged against his representative. If malice on the part of the shareholders, at whose instigation and in whose interest Mr. Ritchie may be presumed to have acted, was duly proved, there is no doubt that their animus would be successfully invoked against him.

But in the absence of any such proof or suspicion of any malevolent motive,

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how can it be pretended that the mere fact of Mr. Ritchie appearing in guise of a *prête-nom* is evidence of malice? Then, on the merits of the question, it appeared to me that Mr. Ritchie, or those for whom he was acting, had very obvious and sufficient motives for desiring an investigation of the affairs of this Company, which is a quasi-public corporation. Even with all the labor expended by the Company's numerous experts and accountants, there still remains in the Company's statements apparent if not real discrepancies which the appellants have scarcely succeeded in clearing up, and it must be remembered that we must judge of the question of reasonable and probable cause from the point of view of the information obtainable by the respondent at the time he took his proceedings, and not from the vantage grounds taken by the Company about a year after, when they had, as appears to me, been converted to respondent's view, and applied a large amount of their year's earnings to wipe out a fictitious asset of $165,000, of which the petitioner specially complained. The appellant, by publishing (during the pending of the proceedings) the statement of 30th September, 1886, in which the obnoxious item of $165,216.77 was removed from capital account and debited to profit and loss, appears to me to have partially admitted the objection which the respondent urged when he based his petition on the statement of the preceding year. There is another point which strikes us as forcibly as it struck the learned judge in the Court below. When the petition was presented in the Court below, asking for the writ of injunction, the appellants were notified and were represented by counsel.

They would have simplified matters very much if they had then taken an unequivocal position, and stated that they would apply a portion of their earnings to wipe out the suspicious assets of $165,000, and thus leave their capital account on a sound basis. But how do they meet the respondent's demand? By further mystifications, instead of by obvious explanations, they file the affidavit of their secretary, who simply says that Mr. Ritchie is a *prête-nom*, and that they have not yet decided whether to declare a dividend or not. Under these circumstances can the respondent be charged with having proceeded without reasonable or probable cause? Assuredly not. It is quite true that the injunction was ultimately dissolved, but that was only upon the Company's showing that they had placed their affairs on a more satisfactory basis than they were when the injunction was allowed to issue.

Appeal dismissed.

Abbotts, Campbell & Meredith, attorneys for appellants.

M. S. Lonergan, attorney for respondent.

SUPERIOR COURT.

MONTREAL, 7th NOVEMBER, 1890.

Present:—THE HONORABLE MR. JUSTICE PAGNUELO.

MEYER LIGHTSTONE,

vs. PLAINTIFF;

HYMAN BERCOVITCH, DEFENDANT.

In the report of this case found at page 132 of this volume, several omissions occur in the judgment of the Court of first instance as there given. The following is the judgment as rendered.

La Cour ayant entendu les parties sur la requête du défendeur présentée le 11 juillet dernier, et demandant la permission de fournir un cautionnement spécial en vertu de l'art. 824 C. P. C., examiné la procédure, pièces, et preuve produites, et sur le tout délibéré;

Considérant qu'un défendeur arrêté sur capias peut, avant le rapport de l'action, et dans les huit jours qui suivent, fournir un cautionnement qu'il ne laissera point la Province du Canada, et que, le cas échéant, les cautions paieront le montant du jugement, en capital, intérêt et frais; qu'il peut également fournir ce cautionnement après le délai ci-dessus fixé sur permission du tribunal pour motifs suffisants, art. 824 C. P. C.

Considérant que le cautionnement fourni en vertu de l'art. 824 a l'effet de libérer le défendeur de la prison, aussi bien que de remplacer le cautionnement fourni en vertu de l'art. 828, au moyen duquel il a pu obtenir son élargissement avant le rapport du bref; attendu que le défendeur a prouvé par sa déposition non contredite qu'il avait chargé son avocat de fournir un cautionnement sous l'art. 824 C. P. C., et de contester le capias dans le délai requis par la loi. Mais que par inadvertance ou malentendu, son avocat n'a pas comparu lors du rapport du capias, qu'il a laissé entrer jugement par défaut contre lui le 6 juin dernier, et qu'il n'a pas renouvelé le cautionnement donné en vertu de l'art. 828 par un nouveau cautionnement sur l'art. 824; que ce motif est suffisant pour justifier le défendeur du retard apporté dans le cautionnement à donner en vertu de l'art. 824,

Permet au défendeur de fournier sous huit jours bonnes et suffisantes cautions suivant l'art. 824, qu'il ne laissera pas la Province du Canada, et que, le cas échéant, les cautions paieront le montant du jugement en capital, intérêt et frais. Le tout aux frais et dépens du défendeur, y compris les frais de la dite requête.

James Crankshaw, attorney for plaintiff.

J. P. Cooke, attorney for defendant.

SUPERIOR COURT, 1890.

MONTREAL, 30TH DECEMBER, 1890.

Present: His Honor Mr. Justice De Lorimier.

THE ONTARIO & QUEBEC RAILWAY CO.,

PETITIONERS;

AND

THOMAS A. DAWES, JUN.,

PROPRIETOR;

AND

THE SAID RAILWAY COMPANY

PETITIONER IN RECUSATION;

AND

JOHN L. BRODIE,

RESPONDENT.

ARBITRATOR.—RECUSATION.

HELD:—That where an arbitrator, appointed under the Statute 51 Vict., cap. 29 (The Railway Act), has performed special services for the proprietor, for which services he has rendered an account and has even enforced his claim by an action at law, the arbitrator, in the absence of proof of some corrupt act, is not thereby disqualified from acting as such arbitrator, and such facts do not constitute a valid ground for his recusation.

This was a petition by the Ontario & Quebec Railway Company, praying that the respondent, who had been named as said proprietor's arbitrator in the expropriation proceedings instituted by the said Company, should be recused.

In support of their petition in recusation, the said Railway Co. alleged the following reasons for the disqualification of respondent:—

1. Because he is at enmity with one of the parties, to wit, your petitioner;

2. Because he has an interest in the amount involved in the said arbitration;

3. Because he is the agent of and in the employ of the proprietor, and is also the agent of and in the employ of other parties interested in a similar suit;

4. Because he has an interest in favoring one of the parties, to wit, the said proprietor;

5. Because he is in the expectation of receiving a reward from one of the parties in consideration of the award to be rendered.

The respondent met the petitioner by, first, a demurrer to the allegations numbered 1 and 3 of the petition in recusation, the allegations of the demand being as follows:

That even admitting the truth of the said allegations, they are illegal and unfounded in law, and do not support the conclusions of said petition, and should be struck therefrom and rejected, for the following among other reasons:—

1o. Because the said allegations do not constitute or set forth any legal ground of recusation of said arbitrator;

Because the petitioners cannot by law set up the reasons set forth in said paragraphs of said petition as a ground of recusation.

Because by law enmity is not a cause of recusation ;

Because the fact that the arbitrator has been or is in the employ of one of the parties is not by law a cause of recusation ;

Because the fact that the arbitrator is in the employ of others interested in similar suits is not by law a cause of recusation ;

Because by law and the provisions of the Railway Act, the only legal ground of recusation is that the arbitrator is personally interested in the amount of the compensation, and such interest is not disclosed or alleged in said reasons.

The respondent further pleaded a general denial.

On the demurrer, *preuve avant faire droit* was ordered, and the case was heard on the demurrer and on the merits by His Honor Mr. Justice De Lorimier.

From the proof it appeared that the respondent had acted as arbitrator in a large number of cases ; that in some of these cases he had rendered special services which could not be included in the taxed bill of costs, and that he had made a charge for such services, and had even enforced his claim by an action at law.

There was no proof made to show any act of corruption on the part of the respondent.

By his judgment of date the 31st of December, 1890, Mr. Justice De Lorimier dismissed the demurrer, and also dismissed the petition for the recusation of the respondent, for the reasons given in the considerants of the judgment, which are as follows :

" Ayant entendu les parties par leurs conseils respectifs sur le mérite de la présente cause, examiné la preuve et les documents au dossier, et sur le tout délibéré ;

Attendu que par la requête en question en cette cause, la Compagnie The Ontario & Quebec Railway Company allégue : qu'elle a commencé des procédures en expropriation pour l'ouverture de son chemin de fer relativement à une propriété appartenant à Sieur Thomas A. Dawes, jr., de la ville de Lachine ; que sur ces procédures en expropriation le dit propriétaire a choisi et nommé la personne de John L. Brodie comme son arbitre ; que la requérante a intérêt à demander à ce que le dit John L. Brodie soit déclaré incompétent à agir comme tel arbitre, pour entre autres les raisons suivantes :

1o. Parcequ'il y a inimitié entre le dit arbitre et la dite Compagnie ; 2o. parceque le dit arbitre a un intérêt dans le montant en question et soumis à l'arbitrage ; 3o. parcequ'il est l'agent ou l'employé du propriétaire, et l'agent ou l'employé d'autres parties intéressées dans de semblables causes ; 4o. parceque le dit arbitre est intéressé à favoriser le propriétaire ; 5o. parceque le dit arbitre s'attend à recevoir une récompense de la part de l'une des parties en cette cause à raison de la sentence qu'il rendra comme tel arbitre ;

Attendu que sur la dite requête le dit propriétaire a comparu et s'en est rapporté à justice, et que le dit John L. Brodie a, de son chef et aux fins de

The Ontario & Quebec Railway Co. and Thomas A. Dawes, jun. and The said Railway Co. and John L. Brodie

repousser les accusations personnelles portées contre lui, comparu et contesté la dite requête ;

Attendu que le dit John L. Brodie conteste la dite requête, premièrement en droit, alléguant que les premier et troisième moyens articulés en la dite requête, fussent-ils fondés en fait, sont insuffisants en loi pour justifier les conclusions de la dite requête, et secondement, par une contestation générale niant toutes et chacune les allégations de la dite requête ;

Attendu que sur la dite réponse en droit il a été ordonné preuve avant faire droit ;

Attendu qu'il résulte de la preuve en cette cause que la requérante n'a aucunement établi les premier, deuxième, quatrième et cinquième moyens allégués en sa dite requête ;

Quant au troisième moyen mentionné en la dite requête : Attendu qu'il résulte de la preuve : 1o. Que le dit John L. Brodie a été, par le passé, dans l'habitude d'agir comme arbitre, nommé en vertu de la dite loi spéciale, par plusieurs des personnes qui ont eu à régler des matières d'expropriations aux diverses compagnies de chemin de fer ;

2o. Que le dit John L. Brodie a été dans l'habitude de se faire payer par les dites personnes une compensation pour la valeur réelle des services qu'il leur rendait, au cours des procédures en expropriation alors que les montants réclamés pour ces services ne pourraient former partie du mémoire des frais taxables et réguliers de la cause ;

Vu ce que ci-dessus, procédant à adjuger sur le mérite des prétentions respectives des dites parties ;

1o. Quant à la réponse en droit produite par le dit John L. Brodie : Considérant que les premier et troisième moyens invoqués en la requête en cette cause ne peuvent être considérés comme absolument insuffisants en loi, mais qu'au contraire le mérite de ces moyens dépendait entièrement des faits particuliers que la preuve aurait pu peut-être établir, et que partant il n'y avait pas de motif à produire la dite réponse en droit ;

Nous, juge soussigné, renvoyons la dite réponse en droit avec dépens contre le dit John L. Brodie, distraction des dits dépens en faveur des procureurs de la requérante ;

2o. Quant au mérite : Considérant que les fonctions des arbitres nommés en vertu du Ch. 109 des Statuts Révisés du Canada, aujourd'hui remplacé par le Statut 51 Victoria, ch. 29, qui est une loi toute spéciale relative aux compagnies de chemin de fer en ce pays, ne peuvent être entièrement assimilés à celles des arbitres ordinaires nommés en vertu du droit commun, vu que les arbitres nommés aux termes de cette loi spéciale représentent les personnes qui les choisissent d'une manière que la loi commune ne semble aucunement reconnaître lorsqu'il s'agit d'arbitres nommés suivant le cours des procédures civiles ordinaires ;

Considérant que rien dans le texte de la dite loi ni en principe s'oppose à ce que les arbitres nommés en vertu de la dite loi aient le droit d'exiger le paie

ment des services légitimes additionnels qu'ils peuvent rendre aux personnes qui les emploient, et ce au cours des procédures en expropriation, lorsque le montant de services ne peut former partie du mémoire des frais taxables et réguliers de la cause ; The Ontario & Quebec Railway Co. and Thomas A. Dawes, jun. and The said Railway Co. and John L. Brodie

Considérant qu'il résulte de la preuve en cette cause que le dit John L. Brodie, en réclamant le paiement de divers montants des personnes, qui, comme dit ci-dessus, l'ont employé comme arbitre, n'a cherché à se faire payer que ce qu'il pouvait, de bonne foi, considérer lui être légitimement dû pour ses services additionnels non taxables ; qu'il a réclamé publiquement et ouvertement ses droits et a même institué des procédures judiciaires en recouvrement de ses réclamations ;

Considérant que la preuve en cette cause ne démontre aucun acte de corruption de la part du dit John L. Brodie, ou de nature à le rendre incompétent à remplir la charge d'arbitre en cette affaire ;

Considérant que la requérante n'a pas prouvé les allégations matérielles de sa requête ;

Nous, juge soussigné, renvoyons la dite requête avec dépens distraits aux procureurs du dit John L. Brodie.

R. T. Heneker, attorney for petitioner.
C. A. Geoffrion, Q.C., Counsel.
Taylor & Buchan, attorneys for respondent.

COURT OF QUEEN'S BENCH, 1889.

MONTREAL, 23RD NOVEMBER, 1889.

Present : TESSIER, BABY, CHURCH AND BOSSÉ, JJ.

DAME A. S. LOW, *es qual.*,

APPELLANT;

AND

DAME A. J. GEMLEY *es qual*,

RESPONDENT.

HELD :—That even where an executrix, who is also named as administrator of an estate, has power to substitute another person to manage the estate, such executrix remains personally responsible for the acts of the person so substituted ;

That the fact of the person substituted having enjoyed a good reputation, and being of good standing, does not entitle a testamentary executrix so substituting another in her place to the benefit of Article 1711 C. C., even when such executrix is entitled to substitute another in her place ;

That the fact of such executrix having made cheques payable to the order of her agent, instead of the borrowers, where investments were intended to be made, was an act of negligence which rendered her responsible for the misappropriation of such moneys by her said agent.

Dame A. S. Low, es qual, and Dame A. J. Gemley, es qual.

This is an appeal from a judgment of the Superior Court, rendered by His Honor Mr. Justice Johnson, the 30th of May, 1888, the judgment being as follows:—

The Court, considering that the plaintiff sues in her quality of tutrix to the minor children of the late George H. Low, for the reformation of the accounts herein filed and rendered to plaintiff *ès qualité*, by the defendant in her quality of sole remaining executrix of the last will and testament of the late Charles Adamson Low, alleging in her declaration that four items in the said accounts, to wit: a loan to Miss Emma Roussel of $2,916.81; a loan to Mrs. John Clarke of $1,000; a loan to Mrs. Joseph Bouchard of $3,000; and a loan to the Estate Phillips of $10,997.30, which said items are in the said accounts placed to the credit of the defendant, and should therein be charged against the defendant;

Considering that the plaintiff *ès qualité* also claims, that as representing the said minors *grevés de substitution*, under the said will of the late Charles Adamson Low, she is entitled to the control and possession with the assistance of the *mis en cause*, as curator to the substitution created by the said will, of the one-third portion of the residuary estate of the late Charles Adamson Low, and of all the stocks and securities in the hands of the defendant representing the same;

Considering that the plaintiff *ès qualité*, by her conclusions, asks that the defendant be condemned personally and also *ès qualité*, to pay her the balance of account in capital and interest, appearing from said accounts to be due to the said minors of the said late George Hamilton Low, with all further interest accrued since the closing of said accounts, and the further sum of $17,914.11, being the total amount of the said four items with which the defendant should have charged herself in said accounts, together with interest;

Considering that the defendant has pleaded to this action, firstly, by demurrer, alleging that under the terms of the will of the late Charles Adamson Low, and the allegations of the declaration, it appears that the plaintiff *ès qualité* is not entitled to have control of the share of the Estate of the late Charles Adamson Low, belonging to said minors, or to demand the rectification of the said accounts; secondly, by a peremptory exception, containing substantially the same grounds of defence pleaded in the said demurrer; thirdly, by a plea, alleging in substance that the accounts filed are correct, that the said sums in the declaration enumerated, and forming the total of $17,914.11, were misappropriated, without any fault or defendant's part, by one J. S. Hunter, whom she employed in the regular course of business in the investment of the monies of the said Estate; that the said Hunter grossly deceived the defendant by false representations and fraudulent manœuvres, making her believe that the said sums entrusted to him were duly invested, while in fact the said Hunter had appropriated them to his own use; that the defendant is not liable for the disappearance or misappropriation of the said sums of money, and that in any event the defendant cannot be condemned to pay over to plaintiff anything beyond the investments actually existing, as shown by the said accounts, and finally, by a general denial;

Dame A. S. Low, es qual, and Dame A. J. Gemley es qual.

Considering that by consent of parties, the decision of the said demurrer was reserved until the final hearing;

Considering that the plaintiff is entitled by law as representing the minor of the late George Hamilton Low, *grevés de substitution*, under the will of the late Charles Hamilton Low, to the control and possession of the one-third portion of the residuary estate of the said late Charles Adamson Low, and that the said demurrer is unfounded in law;

Considering that it is proved that on or about the dates mentioned in the said third plea, the defendant handed over to the said J. S. Hunter, for investment, the said four sums forming the said total sum of $17,914.11, and that the same were misappropriated by the said Hunter;

Considering that even if the defendant had the right to employ the said Hunter to invest the said moneys, she remains by law responsible for the misappropriation thereof by him;

Considering that in entrusting the said moneys to the said Hunter, the defendant acted with gross negligence, and failed to take such precautions as she was bound to take in the administration of the said Estate;

Considering that the plaintiff has established the material allegations of her declaration, and that the defendant has failed to establish the allegations of her pleas;

Considering that the *mis en cause* has filed a declaration of submission to the orders of the Court; doth over-rule and dismiss the defendant's said plea, and doth order the said accounts rendered by the defendant to be and they are hereby reformed and rectified, so as to place the said items of $2,916.81, loan to Miss Emma Roussel; $1,000, loan to Mrs John Clarke; $3,000, loan to Mrs. Joseph Bouchard; and $10,997.30, loan to Estate Phillips, to the debit of the said defendant in the investment account, Exhibit A, and in the recapitulation account, Exhibit D, and wherever else it may be necessary for the proper adjustment and balancing thereof, doth further adjudge and declare that the plaintiff *ès qualité*, assisted by the said *mis en cause* as curator to the said substitution, is entitled to the control and possession of the one-third portion of the residuary estate of the late Charles Adamson Low, bequeathed by his will to the late George Hamilton Low, and to all stocks, debentures, mortgages and other securities and moneys representing the same; doth adjudge and condemn the defendant personally and in her said quality to pay and deliver to the plaintiff *ès-qualité* the whole of the stocks, debentures, mortgages, other securities and moneys which she has in her possession belonging to the said minors, and representing the said one-third portion of said Estate, including all the investments mentioned in said accounts, as being actually in force, and amounting to $41,024.55, together with the said amount of cash on hand amounting to $1,001.58, and all further interest and revenues which may have accrued or become due on said sums since the closing of said accounts on the 7th of April, 1887, doth further condemn the defendant personally to pay over to plaintiff *ès qualité* said sum of $17,914.11, representing the four sums

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handed to Hunter, together with interest on each of said several amounts from the respective dates on which the last payment of interest appears from said accounts to have been paid, the whole with costs, including Exhibits, against the said defendant personally, distraits, etc., but without costs against the said *mis en cause*.

In Appeal the above judgment was confirmed for the reasons given in the remarks of his honor Mr. Justice Bossé, which are given below.

Bossé, J.—La présente action a été portée par l'intimée en sa qualité de tutrice à ses quatre enfants mineurs issus de son mariage avec feu George H. Low, et est dirigée contre l'appelante en sa qualité d'exécutrice et administratrice du testament de feu Charles Adamson Low. Elle est en réformation du compte-rendu par l'appelante, et demande le paiement de la part des enfants de la demanderesse dans la succession de leur grand père.

Le jugement a maintenu l'action, ordonné la rectification du compte et le paiement de la part des enfants de George H. Low.

De là le présent appel.

Les faits sont les suivants:—

Le 30 octobre 1868, Charles Adamson Low fit son testament, dans lequel, après diverses dispositions en faveur de sa femme et quelques legs particuliers, il déclare :— "As to the rest and residue of my property, I give, devise, "and bequeathe the same to my executors hereinafter named, and to "the survivor and survivors of them upon trust, as soon as conveniently may "be after my decease to sell and dispose of the same, and to divide and transfer "the proceeds thereof in equal shares among and to my children respectively; "and in case of any one or more of my said children dying before me, it is "my will, and I hereby direct that such child or children so dying before me "shall be represented for his or her or their share, by his or her or their res- "pective lawful issue, and in default of issue, by his or her or their respective "lawful heirs.

"As to the share and interest in my estate hereby bequeathed to my son "George H. Low, it is my will and desire, and it is given on the express con- "dition, that no part of it do enter into any community of property (if any) "which may subsist between him and his wife; and in the event of his dying "without leaving any lawful issue, him surviving, it shall revert to his law- "ful heirs; and should his wife survive him, it is my will and desire that she "should be allowed by my executors a suitable provision in their discretion as "they may judge reasonable, out of my said son George's share, for her main- "tenance so long as she remains his widow, taking, however, into consideration, "and having a due regard to what may have accrued to her by his decease by "virtue of community rights (if any), or what other benefit (if any) she may "have derived from his estate. Should he leave lawful issue, such issue shall "inherit his share after having deducted such provision for his widow; but in "case they should all die before attaining the age of majority, without leaving "lawful issue, then the said share shall (subject to such provision for his widow)

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" revort to his hoirs nearest of kin to my said son George H. Low.

" And for the execution of this my last Will and Testament, I hereby nominate and appoint Robert Hamilton of Quebec, Richard W. Heneker of Sherbrooke, Lindsay B. Lawford of Sherbrooke, my said daughter Anne Shaw Low, widow of the said late Frederick Lawford, and my said son George H. Low, to be the executors of this my last Will and Testament, and trustees for the due execution thereof, in whose favor I hereby divest myself of all my estate and property, of whatsoever nature or kind, for the trusts and purposes aforesaid, willing and intending and hereby expressly declaring that their functions shall be continued beyond the year and a day limited by law, and until the due execution of all and every the directions, provisions and bequests, hereinbefore contained, hereby giving and granting to my said executors (it need be) power to sell and dispose of real estate and immoveable property bank and other stocks, and all and every other kind of securities, right and estate, which I may die seized, possessed of or entitled to, to grant titles and give discharges for the same and to realize the proceeds thereof."

Le testateur a laissé trois enfants, dont un, George H. Low, est le père des enfants pour lesquels la présente action est instituée.

Sauf la défenderesse, tous les exécuteurs administrateurs ont réfusé d'accepter la charge, ou sont décédés longtemps avant l'institution de l'action.

Le 6 février 1869, James Nelson a été nommé curateur à la substitution créée par le testament pour la part de George H. Low.

Le 2 septembre 1874, George H. Low est mort, laissant quatre enfants mineurs, auxquels la demanderesse es qualité a été nommée tutrice le 29 septembre 1884, et en cette qualité elle a reçu de la défenderesse un compte de son administration de la succession de feu Charles Adamson Low.

La succession y est débitée de divers placements, et entre autres les sommes suivantes :—

Prêt à Emma Rousselle		
"	Mde. John Clarke	$ 2,916.81
"	Mde. Joseph Bouchard	1,000.00
"	Succession Phillips	3,000.00
		10,997.30
		$ 17,914.11

C'est de ces quatre items du compte dont l'action demande la réformation, pour la raison que les sommes y portées n'auraient pas été placées tel qu'indiqué, qu'il n'existe en fait aucun placement de cette nature, et que ces sommes ont été perdues pour la succession par la négligence grossière et mauvaise administration de la défenderesse. L'action conclut de plus à ce qu'il soit déclaré que la tutrice demanderesse, assistée du curateur à la substitution créée pour le tiers appartenant à George H. Low, a droit à la possession et administration de ce tiers, et que la défenderesse soit condamnée à le leur remettre, y compris le tiers des $17,914.11, ci-haut mentionnées.

Dame A. S. Low, es qual. and Dame A. J. Gemley, es qual.

Le premier plaidoyer à cette action est une défense en droit, par laquelle la défenderesse prétend que les enfants mineurs, grevés de substitution s'ils décèdent avant leur majorité, n'ont pas droit à la possession de leur part qui doit rester entre les mains des administrateurs jusqu'à l'accomplissement de toutes les dispositions du testament.

Cette défense en droit a été renvoyée par la Cour Supérieure ; je crois ce jugement bien fondé et conforme aux dispositions citées du testament quant aux enfants encore en minorité,—encore partant grevés de substitution ; mais durant le procès, l'aînée des enfants est devenue majeure, et a repris en son propre nom l'instance commencée pour elle par sa tutrice. Aux termes du testament elle ne se trouve plus grevée de substitution, mais, bien propriétaire incommutable de sa part, et ayant en conséquence droit à la possession de cette part. Son droit n'est, il est vrai, devenu ouvert que depuis la date de l'institution de l'action, mais la défenderesse a déclaré dans son factum, page 11, qu'elle n'a pas d'objection à lui remettre cette part, et il n'y a plus lieu à litige sur ce point.

Quant aux autres enfants encore mineurs, ils n'ont pas, il est vrai, droit à la possession. S'ils meurent en minorité, la substitution quant à leur parts respectives prend son effet, mais ils ont droit de faire déclarer incorrects les comptes qui leur ont été rendus, et de faire déclarer dès maintenant que le montant qui doit leur revenir à leur majorité ne sera pas diminué de leur tiers dans ces $17,914.11.

C'est une mesure conservatoire qui appartient à tout grevé de substitution.

Quant au plaidoyer d'exception produit par la défenderesse, il soulève la véritable question du présent litige, il y est dit en substance que dans le cours de son administration la défenderesse a employé comme son notaire, Jas. S. Hunter, auquel elle a, dans le cours ordinaire des affaires, remis les diverses sommes portées aux items attaqués, que Hunter s'est approprié ces argents, et que s'ils sont perdus, c'est sans la faute de la défenderesse, qui a apporté à son administration tous les soins, l'attention et la prudence d'un bon père de famille, qu'elle n'est pas tenue au-delà, et qu'elle n'est pas partant responsable de la perte résultant des défalcations de Hunter.

C'est sur ces plaidoyers que l'enquête a été faite, et que par le jugement de la Cour Supérieure la défenderesse a été declarée responsable et le compte réformé en y portant au débit les $17,914.11 prises par Hunter.

Hunter est maintenant aux Etats-Unis. Il y a été entendu comme témoin, et raconte comment il a pu tromper la défenderesse. De son témoignage, et du reste de la preuve faite dans la cause, il résulte que lors du prétendu prêt à Russelle, Hunter avait proposé à Mde. Lawford de faire ce placement, qu'elle y avait consenti sur les représentations de Hunter que le placement était avantageux, que Hunter lui avait présenté et fait signer ce qu'il lui disait être un projet d'acte d'obligation non signé par le débiteur, et que sur ce l'appelante lui avait remis son chèque à l'ordre de lui Hunter pour le montant de ce prétendu acte d'obligation. L'acte n'a jamais été signé par le débiteur, nous ne savons même pas si Hunter l'a jamais vu ensuite, mais il a encaissé et gardé pour lui le montant du chèque qu'il avait reçu.

La transaction Bouchard est différente. Bouchard devait en réalité à l'appelante en sa qualité d'administratrice une somme de $3,000.00, et le terme de paiement étant devenu échu, Hunter rappela ce fait à la défenderesse, lui représenta que le placement était avantageux, qu'il était désirable de le continuer, mais que pour cela il était nécessaire d'en passer un acte avec Bouchard. En effet, il lui présenta un prétendu acte de continuation de l'hypothèque, que Mde. Lawford signa sans lire. L'acte était une quittance pour le montant dû, et, muni de ce document, Hunter reçut le montant de Bouchard, et le garda. Cependant, l'hypothèque a été radiée au moyen de la quittance ainsi signée par la défenderesse.

L'affaire Clarke est une obligation signée par la défenderesse, et pour le montant de laquelle elle a donné son chèque à Hunter dans les mêmes circonstances et avec le même résultat qu'elle l'avait fait pour l'affaire Roussello.

Quant à l'affaire Phillips, elle se présenta sous des circonstances un peu différentes.

Hunter avait représenté à l'appelante qu'il pouvait avec avantage placer pour elle $20,000.00, en obtenant une subrogation pour autant dû par la succession Phillips par privilège et hypothèque sur des immeubles dont la valeur assurait le placement. Il fit signer par Mde. Lawford un projet d'acte de subrogation, et reçut d'elle encore un chèque pour le montant entier. L'acte ainsi signé contenait; il est vrai, une subrogation, mais pour $9,002.70, au lieu de $20,000, et cette fois encore Hunter encaissa les $20,000.00, en paya $9,002.70, mais garda la balance de $10,997.30.

Il est établi que Hunter était un [illegible] ami de la famille Low, qu'il avait à Montréal une clientèle des plus étendues, et que jusqu'à sa fuite aux Etats Unis il jouissait d'une grande réputation de probité, et possédait la confiance et l'estime de tous.

La preuve nous montre aussi, que c'est de la part des prêteurs une coutume de donner au notaire instrumentant un chèque à son ordre pour le montant de l'hypothèque à être constituée, et que dans les circonstances la défenderesse seule administratrice, et devant nécessairement se confier à quelqu'un, et enfin qu'en donnant ses chèques à l'ordre du notaire, elle n'avait fait que ce que la plupart des gens font dans l'administration de leurs affaires.

De ce qui précède résulte-t-il responsabilité?

L'on comprend que les règles établies pour les pouvoirs et la responsabilité des exécuteurs testamentaires ne peuvent être appliquées aux administrateurs ou fidéi-commissaires qu'avec des modifications considérables.

Les règles spéciales du mandat, quoique analogues, ne sont pas non plus applicables dans leur intégrité. Toutes deux peuvent cependant être utiles dans l'appréciation de l'étendue de la responsabilité de la défenderesse.

Demolombe nous dit (vol. XXVI, p. 41) :—" L'exécution testamentaire est " un témoignage de confiance personnelle, et l'exécuteur ne peut pas se substituer, " se subdéléguer, disait Ricard (Don. II, No. 92), une autre personne, à moins " que le testateur ne l'y ait autorisé. (comp. art. 1032, 1994). Il n'en faut

Dame A. S. Low, es qual, and Dame A. J. Gemley, es qual.

pas toutefois conclure que l'exécuteur soit tenu d'agir en personne, sans pouvoir se faire aider par un mandataire, ce qui serait une exagération. Il peut donc, en effet, accomplir, par un fondé de procuration, les devoirs qui lui sont imposés par le testament, il n'y a là qu'une simple délégation d'action, qui implique toujours la surveillance et la direction de l'exécuteur lui-même, et qui n'affaiblit nullement sa responsabilité."

A plus forte raison la défenderesse a-t-elle dû, avec les pouvoirs presque illimités que lui conférait le testament, se substituer, se subdéléguer une ou plusieurs autres personnes. Elle en a choisi une en qui elle avait confiance, en qui tout le public avait confiance, et elle lui a communiqué ses pouvoirs.

Elle nous dit qu'en s'en rapportant à Hunter, tant sur le contenu des actes qu'il lui présentait et qu'elle signait sans les lire, que pour le paiement aux emprunteurs des sommes qu'elle lui remettait par des chèques à son ordre, sans plus jamais ensuite s'enquérir de ce que Hunter avait ou n'avait pas fait de ces argents, elle n'a fait que ce que d'autres font. C'est possible, et de fait il est vrai que cet usage existe, mais de ce que d'ordinaire les gens sont peu soigneux de leurs intérêts, et que, soit en raison d'une confiance aveugle, soit par négligence ou idolence naturelle, ils aiment mieux risquer de perdre leur argent que de se donner le travail de la surveillance requise par la prudence la plus ordinaire, il ne résulte pas que celui qui administre le bien d'autrui soit en droit de risquer [illegible] les mêmes raisons la perte du bien qu'il administre. L'usage invoqué [illegible] usage abusif, et le bon administrateur ne peut le suivre.

[illegible] de Hunter était une délégation de pouvoirs pour payer l'argent. C'était ainsi la remise d'argent à un notaire pour payer cet argent contre valeur reçue, sans même s'enquérir si les actes étaient signés par l'autre partie, et si en réalité il y avait cette valeur reçue. C'était encore la signature de projets d'acte sans les lire, ni savoir ce qu'ils contenaient autrement que par la parole du notaire, et la remise de l'argent au notaire sur cette simple assurance de sa part.

Enfin, outre l'emploi du notaire pour la passation de l'acte qu'il devait recevoir comme notaire, il y avait l'emploi d'un préposé volontairement choisi le pouvoir de lui donner des instructions et des ordres sur la manière d'accomplir la mission qui lui était confiée.

2o. Sourdat, responsabilité, p. 187, dit que dans ces cas si vous avez pu le contrôler vous êtes responsable, et *vide* p. 193, *et seq.*, où il établit que la raison de décider qu'il n'y a pas responsabilité résultant du fait de l'officier ministériel est l'impossibilité de la surveillance.

Vide Sirey & Gilbert sur Art. 1384, Nos. 178, 180, 181 et 212.

Notre article 1054 est le même, et il y a parité de raison pour l'application de cette opinion. Sirey, 68-2-315, *Lecher* et *Gubori*, Sirey, 74-2-41, *Petit* et *Levaillant*, Sirey 45-2-551.

Harold et *Corporation de Montréal*, 3 L. C. L. J., p. 88, n'eut que l'application du principe que lorsque le commettant a gardé le contrôle ou la surveillance de l'acte à faire, il est responsable, pour la raison que la chose a dû être

faite en exécution de ses ordres, ou pour le moins parcequ'il ne l'a pas dirigée quand il aurait pu et dû le faire.

Dame A. S. Low, es qual, and Dame A. J. Gemley, es qual.

Et tout ceci s'applique à la présente cause dans les circonstances que nous avons vues.

Mais si l'on y ajoute [illegible] défenderesse, après avoir fait librement le choix de Hunter [illegible], avec le pouvoir et le devoir de lui donner des instructions et [illegible] instructions fussent suivies; et ne l'ayant pas fait, et le croyant [illegible] issé agir à sa guise sans contrôle ni surveillance aucune, mais [illegible] gnage de Hunter, page 10), a partagé avec lui les $150.00 de sala[illegible] qu'elle lui payait pour agir comme agent de la succession, et qu'elle a fait son profit d'autant, nous sommes forcés d'admettre une négligence tellement grossière des intérêts qui lui étaient confiés, qu'elle invitait la fraude commise. C'était une connivance ou une demi-complicité légale avec le défalcataire, et la responsabilité de la perte en devient une conséquence nécessaire.

Je ne puis qu'exprimer mon regret de la position faite à Mde. Lawford, mais nous ne pouvons faire supporter par les enfants la perte qui résulte d'une négligence que l'on ne peut tenter d'excuser que par l'allégation de l'inconscience résultant d'une confiance tellement aveugle qu'elle en devient coupable. Et nous devons de plus considérer que si, dans les circonstances de cette cause, nous déclarons qu'il n'y a pas responsabilité, et que l'administrateur peut, sans les lire, signer les actes les plus importants, donner des quittances sans savoir qu'il le fait, signer des chèques pour des sommes doubles de ce que sont les actes, sans autrement s'enquérir de leur contenu que par la parole de celui qui reçoit l'argent, et ne plus ensuite s'inquiéter de ce qu'est devenu l'argent de la succession, il n'y aurait plus jamais de responsabilité possible, et vaudrait autant renoncer de suite à l'administration des successions.

Judgment confirmed.

Abbotts, Campbell & Meredith, attorneys for Appellant.

Lafleur & Rielle, attorneys for Respondent.

IMAGE EVALUATION
TEST TARGET (MT-3)

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SUPERIOR COURT, 1890.

MONTREAL, 26TH APRIL, 1890.

Present:—THE HONORABLE MR. JUSTICE DAVIDSON.

TACHÉ,

PLAINTIFF;

vs.

DEROME ET AL.,

DEFENDANTS.

HELD:—That unless the works of an author are of such a nature as be held to be immoral under the Criminal law, they are not contrary to good morals within the meaning of art. 990 of the Civil Code;

That the fact that a book has been placed in the *index librorum prohibitorum* by the Congrégation de l'Index will not affect the validity of a contract between a bookseller and an agent for obtaining subscriptions for such work;

The remarks of His Honor Mr. Justice Davidson, in delivering the judgment of the Court and the considerants of the judgment, both of which are given below, shew the facts of this case.

MR. JUSTICE DAVIDSON.—By a special contract dated the 21st of May, 1889, the defendants agreed that the plaintiff should take orders for certain books to be sold through their establishment, and for remuneration it was stipulated that the sales should be made at not less than 22 cents for the franc on publishers' prices, that anything above that rate was to go to plaintiff, together with 5 per cent. commission up to the rate of 22 cents.

This agreement did not bind defendants to import all the books for which an order might be obtained, so there was made a supplementary contract dated the 1st August following, whereby it was specially agreed that defendants were to fill all orders for certain specified works, and among others those of Victor Hugo (Hughes' illustrated edition).

The plaintiff proceeds to allege that he obtained and, on the 19th of September, 1889, delivered to defendants 301 orders for this work, at a rate of 30 cents on the franc, upon which his stipulated profits would amount to $3,386.25. One-half of the commission was to be paid by a four months' note when the orders were handed over, and the balance based on the orders completed in six months. An allowance is made for possibly unacceptable subscribers, and it is now prayed that defendants be condemned to pay the sum of $1,406.25, unless they choose to deliver a four months' note for that amount.

To the action defendants plead that they are Catholic booksellers, and are well known only to sell books permitted by the religious authorities of the Roman Catholic Church; that plaintiff represented Hughes' edition of Victor Hugo to be a permissible book, and by his artifices deceived defendants; that this edition was not in their catalogue, and that some of the works contained in it are immoral, subversive of the principles of society, and forbidden by the Church; that an arbitration was agreed upon and afterwards repudiated by

plaintiff. As to the orders on which the action is founded, the plea asserts that a number of them had been obtained before the date of the contract; that a great many of them were not acceptable, and that the terms of many others did not agree with the terms of the contract.

There is no proof to sustain the pretensions that the supplementary contract was induced by artifice, and that plaintiff repudiated an arbitration to which he had consented.

In support of the allegation, that some of the works included in this edition are forbidden to members of the Church to which the contracting parties belong, the evidence of several ecclesiastics was taken. It appears reasonably certain that "Notre Dame de Paris," "Les Misérables" and "Le Pape" are to be found in the *index librorum prohibitorum*. Let the fact be granted, can it affect a civil contract? To say yes would be to lay down the principle that the Congrégation de l'Index, or the ecclesiastical authority of any other church, would have the power, as between the members of its own communion, to interpret, qualify or even annul contracts. As between members of different religions, these Courts might become battle-grounds for the theologians. In France the Congrégation de l'Index has never, so far as I am aware—at least within times sufficiently modern to be worthy of practical reference,—been recognized as a law giving authority. To enforce its decrees with threats is now unlawful. (Darloz, Jur. Gén. 84. 3. 65.)

What, I take it, Courts have to deal with in the maintenance of contracts is not the conscience of the individual, but that great public conscience which quickens and gives life to the body of the civil law, whose interpreters we are. Now, a contract with an unlawful consideration has no effect, and (C. C. 990) "the consideration is unlawful when it is prohibited by law, or is contrary to "good morals or public order." The clear duty of a Court is to give universal application to this article of our Code—that is, to so interpret it as that the interpretation will not vary because of the persons concerned, but be broad enough to cover all contracts of like classes, no matter who the contracting parties may be.

To generalize in this fashion is easy enough, but to attempt a definition of the generic expression "good morals" is another matter. What is "contrary to good morals"? There are works so wanton in their language, so evident in their purpose, and so violently repugnant to public morality that in their presence definitions become unnecessary. No person, however, pretends that charges such as these can be brought against the writings of Victor Hugo. I have therefore sought to reach some clear and positive conception of what, in its more limited senses, the expression "contrary to good morals" means. There are many things morally which are not legally wrong, and care must be taken to judge between the parties, according to purely legal rules and definitions.

No authorities have been put before me with reference to this feature of the case. I know of no reported local decision which is in point, and a somewhat diligent enquiry among the French writers has brought me no assistance. I imagine the reason to be that the subject is one which is largely a matter of

Taché vs. Derome et al.

police regulations or authority. (Code Penal, 17th May, 1819, Art. 8; do Aug., 1848.) I am led to believe that the liberty given to publishers in France is, if anything, somewhat broader than it is in England. As to English jurisprudence, it may be safely said that, for all practical purposes, the civil law is determined by and co-extensive with the criminal law; the question in a given case is not simply whether the publication be immoral, but whether it is sufficiently so to enable the criminal law to punish it as such (Pollock, Contracts, No. 270. Shirley, Cr. L. 26, 1 Buss, Cr. L. 321; see cases collected in 2 Starkie, Libel, 155, and Stephen's suggested definition, Cr. Dig. Art. 172). If, then, we seek for what an indictment requires, we find that it has to charge the accused with "devising, contriving and intending" to corrupt the public morals. Judged by this, and "indeed, if need be, by a far stricter standard, Victor Hugo's works cannot be condemned as an unlawful consideration" for a contract. Only two of his works have been filed in the cause, the prose romance of "Notre Dame de Paris," and "Les Chansons des rues et des bois," a collection of lyric verse. I am not to presume anything against his other books. (Shortt, Law of Literature 356.) Even in the two specifically impugned, only two or three extracts are challenged, but it is said that these are enough to taint the whole production That Hugo has written things which marred his genius and has committed himself to views which many men would repudiate, are undeniable facts, but all the same he was a great writer, poet and dramatist, and an imposing central figure in the nineteenth century literature of France.

No one can read his works without agreeing with this moderate praise of what he was and what he felt: "In his moral nature we shall find much that is "strong, elevated and tender, a true passion for France, a true sympathy for the "poor and the oppressed, a true fondness for children." Another [redacted] writer declares that "it may be asserted, without the least fear of contradiction, "that Victor Hugo will hold to all posterity the position of the greatest poet "and one of the greatest prose writers in France." One of the reverend witnesses for the defence spoke of his works as being "*magnifique au point de vue littéraire.*" They are to be found in all secular public libraries, and selection from them appear in text-books.

Neither during his life or since his death in 1885 has any Court been sought to hold that any of the works of Victor Hugo were against public law or public morals, or were written for the corruption of the public conscience. His magnificent genius applied itself to loftier, if sometimes mistaken, purposes. It is by these tests that the case must be judged. As well might the works of Racine, or Chateaubriand, or Lamartine, or Byron, or Swinburne or many of the earlier classical writers of France and England be challenged as not susceptible of creating valid civil obligations because they sometimes paint the weaknesses and faults of human nature in words of greater passion or realism than some might think desirable or necessary. I hold the contract to be a good one.

For reasons, which I need not now enter upon, but which will appear in the formal judgment, the demand is reduced to $700, and for that amount judgment goes with costs.

JUDGMENT.

Taché vs. Derome et al.

The Court, seeing plaintiff alleges that by a special contract, dated the 21st of May, 1889, the defendants agreed that the plaintiff should take orders for certain books, to be sold through their establishment; and for remuneration it was stipulated that the sales should not be less than 22 cents for the franc on publisher's prices; that anything above that rate was to go to plaintiff, together with 5 per cent. commission up to the rate of 22 cents; that this agreement did not bind defendants to import all the books for which an order might be obtained, and that in consequence there was made a supplementary contract, dated the 1st of August following, whereby it was specially agreed that defendants were to fill all orders for certain specified works, and among others those of Victor Hugo (Hughes' illustrated edition);

Seeing plaintiff further alleges that he obtained, and on the 19th September, 1889, delivered to defendants 301 orders for this work, at a rate of 30 cents on the franc, upon which his stipulated profits would amount to $3,386.25, one-half whereof was to be paid by a four months' note when the orders were handed over, and the balance based on the orders completed in six months;

Seeing plaintiff makes an allowance for possibly unacceptable subscribers and it is prayed that defendants be condemned to pay the sum of $1,406.25, unless they choose to deliver a four months' note for that amount, as representing the first payment;

Seeing defendants plead that they are Catholic booksellers, and are well known only to sell books permitted by the religious authorities of the Roman Catholic Church; that plaintiff represented Hughes' edition of Victor Hugo to be a permissible book, and by his artifices, defendants were induced to include this edition, which was not in their catalogue; and that some of the works contained in it are immoral, subversive of the principles of society, and forbidden by the Church; that an arbitration was agreed upon, and afterwards repudiated by plaintiff; that a number of the orders on which the action is founded had been obtained before the date of the contract; that a great many of them were not acceptable, and that the terms of many others did not agree with the terms of the contract;

Considering that there is no proof to sustain the pretensions that the supplementary contract was induced by artifice, or that plaintiff repudiated an arbitration to which he had consented;

Considering that a contract with an unlawful consideration has no effect, and that (C. C. 990) "the consideration is unlawful when it is prohibited by "law or is contrary to good morals or public order"; but that said article must be so interpreted as that the interpretation will not vary because of the persons concerned, and will cover all contracts of like classes, no matter who the contracting parties may be;

Considering that the two works of Victor Hugo produced in this cause are not against public law or public morals, and were not written for the corruption of the public conscience;

Taché vs. Derome et al

Considering that the contract invoked was not unlawful ;

Considering that upon the 301 orders produced, plaintiff would be entitled to a commission or profit of $3,386.25, but that the terms granted in a number of said orders were not in accord with those of the contract made with plaintiff, and that a considerable number of said orders are signed by persons from whom collection of their subscription prices would be difficult and perhaps impossible.

Doth reduce plaintiff's present demand to $700 ; and doth in consequence condemn defendants jointly and severally to pay and satisfy to plaintiff the said sum of $700 currency, with interest thereon from the 20th of September last (1889), unless they prefer to deliver to plaintiff their promissory note payable at Montreal, at four months, from the said 20th of September last; with costs, in any case, distraits, etc."

Hall, Nicolls & Brown, attorneys for plaintiff.

Trudel & Lamothe, attorneys for defendant.

SUPERIOR COURT, 1890.

MONTREAL, 29TH APRIL, 1890.

Present: THE HON. MR. JUSTICE WURTELE,

THE E. B. EDDY MANUFACTURING CO., PETITIONER ;

vs.

THE HENDERSON LUMBER CO., RESPONDENT.

HELD :—That when an incorporated company is in fact insolvent, a winding up order may be obtained against it before the expiration of sixty days from the service of a demand of payment of an overdue debt on such company.

That when a petition for such winding-up order is presented before such delay has expired, the petitioner must allege and prove the insolvency of the company, when such insolvency is not acknowledged, or when one of the other cases under which a company is deemed insolvent does not exist.

The facts of this case appear from the judgment of the Court, which is as follows :

The Court, having heard the parties, by their Counsel, upon the respondent's preliminary answer in law to the petition for a winding-up order against the respondent "the Henderson Lumber Company," having examined the proceedings and having deliberated ;

Considering that a winding-up order may be obtained against an incorporated trading company when it is insolvent ;

Considering that if a company is deemed insolvent when it is unable to pay its debts as they become due, and is deemed to be unable to pay them as they become due when it neglects to pay any debt for sixty days after the service of a demand for payment in writing, it does not result therefrom that when a company is in fact insolvent, proceedings for a winding-up order cannot be taken before the expiration of a delay of sixty days after the service of a demand for payment of an overdue debt ;

Considering that in the case of a default to pay during sixty days the company is deemed insolvent, and that it is not necessary for the petitioner to prove the insolvency; but that when the petition for a winding-up order is presented before the expiration of such delay, the petitioner is required to prove the insolvency of the company when it is not acknowledged, or when one of the other cases under which a company is deemed insolvent does not exist;

The E. B. Eddy Manfac'g. Co. vs. The Henderson Lumber Co.

Considering that in the present matter the petitioner alleges that the company respondent is insolvent, and that it has acknowledged its insolvency;

Considering that the allegations of the petition are sufficient, if proved, to maintain its conclusions, and that the preliminary answer in law is unfounded;

Doth dismiss the said preliminary answer in law, with costs, of which distraction is granted to Messrs. McMaster & McGibbon, the petitioner's attorneys, and doth fix Saturday, the 3rd of May next, at ten o'clock in the forenoon, for proof and hearing on the petition.

Macmaster & McGibbon, attorneys for petitioner.
Chapleau, Hall, Nicolls & Brown, attorneys for respondent.

COURT OF QUEEN'S BENCH, 1891.

MONTREAL, 24TH JANUARY, 1891.

Present: CROSS, BABY, BOSSÉ & DOHERTY, J.J.

JOHN M. INGLIS,

Plaintiff in the Court below,
APPELLANT;

AND

DAME GEORGINA A. PHILLIPS ET VIR,

Defendants in the Court below,
RESPONDENTS.

HELD:—Confirming the judgment of the Court below, 33 L.C.J. 82, that as plaintiff, appellant, had made option to keep the lots of land purchased from respondent, instead of refusing to carry out the sales as he might have done on discovering the difference between the actual width of the street on which the said lots were situated and the width the said street was represented to have, and as he had not proved any actual loss suffered by him in consequence of said difference in the width of the street, he was not entitled to recover damages from defendants.

This was an appeal from the judgment of the Superior Court, Montreal (Mr. Justice Davidson), of date the 5th November, 1887, reported at length 33 L.C.J. 82, by which judgment the plaintiff's action was dismissed.

In the Court of Queen's Bench the judgment of the Court of first instance was confirmed, the judgment in appeal being as follows:—

The Court of Our Lady the Queen, etc.

Considering that there is no error in the judgment appealed from, to wit, the judgment rendered by the Superior Court for Lower Canada, sitting at

John M. Inglis and Dame Georgina A. Phillips et vir.

Montreal in the District of Montreal on the 5th day of November, eighteen hundred and eighty-seven, doth affirm the same with costs to the respondent against the appellant.

Judgment confirmed.

Davidson & Ritchie, attorneys for appellant.
Cruikshank & Ferguson, attorneys for respondents.

COURT OF QUEEN'S BENCH, 1891.

MONTREAL, 24TH JANUARY, 1891.

Present: CROSS, BABY, BOSSÉ & DOHERTY, J.J.

JAMES H. MERRILL,

(Plaintiff in the Court below)

APPELLANT

AND

HAMILTON M. RIDER,

(Defendant in the Court below)

RESPONDENT.

M. brought action against R. to recover damages for loss alleged to have been sustained through R. shutting off the supply of water from R's mill which was further down stream than M's mill. It was shown by the evidence that the water supply from both mills came from a pond across the outlet of which R's *auteurs* had built a dam about fifty years before the time of the action, that it had always remained their property, and had been always under their management and control, that R had acquired the rights of said *auteurs* and that M had recognized R's rights. No proof of any special damage was made.

HELD:—That M's action must be dismissed.

This appeal was from a judgment of the Superior Court (District of St. Francis), of date 27th June, 1887, whereby appellant's action against the then defendant Rider was dismissed.

By plaintiff's declaration it was alleged that there is in the Township of Stanstead a lake, or pond, known as "Lovering Pond," with an outlet or river fed thereby, running southerly a distance of some four miles to a bay of Memphremagog Lake, called "Fitch Bay."

That upon this river or outlet, a distance of some sixty rods from the pond, is the plaintiff's saw mill; further south the mill of one Orcutt; about two and a half miles south a saw mill of defendant; and still further south are defendant's saw and grist mill, joined, all of which are run by water wheels. That both pond and stream are navigable and floatable, and as such belong to the Crown.

Conclusion for damages of two thousand dollars, sustained by plaintiff through said Rider having rebuilt the bulkhead across the lower end of the pond (connected with a dam on each side), placing extra plank therein; fastening the same with lock and key, by day and by night, thereby stopping

James H. Merrill and Hamilton M. Rider

the flow of water from the pond, diverting its course, causing it to set back upon the meadow lands, and needlessly preventing plaintiff from having any water in his pond except such as leaked through or ran over the top, or occasionally, when defendant (to suit his own wants) would for a day allow the water to pass. And that he persisted in so doing, notwithstanding plaintiff's request, with the willful intent to injure plaintiff and his business, thereby keeping plaintiff's mill and a large number of men idle fully half of the time, besides injuring his business.

That the said damages commenced in December, 1885, but more particularly were caused in May and following months of 1886, as the mill and business were entirely dependent upon water from the pond, and in the Fall plaintiff was, owing to defendant's illegal actions, obliged at great expense to put in a steam power.

Defendant pleaded first a general denial, and further that from J. W. House, the former owner of all, T. B. & H. M. Rider, in 1879, acquired title to the lower mill properties, as well as pieces of land on both sides of the outlet of the pond upon which a dam had been built; that neither the pond nor stream was navigable or floatable; that the firm sold to him, defendant; that the dam had been there for more than fifty years, and the water had always been controlled principally for the lower mills; that there exists a servitude in favor of defendant, and by the deed ownership and control of the water of the pond was conveyed.

Also, that House subsequently sold to Stewart, whose executors deeded to plaintiff the property and mill privilege owned by plaintiff who is bound by defendant's title.

Defendant in his second plea also quoted a clause contained in deed from House, by which defendant claimed his title to control, stop or divert the flow of water of Lovering Pond, which clause was as follows:

"And together with the right and privilege to the purchasers, their heirs and assigns, at all times hereafter of *taking and using* the water from the pond known as Lovering Pond, *down to low water level* at the dam on the hereby sold land, without hindrance or obstruction on the part of the said vendor, he hereby reserving the right and privilege of floating or drawing saw logs through the said dam in the race-way provided for that purpose, whenever there is high water sufficient for so doing, without causing any unnecessary waste of water, and by said vendors giving to said purchasers twenty-four hours' notice of his intention to run such logs."

The Superior Court dismissed plaintiff's action, the judgment being as follows:

The Court having heard the verbal evidence and argument of Counsel at enquête, and merits in this cause, examined the proceedings and documents of record, and deliberated;

Seeing that this action was instituted by plaintiff to recover damages from defendant, upon three grounds: First, for loss of time of himself and men;

James B. Merrill and Hamilton M. Rider

second, for loss of earnings of his, plaintiff's, saw mill; and third, for injury sustained in his business reputation.

That the parties are mill owners on the stream or river in question in this cause, the plaintiff of a saw mill, and defendant of two such mills and a grist or flouring mill, the former situated higher up on said stream than the latter, although the latter's dam is higher up and above that of the former on said stream! And seeing that said damages are so claimed for that plaintiff alleges that defendant hath so improperly and illegally managed and used his said dam as to unjustly deprive him, plaintiff, of the use of such water running from and out of a certain pond called "Lovering Pond," at the mouth of which defendant's said dam is built; said pond being higher up than said dams, and of which both of said dams depend for their supply of water and motive power for their mills respectively;

And seeing that defendant hath pleaded to this action that his dam was so built over fifty years before this action was instituted by the then owners of his said mills, and that it was always their property, and they had ever since rightfully the management and control of the water of said pond through the medium of their said dam, and that they had, when this action was instituted, acquired, by prescription as well as by title granted to them in the year one thousand eight hundred and seventy-nine, the right to control, use and take the water from said pond for their mills down to lower water level in said pond, and that plaintiff became a party to said title deed by agreeing to and confirming defendant's said title deed giving him such use and control of said water by one James W. House, their common *auteur*, from whom plaintiff also purchased his mill after sale and title by said House to defendant. And further, that plaintiff, by so recognizing defendant's rights to the water down to low water level by preference and privilege, had thereby consented to the servitude so imposed on plaintiff's property by their said common *auteurs* in favor of defendant and his said mills, and upon and against plaintiff and his mill and property. And further, defendant denies that he had controlled or used said water in any way contrary to his right in the matter under said deeds and rights so acquired as aforesaid, and that he was not therefore guilty of any malfeasance, nor liable to plaintiff to damages as claimed by him;

And considering that plaintiff hath failed to establish the material allegations of his declaration, and more particularly that defendant, in exercising his right of preference to take and use said water to low level of said pond, and in his management thereof, had done so carelessly, abusively, or wantonly for the purpose of injuring him, plaintiff, or depriving him of any right he had by title or otherwise, to the use of his fair share of said water;

And considering that the water of said pond being limited in quantities and insufficient in volume to furnish motive power to said mills and others entitled thereto, situate on said stream, in itself as a river of comparatively small propelling power, continuously in full supply, it was necessary as among so many competitors therefore that it should be carefully attended to and managed by

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some one entitled to and responsible for the control thereof; and considering that it is proved that defendant and his *auteurs* as owners of his said mills and of said Lovering dam always had and were best entitled to said management and control;

And considering that in view of the insufficiency of the water to supply the full demand of the number of mills entitled to their shares thereof, and the small resources on which said pond had to depend for its replenishment if drawn to low water level, as defendant had right to do, it was as in the interest of plaintiff and others so entitled that defendant should not exercise his rights to the full extent in this respect by so taking to low level, thus exposing all parties to an almost absolute want of water, whilst the same was again slowly rising to the heights of usefulness to all parties interested;

Considering that it is proved by plaintiff's evidence that thirty-six days of such continuous use of the water, as plaintiff claimed it, would, empty said pond for all practical and useful purposes, and that it was not and could not be for the benefit of plaintiff or any of such others interested that defendant should have drawn the water of said pond much lower than he did, and that upon the whole he was fairly consulting the interests of those interested in not so doing, more particularly as his own mills required more water than plaintiffs, and were dependent therefor for the quantity which must necessarily pass through plaintiff's dam to those below; and considering, therefore, that defendant was acting firmly and judiciously in economizing and in preventing waste of the water in the manner complained of by plaintiff, and that his doings in and about the control and use of said water under the circumstances, and his rights therein acquired and so long exercised, were within his competency, in the best interests of all concerned, and no aggravation of the servitude so imposed by the said common vendor to and *auteur* of both plaintiff and defendant in regard to the properties in question in this cause;

And considering further that plaintiff has failed to make sufficient proof of any specific damages legally appreciable in money for or by reason of any thing done in the premises by defendant, and that the vague and irrelevant evidence offered by him in most cases has been obtained by answers to hypothetical questions, the assumptions of which are *not proved*, and which go beyond the allegations of declaration;

And considering that most of plaintiff's evidence offered to establish his alleged damages is made on assumed and unproved premises, such as that he was wholly deprived of water during six or seven months of the year, of which premises there is no proof, nor is it so alleged or claimed by plaintiff's declaration, and that as a matter of fact plaintiff has not made good the essential allegations of his declaration, nor proved any specific or definite amount of damages for which this Court can give him judgment;

And considering that defendant has proved the material allegations of his pleas and defence, maintaining said pleas, doth dismiss this action with costs distraits to Mtre. Huckett, attorney for defendant.

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From the above judgment the plaintiff appealed to the Court of Queen's Bench, by which Court the judgment was confirmed, the remarks of his Honor, Mr. Justice Tait, in delivering the judgment of the Court being as follows:

TAIT, J., *ad hoc*.—The appellant appeals from a judgment of the Superior Court, district of St. Francis, by which his action against respondent was dismissed.

The litigants are owners of mills situated upon a stream of water, being the outlet of a pond in the township of Stanstead, called "Lovering Pond," and the dispute is about the control of the water. The distance from the outlet to Fitch bay on Lake Memphremagog into which the stream empties is about two and a half miles. The respondent owns the dam and the land at the outlet. The appellant has a dam and a saw mill a few rods below the outlet, while about one and a half miles further down the stream, the respondent has a saw mill, and again about another half mile further down he has a saw and grist mill.

The water from the pond, after passing through the main dam at the outlet belonging to respondent, must pass through appellant's dam and mill before it reaches the respondent's mills. The appellant complains that the respondent has without right controlled the water of the pond to his damage. He alleges that respondent, having rebuilt the bulkhead across the lower end of the pond (connected with the dam on each side), placed extra planks therein, and fastened them down with lock and key by day and by night, thereby stopping the flow of the water from the pond, diverting its course, and needlessly preventing appellant's, having any water in his pond except such as leaked through or ran over the top or occasionally when respondent (to suit his own wants) would allow the water to pass.

The damages are alleged to have been mainly suffered during the season of 1886, from the month of May onwards, and to have consisted in loss of time of himself and men, $200; loss of earnings of mill, $1,500; loss of reputation in business, $300, making altogether, $3,000. This stream is certainly not navigable; it is about ten feet wide, and single logs can only be floated down with assistance, so that it can hardly be called a floatable river either. There is no doubt that the respondent did control the flow of the water out of the pond during the time in question. The bulkhead situated in the middle of the dam was arranged with grooved posts on each side, and the space between the posts could be filled up with planks let down. By putting down or taking off these planks the respondent controlled the flow of water through the bulkhead, and in order that they could not be disturbed by anyone, he had a contrivance by which the planks at any height he might adjust them could be held down under lock and key.

The gist of the appellant's grievance is that during the period of time complained of, respondent kept too much water back in the pond by keeping too many planks in the bulkhead. The respondent says that the stream in question is neither navigable nor floatable; that he has not impeded the natural flow of the water of the stream, but has controlled the flow of the water artificially stored in the pond, as he had a perfect right to do, and as has been done for more than

fifty years by the owners of the grist mill at Fitch Bay; that the dam in question was built by the man who built the grist mill over fifty years ago, and the ownership of the dam and the control of the water have always vested in the proprietor of the grist mill. The respondent appears to have locked down the planks about the 24th of May, 1886, at which time, according to appellant's witness, Rickard, there were about six feet of water at the bulkhead; from that time on, respondent lowered or raised the planks from time to time, never retaining less than a depth of four feet. On an average, Rickard thinks there were ten or eleven inches of water running over the bulkhead from May to December.

The appellant says the respondent had no right to control the water in the way he did; that it was wholly unnecessary to retain such a depth of water, that is over four feet at the bulkhead, and that if the water had been properly managed there would have been ample for the business of all the mills. By the judgment of the first court it was held in substance that the respondent had a right of preference to take and use the water to low level of the pond; that he had not abused his privilege; that it was necessary among so many competitors that the water should be carefully managed by some one entitled to the control thereof; that defendant and his *auteurs* as owners of his mills and the Lovering dam always had, and were best entitled to, such management and control; that respondent had acted in the best interest of all concerned in doing as he did; and that, moreover, no damage appreciable in money had been proved.

As the respondent claims that he has a preference to the water, as against appellant, by virtue of his title, which came from their common *auteur*, it becomes necessary to refer briefly to the respective titles of the parties.

On the 7th November, 1879, one James W. House was the owner of all the mills and dams now owned by appellant and respondent respectively. On that date he sold respondent and his brother, T. B. Rider, the property in which the Lovering dam is constructed, as well as the grist and saw mills now owned by respondent alone, "together with the right and privilege to the said purchasers, their heirs and assigns, at all times hereafter of taking and using the water from the pond known as Lovering pond down to low water level at the dam on the hereby sold land, without hindrance or obstruction on the part of the said vendor his heirs, or assigns. The said vendor hereby reserving the right and privilege of floating or driving saw logs through the said dam, in the raceway provided for that purpose, whenever there is high water sufficient for so doing, without causing any unnecessary waste of water, and by the said vendor giving to said purchasers twenty-four hours' notice of his intention to run such saw logs." To this deed one Horace Stewart was a party as surety of the vendor in favor of purchase against all evictions and troubles.

In February, 1881, House sold to Stewart the mill now owned by appellant, together with other property, and in this deed there appears the following clause:—"The said purchaser hereby binding himself, his heirs and *ayants cause*, to observe, abide by and fulfill all the conditions and agreements binding upon the said vendor with respect to water privileges mentioned and contain-

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ed in a certain deed of sale of part of the lot No. 12, in the fifth range, and part of the north half of the lot No. 26 in the seventh range of lots, in the said township of Stanstead, heretofore granted by the said James W. House to the firm of T. B. & H. M. Rider, the whole to the perfect exoneration of the said vendor, his heirs and assigns forever."

In October, 1881, Stewart leased to appellant, with the condition that he could purchase at any time before the expiration of three years for the price of $1,250. In July, 1882, the Riders registered a notice, stating that a servitude had been created in their favor by the deed of sale to them, that is, the right of taking and using the water in said pond down to low water level at the dam, etc., and that such servitude affected the land owned by House and sold to Stewart. Afterwards, in May, 1884, T. B. Rider sold his interest in the properties and privileges acquired from House to respondent; and finally, in October, 1884, the executors of Stewart, who had died, executed a deed of sale in favor of appellant, in pursuance of the promise of sale contained in the lease, but for the reduced consideration of $1,000. The reason of the reduction is explained by Mr. D. H. Merrill, appellant's father.

Q.—Your son had bonded this property from the Stewart estate prior to purchase, had he not?

A.—Yes, sir.

Q.—At the time of taking the deed there was a trouble between your son and the executors of the Stewart estate, was there not, in reference to the property?

A.—There was.

Q.—What was the trouble?

A.—When my son bonded that property from Mr. Horace Stewart, he bonded it for three years, with the right of purchasing that property any time within the three years, at a certain price.

Q.—And there was no reference in the agreement, but that it was to be free and clear from all encumbrance?

A.—There was no mention of anything else. There was no mention of Rider's servitude.

Q.—And?

A.—And when my son went to close the deed, the executors of the Stewart estate were ready to deed their rights. He declined to take it.

Q.—And?

A.—And after some talk, Mr. Kathan, the executor, made a proposition to take a thousand dollars; that would be a deduction of two hundred and fifty dollars, and to deed it subject to Mr. Rider's rights.

Q.—A deduction was then made of two hundred and fifty dollars ($250 you said?

A.—Yes, sir.

Accordingly there appears in appellant's deed the following clause: "And the said purchaser doth hereby bind himself, his heirs and *ayants cause* to ob-

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serve, abide by and fulfill all the conditions and agreements binding upon the said vendors with respect to water privilege mentioned and contained in a certain deed of sale of part of lot number twenty-one in the fifth range, and part of the north half of lot number twenty-six in the seventh range of Stanstead aforesaid heretofore granted by James W. House to the firm of T. B. & H. M. Rider, the whole to the perfect exoneration of the said vendors *es dite qualité* and their successors and assigns forever."

The appellant and respondent therefore acquired from the same auteur—appellant's title being subsequent to that of respondent, and subject to whatever rights and control may have been given to him over the water of Lovering pond, by virtue of the clause in his deed of acquisition already cited.

The respondent contends that by virtue of the clause in the deed from House to the Riders, by which they were given the right and privilege at all times "of taking and using the water from the pond known as Lovering pond down to low water level on the dam on the sold land without hindrance or obstruction on the part of the said vendor, his heirs or assigns," he had a right to retain and accumulation of water in the pond under lock and key and run it out to suit his convenience. He says this clause gave, and was clearly intended to give, respondent and his brother the control of the water held by the dam for the use of their mills below, subject to right of running logs to the vendor's (now appellant's) saw mill, lying between the dam and the mills at Fitch Bay. That is to say, the vendor expressly made the saw mill retained by him subservient to the mills below, as to the use of the water stored by the dam in Lovering pond.

The appellant has no doubt recognized the right of the respondent to have a dam and to store water therein, for otherwise what use was the privilege of drawing water out of it down to low water level if he had no right to accumulate it. The clause appears to give respondent a preference upon the surplus water so accumulated. Perhaps it would be going too far to say that after this pond is filled up the spring and the water is far above low level, respondent could shut it in and let none escape during the summer; but respondent did not so deal with the water.

On May 25th, the day after the bulkhead was locked, the depth of water there was 6 feet 3½ inches; on September 24th, 4 feet 4 inches; October 28th, 4 feet 2½ inches, so that during the summer it diminished about two feet. And the average flow over the bulkhead down the river was between ten and eleven inches. These figures are given by Mr. Rickard, appellant's witness, who, however, is unable to say during what period of the year the mills could operate if there had been no Lovering dam, or whether more or less than the natural flow of the water passed down the stream during the season the damage complained of was suffered.

Even supposing that the Court could reach so favorable an interpretation to respondent's title as he himself does, it would seem that in any case the appellant, in order to recover damages, should show that respondent withheld more water than would naturally have flowed during the season complained of. But

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appellant has not shown that he did not get a quantity of water equivalent to the natural flow. He proves and complains that he did not get all the surplus water. Some witnesses have stated that more water than usual was retained, and more than was necessary. The respondent may have been a little over-prudent, but it is not shown that he acted maliciously, and if he was entitled to store water at all for the benefit and use of his grist mill, he must be entitled to a certain latitude of discretion.

A great deal depends upon the season, the sources of supply, and other circumstances. As I understand the evidence, the surplus water in this pond at a depth of, say, four feet at the bulkhead, would have been exhausted by appellant's two wheels in about thirty-six days of ten hours a day. If appellant was entitled to draw out surplus water in this way, of what use was the privilege given respondent by his deed and acquiesced in by appellant? The result would be that appellant would get the benefit of the water for his saw-mill, and the respondent's grist mill, which is operated later in the year, would probably be left without water.

There is a good deal of evidence going to show that even before respondent's acquisition of the property the Lovering dam was controlled by the owner of the grist mill. Appellant's witness, Adam J. Taylor, aged 55, who has lived by the pond all his life, and who worked appellant's mill six years, says that the dam and bulkhead in question have always, as far as he knows, been controlled by the proprietors of the grist mill. William Lenny, who has known the premises some 25 years, and Erastus Lee, aged 54, whose father built the dam, and who has lived there all his life, and who owned at one time the respondent's mills, and other witnesses say the dam was always controlled by the lower mill.

With the clause in the deed and this long continued usage in respondent's favor, appellant had to make out a clear case for damages. I must say that I am unable to come to the conclusion that the retention of the quantity of surplus water complained gave rise to damages.

Apart from this aspect of the case, the evidence as to damages, is of the very vaguest description. The witnesses, except appellant's father, all avoid giving any estimate of damages. The father says $5 a day, but his cross-examination shows this estimate to be wholly unreliable. House, in answer to a hypothetical question, speaks of $10 a day; on the other hand, there is considerable evidence, to the effect that appellant having increased the capacity of his mill did a larger business in 1886 than he ever did before. Upon the whole, I think the judgment should be confirmed. Judgment confirmed unanimously.

Joseph L. Terrill, attorney for appellant.
Ives, Brown & French, attorneys for respondent.

COUR SUPÉRIEURE.

SHERBROOKE, 10 SEPTEMBRE 1891.

Présent : LYNCH, J.

NAPOLEON LEPINE

vs.

ARTHUR P. LAURENT,

(percepteur du revenu provincial.)

Constitutionnalité—Licences—Mandamus.

JUGÉ :—Que la législature provinciale peut autoriser un conseil municipal à passer des règlements pour réglementer ou prohiber dans les limites de la municipalité la vente des liqueurs enivrantes en détail ou en gros, et qu'un tel règlement, ainsi autorisé, est légal, et que le percepteur du revenu provincial ne peut accorder une licence en contravention à ce règlement.

In 1890, the Legislature of Quebec, by the Act 53 Vic., chap. 79, incorporated the town of Magog; and, by section 39, power was given the Municipal Council to pass by-laws, among other purposes, "To restrain, regulate or pro-"hibit the sale of any spirituous, vinous, alcoholic or intoxicating liquors, by "retail or wholesale, within the limits of the town."

On the 13th April, 1891, the Council of the town of Magog passed the following by-law: "It is hereby enacted that, on and after the 1st day of May, "1891, the granting of licenses for the sale of spirituous, vinous, alcoholic or "intoxicating liquors, in any quantities, by wholesale or retail, in stores, shops "and all other places (excepting hotels), within the limits of the town of Magog, "is hereby prohibited, and the granting of certificates for such sale will be re-"fused by this Council in accordance with the provisions of article 39 of the Act "of Incorporation of the town of Magog, and other provisions of the Statutes of "the Province of Quebec."

It would appear that, prior to the 1st of May last, petitioner had a license for the sale of liquor, by wholesale, at said town of Magog; and that he subsequently applied to the defendant, the Collector of Provincial Revenue for said District, for the renewal of such wholesale license, tendering him therefor the fees fixed by the statute 54 Vic., cap. 13, sec. 12. To this tender formally made by a Notary Public, defendant answered that he could not accept, that he must be governed by the dispositions of the Act 53 Vic., cap. 79, and of the by-law passed by the Corporation of Magog in virtue of this statute, so long as that by-law remains in force.

On the 17th August last, petitioner applied to this Court for the issuance of a writ of mandamus addressed to the defendant, ordering him to appear and show cause why a peremptory writ should not issue, enjoining him to grant petitioner the wholesale liquor license for which he had applied; and with the petition was a deposit of the amount of fees required by law. It was ordered that a copy of the petition should be served on the defendant, with a notice that the same would be heard on the 20th.

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On the last named day, petitioner and defendant appeared, by their respective counsel; and the Corporation of the town of Magog applied to be permitted to appear and to be heard by counsel, which application was granted. The main facts relied on by petitioner were admitted at the argument; and the only question at all seriously discussed was the constitutional right of the Quebec Legislature to authorize the Council of Magog to prohibit the sale of liquor, as had been done by the section of the Act of Incorporation above quoted. It was incidentally suggested, by the defendant's counsel, that the allegations of the petition did not disclose a right to the writ of mandamus, and that the more correct proceeding on the part of petitioner would be an action to set aside the by-law. It is alleged that it was the duty of defendant, on payment of the prescribed fee, to have granted petitioner his license; and, if that be so, the writ is clearly demandable under par. 2 of art. 1022 C.P. In the Sulte case, which was not unlike the present one, as regards the principle involved, the proceeding was by mandamus; and the defendant raised the same objection; but it was overruled, and the case went to the Queen's Bench and Supreme Court. On the suggestion of petitioner's counsel, the Attorney-General has been notified to appear, if he saw fit; and he has declined to do so.

The issue, therefore, is clear and distinct; and although differing in some respects from that presented in what may now be regarded as the leading and decisive cases affecting the respective powers of Parliament and of Legislature, recourse must be had to them, to aid in determining where the legislative power rests. As regards the matter now under consideration, the sole questions are: had the legislature the right to confer upon the Magog Council the power to pass a by-law to prohibit the sale of liquor by wholesale, and was defendant bound to observe such by-law?

Our jurisprudence on the general question of prohibitory power was certainly, for several years after Confederation, in what may be designated an embryo state, not having received the full development which has more recently been given to it by the pronouncements of the highest Courts of the Province, of the Dominion and of the Empire. Among the early decisions which are quoted in support of the view that Parliament alone can deal with the question of prohibition, is that of Cooey and the County of Brome. Having been counsel in that case, I know something of what the issues really were. It was on a petition to set aside a by-law adopting the Temperance Act of 1864, which, it was contended, had been repealed, as regards the Province of Quebec, by the Municipal Code and the License Act. The late Mr. Justice Dunkin did hold that the legislature had not repealed, and could not repeal, the Temperance Act. His judgment was set aside by the Court of Appeals on a different ground, on informality in the manner of taking the vote. I find, however, that the members of that Court expressed their views freely on the question of legislative power. The late Sir Antoine Dorion said: "Before the union of the Provinces was effected by Confederation, "the power to prohibit the sale of intoxicating liquors had already been conferred "by the Temperance Act of 1864 to the municipalities of the Provinces of Upper

"and Lower Canada. It was by that Act made a matter of local and municipal "regulation. By the Confederation Act, all the laws then in force in the several "provinces were continued (sec. 129), and municipal institutions (sub-sec. 8), as "well as all matters of a merely local or private nature, in each province (sub-"sec. 16, sec. 92), were placed under exclusive legislative control of the several "provinces. In the absence of any expressions to restrict the powers so con-"ferred, they must be understood to comprise all those matters, which, at "the time the union was effected, had been considered by the then existing le-"gislatures as belonging to municipal institutions and as being of a local or pro-"vincial character. This would comprise the authority which the legislature of "United Canada had already delegated to the several municipalities to prohibit "the sale of intoxicating liquors within the limits of such municipalities. The "meaning of the words trade and commerce, as used in the second sub-section "of sec. 91 of the B. N. A. Act, ought to be restricted to those branches of "commerce of a broader application than those already enumerated, and which "are specially provided for in sec. 91, such as the import and export trade of "the country, custom and excise duties, and generally all those matters of trade "affecting the whole Dominion, or more than one of the provinces, or their trade "relations with one another, or with the Empire or any of its possessions. I do "not wish here to lay down as a rule that there are no cases in which the Domi-"nion Parliament could not regulate or prohibit the sale of intoxicating liquors "or other articles of trade within the Provinces composing the Dominion.

"It is not necessary to express any opinion what might be the authority of "the Dominion Parliament in certain possible contigencies; it suffices for this "case to say that the Temperance Act of 1864 must be considered as belonging "to the latter class of subjects coming within the description of local or police "regulations, and this, I believe, is the opinion of all the members of this Court.

"From the best consideration I have been able to give to the question now "under review, I have come to the conclusion that the legislature of the Province "of Quebec had full power to deal with the Temperance Act of 1864, and to "alter and repeal any of its provisions conferring on Municipal Councils the right "to prohibit the sale of intoxicating liquors within their municipality."

Mr. Justice Ramsay said: "Fortunately we are not called upon to recon-"sider sub-sec. 9 of sec. 92 of the B. N. A. Act, for a prohibition to sell intox-"icating liquors is certainly not a license, and it cannot assist in raising a reve-"nue. This is a prohibition to sell intoxicating liquors within the limits of "a local municipality, a matter of a merely local or private nature in the Pro-"vince, and furthermore does it interfere with the regulation of trade and com-"merce? I cannot think that the exclusive power to regulate trade and commerce "can be interpreted in an absolute manner; and we must therefore constantly "enquire whether the matter does not more exclusively belong to some local "power. Here it is contended that a prohibitory by-law is not dependent on "the municipal institutions of the province. But, as it has already been ob-"served, the Act of 1864 evidently treats it as a municipal matter, and to attempt

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"to treat these local prohibitions as a regulation of trade and commerce appears "to me to be ridiculous exaggeration. I therefore think that the local legisla- "ture has the right to deal with the prohibition."

Mr. Justice Cross said: "Municipal government may include much that con- "cerns the regulation of trade, and laws affecting trade may interfere largely "with municipal regulations. When special trading operations become pre- "judicial to public health and morals, the higher law of the public good would "seem to require the supremacy of the local municipal control to restrain the "mischief laws of the class to regulate trade which should be general, not local "or special in their application. To prevent abuses resulting from the sale "of intoxicating liquors on Sunday or at inopportune places might be held to "be reasonable exercise of local municipal power, although it might affect the "volume of trade in those articles. We find the power to prohibit the sale of "intoxicating liquors distinctly attributed to and exercised by our municipal in- "stitutions before Confederation; and being already invested with that power, "we have no warrant for divesting them of it, and must therefore leave them "in possession of it."

I have quoted thus largely from the views of the learned judges of the Provincial Court of Appeals in the Cooey case—which, so far as I know, are not refuted—in order to show how the opinions expressed thus early (1878) by them were afterwards, in the main, adopted by the higher appellate Courts, which were subsequently called upon to judicially interpret sects. 91 and 92 of the Union Act, regarding the respective powers of Parliament and Legislature to deal with the vexed questions of license and prohibition. I ought to say, to correct a false impression, that the judgment of the Court of Appeals in the Cooey case was set aside by the Supreme Court by consent—the petitioner not caring to proceed further.

In 1877 the legislature of Ontario adopted the "Liquor License Act," which contained stringent provisions respecting the regulation of the sale of spirituous liquors, and gave rise to what is known as "the Hodge" case, which was adjudicated upon by the Privy Council the 13th Dec., 1883.

In 1878 Parliament passed "The Canada Temperance Act," which permitted the electors of any municipality to declare in favor of the prohibition of the traffic in intoxicating liquors within the limits of that municipality. "The Russell case" resulted from this legislation, and was pronounced upon by the Privy Council on the 23rd June, 1882.

In 1883, Parliament, largely influenced by inferences drawn from the judgment of the Privy Council in the Russell case, legislated respecting the sale of intoxicating liquors and the issue of licenses therefor. This legislation was regarded with great disfavor by all the provinces; and a joint case to test its constitutionality was submitted to the Supreme Court, which declared it *ultra vires* of the powers of Parliament in its general principles, and this view was confirmed by the decision of the judical committee of the Privy Council rendered on the 12th day of December, 1885.

While their Lordships of the Privy Council have in these three important judgments remained strictly within the issues submitted to them, they have laid down as applicable to each distinct case certain general principles of interpretation, which must always serve as determining tests in construing the powers of Parliament and legislature in dealing with the regulation of the liquor traffic.

The ruling on "The Liquor License Act of 1883" has set at rest all controversy regarding the question as to where lies under the constitution the licensing power. It is thus tersely expressed, "that the Liquor License Act of 1883 and the Act of 1884 amending the same are not within the legislative authority of the Parliament of Canada."

By "the Russell case" it is determined that Parliament had authority to pass "The Canada Temperance Act of 1878," and it is declared: "Parliament does not treat the promotion of Temperance as desirable in one Province more than in another, but as desirable everywhere throughout the Dominion. Parliament deals with the subject as one of general concern to the Dominion upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it."

By the Hodge case it is decided that "The Liquor License Act of 1877 is so "far confined in its operation to municipalities in the Province of Ontario, and "is entirely local in its character and operation"—that the regulations which may be adopted under it "seem to be all matters of a merely local nature in the "Province, and to be similar to, though not identical in all respects with, the "powers then belonging to municipal institutions under the previously existing law passed by the local parliament." "Their Lordships consider that the "powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations "of a merely local character; as such they cannot be said to interfere with the "general regulation of trade and commerce which belongs to the Dominion "Parliament, and do not conflict with the provisions of the Canada Temperance "Act, which does not appear to have as yet been locally adopted." The subjects of Legislation———seem to come within the heads Nos. 8-15 and 16 of sec. 92 of the B.N.A. Act.

Since the rendition of these judgments, or at least of some of them, our Courts have had occasion in several instances to apply them. In the Salte case, to which reference has already been made, the late Mr. Justice Ramsay in rendering the unanimous judgment of the Court of Queen's Bench, Oct. 7th, 1882 (5 L. N., p. 330), said: "It may be at once conceded that the power to pass prohibitory "liquor laws is not essential to the existence of municipal institutions, and that "consequently in a very restricted reading of sub-sec 8 (sec. 92) it would not "justify the local legislature in passing a prohibitory liquor law. In so far as the "Province of Quebec is concerned, municipal institutions were the creation of "special Statutes. The general Act was passed no longer back than 1855. "Among other things, county councils were given the power to make by-laws "for prohibiting and preventing the sale of all spirituous, vinous, alcoholic and

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"intoxicating liquors, etc. These Statutes were in force at the time of con-
"federation. We hold then, that under a proper interpretation of sub-sec.
"8, the right to pass a prohibitory liquor law for the purposes of municipal
"institutions has been reserved to the local legislatures by the B. N. A. Act.
"We have suspended our judgment in this case for an unusual length of time
"awaiting the decision of the Privy Council in the case of Russell and the
"Queen. It has not either expressly or by implication maintained that the Do-
"minion Parliament can alone pass a prohibitory liquor law." The Sulte case went to the Supreme Court, where the judgment of the Court of Queen's Bench was unanimously confirmed Jany. 12th, 1885. (11 S. C. R., p. 25.) Ch. J.—"The case of Hodge *vs.* Queen just decided by the Privy Council covers the constitutional question." Strong J.—"I agree entirely with the judgment delivered by Mr. Justice Ramsay. Hodge *vs.* the Queen decided by the Privy Council since the judgment of the Court of Queen's Bench was delivered having put an end to the question, any further discussion of it is unnecessary." Fournier, J.—"The constitutional question has now to my mind been definitely "settled by the decision of the Privy Council in the case of Hodge *vs.* Queen." Gwynne, J.—"It seems to be supposed that the judgment of this Court in "the City of Fredericton *vs.* the Queen is an authority to the effect that since "the passing of the B. N. A. Act, it is not competent for provincial legislatures "to restrain or prohibit in any manner the sale of any spirituous liquors, and that "therefore the Legislature of the province of Quebec could not invest the Corpo-"ration of the City of Three Rivers with the powers purported to be vested "in them by the 74 and 75 secs. of the Act, 38 Vic., ch. 76, and that the Dominion "Parliament alone could enact the provisions contained in the 75th sec. (the 1st "par. of which reads for restraining and prohibiting the sale of any spirituous "liquors, etc.) What was decided in the City of Fredericton *vs.* The Queen was "that the provincial legislature had not jurisdiction to pass such an Act as 'The "'Canada Temperance Act of 1878,' and that the Dominion Parliament alone "was competent to pass it; but there was nothing whatever in the decision calcu-"lated to call in question the right of the provincial legislatures to insert in all "acts in relation to municipal institutions, such provisions as those in question "here."

In Molson & Lamb (2 M. L. R., Q. B., p. 381) the Court of Appeal again maintained the constitutionality of the Quebec Licence Act, the Chief Justice remarking that they were to be governed by the decision in the Hodge case, followed "by the last decision rendered by the Privy Council, holding that the right to "legislate on the issue of licences for the sale of liquor by wholesale or by "retail belonged to the local legislatures." This case went to the Supreme Court, where the appeal was dismissed. All of the judges concurred in saying that they regarded the constitutional question as definitely settled. Gwynne, J., observed:—"All of these judgments rest upon the foundation that laws which make, or "which empower municipal institutions to make, regulations for granting li-"censes for the sale of intoxicating liquors in taverns, shops, etc., are laws which,

"as dealing with subjects of a purely local, municipal, private and domestic "character, are *intra vires* of the provincial legislature."

In the last reported case bearing on this matter of which I have any knowledge, Moir and Village of Huntingdon (20 R. L., p. 684), the Court of Queen's Bench held, that the power conferred upon local councils by art. 561 of the Municipal Code, to prohibit the sale by retail of intoxicating liquors, was within the competency of the legislature of the Province.

The learned counsel for the petitioner has sent me up for reference the record of a case from Three Rivers, Desserveau & Lasalle, together with the judgment of Mr. Justice Bourgeois therein. The facts there were in the main as nearly as possible identical with those admitted to exist in this case. The learned judge condemned the collector to issue the license, holding that he had shown no legal reasons for his refusal to do so. I regret very much not to have had an opportunity of examining the reasons which led my brother judge to the conclusion at which he must have arrived, that the local council of the parish of Ste. Anne de la Perade had no authority to pass a by-law prohibiting the sale of liquor in such manner and to such extent as to divest the collector of provincial revenue of the obligation to deliver a license to sell by wholesale. The conditions here are not, however, exactly similar to what they were in that case. It is possible that the decision there turned upon the absence of any provision in the Municipal Code, authorising the Council of the Parish of Ste. Anne de la Perade to pass such a by-law, and that possibly the by-law itself did not apply, and could not be applied, to the case of a wholesale liquor license, and was limited in its operation to the prohibition of the sale of intoxicating liquors in quantities less than three gallons, or one dozen bottles, as authorised by art. 561 of the Municipal Code, and consequently could not apply to a wholesale license which would be in excess of the power thus delegated. I am not now called upon to determine any such questions. What the petitioner asks me to do is, to declare that the Legislature of Quebec had no right or authority under sec. 92 of the B. N. A. Act to confer upon the municipal council of the Town of Magog the power of passing a by-law to to prohibit within its limits the sale of liquor by wholesale, as has unquestionably been done by 53 Vic., cap. 79, of the Quebec Statutes, sec. 39. The Supreme Court and the Court of Appeals have, in the decisions referred to, supported by the judgment of the Privy Council in the Hodge case, emphatically laid down the doctrine that the regulation of the liquor traffic, wholesale and retail, is within the exclusive control of the local legislature; and the Court of Appeals in the Moir case has affirmed, in the most distinct manner, the right of the Legislature to delegate to municipal councils the power of prohibiting the sale of liquor by retail. In the Severn case the Supreme Court went far in the direction of holding that the regulation of, and the right to license, the wholesale trade was not within the attributes of the Legislature; but in the Molson case, the Chief Justice remarked :—"In view of "the cases determined by the Privy Council, since the case of Severn *vs.* the "Queen was decided in this Court, which appear to me to have established con-

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"clusively that the right and power to legislate in relation to the issue of "licenses for the sale of intoxicating liquors by wholesale and retail belong to "the local legislature, we are bound to hold that the Quebec License Act of 1878 "and its amendments are valid and constitutional." It may then be assumed as judicially settled, that the Legislature of Quebec had and has, under the constitution, the power to delegate to municipal councils the authority to license or to prohibit the sale by retail of intoxicating liquor, and to license the sale by wholesale; but it is said that the same power does not exist concerning the prohibition of the sale by wholesale. Why should the one be treated differently from the other? It may be as important in the interest of the locality, and in some instances possibly more so, to prohibit the sale by wholesale as by retail; and can the one local prohibition be regarded as an interference with the regulation of trade and commerce when the other is not? I must confess my inability to appreciate the distinction. The late Chief Justice Dorion, in the course of his observations in the Cooey case, quoted two decisions of the Court of Queen's Bench of Ontario, which have a decided bearing on the point now under consideration. In the case of Regina and Taylor it was said:—"The Ontario Legisla-"ture has a right to license or prohibit the sale of liquors in shops or taverns, "and in other places of the like kind, because it has the exclusive power over "municipal institutions; and these institutions had, before and at the time of "Confederation, the exercise of these powers, and because such powers read in "connection with sec. 92, sub-sec. 16 of the Confederation Act, is now a matter "of a merely local or private nature in the Province. That power is in re-"straint of trade as well as a matter of police. The general regulation of trade "and commerce which is vested in the Dominion Government must be considered "to be modified by the powers which the Ontario legislature, acting in relation "to municipal institutions, may properly exercise." The same Court also held in Slavin and the Corporation of the Village of Orillia:—"That by-laws passed "by municipal corporations *wholly prohibiting* spirituous liquors in shops and "places other than houses of public entertainment, and limiting the number of "tavern licenses to nine, were valid as being within the powers of the corpora-"tion under the 32 Vic., cap. 32, Ont., and that it was within the power of the "Provincial Legislature to confer such power."

These judgments express my view of the power of the legislature; and they have received their full confirmation by the judgments since rendered, and to which I have already referred. Before Confederation, our municipal law, ch. 24 of the Con. Sts. of Lower Canada—like that of Upper Canada—recognized the right of municipal councils to prohibit generally the sale of liquors, sec. 26, sub-sec. 11, conferred upon all county councils in the month of March of each year, the power to pass by-laws "for prohibiting and preventing the sale of *all* spirit-uous, etc., liquors;" and by sub-sec. 16 of sec. 27, every local council might make a similar by-law in any year when the County Council had failed to do so in the month of March. This power to prohibit generally the sale of liquors, thus unmistakably conferred upon and enjoyed by municipal councils, prior to

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Confederation, has been held to be continuing and not to have been disturbed by any provision of the Union Act; and it certainly has not since been taken away by any competent authority.

I do not feel that it is necessary for me pursue the enquiry further. From the best thought and attention which I have been able to give this matter, I have come to the conclusion that the inherent right and responsibility, under the constitutions, of controlling municipal institutions in the Provinces, belongs to the legislature; and that the legislature may, and from its very nature must, delegate this control to councils, the recognized guardians and administrators of these municipal institutions; and that one of the most important elements of this control is the regulation of the liquor traffic, which may be effected in the discretion of the Council, under the power so delegated, either by a general or limited system of license, or by a general or partial system of prohibition, or by a combination of both systems.

Was defendant bound to conform to the requirement of the by-law prohibiting the sale of liquor by wholesale in the town of Magog, and to refuse the license asked for by petitioner?

By the Quebec License Act, 41 Vic., cap. 3, sec. 48, the applicant for a wholesale shop license was obliged to produce the same certificate confirmed by the Council, as was required for a hotel license. This formality being observed, and on payment of the requisite duty, he was entitled to his wholesale license, sec. 70, unless the sale in the municipality had been prohibited by by-law, sec. 51. Sec. 48 was amended in 1880, by 43-44 Vic., cap. 11, sec. 14, by taking away the necessity of a certificate for a wholesale license, and by providing that wholesale liquor shop licenses are granted simply upon payment to the proper license inspector of the required duties and fees. This latter provision was not reproduced in the Revised Statutes of Quebec, and has disappeared entirely, so that under art. 892 it is now the duty of the collector of provincial revenue to issue on application a wholesale liquor shop license on payment of the requisite fees, unless he has received under art. 860 copy of a municipal by-law prohibiting the sale of liquors in the municipality, in which case he is forbidden to issue any license, except it be for a steamboat bar or a railway buffet. Here it is admitted that the defendant had received a copy of the by-law in question, at the time when petitioner applied to him for a wholesale liquor license; and I cannot conceive how it was possible for defendant to have given any other answer than the one which is embodied in the formal tender and offer made to him by petitioner of the requisite fees, and which he signed: "*Je ne puis accepter cette offre parceque je dois m'en tenir aux dispositions de l'acte 53 Victoria, chapitre 79, et au réglement passé par la Corporation de Magog en vertu de ce Statut tant que le dit réglement reste en vigueur.*"

On the whole I consider that sec. 39 of cap. 79, 53 Vic., Quebec, in so far as it authorizes the municipal council of the town of Magog to pass by-laws to restrain, regulate or prohibit the sale of any spirituous, vinous, alcoholic or intoxicating liquors, by retail or wholesale, within the limits of the town, is

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within the competency and powers of the legislature of this Province — and not *ultra vires* thereof ; that the municipal council of the town of Magog, in passing and enacting the by-law which is attacked by petitioner, was competent, and acted *ultra vires* of the power conferred upon it by said section ; that the said by-law is in all respects legal and binding for all the purposes thereof and of said section ; and that defendant acted correctly and legally in refusing to accept the tender and offer of petitioner. The petition cannot be granted, and is therefore rejected with costs.

De Lottinville, for petitioner.

Broderick, for Defendant.

Terrill, Q.C., for Corporation of Magog.

COUR DU BANC DE LA REINE (EN APPEL).

MONTRÉAL, 26 SEPTEMBRE 1891.

Présents : BABY, J., BOSSÉ, J., DOHERTY, J. A., et CIMON, J. A.

THE GLASGOW & LONDON INSURANCE CO.
(*Défendeur en Cour de première instance*),
APPELANTE ;

ET

DAMASE LECLAIR
(*Demandeur en Cour de première instance*),
INTIMÉ.

Assurance.

JUGÉ :—Que les conventions contenues dans l'application pour assurance font partie du contrat, quoiqu'elles ne soient pas reproduites dans la police.

Le 11 janvier 1890, la Cour Supérieure à Montréal, Jetté, J., a rendu le jugement suivant :—

JUGEMENT DE LA COUR SUPÉRIEURE.

La Cour, après avoir entendu la plaidoirie contradictoire des avocats des parties sur le fond du procès mû entre elles, pris connaissance de leurs écritures pour l'instruction de la cause, examiné leurs pièces et production respectives, dûment considéré la preuve, et délibéré ;

Attendu que, par une police d'assurance portant le No. 29,537, la compagnie défenderesse, le 11 septembre 1886, assuré contre les accidents du feu, pour le terme d'une année, des machines, courroies, engin et bois manufacturé et en cours de manufacture, appartenant au demandeur, et se trouvant dans un moulin situé au coin des rues Sanguinet et Mont-Royal, de cette ville, et ce qu'à concurrence d'une somme de $2100, dont $1500 payables, en cas de pertes, à Messieurs H. Bulmer, jr., & Brother ;

Attendu que, le 29 août 1887, les objets ainsi assurés ont été détruits par un incendie ;

Attendu que subséquemment, savoir, le 2 septembre 1887, le demandeur, qui avait déjà, par écrit en date du premier novembre précédent, transporté à la Henderson Lumber Company [illegible] collatérale, la somme de $600 lui revenant sur le montant assuré [illegible], a donné à la dite Henderson Lumber Company un ordre sur la défenderesse pour le paiement de cette dite somme ;

Attendu que, nonobstant ce que ci-dessus énoncé, la défenderesse n'a ensuite payé aux dits Bulmer et Henderson & Co. qu'une somme totale de $1879.71, au lieu de celle de $2100, laissant ainsi une balance de $220.29 sur le montant assuré, que la défenderesse refuse de payer au demandeur, et pour laquelle ce dernier se pourvoit ;

Attendu que la défenderesse conteste cette demande, disant ; que le 13 septembre 1887 elle a obtenu des dits Bulmer et Henderson Lumber Company, moyennant ce paiement de $1879.71, une décharge complète et finale du montant de la décharge autorisée, quant à Bulmer, par les termes de la police, et, quant à la Henderson Lumber Co., par l'ordre et le transport sus-mentionnés ;

Qu'en outre, cette somme était tout ce à quoi le demandeur avait droit, vû que l'assurance susdite ne lui avait été accordée que sujette à la garantie No. 2, c'est-à-dire, une contribution due par l'assuré, en vertu d'une clause connue dans le langage commercial sous le nom de "Seventy-five per cent. co-insurance clause," par suite de laquelle l'accusé s'engage à faire assurer sa propriété jusqu'au chiffre de 75 pour cent, et ne paie en conséquence qu'une prime réduite ; que, dans l'espèce, l'assurance en question n'a pas été prise par le demandeur mais pour lui, par M. Bulmer, qui a consenti à la dite clause, et que, si elle n'a pas été ensuite insérée au contrat, c'est par oubli et erreur, mais que, lors du règlement de la perte, la dite clause a été appliquée, et, en conséquence, le montant revenant au demandeur réduit à ce que payé, ce qui était tout ce à quoi le demandeur avait droit ;

Attendu que le demandeur a prouvé que la valeur des choses par lui assurées dépassait considérablement le chiffre garanti par la police sus-mentionnée ;

Attendu que la défenderesse n'a pas prouvé que Bulmer, qui a négocié cette assurance pour le demandeur, ait jamais consenti ou acquiescé à la clause spéciale invoquée par la défenderesse ; qu'il est en preuve, au contraire, qu'il n'en a entendu parlé, pour la première fois, qu'après l'incendie, et qu'il a alors refusé le paiement insuffisant offert par la défenderesse, paiement qu'il n'a accepté ensuite que parceque le montant qui lui revenait se trouvait entièrement couvert, sans s'occuper des intérêts des autres ;

Attendu que, quant à la Compagnie Henderson, le président d'icelle établit qu'il n'a signé le reçu invoqué par la défenderesse qu'avec l'entente que le demandeur consentirait à recevoir cette somme réduite, consentement qui devait être constaté par l'endossement du demandeur sur le chèque donné par la défenderesse pour l'indemnité susdite, et fait payable à l'ordre conjoint du demandeur, de Bulmer et de la Compagnie Henderson ; mais qu'il est de plus prouvé qu'après cette signature de Henderson, le chèque a été changé par le gérant de la défenderesse, de manière à éviter la nécessité de l'endossement du demandeur (que ce dernier avait d'ailleurs formellement refusé), et à en permettre la perception avec les deux signatures seulement de Bulmer et de Henderson ;

Attendu, en outre, que le transport, en sûreté collatérale, consenti à la Compagnie Henderson, et l'ordre du 2 septembre 1887, donne à la même compa-

The Glasgow & London Insurance Co. et D. Leclair.

gnie, pour retirer de la défenderesse la balance revenant au demandeur sur la police d'assurance susdite, n'autorisait pas la dite Compagnie Henderson à recevoir moins que $600, et qu'en prenant de cette compagnie une décharge non autorisée, la défenderesse l'a acceptée à ses risques et périls, et ne peut maintenant l'invoquer contre le demandeur ;

Attendu que l'application que la défenderesse invoque, comme faisant partie de la police émise en faveur du demandeur, n'a été signée ni par ce dernier ni par son mandataire Bulmer, et n'est que l'œuvre de l'agent de la défenderesse ; qu'il n'est pas prouvé que ce dernier ait fait connaître à Bulmer ni au demandeur, lors de la rédaction de cette application, qu'il y insérait une mention ayant pour effet de modifier les clauses ordinaires d'une assurance contre le feu, et dont la portée était de changer absolument les termes du contrat stipulé par le mandataire du demandeur ;

Attendu, d'ailleurs, que cette clause exceptionnelle n'a pas même été insérée ou annexée ensuite à la police remise au demandeur, et que, par suite, ce dernier n'y a jamais consenti, n'en a jamais eu connaissance, et ne peut y être soumis ;

Attendu que, sous ces circonstances, la défenderesse est mal fondée à prétendre que c'est par oubli ou erreur que la clause spéciale par elle invoquée n'a pas été insérée au contrat entre les parties, et qu'elle lie néanmoins le demandeur, vû que son mandataire y avait acquiescé ;

Attendu, néanmoins, qu'il paraît prouvé, quoique sans indication certaine, que la prime payée par le demandeur pour l'assurance susdite a été réduite à raison de la clause spéciale sus-mentionnée ;

Renvoie l'exception et la défense de la dite défenderesse, et condamne la dite défenderesse à payer au demandeur la dite somme de $220.29 courant, avec intérêt du 29 octobre 1887, jour de l'assignation, mais réserve à la défenderesse tout recours que de droit contre la demandeur, pour tout surplus de prime qu'elle aurait eu droit d'exiger de lui en vertu d'un contrat d'assurance ordinaire, c'est-à-dire sans la clause spéciale invoquée comme susdit.

La majorité de la Cour d'Appel a renversé le jugement de la Cour Supérieure par le jugement suivant :—

JUGEMENT DE LA COUR D'APPEL.

Considérant que l'appelante, défenderesse en cour de première instance, a établi en preuve les allégations essentielles de son plaidoyer, et notamment que H. Bulmer, à qui la police d'assurance émise par l'appelante pour une somme de $2,100.00 sur la demande par écrit (application) du dit Bulmer était payable jusqu'à concurrence $1500, et la Henderson Lumber Company, à qui le demandeur intimé avait transporté comme sûreté collatérale la somme de $600.00, qui lui revenait à lui-même, sur le montant total de la dite police, ont donné, moyennant le paiement de $1879.71, une décharge entière et finale du montant assuré, ainsi qu'ils en avaient le droit, savoir, le dit Bulmer, suivant les termes mêmes de la police, et la Henderson Lumber Company, en vertu du transport sus-mentionné, et aussi d'un ordre subséquent de l'intimé sur l'appelante, pour le paiement de la dite somme de $600 à la dite compagnie ;

Considérant que la dite appelante n'était pas tenue de payer plus que la dite sommo de $1879.71 en vertu de la dite police, attendu qu'elle a été émise sur l'écrit sus-mentionné (application du dit Bulmer, demandant qu'elle fut faite avec la garantie, dite garantie numéro deux) (2), c'est-à-dire, sujette à une contribution due par l'assuré, en vertu d'une clause connue, dans le langage commercial, sous le nom de "*seventy-five per cent. co-insurance clause.*" Laquelle clause, il est vrai, n'a pas été insérée dans la police, mais n'en est pas moins obligatoire vû son insertion dans l'écrit (*application*) demandant l'émission de la dite police, et a, de fait, été appliquée, lors du règlement de la perte, et, partant, fait partie du contrat d'assurance, et à l'effet de limiter la responsabilité de l'appelante;

Considérant que, dans le jugment dont est appel, savoir, le jugement rendu par la Cour Supérieure, à Montréal, le onzième jour de janvier 1890, il y a erreur; casse, renverse et annule le dite jugement, et procédant à rendre le jugement que la dite Cour de première instance aurait dû rendre, déboute l'intimé de son action (*Dissentiente*). Monsieur le Juge assistant Ernest Cimon.

Girouard & De Lorimier, avocats de l'Appelante.

Napoléon Charbonneau, avocat de l'Intimé.

COURT OF QUEEN'S BENCH, 1889.

MONTREAL, 24TH JANUARY, 1889.

Present: DORION, C.J., TESSIER, CROSS AND BOSSÉ, J.J.

THE EASTERN TOWNSHIPS BANK,

(*Plaintiffs in the Court below,*)

APPELLANTS;

AND

JULIUS W. BISHOP ET AL.,

(*Defendants in the Court below*)

RESPONDENTS.

HELD:—That an onerous deed executed by a solvent person, conveying real estate, followed by tradition and delivery and open and public possession, will not be set aside as fraudulent and simulated, on the demand of a chirographic creditor although the vendor's circumstances may have changed before the registration of the deed four years after its date.

That the date of such a deed *sous seing privé* may be established by legal proof against a third party.

This was an appeal from a judgment of the Superior Court for the District of St. Francis, rendered by His Honor Mr. Justice Brooks, the 31st March, 1887, the judgment appealed from being as follows:—

"The Court, etc.,

"Considering that plaintiffs have failed to prove the material allegations of their declaration, and particularly that the deed of sale mentioned by them in their declaration between the defendants, purporting to bear date, and to

The Eastern Townships Bank and Julius W. Bishop et al.

have been executed on the 23rd of December, 1880, and registered on the 19th of February, 1885, was fraudulent or simulated, or was made with intent to defraud plaintiff.

"And considering that it is proved that said deed was actually made and signed on the day the same bears date, that it was not ante-dated, and that one of the subscribing parties thereto, to wit, Rebecca H. Jenkerson, died on the 12th of June, 1883; that said Paul Wilson Bishop is not shown to have been, either at the date said deed was in fact executed, nor at the date of the decease of his wife, in embarrassed circumstances, but was in good credit, and competent to make said deed; that the same was followed by tradition and delivery, was not secret, nor attempted to be kept secret, but was followed by open and public possession; that it was made in good faith, and not with intent to defraud plaintiffs, and is not shown to have been made in contravention of the provisions of section 6, of title 3rd of the Civil Code; that defendant, Julius W. Bishop, is not shown to have had any knowledge of any indebtedness to plaintiffs by defendant Paul W. Bishop; that plaintiffs have not shown any legal right or interest in seeking to set aside said deed; that although said deed was not enregistered until the 19th of February, 1885, it cannot, by reason of anything alleged in plaintiffs' declaration, be declared of no effect as against plaintiffs, who have shown no real rights upon the realty conveyed by said deed, but only became chirographic creditors of defendant, Paul W. Bishop, and so became after the delivery of the possession of the realty mentioned in the deed from defendant, Paul W. Bishop to Julius W. Bishop; that plaintiffs have not in any event any interest and rights with regard to said realty, except as they could urge the same against defendant, Paul W. Bishop, who parted, when solvent and competent to do so, by onerous deed, with all his rights of property therein, and the plaintiffs cannot, by reason of anything alleged or proved by them, be entitled to the conclusions of the declaration; doth in consequence dismiss plaintiffs' action with costs, distraits, etc."

The Court of Queen's Bench confirmed the judgment of the Superior Court for the reasons given below in the remarks of the Honorable Mr. Justice Cross, which are as follows:—

CROSS, J.—The present is an action brought by the Eastern Townships Bank, to set aside a deed made by Paul W. Bishop the father, to his son, Julius W. Bishop, who are of course made defendants in the suit, which action has been dismissed by the Superior Court, whose judgment is now brought in question by the present appeal.

The appellants by their declaration complain, that on the 19th of February, 1885, being creditors of Paul W. Bishop on two promissory notes to the extent of $700,—one for $400 bearing date the 18th October, 1884, and another for $300 of date the 17th November, 1884; and the respondent, Paul W. Bishop, being then, the 19th February, 1885, owner of a valuable farm, he, with intent to secrete his property, made a deed of conveyance thereof to his son, the

other respondent, Julius W. Bishop; that the deed purported to be made and was made on the 23rd December, 1880, but was only authenticated and registered on the 19th February, 1885, at which date the said Paul W. Bishop had become insolvent; that said deed was fraudulent and simulated, and made between father and son with a view to defraud the appellants, creditors of the said Paul W. Bishop; wherefore the appellants concluded for the setting aside of said deed.

The respondents pleaded, first by a denial of all the plaintiffs' allegations; further, that the farm in question was really sold by Paul W. Bishop, the father, to his son, Julius W. Bishop, on the 23rd December, 1880; that the contract was an onerous one, and was immediately followed by public possession of Julius W. Bishop; and, moreover, although executed *sous seing privé*, or before witnesses, had nevertheless acquired an authentic date by the signature of the wife of Paul W. Bishop, a party to the deed, who had died on the 12th June, 1883, long before the debt had been incurred in favor of appellants; that the sale was made in good faith at a time when Julius W. Bishop was perfectly solvent; that the failure to register the deed was through ignorance and neglect, and an objection on this ground was not available in favor of a chirographic creditor.

The deed was produced, bearing date as alleged in the plea, attested by two witnesses, both of whom have been examined as witnesses, and swear to its execution at the time it bears date, signed also by Mrs. P. Bishop, then living, with proof of her death on the 12th June, 1883, as to the effect of which see C. C. Art. 1225.

Julius signed with his right hand, which he lost next year by a thrashing mill. The deed to Julius was of half the farm owned by the father, the other half being at the same time deeded to his other son, Dardanus H. Bishop, each being subject to a rent of $75 annually to Paul W. Bishop, a kind of family arrangement not unusual in the country, and quite natural to be claimed by sons then of the respective ages of 29 and 31 years, when they might be expected to look out for separate establishments for themselves.

It is shown that Paul W. Bishop was at the time solvent and in comfortable circumstances. In January, 1880, he sold a property to one McKeon for $3,000, half cash, the other half paid within two years. He had money to lend, and it is also shown that he had no difficulties until recent years, when he became mixed up with some unfortunate transactions in bark, out of which grew the liability in favor of the bank, on which they base their present demand, a liability clearly established, and which would give them recourse if Paul W. Bishop had fraudulently alienated his property to their prejudice. We do not, however, find that there is any proof of either fraud or simulation in the deed impugned.

After its execution, Julius W. Bishop built himself a residence on the property; his name was entered on the assessment roll as an owner; he was reputed and well known as an owner, save as not being registered no secret was made of

The Eastern Townships Bank and Julius W. Bishop et al.

the existence of the deed. True, there was an irregularity in the assessment roll, the names of the father and the two sons appearing jointly as owners, but at all events Julius was publicly held out as owner. There was a circumstance of Paul W. Bishop effecting an insurance in his own name. This, I think, was on the homestead, but this of itself was not sufficient to destroy the general repute of Julius being owner.

The merits of the case being thus disposed of, a further question has been raised as to the registration. It has been contended that the deed should be set aside for defect of registration within thirty days of the alleged bankruptcy of Paul W. Bishop, under Art. 2090 C. C., which declares without effect a registration effected within that time. But turning to Art. 17 C. C., par. 23, for the definition of bankruptcy, we find that it is the condition of a trader who has discontinued his payments; so that to be brought within this description Paul W. Bishop would require to be proved a trader and to have discontinued his payments. I think there is no such pretension precisely raised in this case, but the question does not come up here. The action is to set aside the deed, not the registration. If the registration is without effect, it may be contended that it is without effect as against a subsequent title with a prior registration under Art. 2098 C. C., or perhaps the question might come up on the seizure of the property. See the opinion of C. J. Meredith in Drouin *vs.* Halle, 7 Q. L. R., p. 146, that an effective registration might be made even after seizure, and that the seizure in case of a non-trader created no presumption of insolvency against the debtor. At all events, the question of the validity of registration is not within the issues raised in the suit.

We think the judgment of the Superior Court is correct, and must be confirmed.

Judgment confirmed.

Hall, White & Cate, attorneys for appellants.
Ives, Brown & French, attorneys for respondents.

SUPERIOR COURT, 1890.

MONTREAL, 10TH DECEMBER, 1890.

PARÉ ET AL., PLAINTIFFS;

vs.

ALLAN, DEFENDANT;

AND

PARÉ ET AL., MIS EN CAUSE.

HELD:—That registration of a donation has the same effect as insinuation under the law in force prior to the Statute 14-15 Vict., ch. 93, sect. 4, and this applies to donations registered before the above Statute, and not insinuated.

That gifts made in a contract of marriage, to take effect after the death of the donor, partake of the nature of wills, and a marriage contract containing such dispositions must be registered within six months from the death of the donor, with the declaration required in the case of a will, in order to give it effect against third parties, and the want of such registration can be invoked even against minors.

The following is the judgment of the Court:—

"The Court, etc.

"Whereas the plaintiffs represent that by a private writing, bearing date at Lachine the 23rd day of July last (1890), they agreed to sell to the defendant, and he agreed to buy from them, for the price of $7,500, to be paid cash, a part, situated on Lake St. Louis, of lot No. 13 of the official plan of the parish of Saints-Angos de Lachine, with a right of way thereto from the highway, that they have had a deed of sale prepared and presented to the defendant for execution, but that he refuses to carry out the said sale, alleging that they are unable to give to him a valid title because they have acquired the said lot No. 13 from Dame Anne alias Annie Meunier dit Lapierre, by deed of sale passed before Mtre. L. Forest, notary on the 31st day of October, 1885, and registered on the 7th day of November, 1885, who had acquired it from the testamentary executors duly vested with the power of sale of the late François Paré, senior, by deed of sale passed before Mtre. L. Forest, notary, on the 28th day of September, 1885, and duly registered on the 30th day of October, 1885, which said François Paré, senior, had acquired the said lot No, 13 from one Joachim Poirriau dit Bellefeuille, by deed of exchange passed before Mtre. C. A. Brault, notary, on the 25th day of May, 1852, and duly registered on the 2nd day of June, 1852, and had by his will received by Mtre. L. Forest, notary, on the 24th day of March, 1883, and duly registered on the 16th day of November, 1883, authorized and ordered his testamentary executors to sell the same, and apply the price thereof to the payment of certain particular legacies to the amount of $14,000, which he had made, and had by his marriage contract with his second wife, Dame Anastasie Landry, passed before Mtre. J. Dubreuil, notary, on the 23rd day of June, 1842, and duly registered on the 16th day of December, 1842, stipulated that in the event of him predeceasing his said wife and leaving issue by her, she would have the usufruct of all property that might be possessed by him at the time of his death, with the exception of $400, being the amount of his first wife's dower, and that at her death his children issue of both marriages should inherit the same, and that he consequently had had no right to dispose of his estate by will, and that this pretension of the defendant is unfounded, inasmuch as the said marriage contract was not insinuated in accordance with the law then in force, and as the contractual institution of heirs contained therein was therefore without effect, and whereas the plaintiffs consequently pray that the defendant be condemned to pay to them the said sum of $7,500, and to accept a deed of conveyance of the land and right of way bought by him, and that in default of so doing the judgment to be rendered do serve and avail therefor;

"Whereas the defendant pleads, that the fourth section of the Act 14-15 Victoria, ch. 93, enacted that the registration which had been made of a donation would have the same effect as an insinuation thereof, and that consequently the contractual institution of heirs was valid, and that the plaintiffs could not give a good and valid title for the property which they had agreed to sell to him;

Paré et al. vs. Allan, and Paré et al.

"Whereas all the surviving children of the said late François Paré, senior, and the descendants of all his deceased children have been made parties to the suit, for the purpose of raising any claims which they may pretend to have under the said marriage contract, and hearing the plaintiffs' title declared good and valid, and none of them has made any claim by reason of the said contractual institution of heirs;

"Considering that the said fourth section of the Act 14-15 Victoria, ch. 93, substituted the registration for the insinuation of donations, and also declared that the registration of donations effected before its passing would avail for insinuations which the interested parties had failed to make, and consequently that the want of insinuation cannot be invoked in the present case;

"Considering that all the children now living of the said late François Paré, and all the children of his deceased children who are of the age of majority, have either accepted his succession as universal legatees, or concurred in the testamentary disposition made by him of his estate, by accepting the particular legacies made to them, and that they are consequently estopped from making any claim under his marriage contract, leaving only three who, by reason of their minority, are not so estopped, to wit: Maria Anna Adélina Paré for one-ninth, and Anna Garicpy and Louis Gustave Garicpy each for one-twenty-seventh;

"Considering, however, that gifts made in a contract of marriage, to take effect only after death, such as an appointment of heirs, partake at the same time of gifts *inter vivos* and of wills (C. C. Art. 757), and that consequently for the validity of the appointment of heirs it is necessary that the marriage contract be registered during the lifetime of the donor, and give it effect against third parties acquiring in good faith from the legal heirs of legatees of the donor, it is also necessary that the marriage contract containing the appointment of heirs be registered in the same manner as a will within six months from the death of the person making the appointment, with a declaration of the date of his death, of the names of the heirs, and of the designation of the immoveables affected and transmitted thereby;

"Considering that the immoveable in question in this cause was acquired by the said late François Paré, senior, long after the registration which was made in his lifetime of his marriage contract, that his will was duly registered within six months from his death, with a declaration of the date of his death and a designation of the said lot No. 13, that his testamentary executors and his universal legatees were seized of the said property, that the sale thereof by his testamentary executors, under the power vested in them by the testator, to a third party acquiring in good faith, was duly registered, that the sale by her to the plaintiffs is also duly registered, and that the appointment of heirs made by the marriage contract has not been registered since the death of the said late François Paré, senior, with a declaration of the date of his death and of the names of the heirs appointed in the marriage contract and a designation of the said lot No. 13, as being affected and transmitted by such appointment;

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"Considering that the want of such registration renders the said appointment of heirs without effect against the said Dame Anne alias Annie Meunier dit Lapierre and her representatives, and that such want of registration can be invoked even against minors, and therefore against the above named Marie Anne Adélina Paré, Anna Gariepy and Louis Gustave Gariepy:

"Considering that the plaintiffs have a valid title to the property the defendant agreed to buy, and that they can confer a good title upon him for the same, and that he is unfounded in his refusal to carry out and complete the sale agreed upon, and that he should be condemned to do so;

"Considering, however, that if he has failed to give a valid reason for refusing to complete the said sale, the plaintiffs on their side urged unfounded grounds to maintain the validity of their title, and omitted to set up the want of a proper registration subsequent to the death of the said late François Paré, senior, and that under these circumstances each of the parties should bear his own costs;

"Doth declare that the plaintiffs have a good and valid title to the property which they agreed to sell to the defendant, and that they can validly transmit and convey the same to him, doth adjudge that the parties called into the suit have no rights whatever in the said lot No. 13 of the official plan of the parish of Saints-Anges de Lachine, doth order the defendant to pay the said sum of $7,500 to the plaintiffs, with interest from the service of process, and to accept and execute within three days after the signification upon him of a copy of the present judgment a deed of sale from the plaintiffs to him of the property which he agreed to buy, which is described in the French language as follows, to wit (description); and in default of him so doing within the said delay, doth adjuge that the present judgment do serve and avail as a title in his favor of the above described parcel of land and right of way, for all purposes whatsoever, and condemn him to pay to the plaintiffs the said sum of $7,500, with interest from the 3rd day of September, 1890, and lastly doth order that each party do bear his own costs."

Laflamme, Madore & Cross, attorneys for plaintiffs.

Geoffrion, Dorion & Allan, attorneys for defendant.

SUPERIOR COURT, 1890.

MONTREAL, 12TH DECEMBER, 1890.

Present: HIS HONOR MR. JUSTICE DAVIDSON.

DAME ELIZABETH WEBSTER ET VIR,

vs PLAINTIFFS;

FREDERICK W. KELLY ET AL. ES QUAL,

DEFENDANTS.

HELD:—That where, by a condition of a will, a certain share of the testator's estate was bequeathed to his daughter, but only in the event of her becoming a widow or of her obtaining a separation as to bed and board from her husband, so that he could have no control over her property; although such condition is not impossible, it is contrary to good morals, and must be considered as not written. Art. 760 C.C.

Dame Elizabeth Webster ès qual. et vir. vs. F. W. Kelly et al. es qual.

DAVIDSON, J.—The annulment of a condition appearing in the will of the late J. H. Webster, father of the plaintiff, is sought by this action. His whole property, real and personal, was devised and bequeathed to certain trustees who were required to pay the net income to his widow, to the plaintiff and to a grand-child, "in the following proportions during their lifetime: To my said "daughter Mrs. Fisher (the present plaintiff), so long as she remains with her "said husband, an allowance out of the yearly revenue of my said estate, to be "determined by my wife and said trustees in their discretion, and the balance "of said revenues to be then equally divided between my wife and my said "grand-daughter... In the event, however, of my said daughter, Mrs. Fisher, "becoming a widow, or of her obtaining a separation of bed and board from her "said husband, so that he can have no control over her property, then I direct "that the net income and revenue that may be derived from my estate shall be "equally divided among my wife, my said daughter Mrs. Fisher, and my said "grand-daughter Edith Blanche Bond, share and share alike."

The will proceeds to explain that another daughter and grand-daughter are not included in this disposition of the usufruct, because they are well provided for; but upon want arising, either of them "shall thereupon enter into enjoyment "of an equal share in the revenues and income of my estate, together with my "said wife, my said daughter Mrs. Fisher, and my grand-daughter Edith Blan-"che Bond, provided, however, in the case of Mrs. Fisher that she is entitled "to an equal share under the condition hereinbefore mentioned." It was further provided that the share of any deceased legatee should be divided "among the survivors of them who may be then partaking in the said revenues "in equal proportions share and share alike, provided always that Mrs. Fisher "is entitled to receive an equal share under the aforesaid condition."

It is perhaps worthy of notice that the widow's interest was to cease on her re-marrying, and to revive should she again become a widow. Now, the plaintiff declares that she will not, and could not if she would, obtain a separation of bed and board from her husband; and she prays that the condition imposing this duty upon her ought to be declared unlawful and void.

Of the defendants, the widow alone contests the action. Her defence is, that in consequence of ill treatment plaintiff had often sought her father's assistance to secure a separation; that he did not see the necessity of providing for his daughter so long as she lived with her husband, or until, having obtained a separation, she would be thrown upon her own resources. It is also said that Webster, at the time of making his will, knew action in this direction to be probable. So far as the personal issues are concerned, what proof is of record makes for plaintiff. The testator's efforts to promote a separation between his daughter and her husband and his animosity toward the latter are well established.

An impossible condition, or one contrary to good morals, to law, or to public order, upon which a gift *inter vivos* depends, is void, and renders void the disposition itself, as in other contracts. In a will such a condition is considered not written, and does not annul the disposition. C. C. 760. See also 831.

This article maintains with regard to gifts *inter vivos*, as it already exists with regard to contracts in general (C. C. 1080), the nullity of dispositions which depend upon impossible or prohibited conditions, while it excepts from the rule dispositions by will, in which such conditions are merely ignored. Though in conformity with the ancient law, the solution adopted differs from the French Code (No. 900), which in this respect assimilates gifts to wills, rather than to the other contracts in which there is an accepting party. (Codifiers' report.)

In my judgment, this will imposes not simply a limitation, but a condition precedent, awaiting the performance of which plaintiff cannot have any absolute right in the estate. In fact, the obtainment of a separation is, by the will itself, twice referred to as a "condition." The position thus created for her is in marked contrast to the humane safeguards which protect other of testator's children from adverse vicissitudes of life. Pressing needs, or even the misery of hunger, would add nothing to the rights of plaintiff unless she chose to break away from her husband. Until then her position is one of absolute subjection to the good will of a stepmother and the trustees. And this control of the widow, so far at least as any express provision of the will is concerned, would not cease, even when her own rights had become suspended by re-marriage.

First, let me deal with the plaintiff's pretension, that the condition imposed upon her is impossible, for the reason that absence of the necessary facts puts it beyond her power to secure a judicial separation. But that, I take it, is not the true test to which this provision of the law is to be submitted. A condition is not necessarily impossible, although the party interested may not be able to perform it; the impossibility which makes the condition void is that which exists in the nature of things, and not a mere inability in the devisee to perform it. To be in a high degree improbable is not enough, it must be one which cannot by any means take effect. Co. Litt., 206; Egerton *vs.* Earl of Brownlow, 4 H. L. Ca. 1.

These definitions are pertinent and of assistance, because a principle like to that asserted by our Code prevails in the English law: 1 Jarman on Wills, 12; Theobald do., 374. For a condition to be impossible, say the French books, it is necessary that the laws of nature should oppose its accomplishment, and they are fond of borrowing from Roman authors the quaint example of a testator, requiring his legatee to touch the sky with his finger —*si coelum digito tetigeris*—before he could touch his legacy. Some recognize an impossibility of fact, and others add an impossibility of law. Thus the law would deem that condition impossible, which requires the killing of a person in a public place again, while one might walk from Paris to Berlin, it would be an impossibility of fact to require that it should be done in two days; and, finally, it is only in the case of a perpetual impossibility that the condition is reputed as not written. 8 Duranton, No. 111 et seq.; 5 N. Denizart, vo. Condition, Paris II, p. 113 to 116; 2 Ricard, Donat., p. 142, 1 Trop., Donat., No. 200, 224, 225, 234; 18 Demolombe, No. 220.

Dame Elizabeth Webster et vir. vs. F. W. Kelly et al. es qual.

An English decision, which I shall presently cite, makes somewhat in plaintiff's favor, but it seems alone. In the presence of the requirements imposed by all these great writers, I have to believe that the condition complained of is not in a legal sense "impossible." Let us then consider if it be one which is "contrary to good morals, to law, or to public order." Has this provision an unlawful object? Does it require some act or course of conduct which is *malum in se* or *malum prohibitum*? We must remember that plaintiff's marriage contract gave her separation of property and administration, so far as the law permits, of her own estate.

The testator's purpose was, therefore, not only to secure his bequest to the personal use and control of his daughter; that was easy of accomplishment. Straightened circumstances, or more strongly still, absolute want, would bring duty into conflict with the family sustenance, and tend to create causes sufficient and almost certain to separate husband and wife. And having obtained her third share in the estate, the fear of forfeiting it would offer a continual menace to any after-reconciliation. The lines between what is lawful and what is illicit are sometimes so delicate as to provoke differences of opinion among the authors; but there is found a universal sentiment of impatience and jealousy toward conditions in general restraint of marriage or the marriage relation. A notable exception into the causes of which I need not enter, is the validity of a condition that the surviving consort shall not re-marry on pain of forfeiting his or her rights in an estate.

While in these respects the books abound with interesting and usually elaborate discussions, I have not been referred to, nor have I found any French authority which runs on all fours with the present case. It is fairly covered, however, by the general principle which Demolombe asserts, that a condition is illicit if it tends to prevent the fulfillment of family duties, or to interfere with the marital authority. V. 18, No. 237. Some English decisions, directly in point, are equally apposite, because of the general doctrine in respect of impossible and illicit conditions being the same in both countries. I may add that on this subject the Courts of Equity have followed the doctrines of the Civil Law, 1 Roper on Legacies, 650 et seq. In Tennant *vs.* Brail Tothwell, 77 (Ed. 1820), where a man bequeathed a sum of money to his daughter, "if she will be divorced from her husband," it was held that the gift was good, though the condition was void. So in the case of Brown *vs.* Peck (Eden's Rep. 140), where a testator directed "that if his niece lived with her husband, his executors 'should pay her £2 per month, and no more; but if she lived from him, and 'with her mother, then they should allow her £5 a month," it was held by Lord Keeper Henly, that the niece was entitled to the monthly payment of £5, and his lordship thought "that the condition being impossible at the time of imposing it, and *contra bonos mores*, the legacy was simple and pure."

In Wren *vs.* Bradley, 2 DeG. & Sm. 49, a testator bequeathed an annuity to his daughter, a married woman, "in case she should be living apart from her husband, and should continue so to do," during the life of his widow, with

a direction that if at any time the annuitant should cohabit with her husband, the annuity should cease. By the same will he bequeathed a share in the residue upon trust to pay the income to the same daughter, during such time as she should continue to live apart from her said husband; but should she at any time cohabit with him, the testator directed that during such time the income should be paid between other legatees. The will also contained a trust for children of the daughter by any other husband. At the date of the will the daughter and her husband were living apart. But before and at the date of the testator's death they were reconciled, and living together, and so continued to live. It was held by Knight Bruce V. C., that the daughter was entitled to the bequests. "It is impossible," he said, "to read the will without perceiving "that the testator's wish and object were to obstruct a reconciliation and pre- "vent the wife from living with her husband, and that by that wish, by that "object its provisions to her were influenced and directed. The weight of "authority and the principles of the civil law, as far as I consider them applicable, seem to me to render a decision in this case in the daughter's favor consistent at once with technical equity and moral justice."

In Shewell *vs.* Dwarris, Johns, 172, Wood, V. C., speaks of "the rule which avoids gifts providing for a future separation between husband and wife," and tests the validity of the bequest by temptation to "influence their conduct."

These reports are not in common use here and are not in our library, as I may state for the convenience of learned counsel that they may be found in the admirable collection of reports which the New York Life Library possesses, See on conditions Martin *vs.* Lee, 14 M. P. C. 142; Evanturel *vs.* Evanturel, L. R., 6 P. C.; Kimpton *vs* C. P. 16-16 R. L. 361.

Holding the views which I have expressed as to the special circumstances of this case, and in full sympathy as I am with the principles asserted in the authorities cited, it becomes my duty to adjudge that the condition which involves the separation of plaintiff from her husband must be considered as not written, and her right to a third share in the revenues from the death of the testator is declared absolute. Action maintained with costs but only against the defendant contesting, the trustees being ready to abide by the order of the Court.

JUDGMENT.

"The Court, etc.,

"Seeing plaintiff seeks the annulment of a condition appearing in the will of her late father John Horatio Webster;

"Seeing by said will Webster bequeathed and devised his whole property, real and personal, to certain trustees, who were required to pay the net income to his widow, to the plaintiff and to a grandchild, 'in the following proportions during their lifetime: to my said daughter Mrs. Fisher (the present 'plaintiff), so long as she remains with her said husband, an allowance out of 'the yearly revenue of my said estate, to be determined by my wife and said 'trustees in their discretion, and the balance of said revenues to be then 'equally divided between my wife and my said grand-daughter. In the event,

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'however, of my said daughter Mrs. Fisher becoming a widow or of her 'obtaining a separation of bed and board from her said husband, so that he 'can have no control over her property, then I direct that the net income and 'revenue that may be derived from my estate shall be equally divided among 'my wife, my said daughter Mrs. Fisher, and my said grand-daughter Edith 'Blanche Bond, share and share alike;' the will proceeds to explain that another daughter and grand-daughter are not included in this disposition of the usufruct, because they are well provided for; but, upon want arising, either of them 'shall thereupon enter into enjoyment of an equal share in the 'revenues and income of my estate, together with my said wife, my said 'daughter Mrs. Fisher, and my grand-daughter Edith Blanche Bond, pro-'vided, however, in the case of Mrs. Fisher, that she is entitled to an equal 'share under the condition hereinbefore mentioned."

"Seeing by said will it was further provided that the share of any deceased legatee should be divided among 'the survivors of them who may be then 'partaking in the said revenues, in equal proportions share and share alike, 'provided always that Mrs. Fisher is entitled to receive an equal share under 'the aforesaid condition';

"Seeing plaintiff asserts that she had no cause for obtaining a separation of body, and prays that said condition should be declared unlawful and void;

"Seeing defendants Kelly and Ewing es-qualité déclare qu'ils s'en rapportent à justice;

"Seeing said defendant Dame Margaret Cross Gibb alone contests;

"Seeing said defendant pleads, that in consequence of ill-treatment plaintiff had often sought her father's assistance to secure a separation; that he did not see the necessity of providing for his daughter so long as she lived with her husband, or until, having obtained a separation, she would be thrown upon her own resources; that Webster, at the time of making his will, knew action in this direction to be probable, and that said will is in all respects legal;

"Considering that an impossible condition, or one contrary to good morals, to law, or to public order, upon which a gift *inter vivos* depends, is void, and renders void the disposition itself, as in other contracts; in a will such a condition is considered as not written, and does not annul the disposition (C. C. 760);

"Considering that said disposition as to plaintiff is a condition precedent, and is twice referred to as a 'condition';

"Considering that no cause of separation of body and property at any time existed, and that plaintiff never desired to obtain one, but that the condition contained in said will is not thereby constituted 'impossible' within the meaning of said article;

"Considering plaintiff's marriage contract gave her separation of property and administration of her own estate as fully as a judgment of separation of property would do, and that the testator's purpose was therefore not needed to secure his bequest to the personal use and control of his daughter;

"Considering the position created for her by the said will is in marked con

trust to the proper safeguards which protect other of testator's children from adverse vicissitudes of life;

"Considering that said condition imposes upon her a position of absolute subjection to the good will of a stepmother and the trustees; that this control of the widow would not cease, so far at least as any express provision of the will is concerned, even when her own rights had become suspended by re-marriage;

"Considering that plaintiff and husband are in greatly straitened circumstances; that said condition tends to prevent the fulfillment of family duties, to interfere with the marital authority, to excite the plaintiff to separate from her husband, to obstruct any after-reconciliation, and to influence her conduct adversely to the continuance of the marriage tie;

"Considering said condition is contrary to good morals, to law, and to public order, is void, and should be considered as not written, but without annulling the disposition;

"Considering said late John Horatio Webster died on the 17th of July, 1888;

"Considering, as to costs, that the dispositions of said will justify the defendant Dame Margaret Cross Gibb in putting the pretensions contained in her pleas before the Court, in order to secure a judicial determination thereon, as well in her own interest as in the interest of the estate;

"Doth declare and adjudge the condition and clauses in said last will and testament of the said late John Horatio Webster, requiring the plaintiff to obtain a separation of bed and board from her said husband before being entitled, as of right, to receive one-third of the revenues of said estate, to be contrary to good morals, to law and to public order, and as not written; doth order and condemn the said Frederick W. Kelly and Samuel H. Ewing, in their said quality of executors and trustees, to pay as from the death of her said father, and to continue hereafter to pay to the said Dame Elizabeth Webster, one-third of the net income and revenue of said estate, subject, however, to any and all rights in the same which hereafter arise and become operative in favor of his daughter Dame Anna Maria Webster, and his grand-daughter Mary Elizabeth Bond, or through and during the re-marriage of his said widow, or otherwise as directed and provided by said last will and testament, annulling only the disposition so adjudged not written as aforesaid; and the said Kelly and Ewing are ordered to so adjust the accounts and payments of the estate as to forthwith pay over, out of the revenues in hand, to the plaintiff the amount now due to her, to wit, on the basis of the said Dame Margaret Cross Gibb having received up to the 22nd October, 1890, the sum of $455, the said Edith Blanche Bond $200, and the said plaintiff $150, reserving to pronounce, if need be, upon any extension or fixing of dates in the making of said payment, and upon such details as to accounts or otherwise as may be needed to give this judgment its full effect; the whole with costs against the defendants Ewing and Kelly in their quality of executors to said estate, distraits, etc."

Gilman & Cameron, attorneys for plaintiff.

S. Cross, attorney for defendants.

SUPERIOR COURT, 1890.

MONTREAL, 13TH DECEMBER, 1890.

Present: THE HONORABLE MR. JUSTICE PAGNUELO.

McDONALD,

PLAINTIFF;

vs.

RANKIN,

DEFENDANT.

HELD:—That the action which a shareholder of a bank has against the directors for loss caused by the mismanagement and negligence of such directors is an action of mandate, and is only prescribed by thirty years. That the directors of a bank may employ such assistants as may be necessary to carry on the business of the bank, but such directors remain personally responsible for the fault and misconduct of such employées, unless such fault and misconduct were such as could not have been prevented by the exercise of reasonable care and diligence.

That the directors are bound to exercise the care of a prudent administrator and where they allow overdrafts by insolvent persons without proper security, or impair the capital by paying dividends which have not been earned, or expend the funds of the bank in the illegal purchase of its own shares, or furnish false statements to the Government of the business done by such bank, such acts amount to *dol*, and render the directors personally and jointly and severally liable to the shareholders for all losses occasioned thereby.

That the action for such maladministration belongs to the corporation; but any shareholder may bring such action should the corporation fail to do so, and several shareholders may, by assigning their claims to one of their number, thus constitute him their procurator *in rem*, and entitle him to recover by one action the amounts due to all such shareholders.

The facts of this case appear from the remarks of His Honor Mr. Justice Pagnuelo and the considerants of the judgment.

PAGNUELO, J. — Le demandeur, en sa qualité d'actionnaire dans la "Banque Consolidée du Canada", et comme cessionnaire de plusieurs autres actionnaires, réclame du défendeur une somme de $150,000, montant des dommages qu'il prétend avoir soufferts par la mauvaise administration des directeurs de la banque, au nombre desquels était le défendeur.

On comprend de suite l'importance de ce procès, non seulement à cause du montant actuellement réclamé, mais encore à cause du principe invoqué, et dont les suites peuvent avoir les plus graves conséquences. Ce principe c'est celui de la responsabilité des directeurs de banque, et en général des directeurs et administrateurs des sociétés par actions pour leur administration.

Cette question s'est rarement présentée dans ce pays, et l'on ne trouve guère de précédents parmi nous qui puissent nous guider.

La loi des banques établit certaines règles que complète le droit commun, sur les devoirs et la responsabilité des directeurs, tant envers la banque et ses actionnaires qu'envers les tiers; mais l'application de ces règles est toujours difficile par suite des faits qui varient sans cesse, et des circonstances qui peuvent diminuer ou aggraver la responsabilité des administrateurs.

Le demandeur se plaignant de l'administration de la banque pendant les

deux années qui ont précédé sa liquidation, savoir, de juillet 1877 à août 1879, il a fallu suivre cette administration depuis l'origine de la banque en mai 1876. Cette étude m'a entraîné dans des détails longs et compliqués que je me suis efforcé de condenser, mais qui, cependant, ont rendu mes notes plus volumineuses que je ne l'aurais désiré.

Avant de discuter le mérite de cette cause, je dois examiner les plaidoyers de prescription et de droit litigieux soulevés par le défendeur, et une autre question soulevée à l'audience, savoir : si la banque elle-même n'a pas abandonné le droit d'action que les actionnaires peuvent avoir collectivement contre les directeurs pour leur mauvaise administration, et si cet abandon par la banque ne prive pas les actionnaires de leur action individuelle.

Sur la question de prescription, le défendeur prétend que l'action actuelle est prescrite par deux ans, comme tous les délits et quasi délits (Art. 2261, § 2). Quoique la négligence reprochée au défendeur dans l'administration des affaires de la Banque Consolidée, et qui donne lieu à l'action actuelle, constitue un quasi délit, cependant l'action a pour base les relations de mandant à mandataire, et reproche au défendeur de n'avoir pas, dans l'exécution de son mandat, apporté l'habileté convenable et les soins d'un administrateur prudent ou d'un bon père de famille.

Le mandataire peut bien se rendre coupable de négligence, même de fautes graves, qui pourraient constituer à l'égard d'un tiers un quasi délit ou même un délit; mais ce qui donne lieu à l'action, c'est le mandat que les actionnaires ont confié aux administrateurs de gérer pour eux les affaires de la banque, et le reproche fait aux directeurs de n'avoir pas exécuté convenablement ce mandat. Sourdat, " Responsabilité ", V. 2. § 1227, 376, 1295, 1297, C. C. 1710, 1053.

L'action de mandat ne se prescrit que par trente ans. Les faits reprochés auraient eu lieu durant les années 1877, 1878, 1879 ; l'action a été prise en 1881 ; le plaidoyer de prescription est donc renvoyé.

Le plaidoyer de droits litigieux provient de ce que le demandeur poursuit, tant pour lui-même que pour plusieurs actionnaires qui lui ont transporté leur droit d'action en dommages contre le défendeur ; celui-ci prétend que ce droit était litigieux de sa nature, et qu'en conséquence l'action doit être renvoyée.

Il suffirait de répondre que la vente d'un droit litigieux ne donne pas lieu en général, et ne donnerait pas lieu dans l'espèce, au renvoi de l'action, mais seulement au remboursement de ce qu'il en a coûté au demandeur pour acquérir ce droit ; or, le défendeur ne fait aucune offre à ce sujet : il se contente de conclure au renvoi de l'action. En outre, le droit d'action n'a été transféré au demandeur que dans le but de le constituer *procurator in rem suam* pour les cédants, et pour lui permettre de poursuivre pour tous par une seule action.

Les actionnaires auraient pu s'unir ensemble pour porter une seule action conjointe.

La loi civile reconnaît les sociétés civiles *ad litem*, c'est-à-dire l'union de plusieurs créanciers contre le même défendeur pour porter une action collective. Au lieu de prendre cette voie, les actionnaires ont fait transport au demandeur

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de leurs droits d'action sans les lui vendre, pour lui permettre de porter une seule action dans leur intérêt commun. Cette procédure équivaut à constituer le demandeur procureur pour ces actionnaires, mais au moyen d'une procuration *in rem suam* reconnue par notre droit comme valable, et permettant au cessionnaire de poursuivre en son nom. Vavasseur, "Sociétés Commerciales," V. 1, No. 742. Troplong, Mandat Nos. 37, 737 et 738. Ce plaidoyer est aussi rejeté.

Les parties ont plaidé longuement à l'audience la question de savoir si le droit d'action qui pourrait résulter au demandeur n'a pas été éteint par la décision des actionnaires en assemblée générale, de ne pas poursuivre les directeurs.

Le défendeur a prétendu que le droit d'action par les actionnaires contre les directeurs pour mauvaise administration, résultant du mandat, appartient à la banque elle-même, et que celle-ci peut abandonner ce droit d'action : cet abandon par la banque ou la majorité des actionnaires lierait tous les actionnaires, et leur enlèverait le droit de poursuivre les directeurs en leur nom personnel. Ces principes sont exacts et conformes à la jurisprudence française, qui est parfaitement établie sur ce point. L'actionnaire ne peut poursuivre l'administrateur ou le mandataire de la compagnie qu'à défaut de poursuite par la compagnie elle-même ; il exerce alors le droit d'action de celle-ci pour la part d'intérêt qu'il y possède.

Il suit de là que la société peut régler avec les administrateurs, et leur faire remise du droit d'action moyennant une indemnité, et, dans ce cas, le droit d'action disparaît. Ceci s'entend de l'action qui appartient à la compagnie pour mauvaise administration, et qui résulte du mandat ; il en serait autrement de l'action qui appartiendrait à des tiers contre les administrateurs, et de celle qui résulterait d'un délit ou quasi délit, sans relation de mandant à mandataire ; ainsi les créanciers de la compagnie, les tiers qui achèteraient des actions à un taux au-dessus de la valeur réelle, par suite des rapports exagérés des directeurs, ou même les actionnaires qui prendraient de nouvelles actions dans les mêmes circonstances.

1. Vavasseur, sociétés civiles et commerciales, Nos. 743 à 748.

2. Vavasseur, id., Nos. 862, 863, 864.

Si la corporation, ou la majorité des actionnaires réunie en assemblée, avait de fait déchargé les directeurs de toute responsabilité pour leur administration, je renverrais l'action actuelle comme ayant cessé d'exister, mais cette prétention n'est pas fondée en fait, et même le défendeur ne plaide point l'abandon du droit d'action par la corporation.

La seule question soumise aux actionnaires était de savoir si les directeurs seraient poursuivis en dommages au nom de la banque, ainsi que la chose avait été résolue à une assemblée antérieure, savoir, lors de la nomination du comité d'enquête ; et la seule résolution adoptée par la majorité des actionnaires fut qu'une action ne serait pas intentée au nom de la banque et avec ses fonds. Cette résolution n'enlevait certainement pas le droit d'action aux actionnaires ; son objet même était de laisser les actionnaires poursuivre en leur nom personnel, s'ils le jugeaient à propos.

D'ailleurs, la question ne se présente pas.

Loin de plaider l'abandon du droit d'action par la banque, le défendeur, au contraire, plaide que la banque n'a pas refusé de poursuivre les anciens directeurs. Voici comment le défendeur fut amené à prendre cette position.

Le demandeur allègue dans sa déclaration que la banque a refusé de poursuivre, qu'il l'a mise en demeure, ainsi que les liquidateurs, de prendre l'action en dommages contre les directeurs pour leur mauvaise administration ; qu'elle s'abstient et néglige de le faire, et qu'en conséquence les actionnaires ont droit de poursuivre en leur nom personnel. A cela le défendeur plaide spécialement qu'il est faux que la banque ait refusé de poursuivre les anciens directeurs, ce qui est loin de plaider l'abandon du droit d'action par la banque.

Je passe au mérite ou au fond de l'action.

Le demandeur se plaint du défaut de surveillance des directeurs de la banque. Il les accuse d'avoir abandonné au gérant l'administration dont ils étaient eux-mêmes chargés par la loi, d'avoir accepté du gérant et des autres employés les états par eux fournis sans les contrôler ni les vérifier, et de n'avoir pas examiné les livres de la banque pour se mettre au courant des affaires qu'elle renseignait.

Il allègue les faits suivants de mavaise administration, savoir :

1o. Que les directeurs ont prêté les fonds de la banque à des personnes insolvables et déjà endettées à la banque pour des montants considérables, sans garanties ou sur des garanties insuffisantes, ou même sur de simple chèques sans dépôts en banque ;

2o. Que la banque pour payer les dividendes et rencontrer ses obligations recevait des dépôts et faisait des emprunts à des taux ruineux ;

3o. Que les directeurs ont déclaré et payé les dividendes à même le capital de la banque ;

4o. Que les états fournis au gouvernement étaient faux, et préparés dans le but de tromper le public et les actionnaires, qui, sur la foi de ces états, les ont continués en exercice. Les états représentent comme argent en caisse, de simples reconnaissances ou chèques de la part de débiteurs insolvables, et les montants empruntés des banques étrangères étaient entrés comme dépôts ordinaires ;

5o. Que les directeurs ont joué à la hausse et à la baisse avec ses fonds, lui faisant perdre des sommes considérables.

Il ajoute que l'administration des affaires de la banque par le défendeur et ses co-directeurs, durant les deux années qui ont précédé le premier août 1879, ont eu pour effet de faire perdre à la banque une somme de trois millions sur un capital de $3,477,224, outre une réserve de $247,650 ;

Que le demandeur possédait à cette époque 35 actions payées de cent piastres, et ses cédants 1,080 actions payées dans le capital section de la dite banque, formant un total de 1,115 actions payées ;

Que le demandeur a souffert un dommage de $150,000 pour les pertes qu'il a éprouvées.

Le défendeur ne conteste pas que les affaires de la banque ont été mal admi-

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nistrées, et que cette mauvaise administration a entraîné des pertes considérables. Mais, dit-il, dans son septième plaidoyer, pour tout ce qui concerne l'administration des affaires de la banque, les directeurs ont agi de bonne foi, au meilleur de leur connaissance et capacité, et ne sont point coupables de négligence ; les pertes n'ont pas été causées par eux, mais par le gérant général Rennie, le comptable Morgan et les autres employés de la banque, qui ont trompé et déçu le défendeur et ses co-directeurs, leur ont caché les transactions qu'ils faisaient et les informations qu'ils possédaient, et qui ont généralement agi de manière à les tenir dans l'ignorance des actes du gérant général, du comptable et des autres employés de la banque, malgré les précautions prises par les directeurs.

La question soulevée par ce plaidoyer est de savoir si les directeurs sont coupables de négligence, ou s'ils ont apporté dans l'exercice de leurs fonctions l'habileté, la diligence et le soin dont ils étaient capables, et qu'on a droit d'attendre d'un homme diligent et entendu aux affaires de banque.

Le défendeur ne nie pas dans de plaidoyer que l'administration incombait aux directeurs, en effet la loi des banques, 34 Vict. (Ottawa), ch. 5, secs. 30 et 33, porte que le capital, les biens et les affaires de la banque sont administrés par un bureau de directeurs qui peut nommer les employés nécessaires, et naturellement peut les révoquer et les renvoyer, car le droit de nommer implique celui de révoquer.

Les employés qu'ils nomment, et qui dépendent d'eux entièrement, sont nommés pour les aider et non pour administrer à leur place. Si ces employés les ont trompés invinciblement, et ont dilapité les deniers de la banque malgré la surveillance et le contrôle des directeurs qui auraient apporté dans leur gestion le soin et la diligence qu'on peut attendre d'un homme d'affaires diligent et entendu, les directeurs doivent être absous. La loi exige du mandataire qu'il apporte dans l'exécution de son mandat l'habileté convenable et tous les soins d'un bon père de famille (C. C. Art. 1710), ou suivant la traduction anglaise " reasonable skill and all the care of a prudent administrator," mais rien de plus.

Le mandataire ne peut déléguer ses pouvoirs à d'autres, sans une permission expresse du mandant, sinon il répond de celui qu'il s'est substitué. Art. 1711, C. C.

Il peut se faire aider par des employés suivant les besoins des affaires qu'il transige, mais il répond de leur malversation s'il n'a pas pris les précautions ordinaires dans le choix des employés, ou s'il ne les a pas surveillés convenablement. Surtout, et c'est un point capital, il nomme les employés dont il a besoin pour l'aider, mais non pas administrer à sa place, et s'il leur abandonne l'administration il en répond. (Art. 1711, C. C.)

D'après la même loi, les directeurs sont tenus de soumettre à chaque assemblée un état complet et détaillé des affaires de la banque avec les indications mentionnées au statut, et montrant, d'un côté, les engagements de la banque et les sommes dûes par elle, et, de l'autre, son actif et ses ressources, et indiquant le montant des sommes dûes à la banque échues et non payées, avec estimation

des pertes probables à essuyer sur ces sommes. (Sect. 36.) Les livres, la correspondance et les fonds de la banque sont en tout temps soumis aux directeurs, tandis que les actionnaires n'ont pas le droit d'examiner les comptes des personnes qui transigent avec la banque. (Sect. 37.) Les directeurs déclarent les dividendes à même les profits réalisés. Les directeurs qui volontairement et sciemment concourent à déclarer un dividende, qui aurait l'effet d'entamer le capital versé, sont conjointement et solidairement responsables du montant de ce capital comme d'une dette dûe à la banque. (Sects. 38 et 10.)

Le président et le gérant ou caissier sont tenus de préparer, signer et transmettre au gouvernement, pour être publiés dans la *Gazette Officielle*, un état mensuel de la situation de la banque dans la forme indiquée par le statut. (Sect. 13.)

Le président, le gérant ou caissier, qui dresse, signe, approuve ou ratifie un état faux au sujet des affaires de la banque, est responsable des dommages envers tous ceux qui seraient induits en erreur par ces états. (Sect. 63.)

Tels sont les pouvoirs et les devoirs des directeurs de banque.

La première question qui se présente est celle de savoir si la négligence et le défaut de surveillance reprochés aux directeurs sont fondés, et si cette négligence a été préjudiciable à la banque.

La seconde, si la banque a distribué des dividendes non justifiées par les profits réalisés, et si les directeurs ont consenti à cette distribution en connaissance de cause.

1o. Pour apprécier la conduite des directeurs au sujet de l'administration de la banque, il est nécessaire d'indiquer comment les affaires de la banque ont été conduites, et quelles ont été les causes de la faillite.

La Banque Consolidée a été organisée le 10 mai 1876, par la fusion de deux banques, savoir, la City Bank de Montréal et la Royal Canadian Bank de Toronto. Un bureau provisoire de directeurs, dont le défendeur formait partie, fut nommé par le statut, et remplacé, le 7 juin 1876, par les directeurs choisis à l'assemblée des actionnaires tenue ce jour-là.

Le défendeur fut élu directeur, et ensuite maintenu en charge jusqu'à la faillite de la banque, en juillet 1879, et même jusqu'à la nomination des liquidateurs en juin 1880.

Lors de l'amalgamé des deux banques, le capital payé de la Banque Consolidée était de $3,477,224 et la réserve de $247,650.17, formant un total de $3,724,874.17, d'après les états fournis par les directeurs provisoires et par les directeurs élus en juin 1876 et les années suivantes. (Rapport du comité, pp. 5; 6 et suiv.)

Trois ans plus tard, le 31 juillet 1879, lorsque la Banque Consolidée a fermé ses portes, la réserve était disparue, et les cinq-sixièmes du capital étaient engloutis. (Dép. de P. S. Ross, pour le demandeur, p. 8.) Il n'a été réalisé par les liquidateurs que $460,000; perte $3,264,874.17. Un dividende de 3 et 3½ par cent avait cependant été payé tous les six mois, savoir, le 1er décembre de l'année 1876, le 1er mai et le 1er décembre des années 1877 et 1878.

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Des rapports brillants accompagnaient ces déclarations de dividendes; des rapports semblables étaient publiés dans la *Gazette Officielle* tous les mois, au désir de la loi sous la signature du président et du gérant. Mais le 24 avril 1879, les directeurs reconnurent qu'ils ne pouvaient payer le dividende ordinaire de mai, et résolurent d'envoyer aux actionnaires une circulaire pour expliquer la chose.

Voici cette circulaire (p. 11 du rapport) :—

" I regret to inform you that, owing to the serious losses which this bank, in common with similar institutions, has recently sustained, the directors find themselves unable to declare a dividend for the current six months; and I am further directed to state that, after a careful examination and valuation of all the assets of the bank, including the business premises and securities for past due debts, in which the shrinkage in value has been considerable, the directors are of opinion that, in the interest of the shareholders, and with a view of securing an early resumption of dividend, it will be expedient to reduce the capital stock of the bank.

" The directors will thereby be enabled to set aside a fund sufficient, not only to meet all ascertained losses, and to provide for any that may occur in connection with current loans, but also to create an adequate rest.

(Signed.) " F. HINCKS,

" PRESIDENT."

Le 5 mai 1879, les directeurs décidèrent de s'adresser à la législature pour réduire le capital de la banque, et le capital fut réduit de 40 par cent par un statut sanctionné en mai 1879, quoique les directeurs n'eussent demandé qu'une réduction de 33 par cent qu'ils trouvaient suffisante pour permettre de payer un dividende sur le capital réduit. Il restait suivant eux, après cette réduction de 40 par cent, un surplus de $943,707.47, (v. minute book, séance 2 juin 1879. Rapport du Com., p. 12.)

Mais le 3 juillet, le gérant général résigna sa charge, et le 15 juillet 1879, les directeurs informèrent, par circulaire, les actionnaires qu'à la suite d'un nouvel examen approfondi, *after careful investigation*, l'avoir de la banque pourrait réaliser $1,250,000 à $1,500,000, ou 60 à 75 par cent. du capital réduit. Telle était l'opinon du nouveau gérant général et de tous les directeurs. Ils espéraient pouvoir se justifier plus tard de l'accusation de négligence ou de mauvaise administration portée contre eux. (Minutes du 15 et du 18 juillet 1879. Rapport du Comité, pp. 12 et 13.)

M. Archibald Campbell, nommé le 7 juillet gérant à la place de Rennie, démissionnaire, suspendit les paiements, et ferma la banque le 31 juillet, du consentement des directeurs.

Le président, Sir Francis Hincks, et quelques autres directeurs se demirent de leurs fonctions en septembre 1879, probablement à la suite de ce rapport; le défendeur fut nommé président à sa place, et continua cette charge jusqu'en juin 1880, alors que des liquidateurs furent nommés suivant la loi.

Le 23 juin 1880, les actionnaires réunis en assemblée générale ont nommé

un comité de trois pour prendre des procédés en dommage contre les directeurs pour les dividendes payés et pour leur mauvaise administration, avec instruction de faire rapport le 1er septembre suivant à une assemblée des actionnaires. Le rapport présenté fut un réquisitoire contre les directeurs : il n'a été d'un grand secours dans l'examen de l'administration des affaires de la banque pendant les trois ans qu'elle a existé. Il contient plusieurs procès-verbaux de séances des directeurs, leurs rapports semi-annuels, et des états des comptes, qui tous sont admis conformes aux livres de la banque. J'aurai l'occasion d'y référer fréquemment. Les liquidateurs, après avoir payé toutes les dettes de la banque, ont réalisé $460,000 pour les actionnaires. La balance de l'actif fut vendue en 1881, à la société dite Canadian Securities Co.

La perte de $3,264,874.17 sur un capital de $3,724,874.17 dans l'espace de trois ans, est quelque chose d'extraordinaire. Elle provient en grande partie des avances et des escomptes à des clients insolvables, dont les comptes remontent presque tous, j'entends les plus importants, à l'origine de la banque. La plupart étaient même antérieurs à la fusion des deux banques. Les pertes de ce chef se montent à près de trois millions de dollars constatés par la liquidation. On conçoit qu'elles doivent remonter assez haut. Le président de la banque, Sir Francis Hincks admet que douze mois avant la faillite, il était trop tard pour éviter la perte causée par ces mauvais comptes. Dès la fin de 1876, la plupart de ces comptes étaient déjà à découvert, *overdrawn*, pour des montants considérables, et le débit des ces comptes a continuellement augmenté.

Une autre cause de pertes serait le paiement de dividendes à même le capital et au moyen d'emprunts pendant au moins deux ans. Ajoutons des intérêts de 5, 6 et 7 par cent depuis avril 1877 sur des emprunts faits aux autres banques pour des montants considérables et toujours croissants, une somme de $65,000 perdue à la suite de jeu de bourse, par les directeurs, sur les actions de la banque pour les empêcher de tomber, outre les autres pertes qu'entraîne toujours une mauvaise administration ; enfin, les dépenses d'administration pendant deux ans de déficits, qui s'accumulaient avec rapidité ; telles sont les causes principales qui ont fait disparaître un capital aussi considérable dans l'espace de trois ans.

On comprend qu'il n'était pas possible de faire l'examen détaillé de chacun des comptes des clients, mais nous avons le fait que seize des comptes de Montréal ont fait perdre à la banque $1,600,000, et nous savons comment ces comptes se sont accumulés et ont amené un résultat aussi désastreux. Ils remontent tous à 1876 ; la plupart, dit Sir Francis Hincks, étaient d'anciens comptes de la City Bank. Ce fait est constaté par le livre d'escompte de la City Bank produit en cette cause, et qui remonte à 1874.

Le compte d'Ascher & Co., le plus important de tous, puisqu'il a fait perdre au-delà d'un demi million de dollars, était déjà à découvert à la date du 19 décembre 1876, de $17,486.02 ; il a été constamment à découvert jusqu'à la fin, comme en font foi les deux extraits du Deposit Ledger, Exh. B19 et B20 du demandeur, et le témoin Arch. Campbell ; Dép., p. 32.

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On voit par ces extraits, qu'à la date du 20 juin 1878, ce compte était à découvert, *overdrawn*, de $85,103.70, et le 5 juillet 1878 de $109,845.59. L'Exhibit B5 (p. 8 Doc. imprimé) porte ce montant, le 10 novembre 1878, à $153,529.28, savoir :—

	$81,895.68
	30,350.00
	33,283.60
	8,000.00
	$153,529.28

Cependant les directeurs lui accordent constamment de l'escompte, comme on le voit dans le livre d'escompte et dans le livre des minutes signés chaque fois par le président de l'assemblée des directeurs.

La plupart des comptes importants sont dans le même cas. A la date du 10 novembre 1877, les avances à découvert s'élevaient à $583,291.59.

Le 10 mai 1878, elles étaient de $850,097.04.

Le 10 novembre 1878, de $1,107,037.24.

Ce fait est constaté par les états hebdomadaires faits régulièrement et copiés dans un livre spécial, et par l'état général semi-mensuel copié dans un autre livre spécial tenu à cet effet.

(Voir les extraits Exh. B2, Documents imprimés, p. 2, Eh. B9, B14, B15, B16.)

Naturellement, la banque n'avait aucune garantie pour ces avances que le chèque du client ou son bon sous la forme d'un billet à demande.

Le chèque augmentait d'autant le débit du compte des dépôts. On peut voir par les extraits du compte de dépôts de Ascher & Co. (B19 et B20) que les chèques étaient présentés tous les jours et plusieurs fois par jour. Pendant trois ans le caissier *(Receiving Teller)* Louson, garda en sa porte-feuille comme de l'argent en caisse des billets protestés au montant de $50,000 à $200,000 et au-delà, par ordre du gérant général Renuie et à la connaissance de Kinnell, le comptable de la branche de Montréal, qui tous les jours vérifiait la caisse de Louson, à la connaissance de Wethey, assistant gérant, et de Pridham, comptable en chef de la banque ; ces derniers vérifiaient la caisse de Louson deux fois par mois. (Dép. Louson, par. 2 à 4 et 11 à 14.)

Ces billets avaient été remis à Louson pour être collectés, et correspondaient aux chèques donnés par les clients qui n'avaient point de fonds en banque. Louson considérait ces billets comme payés et de l'argent en caisse.

Kinnell dit (p. 7) qu'ils furent d'abord gardés un jour ou deux, en attendant qu'ils fussent renouvelés; ils sont ensuite restés indéfiniment entre les mains de Louson. Ces entrées avaient un double but,— de diminuer d'autant le montant des billets en souffrance et d'augmenter le numéraire en caisse. Ces entrées se faisaient ouvertement ; la caisse, qui ne devait comprendre que le numéraire en mains, les débentures du gouvernement, et les billets et chèques des autres banques, comprenait en outre un item de *sundries*, composé de billets

en souffrance, quelquefois le mot *sundries* était joint aux mots *past due notes*, et d'autres fois ces derniers mots seuls étaient entrés.

Pendant trois mois, de novembre 1878 à février 1879, Louson garda en main comme argent un autre item de "*checks and notes*," qui a varié de $200,000 à $300,000, et qui était composé de chèques et de billets à demande donnés par les clients; ce montant était de $221,495 à la date du 21 février 1879.

Voici l'histoire de ces chèques et notes :

Rennie, le gérant général, pour couvrir ou diminuer le montant des découverts (*overdrafts*) au livre des dépots et aux états hebdomadaires et mensuels, fit accepter par Louson, en novembre 1878, des bordereaux de dépôt, "*credit slips*," en faveur d'Ascher, pour $47,300 et pour $68,000 ; en faveur de Davidson Bros. & Co., pour $23,100 ; de S. Davis & Co., pour $25,425.19 ; de B. Furniss & Co., pour $30,070 et pour $27,900 ; total, $221,795.19. Ces bordereaux furent transmis par Louson au commis qui tient le livre des dépots, et entrés au crédit de chacun de ces comptes.

Pour se protéger et se justifier, Louson fit signer par le gérant un double de ces bordereaux, qu'il appelle des "*debit slips*," et qu'il garda dans sa caisse comme de l'argent comptant pendant trois mois à la connaissance de Wethey, de Pridham, et de Kinnell. (Louson, pp. 2 et suiv. ; pp. 11 et suiv.)

Pendant cette période, d'autres chèques et bons furent reçus, et portèrent cet item à $300,000, et même au-delà pendant quelque temps.

Louson et Kinnell admettent que tout cela était bien irrégulier et contraire aux usages des banques, mais ils se défendent en disant qu'ils agissaient ainsi par ordre de leurs supérieurs. Kinnell dit qu'il a refusé d'abord de passer ces entrées avant d'en référer au gérant, et qu'il insistait pour faire retirer les billets et ces "*slips*" de la caisse, mais que s'il en eût parlé aux directeurs, on lui aurait répondu de se mêler de ses affaires. (p. 15.) Louson dit que c'était à Kinnell d'en informer Wethey, à celui-ci d'en informer Rennie, et à Rennie d'en informer les directeurs. (p. 14.)

Avec ce système d'administration, tout se trouvait laissé entièrement au contrôle et à l'arbitraire de Rennie, et tous les officiers nommés et payés pour se contrôler les uns les autres ne contrôlaient personne, et la banque était, pour ainsi dire, mise au pillage par Rennie.

Le 21 février 1879, les $221,795.19 de bordereaux gardés par Louson, comme de l'argent dans sa caisse, en furent retirés par l'ordre de Rennie au moyen d'un escompte qu'il accorda à chacun de ces clients sur leur seul billet à demande, et qu'il fit sanctionner par les directeurs à leur séance du 24 février 1879. De cette manière, ces bordereaux et billets en souffrance disparurent de la caisse, sans entrer dans la classe des billets en souffrance, mais bien dans celle des billets escomptés et courants. (Campbell p. 29.) Du coup, dit Louson, ma caisse diminua de plus de moitié. (p. 14.)

Ce n'est pas de moitié qu'il faut dire, mais des neuf-dixièmes.

Dans les états transmis au gouvernement chaque mois, et publiés dans la

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Gazette Officielle, le montant des découverts était porté dans la colonne des billets escomptés et courants, comme le montant des emprunts était porté à la colonne des dépôts, de sorte que les deux items, découvertes des clients et emprunts par la banque, qui auraient dû donner l'éveil aux actionnaires, servaient à augmenter leur confiance dans l'administration et à justifier le paiement des dividendes.

Le compte des billets escomptés et courants ne comprenait pas seulement des sommes de six à huit cent mille dollars d'avances à découverts (*overdrafts*), mais encore les dépenses préliminaires, les intérêts payés, la papeterie, etc., etc.

Ainsi dans le rapport au gouvernement du 30 novembre 1877, tel que publié dans la *Gazette Officielle*, les billets escomptés et courants sont portés a $7,102,179.34, mais l'état général des affaires de la banque, tel que porté au livre tenu à cet effet pour la semaine finissant le 30 novembre 1877, donne les billets escomptés et courants à $6,403,848.56, et le montant des comptes à découvert à $647,171.09. Il faut ajouter ce dernier montant à celui des dépenses diverses (même les salaires) et des billets escomptés et courants pour arriver au chiffre de $7,102,179.34, dit M. Campbell. (Dép. 24 et 38.)

Les billets escomptés et courants portés dans l'état fourni au gouvernement pour le 30 octobre 1878 comprennent $808,749.82 d'*overdrafts*, tel qu'indiqué dans l'état général de la banque pour la même date, et, de plus, $22,846.73 pour dépenses préliminaires ; $55,894.12 pour intérêt en suspens (*interest suspense account*) ; $71.00 pour loyer ; $151.58 pour papeterie ; $30,591.67 intérêt échu ; $17,191.60 intérêt accru sur les billets escomptés ; et enfin $7,998.04 pour diverses dépenses aux agences. (Campbell, pp. 25, 26 et 38.)

J'ai dit que le gérant et trois autres officiers de la banque, les plus élevés en position, et en même temps les surveillants du caissier, connaissaient sa conduite et laissaient faire ; mais il y a plus, c'est que deux directeurs, M. Reekie, le vice-président, et M. Ogilvie ont fait l'inspection de la caisse de Louson en compagnie de Rennie une fois en 1876 et une fois en 1877, et ont accepté les billets protestés détenus par Louson, comme du numéraire dans la caisse. Rennie faisait apporter les billets par le caissier pour vérifier leur existence et leur montant, et pour cela les tirait de leurs protêts respectifs. Les directeurs furent satisfaits, et la caisse fut certifiée correcte.

Evidemment, ils ne comprenaient pas le premier mot de la fonction qu'ils exerçaient, à moins de les supposer complices eux-mêmes, ce que je ne puis faire dans les circonstances. Voyant que le caissier avait ces billets en mains, qu'il les entrait dans sa caisse, et que le gérant, loin de faire aucune remarque, les exhibait et vérifiait avec eux, ils ont dû croire que cela se faisait toujours ainsi, et que leur devoir se bornait à vérifier les billets, il n'est pas surprenant que durant l'année suivante les affaires se soient aggravées chaque jour.

Ce sont les deux seuls examens de la caisse faits par les directeurs, qui n'ont jamais fait inspecter l'agence de Montréal, ni celle de Toronto, la plus importante après Montréal, par leur inspecteur régulier, M. Campbell.

D'ailleurs, si les autres directeurs ressemblaient à Reekie et à Ogilvie, il valait bien autant n'en pas faire; c'était une cérémonie qui ne pouvait avoir que le mauvais effet de faire croire aux employés que s'ils osaient avertir les directeurs, on leur répondrait de se mêler de leurs affaires.

Les pertes subies par la banque avec ses clients, telles que constatées par la liquidation, ont été à Montréal de $1,792,463 00
Et aux autres agences de..... 1,044,618 00
Toronto figure dans ce dernier chiffre pour..... 561,373 00
Diverses autres pertes pour un montant de..... 191,548 00
Dépenses, intérêt, etc..... 42,157 00
Pertes par le syndicat de directeurs pour racheter les actions de la banque et les empêcher de tomber 65,091 00

Formant un total de..... 3,135,877 56
Laissant un surplus de..... 588,996 61

Pour former le capital payé et la réserve de..... $3,724,874 17

Rapport du comité, pp. 14 et 15. Dép. P. S. Ross pour le demandeur.

Mais, comme nous l'avons dit, ce surplus nominal de $588,996.61 n'a réalisé pour les actionnaires que $460,000, et qui porte la perte réelle à $3,264,874.17.

Les comptes à découverts ne sont pas limités à Montréal; il y en a beaucoup à Toronto, mais le demandeur s'est attaché à démontrer le résultat des principaux comptes de Montréal. Sur les seize comptes mentionnés par le comité comme ayant fait perdre $1,600,000, le demandeur en a choisi treize, qui tous étaient à découvert (*overdrawn*) pour de forts montants, qui ont fait perdre à la banque $1,313,097.87, c'est-à-dire une moyenne de $100,000 chacun (Exh. B6, p. 17, Doc. imp.)

M. Campbell, interrogé si les avances à découvert étaient garanties, répond qu'ils ne l'étaient pas, et que le montant entier du découvert de ces treize comptes a été perdu, excepté $50 collectés de la faillite de Riley, et $4,000 provenant de l'assurance sur la vie d'O'Brien. Tous ont fait faillite moins deux ou trois, mais ni les uns ni les autres n'ont payé un sou, excepté, comme je l'ai dit, Riley $50.00 sur $65,000, et O'Brien $4,000 sur $145,840. (Campbell p. 31.)

Je ne trouve pas dans les témoignages ou les états produits le montant des avances à découvert pour chacun de ces clients, ni le total de leurs comptes respectifs lors de la suspension de la banque, mais l'Exh. B5 nous donne le montant à découvert pour chacun d'eux à la date du 10 novembre 1878; et l'Exh. B6 (p. 17 imprimé) prouvé par Campbell (p.—) donne le montant perdu par la banque avec chacun de ses clients sur leur compte général.

En voici le résultat:—

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Noms des clients.	Montant du découvert (*overdrafts*) le 10 novembre 1878.	Pertes totales lors de la liquidation.
Ascher & Co	$153,528 22	$501,849 98
Beattie & Co	30,901 08	94,848 75
Couper George	129,822 25	72,113 87
Cushing & Co	383 89 744 45 436 21	95,079 79
Davidson Bros. & Co	28,169 20	94,220 98
S. Davis & Co. (en liquid).	24,927 00	23,000 00
B. Furniss & Co	122,758 45	123,335 10
R. Forsyth	43,249 67	38,000 00
W. Head	20,675 33	48,528 40
M. Kortosk & Co	10,938 04	75,301 00
T. F. O'Brien	119,202 63	141,840 00
W. H. Riley	21,047 29	65,000 00
Total		$1,313,097 87

Tous comptes étaient connus comme mauvais par le monde commercial, et étaient cause que le public a commencé à perdre confiance dans la banque, de février 1877, malgré des dividendes réguliers de 3 et 3½ par cent deux fois par année. Ce manque de confiance a donné lieu à l'emploi d'un *broker* par Rennie et le président, et ensuite au syndicat des directeurs pour acheter les actions de la banque à la Bourse, les empêcher de baisser davantage. (Simpson, pp. 2, 3, 4; Campbell, p. 18.)

Les commis de la banque en parlaient comme des comptes boiteux (*shaky*) (Struthers, p. 2); le défendeur admet qu'il considérait Ascher, Kortosk, Beattie et Davidson comme suspects (pp. 29, 47); cependant, le montant des avances à découvert et de l'escompte à ces clients augmente sans cesse en même temps, avec cette particularité remarquée par M. Campbell que les billets de pratique sont rares et ceux des clients très élevés. (Dép. p. 17.)

Ces avances énormes sans garantie à des insolvables étaient injustifiables. Si les directeurs, dit P. S. Ross, témoin du défendeur. (p. 30), eussent examiné le livre des dépôts et celui des états mensuels de la banque, ils n'étaient pas justifiables de faire ces avances. Il ne peut y avoir deux sentiments sur ce point.

Le Syndicat.—J'ai mentionné que dès février 1877, les actions de la Banque Consolidée ont commencé à faiblir, et que Rennie, à la connaissance et avec la sanction expresse du président, employa M. Simpson, broker, pour acheter aux frais et dépens de la Banque, les actions de celle-ci lorsqu'elles fléchissaient, et les revendre ensuite le mieux qu'il pourrait. Il acheta et vendit ainsi jusqu'en mai 1878. Sauf de légères fluctuations, dit Simpson, les actions tendaient à décliner tout le temps: "*It was a falling stock all the time with fluctuations.*" Il payait ses achats par des chèques sur la Banque Consolidée qui lui avait ouvert un crédit, et lorsqu'il vendait le produit était déposé à son crédit. Le stock déclinait continuellement, dit-il, parce que la banque était soupçonnée de manquer

de prudence dans ses affaires : " *There was a general suspicion that the bank was doing an imprudent business—bad banking.*"

En 1878, l'intervention de M. Simpson fut jugée insuffisante, et Rennie, avec la plupart des directeurs et d'autres personnes, organisèrent des syndicats pour faire le même jeu sur une plus grande échelle, mais toujours au compte de la banque et avec ses fonds. (Dép. Campbell, pp. 19 et 20.)

Rien de plus compliqué que les comptes ouverts dans les livres de la banque à ce sujet ; il y a le compte de R. J. Reekie, de Reekie *trustee*, de Reekie *in trust No.* 2, Reekie *in trust No.* 3, de Reekie *special*, de Reekie *special No.* 2, Reekie *et al.*, de John Rankin, de John Rankin *in trust*, de John Rankin *special*, de Thomas Workman, de G. W. Simpson, de Hugh Mackay, de John Grant, de Sir Francis Hincks, Syndicate Workman, Syndicate Joseph, Workman *et al.*, etc., etc.

On y trouve les noms de Rennie, le gérant du président Sir Francis Hincks, du vice-président Reekie, du défendeur John Rankin, de Grant, Mackay, Workman, Joseph McCulloch, Saunders, Moss, Ogilvie, O'Brien, de Moat et de A. W. Campbell ; presque tous les directeurs de la banque en font partie. Ce qui complique ces comptes, ce sont les transports fréquents d'actions de l'un de ces comptes à l'autre, du *Deposit Ledger* ou *General Ledger*, de Reekie, *trustee*, à R. J. Reekie, de Rankin *in trust* à R. J. Reekie, de Workman à Reekie *in trust*, et à Rankin *in trust*, de Grant à Reekie *in trust*, Reekie *special*, Rankin *in trust*, etc. On trouvera tous les détails dans le rapport du comité, pp. 22 et suiv., que M. Campbell déclare corrects (Dép. p. 20). Ces opérations commencent par une lettre conjointe du 21 novembre 1878, par R. J. Reekie, le défendeur, John Rankin et John Grant, trois des directeurs, adressée à R. & J. Moat, brokers, le requérant d'acheter pour eux du stock de la Banque Consolidée. Elles ont absorbé une partie très considérable du capital de la banque, certains comptes de syndicats excédant $100,000 d'avance à la fois, et se sont terminées par une perte nette de $65,091.79.

Ces transactions illégales paraissent embrouillées à dessein, peut-être pour sauver les apparences et la responsabilité de quelques-uns des individus qui y figurent. Sans doute, chacun peut être responsable envers la banque du reliquat à son débit ; le défendeur paraît avoir payé environ $17,000 à ce sujet ; son compte était plus élevé, et un compromis paraît avoir eu lieu avec les liquidateurs, mais plusieurs sont insolvables, et finalement la banque a perdu $65,091.79 avec les syndicats. Les directeurs ne peuvent échapper dans ce cas à la responsabilité de l'emploi des fonds de la banque pour des fins prohibées, quand même ils auraient agi de bonne foi et dans l'intention de conserver le crédit de la banque ; cette responsabilité, résultant d'un quasi délit aussi bien que de l'inexécution d'un mandat conjoint, devient solidaire à double titre entre tous ceux qui ont participé.

Emprunts.—Un troisième grief contre l'administration des directeurs, et une autre occasion de perte pour la banque, ce fut les emprunts extraordinaires à des taux élevés faits aux autres banques par la Banque Consolidée, et le mode d'opérer ces emprunts.

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Le 27 avril 1877, la Banque Consolidée emprunte de la Banque de Montréal $100,000 à 5 par cent; remboursables sur avis de 30 jours.

Le 22 mai, elle achète £10,000 sterling de change à la Banque du Commerce à 9⅝ par cent, remboursables sur trois mois d'avis, et elle les revend sur place 9 9-16, perte 1-16 par cent.

Après plusieurs autres emprunts sous forme d'achat et vente de change, avec perte chaque fois, la Banque Consolidée emprunta de la Banque de Montréal, le 30 octobre 1877, $100,000, intérêt à 6 par cent, remboursables à demande; et le 29 novembre, $25,000 de Mont à 6 par cent. Depuis ce moment, les emprunts augmentent rapidement, quelques-uns à 5½ par cent, mais la plupart à 6 par cent jusqu'en octobre 1878, et ensuite l'intérêt monte à 7 par cent, outre que la banque donne les billets de ses pratiques en sûreté collatérale. (Voir le tableau des emprunts p. 21 du Rapport du Comité, dép. P. S. Ross pour le demandeur, p. 15; Campbell, p. 20.)

Les emprunts faits par la Banque Consolidée, depuis le 27 avril 1877 au 20 mai 1878, soit directement des autres banques, soit par l'achat et la revente du change sur Londres, se montent à plus de quatre millions de dollars.

Le 1er juin 1878 elle devait pour emprunts.....	$248,597
Le 31 décembre 1878.....	725,134
Le 24 octobre 1878	629,000
Le 24 avril 1879	971,425
Le 1er mai 1879 elle a emprunté de la Banque de Montréal à 7 par cent.....	570,000
Et le 20 mai.....	78,000

(Ross, dép. pp. 13, 14 et 15.)

Intérêts.—Le compte des intérêts de tous genres payés par la banque est un autre item important. Il est porté dans les états semestriels présentés par le gérant, comme suit :—

26 octobre 1876, réservé pour intérêt.	$50,776
19 avril 1877, payé et réservé.....	91,786
29 octobre 1877 " "	92,942
22 avril 1878 " "	95,537
24 octobre 1878 " "	112,785

On voit que l'intérêt augmente continuellement. Durant l'année expirée en octobre 1877, il se monte à plus de $184,000; cette somme représente, à 6 par cent, trois millions, et à 5 par cent, trois millions sept cent mille piastres, c'est-à-dire, tout le capital de la banque y compris la réserve. Durant l'année finissant en octobre 1878, cet intérêt est rendu à $218,000. Les emprunts aux banques y figurent pour une large somme, comme on l'a vu plus haut. Voir aussi l'Exb. B7 (p. 18, documents imprimés), qui est un état détaillé du compte des intérêts payés par la banque.

Responsabilité des directeurs.—Le défendeur et ses collègues sont-ils responsables des pertes subies par la banque par suite de cette mauvaise administration? Ont-ils exécuté leur mandat avec l'habileté convenable et tous les soins

d'un bon père de famille, c'est-à-dire, d'un administrateur prudent; ou bien, sont-ils coupables de négligence, d'incurie ou d'inhabileté aux termes des articles 1710 et 1053 du Code Civil?

Le défendeur prétend dans son septième plaidoyer, qu'il ne s'est point rendu coupable de négligence dans l'administration des affaires de la banque, et qu'il a apporté tout le soin et la surveillance dont il était capable, ajoutant que les pertes ont été causées par les employés qui, malgré ses précautions, lui ont caché, ainsi qu'à ses collègues, les transactions qu'ils faisaient.

Mais, examiné comme témoin, le défendeur s'est écarté considérablement de cette ligne de défense. Il a prétendu que ses fonctions de directeur se bornaient à donner son avis au gérant, sur les questions que celui-ci soumettait aux directeurs deux fois par semaine, au sujet de l'escompte demandé, et tous les six mois sur les dividendes à déclarer (p. 54).

Pour donner cet avis, il se guidait entièrement sur les états fournis par le gérant, sans les contrôler en aucune manière (p. 18).

Il n'a jamais examiné les livres de la banque, et, d'après lui, aucun directeur de banques ne le fait; les informations sont fournies par les principaux employés, et cela suffit (p. 19).

Avant la débâcle il n'avait jamais vu d'autre livre que le livre des minutes (pp. 22 et 44), et il a toutes les peines du monde à l'identifier, quoique pas moins de dix-huit assemblées soient signées par lui en sa qualité de président (Rapport du comité, p. 17). Il n'a jamais vérifié les garanties données par Ascher, qui a fait perdre plus de $500,000 à la banque (p. 30); il n'a jamais évalué les valeurs de la banque avant de déclarer les dividendes, s'en rapportant à Rennie (p. 30). Il n'a eu aucune connaissance personnelle des comptes des clients (p. 31). Il n'a pas eu connaissance des emprunts faits par la banque au montant de quatre millions dans l'espace de deux ans, savoir: d'avril 1877 à mai 1879 (p. 31, Rapport du comité, p. 21). Il n'a jamais examiné les rapports faits au gouvernement (p. 32). Il déclare que les fonds de la banque n'ont pas été employés par les directeurs pour soutenir le stock à la bourse; c'était l'affaire de Rennie, dit-il (pp. 32 et 33), et cependant il avait lui-même deux ou trois comptes d'ouverts à la banque pour cet objet, sous différents noms, et il a acheté de ses co-directeurs (*in trust*) et leur a vendu des actions nombreuses en différentes circonstances pour cet objet; on en peut voir le détail au rapport du comité (pp. 24 et suiv.).

D'après lui, Furniss & Co. étaient réputés solvables, mais l'était-il pour $5,000, $10,000 ou $100,000? Cela ne fait pour lui aucune différence, et il ne s'en est jamais inquiété (p. 44). Il ne sait pas si les avances aux dix ou douze mauvais clients en question l'ont été sur des garanties collatérales ou non; il ne sait pas si elles ont été sur la seule responsabilité personnelle des emprunteurs. Toute connaissance qu'il a des affaires de la banque est celle que Rennie et le caissier Louson lui en ont donnée (p. 46). S'il eût connu les découverts, il n'aurait certainement pas fait d'autres avances aux mêmes clients (p. 48). Il a été l'un des directeurs provisoires de la Banque Consolidée, mais

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n'a pas examiné les valeurs de la banque lors de l'amalgame; s'en étant rapporté aux états fournis par Rennie (p. 50). M. Campbell était l'inspecteur de la banque; il a dû inspecter la branche de Montréal comme les autres, dit-il, mais le défendeur n'a jamais vu ses rapports, ni pour Montréal ni pour ailleurs; c'était à l'exécutif à s'occuper de ces choses, c'est-à-dire au président, au vice-président, au caissier et au comptable, tous officiers salariés (pp. 52 et 53). Il ne s'est pas enquis, même depuis la suspension de la banque, si les rapports au gouvernement étaient inexacts ou non, et n'en a pas entendu parler (p. 53). Enfin, sa défense, c'est qu'il a été trompé par Rennie sur le montant de l'escompte accordé aux clients, au moyen de bordereaux faux qu'il mettait devant les directeurs deux fois par semaine. Beaucoup d'escompte, d'après lui, aurait été accordé par Rennie hors la connaissance des directeurs.

Sir Francis Hincks dit que Rennie avait instruction de mettre devant le bureau des directeurs, chaque jour d'escompte, c'est-à-dire deux fois par semaine, le chiffre des obligations dues par les clients au-delà d'un montant fixé, probablement $100,000; les billets escomptés les jours précédents étaient soumis aux directeurs, et entrés, lorsqu'ils étaient ratifiés, dans un livre tenu à cet effet, et signé, séance tenante, par le président. Rennie fournissait sur une feuille volante le montant des obligations des clients qui demandaient de l'escompte; ces états de Rennie étaient faux (p. 7, verso 8). Il se croit certain que tous les billets escomptés par Ascher ne sont pas entrés dans le livre des escomptes (p. 10 verso). Un autre fait de nature à tromper les directeurs sur le montant des obligations des clients envers la banque, c'est que dans le livre tenu pour cet objet, *Liability Ledger*, et dans lequel les comptes sont entrés par lettres alphabétiques, plusieurs des comptes les plus importants sont divisés sous différents titres, et les sub-divisions au lieu d'être dans l'ordre alphabétique sont renvoyées au milieu ou à la fin du livre.

Ainsi Ascher avait un compte au commencement du livre, et en avait trois ou quatre autres plus loin, de manière que les directeurs qui auraient ouvert ce livre pour examiner le compte d'Ascher au commencement du volume n'y auraient trouvé qu'une partie très faible de ses obligations; de même pour Cushing, Davidson et quelques autres.

Les témoins Ross et Campbell se basent presque uniquement sur ce fait pour excuser les directeurs qui, suivant eux, ont dû être trompés par ces divisions des comptes, car ce livre, disent-ils, est préparé uniquement pour l'information des directeurs, et est mis, à chaque séance du bureau, sur la table, pour les guider dans l'octroi de l'escompte.

Je n'hésite pas à rejeter l'excuse des directeurs résultant de cette division des comptes dans le *Liability Ledger*. En premier lieu, le défendeur n'a jamais ouvert le *Liability Ledger*, ni aucun des livres de la banque; il n'a donc pas été trompé par la division des comptes. En second lieu, le président n'a pas été trompé non plus par cette division, car il déclare avoir examiné fréquemment ce livre, et avoir connu cette division. Quant aux autres directeurs, on ne sait pas s'ils ont ouvert le livre ou non; mais aucun n'a pu être trompé

parce qu'il y avait, pour se guider, l'index aux noms qui accompagne le volume, et qui renvoie à tous les comptes et à toutes les pages du volume, comme M. Campbell a fini par le reconnaître (dép. p. 35). Si quelqu'un des directeurs eut été trompé à ce sujet, le défendeur n'eut pas manqué de le faire entendre comme témoin. Il n'y a donc pas de preuve qu'aucun directeur ait été trompé par cette division des noms dans le *Liability Ledger*, et en regardant à l'index, la division des comptes était apparente.

D'après M. Campbell (p. 18) et M. Ross (témoin du défendeur, p. 7), ce livre a dû être sur la table des directeurs à chaque assemblée ; c'est pour eux qu'il est préparé.

Sir Francis Hincks déclare dans un protêt du 7 juillet 1879, entré au livre des minutes, que ce *Liability Ledger* était examiné de temps à autre par le bureau des directeurs, et servait à faire connaître le montant des obligations des clients. Outre le "Livre des Obligations," *Liability Ledger*, les directeurs avaient encore, pour se renseigner, le livre de l'escompte, le livre des dépôts, le livre des états hebdomadaires et celui des états mensuels.

Ce sont ces livres que les directeurs devaient consulter, et non les petits papiers de M. Rennie, qui tous ont disparu, et dont on n'a pu produire un seul. S'ils ont été trompés par Rennie à ce sujet, et le témoignage de Struthers tend à confirmer le dire de Sir Francis et du défendeur, c'est par un excès de confiance en Rennie, leur [illegible]ré, et par négligence et manque de soins de leur part. Comme le dit fort bien M. Campbell, si les directeurs eussent été des banquiers expérimentés, et qu'ils eussent voulu y donner l'attention nécessaire, ils auraient pu ouvrir les livres eux-mêmes et se rendre compte des affaires. (dep. p. 43.). La loi des banques donne aux directeurs le droit d'examiner en tout temps les livres et comptes de la banque, parce qu'ils sont administrateurs, et qu'ils ne peuvent se rendre compte autrement, tandis que ce droit d'examiner les personnes qui transigent avec la banque est refusé aux actionnaires (sect. 5). Si les directeurs omettent de le faire, ils manquent à leur devoir ; et s'il en résulte un dommage pour les actionnaires qui composent la banque, ils en répondent. Autrement, leur responsabilité serait illusoire.

Le défendeur dit : Je n'avais rien à voir à l'administration ; c'était au président et au vice-président d'y voir. Le président dit : Je n'étais pas l'administrateur, je tiens à ce qu'on comprenne bien que je ne me suis jamais chargé d'administrer les affaires de la banque; ce devoir incombait à Rennie en qui nous avions la plus grande confiance. Dans toutes les banques, dit-il, il faut un chef unique qui se charge de tous les détails de l'administration ; quelquefois, c'est le président, comme en Amérique généralement ; d'autres fois c'est un gérant choisi par les directeurs.

Je comprends parfaitement cette théorie ; les directeurs peuvent se diviser l'ouvrage et la responsabilité entre eux ; mais vis-à-vis des actionnaires et du public, ils restent toujours responsables comme administrateurs. Leur responsabilité peut être plus ou moins grande, suivant les circonstances ; quelques-uns pourraient même échapper à la responsabilité d'actes auxquels ils n'auraient

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pas participé s'ils avaient géré avec habileté et soin et que leur vigilance eût été surprise, mais jamais les administrateurs d'une banque ne sauraient se décharger de leur responsabilité de mandataires en abandonnant la gestion de la banque à un employé ou à l'un des directeurs. Art. 1711, 1712, C. C.

En second lieu, Sir Francis Hincks prétend que des escomptes ont été accordés à Ascher hors la connaissance des directeurs; mais il se trompe. P. S. Ross, qui a examiné le livre des escomptes, admet que tous les escomptes sont entrés dans ce livre, même les simples billets à demande sans endosseur, qui ont remplacé le 21 février 1879 les chèques et bons de Ascher et autres, gardés par Louson dans sa caisse depuis trois mois comme numéraire.

En effet, si l'on ouvre le livre de l'escompte à la date du 24 février 1879, on y trouve les billets suivants escomptés depuis la séance du 20 février, et approuvés :

Beattie	$49,460
Davidson & Bros	23,600
Ascher	90,880
O'Brien	2,200
Fish, Sheppard & Co	5,630
S. Davis & Co	25,450
B. Furnis & Co	57,970
Kortosk	4,730
Cushing & Co	2,290
Forsyth	280

Le total de l'escompte s'est monté ce jour-là à $290,000, qui a été porté au procès-verbal de la séance, dans le livre des minutes. Ce procès-verbal fut lu et adopté à la séance suivante, et le livre d'escompte avec les détails fut mis ensuite devant les directeurs à chaque séance subséquente. Tous les escomptes ont été entrés régulièrement dans ce livre à chaque séance. Si les directeurs n'ont pas pris la peine de l'ouvrir, ils ne doivent accuser qu'eux-mêmes de négligence.

La loi suppose que celui qui accepte de gérer l'affaire d'un autre, possède les capacités et les connaissances nécessaires. Elle exige du mandataire l'habileté convenable pour l'affaire dont il se charge. Art. 1710, C. C., 1053, Pothier, mandat, Nos. 48 et 49.

L'ignorance, l'inhabileté ou l'impéritie, et la négligence sont également comparées à la faute lourde et au dol: *imperitia culpæ annumeratur; lata negligentia dolo æquiparatur.* Le tailleur qui gâte un habit, l'horloger qui brise la montre à réparer, sont responsables de leur ignorance. Pothier, louage, No. 425.

De même le marchand qui entreprend d'administrer une banque doit posséder les connaissances et les capacités voulues; il devra connaître la tenue des livres et les affaires de banque, car autrement il ne pourra gérer ni se rendre compte. Il doit exécuter son mandat avec l'habileté convenable, dit l'art. 1710; il est responsable des dommages qu'il cause par son inhabileté, dit l'art. 1053 C. C.

Quelques témoins disent que la tenue des livres dans les banques diffère de celle des marchands. Sans doute il y a des différences, mais un homme entendu se mettra facilement au courant, s'il s'en donne la peine. Après tout, en quoi consiste les fonctions du directeur de banques? Dans l'octroi de l'escompte aux clients, dans la surveillance des employés, dans l'évaluation des valeurs, la collection des créances, la distribution des dividendes, et dans les opérations incidentes aux affaires d'argent.

Le prêt des capitaux au commerce étant la principale fonction des banques, les directeurs doivent s'assurer de la solvabilité des emprunteurs, de leurs habitudes et de leur crédit; ils ne doivent pas dépasser un certain montant de prêts, et sont tenus d'exiger dans tous les cas un endosseur solvable.

Pour les guider, la banque tient un livre journalier d'escomptes, où sont entrés les noms des emprunteurs et le montant de chaque billet escompté; ce livre est sur la table des directeurs à chaque séance, et signé du président. Dans le procès-verbal de la séance, le montant total de l'escompte est entré; on a qu'à référer au livre d'escompte pour voir le détail.

En outre le *Liability Ledger* contient sous le nom de chaque emprunteur, le détail de toutes les sommes qu'il doit ou dont il est responsable. Ce livre doit aussi se trouver sur la table des directeurs, à chaque séance. Voilà pour l'escompte.

Quant aux dépôts, un *Ledger* spécial appelé *Deposit Ledger*, est tenu à cet effet, dans lequel on entre le nom de chaque client, le montant de tous les dépôts et de tous les chèques. Pour connaître la situation d'un client, il faut connaître ce qu'il doit directement et indirectement sur billets, et s'assurer quel dépôt il tient à la Banque. Si au lieu d'avoir un dépôt, il a un découvert, les directeurs l'arrêteront et demanderont raison au commis de l'argent avancé irrégulièrement sur chèque.

Tous ces livres ont été tenus régulièrement dans la Banque Consolidée; on pouvait, chaque jour, connaître le montant d'escomptes accordé à chaque emprunteur, et l'état de son compte de dépôts.

Mais outre ces livres, il était fait chaque semaine un état des affaires à chaque branche, et ce rapport était transmis au *head office*, à Montréal; il était fait aussi tous les quinze jours un état général de toute la banque. Ces états étaient copiés dans des livres spéciaux. Le rapport hebdomadaire était pour l'usage des directeurs uniquement, comme l'explique Kennell, et devait être tenu constamment devant eux. Les états semi-mensuels servaient à préparer le rapport mensuel au gouvernement. Ils étaient aussi à la disposition des directeurs.

Or, tous ces états hebdomadaires et semi-mensuels contenaient le montant total des escomptes courants, des billets dûs, garantis et non garantis et des comptes à découvert. Si les directeurs avaient ouvert un de ces livres, seulement une fois par mois ou par trois mois, ou même par six mois, ils auraient vu, dès le millieu de 1876, des comptes à découvert (*overdrafts*) pour des montants considérables, qui sont allés continuellement en augmentant; ils se seraient enquis du nom des clients en défaut, et auraient mis à l'ordre Rennie, le gérant infidèle et les autres employés, ses complices.

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Non seulement le défendeur n'a pas ouvert un seul des livres de la banque, ni celui des escomptes, ni celui des dépôts, ni celui des états hebdomadaires ou des états mensuels, ni les rapports au gouvernement, il ne s'est pas enquis de la solvabilité des emprunteurs, ni de la nature de la valeur des garanties offertes; il n'a pas évalué les créances, ni les garanties, il ne s'est pas même enquis, non plus que ses collègues, si les branches étaient inspectées; il a supposé qu'elles devaient l'être, mais les directeurs ne se sont jamais fait présenter un seul rapport de l'inspecteur. De fait, les deux branches les plus importantes, Montréal et Toronto, n'ont jamais été inspectées par M. Campbell.

Le défendeur déclare qu'il n'a jamais dépassé le comptoir, il n'a jamais rien visité personnellement, ni la caisse, ni les comptes; il n'a pas eu connaissance des emprunts de quatre millions de dollars par la banque en deux ans, ni des avances à découvert (*overdrafts*) pour près d'un tiers du capital de la banque.

Sur ce dernier point, Sir Francis Hincks, son témoin, semble le contredire, dans le protêt qu'il a fait entrer contre Rennie dans le procès-verbal de la séance du 7 juillet 1879, où il déclare: "The board had required that at every meeting, a statement should be laid before the directors exhibiting the liabilities of those customers of the bank which amounted to $100,000 and upwards, together with their overdrafts."

Les directeurs, et nommément le défendeur qui a approuvé cette déclaration, comme le procès-verbal le constate, savaient donc qu'il y avait des *overdrafts*, contrairement à ce que le défendeur prétend aujourd'hui. C'est une chose presqu'incroyable qu'un directeur de banque ait ignoré que le stock de la banque dont il était chargé de gérer les affaires, et au succès de laquelle il était personnellement intéressé, ait commencé à décliner un an après sa fondation, savoir dès février 1877, et qu'il ne se soit pas enquis des causes de la baisse, que tout le monde connaissait, et qui n'étaient un secret pour personne. Ces causes qui enlevaient la confiance du public, malgré les dividendes réguliers de 3 et 3½ par cent tous les six mois, et les rapports pompeux des directeurs, c'était que la plupart de ses clients ne valaient rien, que la banque, comme dit M. Simpson, était généralement soupçonnée d'imprudence et de mauvaise administration: "There was a general suspicion that the bank was doing an imprudent business.....bad banking." (p. 4).

C'est une chose bien extraordinaire qu'il ait ignoré que la banque empruntait continuellement, depuis avril 1877, des sommes considérables qui se sont montées à quatre millions de dollars en deux ans, quand il était notoire parmi les employés de la banque, dit Kennell, (p. 4), que pendant douze mois au moins, la banque a été dans un besoin journalier d'emprunter.

Mais si le défendeur a ignoré tout ce qui concernait la banque, il n'en est pas de même du président, qui examinait le *Liability Ledger* de temps en temps, qui connaissait tous les comptes de chaque client dans ce livre, qui savait que plusieurs d'entr'eux étaient à découvert, qui a employé Simpson dès février 1877, pour racheter le stock de la banque et le maintenir à flot, qui ne nie pas avoir participé à tous les emprunts, qui a signé les rapports au gouvernement où les

emprunts étaient portés, au compte des dépôts, et les avances à découvert, (*overdrafts*) au compte des billets escomptés et courants. Le défendeur s'en est rapporté au président et au gérant, à qui il a abandonné virtuellement l'administration des affaires, qu'il avait accepté de gérer lui-même de concert avec les autres directeurs, et qui recevait un honoraire pour les services qu'il était supposé rendre; il ne peut échapper aux conséquences de sa conduite, il est responsable civilement de la mauvaise administration de ceux qu'il s'est délégués.

S'il en était autrement, il n'y aurait plus de responsabilité nulle part, et il vaudrait mieux abolir les directeurs pour confier l'administration à un ou deux hommes que les actionnaires choisiraient eux-mêmes et de qui il exigeraient les garanties nécessaires. Dans ce cas, il est probable que les actionnaires nommeraient au moins un conseil de surveillance comme on fait en France pour les sociétés en commandite par actions, et ce conseil serait responsable envers les actionnaires de son défaut de surveillance.

Le rôle du directeur de banque, d'après le défendeur, n'est pas même celui de surveillant du gérant et des employés; ce serait celui d'un conseiller ou aviseur; le bureau des directeurs serait simplement un bureau de consultation pour le gérant. Dans ces conditions, combien de capitalistes, de veuves et de tuteurs voudraient placer leurs capitaux dans ces institutions?

On se demande à quoi sert un directeur comme le défendeur l'entend, à quoi sert un administrateur qui n'administre pas, et un surveillant qui ne surveille pas?

Les actionnaires qui payaient $15,000 par année aux directeurs, et qui étaient empêchés par la loi de regarder dans les livres de la banque et dans les comptes des clients, se reposaient entièrement sur les connaissances, l'habileté et le zèle de leurs mandataires. Grâce aux rapports préparés par les directeurs et aux beaux dividendes votés par eux et payés deux fois par année, les actionnaires ont réélu les mêmes habiles financiers pour gérer et administrer leurs capitaux, jusqu'au moment où l'on apprend que le capital entier est perdu dans un cataclysme effroyable. Alors les directeurs protestent qu'ils ne sont pas responsables, accusent les employés de malversation, et prétendent qu'ils n'étaient pas administrateurs, mais un simple conseil de consultation pour leur employé Rennie, quand celui-ci voulait bien les consulter.

Je n'éprouve donc pas la moindre hésitation à déclarer les directeurs de la Banque Consolidée coupables de négligence et d'incurie, et à les tenir conjointement et solidairement responsables des pertes éprouvées par la mauvaise administration des affaires de la banque.

J'examinerai plus tard la part de responsabilité des directeurs dans les pertes subies par la banque.

Dividendes.—Il me faut auparavant examiner la question des dividendes et décider si les directeurs sont aussi tenus de les rembourser aux actionnaires à qui ils ont été payés et par qui ils ont été dépensés comme profits et revenus, tandis qu'ils étaient pris sur le capital.

Deux questions se présentent: les dividendes ont-ils été payés à même le

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capital, et depuis quelle époque, et les directeurs ont-ils voté ces dividendes en connaissance de cause, c'est-à-dire connaissant que la banque n'avait pas réalisé des profits pour les justifier, et par suite qu'ils devaient être payés à même le capital de la banque ?

1o.—Le demandeur prétend que les trois dividendes payés en décembre 1877, et en mai et décembre 1878, l'ont été à même le capital de la banque. Ces trois dividendes ont été :

De 3½ par cent le 1er décembre 1877, soit.....	$121,315 18
De 3 par cent le 1er mai 1878, soit.....	103,995 60
De 3 par cent le 1er décembre, soit.....	104,048 55
Total.....	$329,359 33

Le 29 octobre 1877, les directeurs ont déclaré un dividende de 3½ par cent pour les six mois écoulés, savoir, $121,315.18, payable le 1er décembre.

Lors de ce dividende les directeurs avaient estimé les profits à.....	$131,568 00
Mais ils n'avaient alloué que les ⅔ des pertes sur les vieux comptes, laissant encore à déduire des profits.....	11,457 00
De sorte, que d'après leur propre état, les profits n'étaient que de.....	120,111 00
Auxquels il faut ajouter la réserve de.....	232,000 00
Total.....	$352,111 00

Mais à cette époque les comptes à découvert se montaient déjà à $594,285.53, outre l'escompte régulier.

Or, d'après l'insolvabilité notoire et continue des principaux clients, vu la crise financière et commerciale qui existait déjà depuis trois ans, d'après le témoignage de Sir Francis Hincks et de P. S. Ross, et le fait que le montant entier des découverts a été perdu par la banque, en outre d'une somme énorme sur les escomptes, on peut affirmer hardiment que ces $594,285.53, pour lesquels la banque n'avait aucune garantie quelconque, et dont une forte partie, $150,000 au moins, remontait à 1876 (Rapport du comité, p. 19), devaient être retranchés de l'avoir, comme n'ayant pas de valeur.

Ce montant est suffisant pour absorber tous les prétendus profits des six mois et la réserve ; il reste même encore un déficit de $242,714.53.

On pourrait peut-être ajouter à ce déficit une partie des $200,000 qui, d'après M. Ross (1ère Dep. p. 17), ont été perdus sur les vieux comptes lors de la liquidation, $45,465.31 que les directeurs ont déduits de ce chef en décembre 1878.

Ces vieux comptes comprennent la plupart des noms déjà connus.

Dans le livre des billets escomptés (Exch. B. 19), je trouve à la page pre-

mière, date du 8 juin 1874, les noms de Kortosk pour $5,126, F. X. O'Brien pour $3,000, et Mulholland et Baker pour $11,692.

Le 11 juin 1874, page 2, je trouve Ascher pour $5,820 et $425, Kortosk pour $820 et $5,870, R. Forsyth pour $655, S. Davis & Co. pour $3,878, Mulholland & Baker pour $4,068.

Le 18 juin 1874, je retrouve presque tous les mêmes noms, avec des montants de $3,892, $4,212, $7,742, $2,439, etc.

Le 24 juin 1874, je trouve en sus, Beattie et B. Furniss; le 6 mai 1875, Fish, Sheppard & Co.; le 3 janvier 1876, Wm. Head; le 6 mai 1876, W. H. Riley. J'ai pris ces dates un peu au hazard.

Voilà onze des mauvais clients qui ont fait perdre chacun, en moyenne, $100,000 à la Banque Consolidée, et qui devaient avoir déjà de beaux comptes lors de l'union des deux banques.

Durant l'année 1876, ces mêmes onze noms (Davidson étant substitué à Mulholland et Baker) ont retiré sur leurs chèques, sans provision, une moyenne de $150,000, d'après le rapport du comité, p. 19, et de $273,358 le 10 novembre 1877 (Exh. B5, p. 8 a 17, Doc. imp.). Ajoutons le *Credit Valley R.R.* qui a fait perdre $106,451, et Laidlaw, son président, $17,480.47, outre un compte à découvert pour le *Credit Valley R. R.* de $63,592.02. (Rapport du comité, p. 18.)

Evidemment, les compte de ces clients, antérieurs à 1876, étaient bien dépréciés, et une bonne part des pertes constatées plus tard à leur sujet aurait dû être rayée en octobre 1877.

Combien aurait-il fallu déduire aussi sur les sept millions de billets escomptés et courant le 30 novembre 1877, les $134,000 de billets en souffrance non garantis, et les $340,000 de billets en souffrance et prétendus garantis, dans l'état fourni au gouvernement pour le 30 novembre 1877 (pp. 25 et 26 Doc. imp.).

Les directeurs n'ont retranché en novembre 1877. que $9,294 pour dettes mauvaises et douteuses pour les six mois écoulés! (Rapport du comité, p. 8).

La crise financière et commerciale, dont parlent Sir Francis Hincks et P. S. Ross, devait être alors à son apogée, puisqu'elle a commencé en 1874 et s'est terminée vers 1879.

N'est-il pas absurde de prétendre que $9,294 étaient toutes les pertes que la banque avait souffertes durant les six mois précédents sur environ $7,500,000 de billets escomptés, au milieu d'une crise financière et commerciale qui durait depuis trois ans, quand les montants avancés sans aucune garantie s'élevaient à $594,000?

Il est plus probable, d'après le résultat, et une perte de trois millions de dollars constatée, dix-huit à vingt mois plus tard, que les pertes éprouvées par la banque à cette époque, tant sur les anciens comptes que sur les nouveaux, y compris les avances sur chèques, s'élevaient à près d'un million de dollars, et que le déficit, déduction faite des profits et de la réserve, s'élevait encore à $500,000 ou $600,000.

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Quoiqu'il en soit, je suis moralement convaincu que le dividende de $121,315.18 payé le 1er décembre 1877, l'a été à même le capital de la banque, et non avec des profits réalisés.

Il va de soi que les dividendes de mai et décembre 1878 ont aussi été payés à même le capital, car les affaires de la banque ont marché plus rapidement encore vers la ruine à partir de ce moment.

2o. Mais les directeurs, et en particulier le défendeur, sont-ils responsables envers les actionnaires du paiement de ces trois dividendes?

Les directeurs, dit la loi des banques, section 38, qui volontairement et sciemment concourent à déclarer un dividende qui peut avoir l'effet d'entamer le capital versé, sont conjointement et solidairement responsables du montant de ce dividende comme d'une dette due par eux à la banque.

La question est donc de savoir si les directeurs ont volontairement et sciemment concouru à déclarer des dividendes qui entament le capital versé.

Les actes de négligence grossière de la part des directeurs, rapportés plus haut, constituent pour eux une faute lourde équivalente à dol, et donnaient lieu de présumer que les directeurs se sont associés à la faute du gérant, et, qu'ils ont sciemment et volontairement concouru à déclarer des dividendes qui entament le capital de la banque. Celui qui ferme les yeux pour ne pas voir est responsable comme s'il avait les yeux ouverts. Quiconque abandonne à autrui la gestion d'une affaire dont il s'est chargé est responsable des actes de celui qu'il s'est substitué comme des siens propres. Les directeurs de banque, qui par négligence ou ignorance grossière de leurs devoirs, laissent dilapider les deniers de la banque par leurs employés, acceptent aveuglement de ceux-ci des états faux qu'ils pouvaient facilement contrôler, mais qu'ils n'ont pas même cherché à vérifier, qui se basent sur ces faux états, ordonnent de diviser entre les actionnaires une partie de leur capital sur forme de dividendes, que les actionnaires accepteront et dépenseront comme revenus, ne peuvent échapper à la responsabilité d'avoir volontairement et sciemment concouru à déclarer des dividendes fictifs.

D'ailleurs, il n'est pas possible de croire que les directeurs aient ignoré les avances à découvert qui étaient dans les rapports hebdomadaires et mensuels, et constatés dans les livres et comptes de dépôt; ni les prêts aux mêmes individus constatés par le livre des délibérations, le livre d'escomptes et le livre des obligations, *Liability Ledger*, ni le peu de crédit des emprunteurs dont la clientèle faisait décliner le cours des actions à la bourse dès février 1877, le défendeur reconnaissant lui-même que plusieurs des emprunteurs étaient insolvables et d'autres douteux, et qu'il ne s'est pas enquis de la valeur de ces derniers ni de la valeur des garanties offertes; il est encore impossible de croire que les directeurs ont ignoré les emprunts énormes dont la nécessité était connue de tous les employés de la banque depuis le printemps de 1878, surtout lorsqu'on se rappelle la part active prise par le défendeur dans les syndicats pour maintenir les actions de la banque à un cours non justifié par l'état réel de ses affaires.

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Je tiens donc le défendeur personnellement responsable du paiement de ces dividendes fictifs comme des pertes souffertes par suite des syndicats et de la mauvaise gestion des affaires de la banque.

Je me suis borné, jusqu'à présent, aux principes généraux du droit pour établir cette responsabilité des directeurs de la Banque Consolidée du Canada, mais je trouve des principes sanctionnés par les auteurs et la jurisprudence française et anglaise, que je vais rappeler aussi brièvement que possible.

En France, les " sociétés anonymes " sont gérées par des " administrateurs," terme qui correspond à celui de directeurs " parmi nous; tandis que les " sociétés en participation " sont conduites par des " gérants " qui seuls sont responsables personnellement des engagements de la société; mais dans les " sociétés en participation par actions " un " conseil de surveillance " est nommé pour contrôler les gérants dans l'intérêt des actionnaires. Les fonctions du conseil des surveillance n'avaient pas été définies avant la loi du 17 juillet 1856.

La loi sur la commandite rendant responsable des dettes tout actionnaire qui se mêle de l'administration, les surveillants n'osaient pas intervenir dans la crainte de se rendre responsables des dettes, et la société était laissée entièrement au gérant; le contrôle des surveillants était presque nul.

La loi du 17 juillet 1856 a chargé les membres du conseil de surveillance de vérifier les livres, la caisse, le porte-feuille et les valeurs de la société, et les a chargés de faire un rapport à l'assemblée générale sur les inventaires et les propositions de distribution de dividendes faites par le gérant. Art. 8.

La loi ajoutait, art. 10, " tout membre d'un conseil de surveillance est responsable avec le gérant solidairement et par corps: 1o. lorsque, sciemment, il a laissé commettre dans les inventaires des inexactitudes graves, préjudiciables à la société ou aux tiers; 2o. lorsqu'il a, en connaissance de cause, consenti à la distribution de dividendes non justifiés par des inventaires sincères et réguliers."

Le conseil de surveillance n'est pas établi administrateur, c'est la fonction du gérant; il ne peut même intervenir dans la direction pratique et journalière des affaires; le gérant qui est responsable personnellement doit rester libre dans son administration et n'est pas tenu de rendre compte de ses projets ni de ses opérations au conseil de surveillance; celui-ci possède cependant le pouvoir de surveiller les inventaires et la distribution des dividendes et doit informer les actionnaires des irrégularités qu'il remarque, et même au besoin provoquer la dissolution de la société. Pour parvenir à cette fin, il lui était permis de vérifier les livres, la caisse, le portefeuille et les valeurs de la société. Sous l'empire de cette loi, les membres du conseil de surveillance étaient responsables envers les associés et les tiers des inexactitudes graves dans les inventaires, qu'ils n'avaient point signalées à l'assemblée, et de la distribution de dividendes non justifiés par des inventaires sincères et réguliers.

" Il est certain," dit Bédarride, Sociétés, App. 2e. Vol. No. 115, " que les membres du conseil de surveillance, qui auraient omis de se conformer exacte-

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ment aux désirs de l'article 8, pourraient et devraient être tenus à la réparation du préjudice qui en serait résulté pour les actionnaires. Une négligence pareille acquerrait d'ailleurs les proportions du dol, et placerait ses auteurs sous le coup de l'article 10, *Culpa lata dolo æquiparatur.*"

Sourdat, " Responsabilité," II, Nos. 1193, 1201.

Les membres du conseil n'étaient cependant responsables des irrégularités de l'inventaire et du paiement des dividendes à même le capital que lorsqu'ils avaient agi sciemment et avec connaissance de cause. C'est exactement la disposition de la section 10 de la loi des banques du Canada, sujet de la déclaration de dividendes qui entament le capital. La nécessité de prouver cette connaissance a créé de grandes difficultés. Les uns ont prétendu que la signature d'un inventaire qui dissimule une partie du passif ou exagère l'actif dans le but de cacher l'état réel des affaires, de taire l'importance des pertes et d'engager les actionnaires à continuer une société que la connaissance de la vérité leur aurait fait dissoudre plutôt, donne lieu au soupçon que les membres du conseil sont associés à la fraude du gérant, mais cette présomption peut être détruite. Si cette signature a été surprise par l'erreur ou obtenue par le dol, le surveillant n'a pas agi sciemment et n'a encouru aucune responsabilité, mais il est tenu de prouver son allégation d'erreur et de dol. Bédarride, Id. Nos. 127 et 129.

Ce serait une faute lourde de s'abstenir de s'assurer de la sincérité des faits et d'accepter aveuglément les indications du gérant.

Si la recherche dont le membre du conseil s'est abstenu était facile et devait nécessairement aboutir à faire découvrir la fausseté du rapport, il ne peut donner aucune excuse valable d'avoir laissé le gérant supposer des valeurs qui n'existent pas ou qui ont cessé d'appartenir à la compagnie, d'annoncer un actif que les écritures démontent, de porter un reliquat de caisse lorsqu'il y a un déficit, de porter comme bonnes des créances mauvaises, ou comme rentrées, d'autres créances qui existent encore en portefeuille et qui n'entreront peut-être jamais. Un simple coup d'œil sur les livres devait nécessairement amener la découverte de la fraude du gérant. Celui qui, ayant reçu et accepté la charge de surveillant et qui se serait volontairement abstenu de vérifier les livres, s'est, dit Bédarride, volontairement associé à cette fraude et il est juste qu'il en supporte les conséquences, Id. 130, 131. Il en serait autrement si les livres avaient, dès longtemps, été préparés en vue de tromper, et si l'inventaire en reproduit fidèlement la substance ; les membres du conseil auraient alors été eux-mêmes victimes et n'auraient pu découvrir la fraude du gérant qu'en contrôlant son administration, tandis que leurs fonctions se bornent à l'examen des livres et de la caisse. Id. No. 132.

En résumé, la question de savoir si le membre a agi sciemment et avec connaissance de cause est nécessairement subordonnée aux faits et circonstances ; ce qui est certain cependant, c'est que les membres du conseil sont tenus d'examiner les livres, la caisse, les valeurs et de contrôler les inventaires ; ils ne pourraient se faire représenter par un mandataire dans cette fonction ; la nomi-

nation d'un conseil de surveillance exclut formellement le pouvoir de se substituer un tiers. Ce qui a déterminé cette nomination, c'est la position personnelle de celui qui en a été l'objet. Id. No. 134; Vavasseur id. 11, Nos. 802 à 806.

A plus forte raison, il ne peut pas s'en rapporter au gérant et s'excuser en disant qu'il a été trompé par les états qu'il lui a fournis. Tel était l'esprit de cette loi de 1856. Cependant la responsabilité des membres du conseil était fréquemment inappliquée à cause de la nécessité de prouver que les membres du conseil avaient agi sciemment.

La jurisprudence cependant, lorsqu'elle exigeait une connaissance positive en vertu de l'art. 10 de la loi de 1856, atteignait le surveillant par le droit commun qui le rend responsable de sa négligence, en vertu de l'article 8 qui l'oblige de vérifier la caisse, les valeurs et les livres, et en vertu des articles 1383, 1850 et 1992, C. N., sur le mandat, la société et le quasi délit. "Le droit commun continue d'être la règle de [illegible], constituant l'incurie, la négligence et la faute auxquelles ne s'appliquait pas la responsabilité spéciale créée par la loi du 17 juillet 1856, dit la Cour de Cassation." (D. 64, 1, 377.) Cette loi n'a pas eu la pensée de se substituer en [illegible] droit commun pour effacer ou affaiblir, dans les cas auxquels elle ne pourvoit pas expressément, la responsabilité imposée antérieurement."

Voir aussi Caen, 16 août 1864, D. 65, 2, 193 et note 3.

Lyon, 8 juin 1864, D. 65, 2, 197. Vavasseur, vol. 2, No. 689, commentant et interprétant l'arrêt de la Cour de Cassation, dit: "Ainsi interprétées, les expressions sciemment, en connaissance de cause, n'ont rien que d'équitable: au conseil disant pour s'excuser: Je n'ai pas su, je n'ai pas connu, on répond: Vous auriez dû ou pu savoir et connaître. *Idem, scire et scire debuisse aut potuisse.*"

On peut dire avec Vavasseur, vol. 1, No. 693, que sous la loi de 1856 les actionnaires étaient tenus de produire la preuve que le conseil avait agi sciemment et en connaissance de cause, jusqu'à cette preuve il y a présomption que le conseil a vérifié et ignoré les pertes; tandis que sous l'empire du droit commun et de la loi de 1867, dont nous allons parler, c'est la présomption inverse qu'il faut suivre; le fait seul de la distribution de dividendes fictifs constitue en faute les membres du conseil de surveillance; c'est à eux qu'il appartient de détruire cette présomption en prouvant qu'ils ont été trompés par le gérant. Vavasseur, vol. 1, No. 693.

La loi du 24 juillet 1867 a donc rappelé la loi de 1856, et l'article 9 porte: "Les membres du conseil de surveillance n'encourent aucune responsabilité en raison des actes de la gestion et de leur résultat; chaque membre du conseil de surveillance est responsable de ses fautes personnelles, dans l'exécution de son mandat, conformément aux règles du droit commun." Cette disposition rapproche davantage la loi française de la nôtre en ce que, dit Sourdat, Responsabilité, vol. 2, No. 1193: "Les conseils sont tenus responsables, non pas seulement du fait spécial d'inexactitude dans les inventaires et de distribution de

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dividendes fictifs, mais des autres fautes qu'ils commettraient dans l'exécution de leur mandat, par example s'ils omettaient de vérifier, en tout ou en partie, les livres, la caisse, le portefeuille et les valeurs de la société, comme les y oblige l'article 10."

"Que serait un conseil de surveillance qui ne surveillerait rien et ne remplirait pas, ou ne remplirait que d'une manière incomplète et sans attention, sans vigilance sérieuse, la mission qu'il a acceptée? Mieux vaudrait ne pas établir, et forcer ainsi les intéressés à s'occuper eux-mêmes de leurs affaires." Sourdat, Id., No. 1193.

Cette loi est basée sur le principe que les membres du conseil de surveillance sont des mandataires, et comme tels soumis à la responsabilité que le droit commun impose à tous ceux qui sont revêtus de cette qualité.

"Les inexactitudes dans l'inventaire, dit Sourdat, Id., No. 1201, seraient plus souvent constatées si le conseil de surveillance examinait en réalité et avec soin les livres, les comptes courants, les valeurs remises ou les sommes reçues par les clients, etc." Sans doute, dit-il, "il en résulte pour le conseil un travail sérieux, quelquefois difficile, et nécessitant des connaissances spéciales en matière de comptabilité. Mais ce sont là des conditions inhérentes à la nature de semblables fonctions qu'il ne faut pas accepter sans être en état de les remplir."

La Cour de Cassation et quelques Cours d'Appel ont décidé que le conseil est responsable des dommages s'il s'est contenté de simples balances de comptes, sans vérifier les livres, la caisse et le portefeuille; alors surtout qu'en exigeant un inventaire et en faisant des vérifications, les membres du conseil, hommes versés dans les affaires, auraient facilement constaté que le gérant par complaisance ou faiblesse, avait mis la société à découvert vis-à-vis de débiteurs ne présentant aucune garantie sérieuse pour des sommes considérables; qu'ils auraient vu que le gérant, pour masquer le découvert et présenter des balances mensongères, recevait de ces débiteurs des effets qui n'étaient jamais payés à l'échéance, et qu'il plaçait dans le portefeuille où ils figuraient comme valeurs réalisables; c'est en vain, dit la Cour d'Appel de Caen, que pour se soustraire à la responsabilité, les membres du conseil invoqueraient les difficultés et les longueurs du travail de vérification des livres, du portefeuille et des valeurs sociales, ou les obstacles résultant de leurs opérations personnelles; ces considérations ne pouvaient les dispenser des devoirs qu'ils avaient acceptés à raison de leurs connaissances spéciales et de leur habileté en affaires.

Le tribunal civil de première instance dans l'affaire de la Compagnie immobilière, (D. 70, 2, 121) avait, par les motifs suivants, refusé d'absoudre les administrateurs qui prétendaient n'avoir pas pris une part active à l'administration de la société et s'en être rapportés au comité d'exécution. "Attendu que le mandat qu'ils avaient accepté ne leur permettait pas de s'en rapporter à l'appréciation des autres administrateurs ou des agents de la société; que les statuts leur imposaient le devoir d'administrer personnellement; qu'ils ne pouvaient prétendre que, absents lors des délibérations relatives aux actes importants, lors de rédactions des rapports aux assemblées générales, ils devaient être affranchis

de tous recours ; que les administrateurs n'avaient conservé leurs fonctions qu'en restant responsables vis-à-vis de leurs mandants des actes de conseil qui pourraient porter préjudice à ces derniers ; que les actionnaires auxquels toute intervention directe dans l'administration était impossible avaient droit de compter sur chacun des membres du conseil ; que l'art. 27 des statuts autorisait, il est vrai, les délégations au comité d'exécution, à l'un des membres du conseil ou à toute personne désignée par un mandat spécial, mais que, en usant de cette faculté, les administrateurs conservaient leur qualité et restaient soumis aux devoirs qui y étaient attachés."

MM. X. et X., a dit encore M. Dupré Lasalle, avocat général, plaidant dans la cause de la Compagnie immobilière, (D. 70, 2, 121,) invoquent leur bonne foi, ils présentent à l'appui le tableau des pertes qu'ils ont éprouvées en prenant des actions nombreuses du crédit mobilier et des compagnies que le crédit mobilier patronnait ; leurs collègues, sans le dire, ont fait des pertes semblables, sinon plus grandes, et personne ne conteste leur dévouement à la compagnie ni leur honorabilité ; mais la question n'est pas de savoir s'ils ont souffert un préjudice, mais s'ils ont fait ce qui était en eux pour prévenir le préjudice que les actionnaires ont souffert."

"Quant aux autres administrateurs (en dehors du comité d'exécution), ils nous ont donné un triste spectacle lorsqu'ils sont venus à votre barre l'un après l'autre, déclarer qu'ils n'avaient ni étudié les travaux de Marseille, ni examiné les traités, ni vérifié les comptes, ni contrôlé les dividendes ; et me rappelant que l'on a souvent répété que la sévérité des tribunaux empêcherait les sociétés de trouver des administrateurs, je me disais qu'elles ne seraient pas si malheureuses d'être privées de ces conseils qui ne voient rien, qui ne savent rien, et couvrent de leurs noms et de leur réputation des actes blâmables qu'ils n'empêchent pas. Si on leur reprochait un acte unique et isolé, j'admettrais qu'ils pussent exciper de leur absence ou de leur inattention pour en écarter la responsabilité ; mais il s'agit de faits nombreux d'un système suivi constamment pendant plusieurs années, de la fixation des dividendes, des opérations les plus importantes pour le conseil, et en même temps les plus faciles à surveiller. Ils ne peuvent prétendre qu'ils ont tout ignoré en tout temps ; il ne saurait leur suffire d'invoquer leur négligence pour échapper à la solidarité de mesures qui n'ont pu être prises qu'avec leur participation."

Passant au droit anglais : "Il n'est pas douteux", dit Smith, "*Law of Negligence*," No. 160, "Que les directeurs d'une compagnie doivent apporter envers les actionnaires plus que le soin ordinaire, parce qu'ils se donnent comme des personnes capables de diriger des affaires compliquées et ils invitent le public à confier leur argent à une compagnie qu'ils entreprennent de conduire."

Wharton, *On Negligence*, livre 11, No. 510 :

"Whatever be the consideration which induces a person to undertake the control of another's affairs, he is required, if there is confidence bestowed and accepted, to show the diligence a good man of business is accustomed to show in the exercise of such a trust. A man holding himself out to the public as a business

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man capable of properly acting as a bank director, is liable for "*culpa levis*" in not showing the diligence a good bank director should. What this diligence is, is of course determined in part by the charter of the bank, in part by general commercial law, in part by business usage."

Lord Romilly, in giving judgment in Turquand v. Marshall, said: "I am also of opinion that the other directors, who may not have examined the books, must be taken to be liable for all the consequences which would properly flow from the fact if they had been acquainted with the contents of them. It was a duty which they had undertaken to perform by becoming directors, and, therefore, I am of opinion that they are liable for the falsity of the accounts." L. R. 6 Eq. 112,130.

Dans une cause de Joint Stock Co. v. Brown, L.R., 8 Eq, 404, James, V.C., dissit: "Of course it is quite clear that no company of this kind could be carried on if every director were obliged to sign every cheque, and it is, therefore, required that the cheques should be signed by a certain number of persons for the safety of the Company. That implies, of course, that every one of those persons takes care to inform himself, or, if he does not take care to inform himself, is willing to take the risk of not doing so, of the purpose for which, and the authority under which the cheque is signed; and I cannot allow it to be said for a moment that a man signing a cheque can say, "I signed that cheque as a mere matter of form; the secretary brought it to me; a director signed it before me; two clerks have countersigned it; I merely put my name to it."

Voir aussi Rance's case, L.R. 6 Ch. 104.

Morse on Banking, 2nd Edit., p. 134 et suiv.

Etendue de la responsabilité du défendeur.—La dernière question est celle de l'étendue de la responsabilité des directeurs, particulièrement du défendeur dans les pertes subies par la Banque Consolidée.

Sur un capital de.....	$3,477,222 00
Et une réserve de.....	247,650 17
Formant un total de.....	$3,724,872 17
Il n'a été réalisé pour les actionnaires (sauf certains frais d'administration), que.....	460,000 00
Laissant une perte de.....	$3,264,872 77

Dois-je, ou puis-je tenir les directeurs responsables personnellement de cette somme entière?

Les directeurs ne sont responsables que dans les limites du dommage qu'ils ont causé par leur négligence et leur incurie. Est-ce que la perte de cette somme de $3,264,872 17 est due entièrement à la négligence et à l'incurie des directeurs, ou d'autres causes y ont-elles contribué?

Quand les deux banques, savoir la *Royal Canadian Bank* et la *City Bank* se sont fondues ensemble en 1876, sous le nom de la *Consolidated Bank*, elles ont amené à cette dernière plusieurs mauvais clients déjà endettés envers l'une ou

l'autre des deux banques ; il est vrai que leurs comptes n'étaient pas alors trop élevés, en comparaison de ce qu'ils le sont devenus plus tard ; on peut dire encore que si la Banque Consolidée a perdu sur ces vieux comptes, cela est dû en grande partie à l'incurie et à la négligence des directeurs de la nouvelle institution, mais il est indubitable que la Banque Consolidée a perdu des sommes assez élevées sur les vieux comptes, que tout le soin possible n'aurait pu éviter ; je ne mentionnerai que les sommes dues par le "*Credit Valley Railway*," par Ascher & Co., et quelques autres des onze clients déjà connus.

En second lieu, il y a les pertes ordinaires dans le commerce de banque, aggravées dans le cas actuel par la crise financière et commerciale qui a duré de 1876 à 1879, et dont plusieurs banques canadiennes et institutions financières ont été les victimes. Je ne doute pas que plusieurs des pertes de la Banque Consolidée sur les avances de fonds ne soient dues à cette crise. La banque a perdu aussi par la dépréciation de ses immeubles, perte que je ne puis attribuer qu'à cette cause, et qui fut assez forte.

Enfin, la liquidation forcée et la réalisation hâtive de l'actif de la banque, dans un temps de crise, ont nécessairement produit un montant inférieur à la valeur de l'actif. Il est bien vrai que cette liquidation forcée est due à l'incurie des directeurs, et que ceux-ci en sont responsables, mais cette responsabilité doit être tempérée par suite de la crise financière qui a rendu plus difficile la réalisation de l'avoir. Je puis ajouter encore que malgré les pertes énormes souffertes par la Banque Consolidée lors de sa liquidation, le gérant et les directeurs ont pu se faire illusion sur les risques connus avec quelques-uns des clients.

Enfin, la responsabilité des directeurs doit être appliquée avec modération. S'il importe de protéger la bonne foi publique contre la négligence des administrateurs, il serait injuste de les sacrifier aux actionnaires, et de les transformer en assureurs du capital de la banque, comme dit un arrêt d'une cour française. Ce serait rendre la charge impossible ; personne ne voudrait plus l'exercer. "Il est impossible," dit Vavasseur, No. 701, parlant de surveillants, de poser *a priori* une règle uniforme ; la responsabilité sera tantôt de tout le passif, tantôt d'une partie seulement. "S'il y a eu une faute commise par les membres du conseil de surveillance, dit un arrêt de la Cour d'Appel de Caen, du 16 août 1864 (D. 65, 2, 192), il y a aussi un malheur commun qui doit peser sur tous ; il ne serait ne juste ni conforme à l'esprit de la loi que le mandataire gratuit, auquel on ne peut reprocher que de l'incurie et de la négligence, fût traité aussi sévèrement que le mandataire salarié, ou le mandataire coupable d'intention mauvaise."

Il a été jugé, dans les espèces suivantes, que la réparation devait consister : 1o. Dans une quote part des pertes, savoir dans 4-5 des pertes subies par les créanciers, suivant la durée des fonctions des surveillants (D. 67, 2, 19, Arrault, 11 janvier 1867, Cour d'Appel d'Angers.)

2o. Dans le paiement aux créanciers représentés par les syndics, savoir par l'un des directeurs, d'une somme de 400,000 francs, par un deuxième d'une

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somme de 160,000 francs; par quatre autres directeurs de 40,000 francs chacun, sans solidarité (D. 1867, 2, 179, Créanciers du comptoir d'escompte du Haut-Rhin, Cour de Metz, 14 août 1867.) Voir une seconde espèce, (D. 67, 2, 188, 2e. col.)

3o. Les administrateurs d'une société anonyme ont été condamnés à payer aux créanciers 15 par cent sur leurs créances, les dommages étant réduits vu que les défendeurs, hommes honorables et d'une entière bonne foi, possédaient encore, eux et leurs familles, près de la moitié des actions, et qu'ils étaient encore créanciers, en comptes courants, de sommes considérables pour lesquelles ils subissaient le sort commun, (D. 67, 2, 238, Comptoir d'escompte de Ste. Marie aux Mines, 3 juillet 1867, c. de Colmar.)

4o. Les premiers juges ayant condamné les administrateurs de la Société Générale du Crédit Mobilier à payer le montant entier des actions nouvelles souscrites par les actionnaires sur remise du titre; la Cour d'Appel de Paris par arrêt du 1er août 1868, trouvant que la réparation dépassait le préjudice éprouvé et qu'elle n'avait pas les données suffisantes pour déterminer la quotité du dommage éprouvé, ordonna qu'il fut fixé par état, c'est-à-dire à l'aide de documents et d'appréciations nouvelles.

Par un second arrêt du 28 juin 1870, la Cour a fixé à 100 francs par action le préjudice à la réparation auquel l'actionnaire avait droit.

Un troisième arrêt en date du 5 juillet 1870, rendu pour interpréter le précédent, oblige les souscriptours soit à représenter les titres nouveaux, soit, à défaut de présentation, à justifier du prix d'aliénation des dits titres, afin que le souscripteur qui aurait vendu son titre à un taux supérieur au taux d'émission, ne réclame pas la réparation d'un préjudice qu'il n'aurait pas éprouvé, ou enfin que l'indemnité qui ne peut être supérieure à 100 francs par action soit réduite suivant le taux des ventes.

Il fut rendu encore plusieurs autres arrêts par la même Cour pour déterminer les modes de preuve à fournir par les réclamants, suivant les circonstances de chaque cas, pour avoir droit à l'indemnité de 100 francs par action. (2 Vavasseur, des Sociétés, No. 883.)

5o. L'arrêt de la Cour de Paris du 22 avril 1870 au profit des acheteurs d'actions de la Compagnie immobilière, trompés par la distribution de dividendes fictifs, se basant sur ce que non seulement les acheteurs avaient payé trop cher, mais qu'ils n'auraient pas consenti à se rendre actionnaires s'ils avaient connu la vérité, oblige les administrateurs à rembourser le prix d'achat des actions à la charge par les demandeurs de leur remettre leurs titres. Vavasseur, Id.

6o. La Cour accorde 80 francs par obligation à une autre classe d'actionnaires dans la Compagnie immobilière.

7o. Les administrateurs de la Société des Docks de Saint-Ouen sont condamnés envers les actionnaires au paiement total (près d'un million et demi de francs) des actions qu'ils avaient, dans leur intérêt personnel, négligé de vendre en temps opportun.

8o. Le directeur du Sous-comptoir du commerce fut condamné envers les

actionnaires à leur tenir compte de la perte due à son incurie, d'une créance de la société ; 2 Vavasseur, Id.

Me guidant sur ces précédents et prenant en considération toutes les circonstances, je fixe la responsabilité du défendeur à 60 par cent des pertes subies par les actionnaires, et j'établis ces pertes à 88 par cent du capital payé, déduction faite de 12 par cent environ distribués aux actionnaires par les liquidateurs sur les $460,000 réalisés pour eux.

Le demandeur est propriétaire de 1115 actions de $100 chacune, formant un total de $111,500 ; à 88 par cent sur ce dernier chiffre, les pertes par le demandeur sur ces actions payées sont de $98,120 ; 60 par cent sur $98,120 donnent $58,872 qui est le montant des pertes du demandeur que je considère dues à la mauvaise administration des directeurs.

En conséquence, je condamne le défendeur à payer au demandeur $58,872 avec intérêt du 15 avril 1882, jour de l'assignation en cette cause, et les dépens, sauf le recours du défendeur contre qui de droit.

The following is the judgment:—

"La Cour ayant entendu les parties par leurs avocats, sur le mérite de cette cause, examiné la procédure, les pièces produites, la preuve orale et documentaire, et sur le tout mûrement délibéré :

"Considérant que le demandeur en sa qualité d'actionnaire dans la Banque Consolidée du Canada et comme cessionnaire de plusieurs co-actionnaires réclame du défendeur une somme de $150,000, montant des dommages qu'il prétend avoir soufferts par la mauvaise administration du défendeur, l'un des directeurs de la dite Banque Consolidée du Canada, et celle de ses co-directeurs:

"Sur le plaidoyer de prescription :

"Considérant que la dite banque a commencé ses opérations en l'année 1876, que le défendeur a été nommé dans la même année, l'un des directeurs de la dite banque, et qu'il a continué d'agir comme tel jusqu'à sa liquidation forcée, au mois d'août 1879 ;

"Que la responsabilité que le défendeur pourrait avoir encourue à l'égard des actionnaires de la dite banque, proviendrait du mandat confié au défendeur et aux autres directeurs par les actionnaires ;

"Que l'action qui appartient au mandant dans ce cas ne se prescrit pas par deux ans comme les délits et les quasi-délits, mais par trente ans seulement ;

"Que les actes de mauvaise administration, reprochés au défendeur, auraient eu lieu dans la période comprise entre les années 1876 et 1879 ;

"Renvoie le plaidoyer de prescription produit en cette cause par le défendeur.

"Sur le plaidoyer de droits litigieux :

"Considérant que le transport du droit d'action en dommages que certains actionnaires de la dite banque ont consenti au demandeur n'a été consenti que dans le but de constituer le demandeur *procurator in rem suam* pour les dits cédants ;

"Que les dits cédants auraient pu porter une action collective avec le deman-

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deur contre le défendeur et former pour cet objet une société civile *ad litem*, et qu'il leur était loisible de prendre la voie du transport, ainsi qu'ils l'ont fait, et que ce transport ne constitue pas la vente de droits ligitieux prohibée par la loi;

"Que d'ailleurs la vente de droits ligitieux ne donnerait lieu dans le cas actuel, qu'au remboursement de ce qu'il lui a coûté au demandeur et non au rejet de la demande basée sur cette vente ou transport;

"Rejette le plaidoyer de droits ligitieux.

"Et sans s'arrêter à la question de savoir si l'abandon par la banque ou par la majorité des actionnaires, du droit d'action en dommages contre les anciens directeurs pour leur mauvaise administration, ferait perdre aux actionnaires l'action personnelle qu'ils peuvent avoir contre les dits directeurs à cette occasion, vû que le défendeur ne plaide pas l'abandon du droit d'action par la banque, et qu'au contraire il plaide spécialement que la dite banque n'a pas refusé de poursuivre les anciens directeurs au sujet de leur mauvaise administration; vû en outre que le demandeur n'a pas prouvé, pour justifier son action personnelle comme actionnaire, que le refus de la banque ou de la majorité des actionnaires de laisser poursuivre le défendeur et ses co-directeurs en dommages par les actionnaires au nom des demandeurs, ce qui n'entraîne pas l'abandon par la banque de son droit d'action; vû enfin que la seule résolution adoptée par la majorité en valeur des actionnaires est qu'une action ne serait pas intentée contre les anciens directeurs par quelques actionnaires au nom de la banque, et avec ses fonds.

"Au fonds: Considérant que le demandeur accuse les directeurs de la dite banque de négligence et de défaut de surveillance, spécialement d'avoir virtuellement abandonné au gérant l'administration dont ils étaient eux-mêmes chargés par la loi; d'avoir accepté du gérant et des autres employés les états par eux fournis sans les contrôler ni les vérifier; de n'avoir pas examiné les livres de la banque pour se mettre au courant des affaires qu'elle transigeait;

"Que par suite de cette négligence des directeurs et de leur mauvaise administration la banque a perdu durant les deux années qui ont précédé le premier août 1879, une somme de trois millions de dollars sur un capital de $3,477,224, outre une réserve de $247,650;

"Que le demandeur allègue les faits suivants de mauvaise administration, savoir:

"1o. Que les directeurs ont prêté les fonds de la banque à des personnes insolvables et déjà endettées à la banque par des montants considérables, sans garantie ou sur des garanties insuffisantes, ou même sur de simples chèques sans dépôts en banque;

"2o. Que la banque pour payer les dividendes et rencontrer ses obligations recevait des dépôts, et faisait des emprunts à des taux ruineux;

"3o. Que les directeurs ont déclaré et payé les dividendes à même le capital de la banque;

"4o. Que les états fournis au gouvernement étaient faux et portaient dans le

but de tromper le public et les actionnaires qui, sur la foi de ces états, les ont continués en exercice; que les états représentent comme argent en caisse, de simples reconnaissances ou chèques de la part de débiteurs insolvables, et que les montants empruntés des banques étrangères étaient entrés comme dépôts ordinaires;

"5o. Que les directeurs ont joué à la hausse et à la baisse avec les fonds de la Banque, lui faisant perdre des sommes considérables;

"Que le défendeur et ses cédants possédaient durant cette période 1115 actions payées de $100 chacune dans le capital action de la dite Banque, et qu'il a souffert un dommage proportionné à la perte éprouvée par la Banque sur son capital et sa réserve;

"Considérant que le défendeur plaide qu'il a géré les affaires de la Banque de bonne foi, au meilleur de sa connaissance; qu'il n'est pas coupable de négligence; que les pertes sont dues à la conduite du gérant général Rennie, du comptable Morgan, et des autres employés de la Banque qui ont trompé les directeurs, et leur ont caché les informations qu'ils possédaient et les transactions qu'ils faisaient;

"Considérant que par la loi des Banques, 34 Viet. ch. 5, le capital, les biens et les affaires de la Banque sont administrés par un bureau de directeurs qui peut nommer les employés nécessaires (sects. 30 et 33);

"Que ces directeurs et administrateurs sont tenus de soumettre à chaque assemblée annuelle des actionnaires, un état complet et détaillé des affaires de la Banque, avec les indications mentionnées au statut, et montrant d'un côté les engagements de la Banque et les sommes dues par elle, et de l'autre son actif et ses ressources, et indiquant le montant des sommes dues à la Banque, échues et non payées, avec une estimation de la perte probable à essuyer sur ces sommes (Id. sect. 37);

"Que les livres, la correspondance et les fonds de la Banque doivent être en tout temps soumis à l'examen des directeurs, tandis que les actionnaires n'ont pas le droit d'examiner les comptes d'aucune personne qui transige avec la Banque (Id. sect. 37);

"Que ce sont les directeurs qui déclarent les dividendes à même les profits réalisés, et que les directeurs qui volontairement et sciemment concourent à déclarer un dividende qui peut avoir l'effet d'entamer le capital versé, sont conjointement et solidairement responsables du montant de ce dividende comme dette due par eux à la Banque (Id. sects. 36 et 10);

"Enfin, que le président ou le directeur agissant comme tel, et le gérant ou caissier sont tenus de préparer, signer et transmettre au gouvernement, pour être publiés dans la Gazette Officielle, des états mensuels de la situation de la Banque dans la forme indiquée au statut (Id. sect. 13);

"Et que le président, directeur, gérant, caissier ou autre officier de la Banque, qui dresse, signe, approuve ou ratifie un état faux au sujet des affaires de la Banque, est responsable en dommages envers tous ceux qui seraient induits en erreur par cet état (Id. sect. 63);

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"Considérant que le mandataire dans l'exécution du mandat doit agir avec l'habileté convenable et tous les soins d'un bon père de famille, c'est-à-dire d'un administrateur prudent, art. 1700 C.C., "*Of a prudent administrator,*" et qu'il est responsable du dommage causé par sa faute, soit par son fait, soit par imprudence ou inhabileté (1053 C. C.);

"Que le mandataire répond de celui qu'il s'est substitué dans l'exécution du mandat lorsqu'il n'est pas autorisé à le faire. Art. 1711;

"Que les fonctions d'administrateurs de Banque doivent être exercées par eux personnellement et ne peuvent être déléguées;

"Que les directeurs peuvent et doivent à la vérité, choisir des employés pour les aider dans l'administration des affaires de la Banque, mais que le devoir des directeurs comme administrateurs, est de surveiller les employés qu'ils ont nommés, et qu'il ne peuvent leur déléguer leurs fonctions d'administrateurs.

"Que les directeurs de banques sont responsables solidairement des actes d'administration, les uns des autres, comme dans le cas où plusieurs mandataires sont établis ensemble pour une même affaire. Art. 1712, C. C.;

"Considérant que la question soulevée par le défendeur est de savoir si les directeurs sont coupables de négligence et s'ils ont apporté dans l'exécution de leurs fonctions l'habileté convenable et les soins d'un administrateur prudent ou d'un bon père de famille, et que pour établir cette responsabilité contre les directeurs de banques, il n'est pas nécessaire de prouver contre eux la fraude et la mauvaise foi, mais qu'il suffit d'établir la négligence ou l'incurie;

"Considérant qu'il y a lieu d'examiner:

"1o. Sur la question d'administration, si la négligence et le défaut de surveillance reprochés par le domandeur au défendeur sont fondés, et si cette négligence a été préjudiciable à la Banque:

"2o. Si la Banque a distribué des dividendes non justifiés par les profits et qui ont entamé le capital payé, et si les directeurs ont consenti à cette distribution en connaissance de cause.

"1o. En ce qui touche l'administration.

"Considérant que la Banque Consolidée du Canada a été organisée le 10 mai 1876 par la fusion de deux banques, savoir, The City Bank, de Montréal, et The Royal Canadian Bank, de Toronto;

"Que le défendeur a été l'un des directeurs provisoires de la nouvelle Banque et qu'il a continué à en être directeur jusqu'à sa liquidation;

"Que le capital payé de la Banque Consolidée était à cette époque de $3,477,224.00, et la réserve de $247,650.17, formant un total de $3,724,874.17, d'après les états fournis par les directeurs élus en juin 1876 et les années suivantes;

"Que trois ans plus tard, savoir, le 31 juillet 1879 lorsque la Banque Consolidée a fermé ses portes, la réserve était disparue ainsi que le capital payé moins $460,000.00 qui ont été réalisés par les actionnaires après le paiement des dettes;

"Que les 1er mai et 1er décembre 1876, 1877, 1878, les directeurs ont déclaré des dividendes semi-annuels de trois et trois demi pour cent sur le capital payé

accompagnant chaque fois ces déclarations de dividendes de rapports brillants ;

" Considérant que la perte de la réserve et du capital de la Banque dans un espace de temps aussi court, provient en grande partie des avances et des escomptes à des clients insolvables ou qui le sont devenus plus tard ;

" Que les pertes de ce chef constatées par la liquidation se montent à plus de trois millions de dollars, et que seize de ces comptes, dont douze ou treize étaient d'anciens clients de la Banque de la Cité, ont fait perdre à la Banque Consolidée $1,600,000.00.

" Que la plupart de ces clients étaient déjà endettés pour des montants élevés envers la Banque de la Cité lors de la dite union, et que le montant de leurs obligations a continuellement augmenté à partir de cette époque et surtout à partir de l'année 1877 ;

" Que leurs comptes étaient déjà à découvert (*overdrawn*) pour des montants considérables vers la fin de l'année 1876 ; celui d'Ascher & Co., le plus important de tous, puisqu'il a fait perdre au-delà d'un demi-million de dollars à la Banque, était à découvert, à la date du 19 décembre 1876 de $17,486.02 ; le 20 juin 1878 de $85,103.70 ; le 5 juillet 1878 de $109,845.59 ; et à la date du 10 novembre 1878 de $153,529.28 ;

" Que le 10 novembre 1877, les avances à découvert (*overdrafts*) s'élevaient à $583,291.59 ; le 10 mai 1878, elles s'élevaient à $1,107,037.24 ;

" Que la Banque n'avait aucune garantie pour ces avances que le chèque du client ou son bon sous la forme d'un billet à demande : , que les chèques augmentaient d'autant le débit du compte des dépôts, et correspondaient à des billets dus et non payés à l'échéance ;

" Que dans les états annuels et semi-annuels préparés par les dits directeurs, et dans les états fournis au gouvernement, ces diverses sommes étaient portées au compte des billets escomptés et courants.

" Que le caissier, *Receiving Teller*, a gardé pendant trois ans, et compte comme de l'argent en caisse, des billets en souffrance de ces même clients pour des montants variant de cinquante mille à deux cent mille dollars, à la connaissance de Rennie, le gérant général, de l'assistant gérant, du comptable général, du comptable de Montréal et de deux des directeurs ;

" Qu'il a pendant trois mois, gardé en sa possession comme de l'argent en caisse, les chèques de ces mêmes clients au montant de $221,495.00, et que cette somme a même dépassé $300,000.00.

" Que ces faits étaient constatés journellement dans les livres de caisse du caissier, *Receiving Teller* ;

" Que cette manière d'agir avait un double résultat, savoir, de réduire le montant des billets en souffrance et d'augmenter le montant en caisse, et par ce moyen de payer les dividendes avec de l'argent emprunté aux autres banques ;

" Que tous les découverts étaient entrés sous le titre d'*overdrafts* ou découverts dans le compte des dépôts de chaque client ; le total à découvert était entré chaque semaine dans l'état hebdomadaire, copié dans un livre tenu à cet effet

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pour l'information des directeurs, et aussi dans l'état général semi-mensuel des affaires de la banque, copié également dans un livre à cet effet ;

"Que des escomptes considérables [illegible] accordés tout le temps à ces mêmes clients et sanctionnés chaque fois [illegible] ars ;

"Qu'un livre des escomptes [illegible] ainsi qu'un livre des obligations par billets de chacun des clients, pour l'information des directeurs ;

"Qu'il suit de là que malgré les agissements irréguliers de Rennie et des autres employés que la banque contrôlait, les directeurs auraient pu facilement et à toutes les époques se rendre compte des montants avancés à chacun des clients et du total des découverts s'ils eussent pris la peine d'[illegible] examiner les livres de la Banque ;

"Qu'ils auraient également connu les irrégularités du caissier, *Receiving Teller*, s'ils avaient fait inspecter sa caisse par l'inspecteur général de la banque, Campbell, ou s'ils l'avaient inspecté eux-mêmes, comme ils l'ont fait les deux premières années ;

"Que lors de ces deux inspections, ces irrégularités ont été signalées aux deux directeurs qui l'ont faite, et que ceux-ci n'ont fait aucun reproche au dit caissier ni au gérant, et n'en ont fait aucun rapport aux autres directeurs ;

"Que le défendeur, examiné sous serment, a prétendu que ses fonctions de directeur se bornaient à donner son avis sur les questions que le gérant soumettait aux directeurs à propos de l'escompte demandé et des dividendes à déclarer ; que sur ces questions, il se guidait entièrement sur les états fournis par le gérant, sans les contrôler en aucune manière, qu'il n'a jamais examiné les livres de la Banque ; qu'il n'a jamais vérifié les garanties données par Ascher ou les autres emprunteurs, ni évalué les valeurs de la banque avant de déclarer les dividendes, s'en rapportant entièrement à Rennie ; qu'il n'a eu aucune connaissance personnelle des comptes des clients ; qu'il n'a pas eu connaissance des emprunts de la banque au montant de quatre millions de dollars faits depuis avril 1877 à mai 1879 ; qu'il savait que quelques-uns des clients étaient insolvables, et qu'il ne s'est jamais inquiété pour quel montant les autres clients étaient solvables, qu'enfin la seule connaissance qu'il a des affaires de la banque, est celle que Rennie et le caissier, *Receiving Teller*, lui en ont donnée ;

"Considérant que la seule défense faite par le défendeur et sir Francis Hincks, président de la dite banque durant la dite période, telle que faite dans leur examen comme témoins, est que les directeurs ont été trompés sur le montant des avances faites aux clients par Rennie, le gérant, qui leur aurait présenté des états faux ;

"Que cette excuse est inacceptable, attendu que les directeurs avaient pour se renseigner le livre d'escomptes et le livre des obligations *Liability Ledger*, ainsi que le livre des dépôts dans lequel les découverts étaient entrés régulièrement ;

"Qu'il est faux que Rennie ait accordé de l'escompte hors de la connaissance des directeurs ;

"Qu'il suit de là que le défendeur s'en est rapporté au président et au gérant à qui il abandonna virtuellement les affaires de la banque, et qu'il est responsable de la mauvaise administration de ceux qu'il s'est délégués ;

"Considérant que les emprunts par la banque au montant de quatre millions dans l'espace de deux années, ont été cachés aux actionnaires et au public et entrés frauduleusement sous le titre de dépôts ;

"Que le compte des billets escomptés et courants ne contenait pas seulement des sommes de six cent mille à huit cent mille dollars de comptes à découvert, *overdrawn accounts*, mais encore divers montants pour dépenses préliminaires, intérêts payés, papeterie, loyer, etc ;

"Considérant qu'il était notoire dans le monde commercial de Montréal, que la Banque Consolidée avançait ses fonds à des personnes d'une solvabilité douteuse ; que cette connaissance a eu l'effet de faire tomber la valeur des actions de la banque dès le mois de février 1877, et que dès cette époque, Rennie avec la sanction expresse du président, employa Simpson, broker, pour acheter aux frais et dépens de la banque, les actions de celle-ci et les revendre ensuite le mieux qu'il pourrait, ce qu'il fit jusqu'en mai 1878 ;

"Que sauf de légères fluctuations, les actions de la banque tendaient à décliner tout le temps ;

"Que durant l'année 1878, l'intervention de Simpson fut jugée insuffisante, et Rennie avec la plupart des directeurs y compris le défendeur et d'autres personnes organisèrent des syndicats pour faire le même jeu sur une plus grande échelle, toujours au compte et avec les fonds de la banque : Que définitivement la banque a perdu $65,000 avec ces divers syndicats ;

"Que les intérêts payés par la banque, soit pour dépôts ou emprunts ont encore contribué à sa ruine.

"Sur la question de dividendes.

"Considérant que le 29 octobre 1877, les directeurs ont déclaré un dividende de trois et demi pour cent pour les derniers six mois écoulés, savoir, $121,315.53, payable le premier décembre :

Que les directeurs ont alors estimé les profits à.....	$131,568 00
Moins	11,457 00
Pour le tiers des pertes à déduire sur les vieux comptes, dont ils n'avaient déduit que les deux tiers, de sorte que d'après leur propre état, il ne reste que.....	$120,111 00
Auquelles il faut ajouter la réserve.....	232,000 00
Formant un total de.....	$352,111 00

"Qu'à cette époque les comptes à découvert se montaient à $594,285.53 outre l'escompte régulier ;

"Que vu la perte définitive de toutes les avances à découvert, en outre d'une somme extrêmement élevée sur les escomptes, vu l'insolvabilité notoire et continue des principaux clients depuis au moins février 1877, époque où Simpson fut employé pour empêcher les actions de la banque de tomber à la bourse, baisse due à ces mauvais comptes, et vu la crise financière et commerciale qui existait déjà depuis trois ans, il convient de défalquer de l'avoir cette somme de $594,285.53 pour laquelle la banque n'avait aucune garantie quelconque, et dont une forte partie, savoir, $150,000 au moins remontait à 1876 ;

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" Que cette somme absorbe tous les prétendus profits et la réserve, et même laisse un déficit de $242,174.53 ;

" Qu'à ce déficit il conviendrait d'ajouter un montant que l'on ne peut préciser, mais qui doit être considérable, perdu sur les escomptes, et $45,465.31 que les directeurs ont déduit en octobre 1878, sur les vieux comptes et qui auraient dû être déduits plus tôt avec un montant beaucoup plus fort ;

" Que onze des mauvais clients qui ont fait perdre à la banque, en moyenne, chacun $100,000 étaient d'anciens clients de la Banque Consolidée qui devaient de forts montants lors de l'union des deux banques et qui avaient déjà un découvert de $273,358 à la date du dix novembre 1877 ;

" Qu'il faudrait encore défalquer une forte proportion du montant dû par le *Credit Valley R.R.* qui a fait perdre à la banque $106,451, plus $17,480.47 au nom de Laidlaw, et un découvert par la même compagnie de $63,592 ; que le montant d'escompte accordé par la banque était à cette époque d'au-delà de sept millions de dollars, outre $134,000 de billets en souffrance, non garantis, et $340,000 de billets en souffrance et prétendus garantis, tel que le tout appert aux états fournis au gouvernement ;

" Que cependant les directeurs n'ont retranché qu'une somme de $9,294 pour dettes mauvaises et douteuses pour les six mois écoulés précédemment ;

" Qu'il résulte de la preuve que le dividende payé le premier décembre 1877 et les deux dividendes suivants ont été payés à même le capital de la banque et au moyen d'emprunts.

" Sur le point de savoir si les directeurs ont consenti à cette distribution avec connaissance de cause :

" Attendu que cette circonstance est démontrée par les motifs concernant l'administration, d'où il résulte que les directeurs ont connu ou dû connaître l'état réel où se trouvait la banque à cette époque, la gêne qui l'a forcée à recourir à l'emprunt dès avril 1877, et à l'agiotage pour maintenir le cours des actions de la banque, dès février 1877, et les causes notoires de cette dépréciation, qu'elle résulte encore de l'abstention affectée et systématique des affaires de la banque par le défendeur et ses co-directeurs, du fait que le défendeur connaissait quelques-uns des clients de la banque comme insolvables et d'autres comme douteux, et enfin de sa participation directe aux syndicats formés en 1878 pour maintenir le cours des actions de la Banque Consolidée à la bourse.

" Sur la part de responsabilité :

" Attendu que les directeurs ne doivent être déclarés responsables que dans les limites du dommage qu'ils ont causé par leur négligence et leur incurie ;

" Que malgré les pertes énormes souffertes par la banque lors de la liquidation, le gérant et les directeurs ont pu se faire illusion sur les risques connus avec quelques clients ;

" Qu'il faut faire la part de la crise financière et commerciale qui a existé depuis 1874 à 1879, et de la dépréciation qu'elle a entraînée sur les valeurs de la banque ;

" Que la responsabilité doit être appliquée avec modération ;

"Que s'il importe de protéger le public contre la négligence des administrateurs, il serait injuste de les sacrifier aux actionnaires et de les transformer en assureurs du capital de la banque;

"La Cour fixe cette responsabilité à 60 pour cent des pertes subies par les actionnaires, lesquelles, vu le dividende de 12 pour cent environ payé aux actionnaires par les liquidateurs sur le montant réalisé par eux, la Cour évalue à 88 pour cent du capital payé.

"Et attendu que le demandeur est propriétaire de 1,115 actions payées de $100 chacune, formant un total de $111,500, la Cour condamne le défendeur à payer au demandeur la somme de $58,872, avec intérêt du 15 avril 1882, jour de l'assignation en cette cause, et les dépens, distraits, à MM. Barnard & Barnard, avocats du demandeur, sauf le recours du défendeur contre qui de droit."

Barnard & Barnard, attorneys for plaintiff.
F. L. Beique, Q.C., counsel.
Carter & Goldstein, attorneys for defendant.
Hon. R. Laflamme, Q.C., and Hon. Alex. Lacoste, Q.C., counsel.

COURT OF QUEEN'S BENCH, 1891.

MONTREAL, JANUARY 21ST, 1891.

Present:—DORION, C.J., BABY, BOSSÉ, DOHERTY, J.J., AND TAIT, J., *ad hoc*.

WILLIAM H. JEFFREY,
(*Plaintiff in the Court below*),
APPELLANT;

vs.

THE CANADA SHIPPING COMPANY,
(*Defendants in the Court below*),
RESPONDENTS.

HELD:—That where goods are consigned to a place beyond the point to which the carrier's line extended, and such carrier has received the goods under a bill of lading to the terminus of his own line only, and delivers them safely and is paid the freight to such terminus, if such carrier at the request of the shipper undertakes to deliver the goods to another carrier to be taken to their destination, such carrier, by so delivering the goods to the second carrier, does not render himself responsible for the delivery of the goods at their destination.

This is an appeal from a judgment of the Superior Court, Montreal, rendered by His Honor Mr. Justice Mathiot, the 25th January, 1889, which judgment is as follows:—

"La Cour, etc.

"Vu que le connaissement, signé par la défenderesse à Montréal, le 8 octobre 1885, pour le transport de l'amiante (asbestos) mentionné en la déclaration en cette cause, est à l'effet qui suit, savoir: 'Shipped, in good order and condition by W. H. Jeffrey, in and upon the screw steamship "Lake

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Nepigon" ; whereof, etc., and bound for Liverpool, etc., one hundred and twelve bags asbestos, being marked and numbered as in the margin, and are to be delivered from the ship's deck (where the ship-owner's responsibility shall cease), in like good order and well conditioned, etc., at the port of Liverpool, etc., unto order to Genoa, or to the assigns; freight and primage payable by shipper at the rate of fifteen shillings sterling per gross ton to Liverpool, freight Liverpool to Genoa, payable by consignee" ;

" Considérant que, par ce connaissement, la défenderesse a contracté envers le dit demandeur l'obligation de livrer la dite amiante en bon ordre emportée de Liverpool à ordre, c'est à dire au demandeur porteur du connaissement dûment endossé par le demandeur ; que le fret n'a été fixé que jusqu'au port de Liverpool, et a été payé par le demandeur à la date du connaissement jusqu'à Liverpool seulement ;

" Considérant que les mots qui se trouvent dans le dit connaissement, et qui indiquent que la destination définitive de la dite amiante était le port de Gènes en Italie, et que le fret de Liverpool à Gènes serait payé par le consignataire, ne sauraient être interprétés comme constituant une obligation de la part de la défenderesse dont la ligne de vapeur n'allait pas plus loin que Liverpool, et qui n'avait pas de concordance avec des lignes de transport allant à Gènes de transporter la dite amiante jusqu'à Gènes, interprétation qui ne serait justifiée ni par les termes du connaissement ni par les circonstances de l'affaire, et que ces mots peuvent tout au plus comporter un mandat gratuit, par lequel la défenderesse se serait chargée de faire transmettre la dite amiante à bord d'un vaisseau allant à Gènes, pour être livrée là au demandeur, porteur du connaissement ou à ses ayants-cause, ou à un consignataire que lui indiquerait le demandeur ou ses ayants-cause porteurs du connaissement ;

" Considérant qu'aussitôt ou peu de temps après avoir reçu le dit connaissement de la défenderesse, le demandeur l'a endossé en faveur de la banque, dite 'The Bank of British North America,' laquelle s'est trouvée dans tous les droits du demandeur, en vertu de ce connaissement, et que lors de l'arrivée de la dite amiante dans le port de Liverpool, c'était la dite banque qui était porteur et en possession du dit connaissement, et qui avait seulement le droit d'en recevoir livraison en échange du dit connaissement, et de donner des ordres ou directions à la défenderesse relativement à la dite amiante ;

" Considérant que c'est la dite banque elle-même qui, en réponse aux recherches faites par l'agent de la dite défenderesse à Liverpool pour savoir quels étaient les consignataires de la dite amiante, a informé le dit agent qu'elle était porteur du connaissement, et que la dite amiante devait être envoyée à Gènes, et que les consignataires étaient MM. Develle, Pelli & Co. ;

" Considérant que la dite banque et ses employés, agents ou ayants-cause paraissent s'être inquiétés fort peu de la dite amiante tant à Liverpool qu'à Gènes ;

" Considérant que le demandeur est lié par les faits de la dite banque, et responsable de ses omissions et négligences, et qu'il ne peut avoir plus de droit

contre la défenderesse que la dite banque en aurait eu elle-même si elle eut elle-même poursuivi la défenderesse en vertu du dit connaissement ;

" Considérant qu'il est établi que la dite défenderesse a rendu la dite amiante dans le port de Liverpool en bon ordre et condition, tel qu'elle y était tenue par son contrat contenu dans le dit connaissement, et à celle qui lui a été donnée par la dite banque, porteur du dit connaissement, et qui était aux droits du dit demandeur, elle a fait embarquer la dite amiante sur un bon steamer, ' The Persian,' en destination pour la ville de Gènes, en Italie, et appartenant à une compagnie solvable, laquelle s'est obligée par un connaissement en bonne et due forme à transporter la dite amiante à Gènes, et à ne la livrer qu'en échange du connaissement donné par la défenderesse au demandeur à Montréal, le 8 octobre 1885, et cité en la déclaration en cette cause, et que la dite défenderesse a ainsi accompli toutes les obligations auxquelles elle était tenue ;

" Déboute l'action du dit demandeur avec dépens."

In appeal the above judgment was confirmed for the reasons given in the remarks of His Honor Mr. Justice Tait, which are given below.

TAIT, J.—The appellant claims the value of a quantity of asbestos, which he alleges respondents contracted to convey from Montreal to Genoa in Italy, and to deliver there to his order, but which they failed to do, the goods having been delivered there to the wrong person without the production of the bill of lading. The Superior Court dismissed the appellant's action. The facts are simple enough. The respondents own a line of steamers called the "Beaver Line," running between Montreal and Liverpool, and appellant shipped on the "Lake Nepigon," one of the steamers of the line, 112 bags of asbestos, value admitted to be $840.00, under a bill of lading dated 8th October, 1885, which, leaving out immaterial portions, reads as follows :—

"Shipped, in good order and condition, by Mr. Jeffrey, in and upon the screw steamship called the 'Lake Nepigon,' bound for Liverpool, one hundred and twelve bags asbestos, to be delivered from the ship's deck (where the ship owners' responsibility shall cease) in the like good order and well conditioned, at the port of Liverpool,..... unto order Genoa, or to its assigns, freight and primage payable by shipper at the rate of fifteen shillings sterling per gross ton to Liverpool, freight Liverpool to Genoa payable by consignee, the goods to be received by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed and stored at the sole expense and risk of the consignee, in the warehouse provided for that purpose, or in the public store, as the collector of the port of Liverpool shall direct, etc."

On the margin of the bill is the receipt for the freight to Liverpool. The appellant says (1) that this document is, by its terms, a through bill to Genoa; and (2) if not, the respondents treated it as such, and assumed obligations which render them responsible to the same extent as if it had been a through bill.

The Court is of opinion that this was not intended for a through bill to Genoa, the vessel was bound for Liverpool, the freight to Liverpool was prepaid and was separate and distinct from the freight from Liverpool to Genoa, which was

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to be paid by the consignee there. It is not proved that respondents had vessels running from Liverpool to Genoa, or any running arrangements with, or control over, any other line trading between these ports, or that they would derive any benefit whatever by assuming the additional responsibility.

As is quite usual with this kind of documents, this one is not clearly expressed. It is stated that delivery is to be made at the port of Liverpool (the word "Liverpool" being in writing) where the ship's responsibility shall cease, and provision is made for warehousing the goods there, if not called for; while, at the same time, in the space left for inserting the name of the consignee, are written in the words "unto order Genoa or its assigns."

The goods were, as the bill of lading read, to be delivered at the port of Liverpool unto order Genoa or its assigns. We have to give a reasonable interpretation and meaning to the document, and make it consistent with itself and with the intention of the parties. I think the proper interpretation to be given to the contract is that the respondents would carry the goods to Liverpool, subject to order for Genoa. There is no doubt the ultimate destination of the goods, as respondents had reason to know, was Genoa, and, looking at the bill and at the facts proved, we think it is quite evident that what the respondents undertook to do was to convey the goods to Liverpool, and to forward them from there by other carriers to Genoa, and that with respect to the forwarding of the goods the respondents merely acted as the agents of the shipper. As carriers, the respondents' responsibility ceased at Liverpool, and whatever further responsibility they incurred was as agents of the shippers to forward the goods.

I think the appellant's letter to the respondents of date 17th November, 1885, is fairly open to the interpretation that he must have understood the transaction in this way. Referring to the delay in forwarding the goods from Liverpool, he says: "Can you give me an explanation of this detention, and how caused, from the agents of your line not forwarding these lots of goods by the Genoa S.S., as agreed on? My bills are being protested in consequence of this irregularity, and causing me a good deal of trouble and expense, as well as damage. Can you give me the address of the agents of the Genoa line of S.S. Liverpool?"

Previous to this, the Bank of B.N.A., at London, then holders of the bill of lading, had written to the respondents' agents at Liverpool: "I shall be glad to know if you have instructions to forward the shipment to Genoa."

It is plain that the parties interested, the shipper and the transferees of the bill, all understood that, as respects the voyage from Liverpool to Genoa, the respondents were mere forwarding agents.

The "Lake Nepigon" arrived at Liverpool on the 21st October, and there seems to have been some perhaps unnecessary delay at that place. Mr. Thom, the Company's freight agent, had written to the Company's agent at Liverpool on the 9th October, 1885:—

"Upon the 'Nepigon' there goes out a shipment of 112 bags asbestos, and the B. L. reads it is to be forwarded to Genoa. We have a letter from Mr.

Thorpe, agent for Mr. W. H. Jeffrey, stating that the shipment should be forwarded to Devalle, Pelli & Co., Torino, Italy. Until we hear further from Mr. Jeffrey, you had better hold the shipment, and I will advise you the correct destination. I believe there are some of the bags (20) not marked; will you please have them marked the same as the others."

The respondents' agent at Liverpool held the goods there till the 30th October, when he received the letter from the Bank of B.N.A., already alluded to, which was to this effect:—

"With reference to the enclosed bill of lading for a shipment of 112 bags asbestos per 'Lake Nepigon,' I shall be glad to know if you have instructions to forward the shipments to Genoa. The consignees are Messrs. Devalle, Pelli & Co., of Torino, and, according to the wording of the bill of lading, the freight from Liverpool to Genoa should be paid by them."

As already stated, the Bank was the holder of the bill of lading, it having been transferred to them by appellant at Montreal to cover a draft drawn against it by appellant upon Devalle, Pelli & Co. The respondents, after receiving this letter from the Bank, forwarded the goods to Genoa by steamer "Persian," of the "Leyland Line," which was a regular and first class line, and returned to the Bank the Beaver Line bill of lading, which had been enclosed in the letter just referred to. Of course, a new bill of lading was taken from the "Leyland Line," which was dated 3rd November, 1885, by which that Company undertook to convey the goods to Genoa, and to deliver them to Messrs. Devalle, Pelli & Co., or assigns; but in order to protect the bank, as holder of the first bill of lading, and enable it to secure acceptance of the draft drawn against it before the delivery of the goods, the following express condition was inserted in the margin: "Deliver only in exchange for B. Ldg. issued by Beaver Line, Montreal to Liverpool." The new bill of lading was sent to the consignees, Messrs. Devalle, Pelli & Co., but of course it did not give them the control of the goods, but would enable them to get the Beaver Bill upon accepting the draft. It appears by the correspondence, that the Bank forwarded this bill and the draft to their agents at Genoa; but the Leyland Line, by some mistake of their clerk, delivered the goods to the wrong person, without requiring the production of this bill. The draft never having been accepted, and the goods lost to appellant, he has had to refund the Bank, and now claims against the respondents. The Court is, however, of opinion that he has no action against them, they merely undertook to forward the goods to Liverpool, and they did so in a proper manner and with proper precautions. It is no fault of theirs if the goods were wrongly delivered, for such delivery was against their positive and written instructions, which required the production of the Beaver Line bill.

We think the judgment which dismissed appellant's action should be confirmed, and it is confirmed, with costs of both courts.

Judgment confirmed.

Greenshields, Guerin & Greenshields, attorneys for appellant.

Selkirk Cross, attorney for respondents.

SUPERIOR COURT, 1891.

MONTREAL, FEBRUARY 4TH, 1891.

Present:—HIS HONOR MR. JUSTICE WURTELE.

PRUNET ET AL.,

PLAINTIFFS;

vs.

RASTOUL,

DEFENDANT.

HELD:—That a servitude of right of way may be created by a deed of partition between heirs entitled to the property.

That such a deed should disclose the nature of the servitude; the property which is to be charged, and that in whose favor the servitude is created.

That such servitude, where it has not been used, may be revived, if the prescription of thirty years has not been acquired.

"The Court, after having heard the parties by their counsel upon the merits of the cause, having examined the proceedings and the written and oral proof adduced, and having deliberated;

"Whereas the plaintiffs represent that the defendant claims to have a right of way or passage over their property, being the south-east part of lot No. 626 of the cadastre of St. Lawrence ward in the city of Montreal, to communicate from St. Lawrence street to his adjoining property, being the north-west part of the said lot No. 626, under the deed of sale from the heirs of the late Dame Catherine Timmens to him and his brother Abraham Rastoul of the last mentioned property, passed before Mtre. J. L. Coutlée, notary, on the 6th day of February, 1875; but that the authors of the defendant and his said brother, who has conveyed his rights to the defendant, had no right to constitute such servitude upon their property in favor of the defendant's property, and that they ask that it be declared that no servitude of a right of way or passage exist upon their property in favor of the defendant's property, and that he be prohibited from disturbing them in the full enjoyment of their property;

"Whereas the defendant pleads that he is entitled to claim the right of way or passage mentioned in his deeds of purchase and complained of by the plaintiffs; that the two properties formerly belonged to the late John George Schmidt, and that he had during his possession and enjoyment established the said passage for the use of the property now belonging to the defendant; that after [illegible] his representatives acknowledged the existence of the said passage, and that it was constituted as a servitude by the destination made by one who was proprietor of both properties;

"Seeing that both properties were acquired by the said late John George Schmidt during the community of property which existed between him and his second wife the said Dame Catherine Timmens; that during his possession and enjoyment a passage existed and was used, by which the occupants of the property now owned by the defendant entered the yard in rear of the house

then on the property, from St. Lawrence street, by passing through a gateway and along a passage on the other property, to a gate at the end of the addition built to the said house, opening into the said yard, being at a distance of about 58 feet and 7 inches English measure, from the line of St. Lawrence street as it then existed; that he instituted the six children, issue of his two marriages, as his universal legatees, subject to a substitution in favor of their children, and that during the joint possession and enjoyment of both properties by his legatees and his widow the use of the said passage was continued for the occupants of the property now owned by the defendant; that the said Dame Catherine Timmens instituted her four children as her universal legatees, and that after her death a partition of the property of the said community between her legatees and the legatees of her husband was made by deed passed before Mtre. J. L. Coutlée, notary, on the 11th day of September, 1874, and duly registered by memorial on the 4th day of November, 1874, by which the property now owned by the defendant was allotted to the legatees of the said Dame Catherine Timmens, and the property now owned by the plaintiffs was allotted to the estate or representatives of the said late John George Schmidt; that in and by the said partition it was declared and stipulated that a right would exist in favor of the property now owned by the defendant to communicate thereto by a passage sufficient for that purpose, to be taken on the property now owned by the plaintiffs, the following words being added to the description of the first mentioned property, to wit: the northwest part of the said lot No. 626, 'et le droit d'y communiquer par un passage suffisant pris sur le terrain ci-après désigné,' and the following words being added to the description of the other property, to wit: the southeast part of the said lot, 'sujet à la servitude du passage ci-dessus décrit 'pour le terrain en premier lieu désigné'; that a width of twenty-seven feet on the front of both properties was expropriated and taken in May, 1889, to widen St. Lawrence street, and that from the date of the said partition until the said expropriation and the demolition of the houses on the said properties, a right of way or passage was exercised by the occupants of the defendant's property through a gateway about 9 feet high and 8 feet wide, and over a passage 8 feet wide extending 58 feet and 7 inches English measure, from St. Lawrence street (and 31 feet and 7 inches English measure, from the new and actual line of the street), and at that depth entering the yard of the defendant's property by a gate;

"Seeing that the plaintiffs contend that the description given of the said right of way or passage is insufficient in law to constitute a servitude, either by destination or by title, and that none therefore exists, and that the defendant on the other hand maintains that the destination above mentioned and the description contained in the said partition are either of them sufficient to establish a valid servitude;

"Considering that the servitude of a right of way or passage could be validly created and legally established by the partition between the legatees of the late Dame Catherine Timmens and the representatives or estate of the late John George Schmidt;

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"Considering that all that is required and is necessary to meet the provisions of the Civil Code as to the nature, the extent and the situation of a servitude is that the terms used be sufficiently clear and explicit to disclose the nature of the servitude, and the property to bear and the property to profit by the servitude, and to enable its extent to be fixed, and that as regards the servitude of a right of way or passage, the choice and use of a site for such way or passage supplied an exact and definite description and fixed the extent thereof;

"Considering therefore that in the present case the servitude of a right of way or passage was legally and validly established by the said deed or partition upon the property of the plaintiffs for the benefit of the property of the defendant; that it was mentioned as an existing servitude in the deed of sale from the [illegible] of the late Dame Catherine Timmens to the defendant and his brother, and that its site and extent were fixed by the use which had been made of it before the said partition through an existing gateway and passage, and also since such partition both before and after the date of the said deed of sale through the same gateway and passage;

"Considering that the defendant cannot aggravate the burden created by the said servitude by changes which he may make in his buildings or otherwise, and that the passage to which the defendant is entitled cannot be exacted by him beyond a depth of 31 feet and 7 inches English measure from the present line of St. Lawrence street;

"Considering that the defendant has erected a building on his property extending back 60 feet from the street, with a common wall between his property and the plaintiffs', and that he has consequently himself rendered the exercise of the servitude impossible in the present state of things;

"Considering that there is at present a cessation of the exercise and use of the servitude, but that it is not extinguished, and that it might revive and be again exercised and used if the defendant again placed his property in a condition to render it possible;

"Considering that it is therefore impossible to declare that the servitude of the right of way or passage complained of does not presently exist, and that the plaintiffs are therefore unfounded in their demand;

"Doth dismiss the action in this cause, with costs, of which distraction is granted, etc."

Girouard & DeLorimier, attorneys for plaintiffs.
Beaudin & Cardinal, attorneys for defendant.

SUPERIOR COURT, 1891.

MONTREAL, MARCH 26TH, 1891.

Present :—HIS HONOR MR. JUSTICE WURTELE.

NORTHFIELD,

PLAINTIFF;

AND

LAWRENCE,

DEFENDANT.

HELD :—That the law of England in force on the 30th of May, 1849, applies to a suit based on promissory notes or bills of exchange, and by the laws then in force in England, parol evidence is admissible to establish the relationship between the parties to such promissory note or bill of exchange.

The facts of this case appear from the judgment, which is as follows :—

"The Court having heard the parties by their counsel, as well upon the defendant's motion to revise the ruling of Mr. Justice Jetté given on the 17th day of December, 1890, maintaining an objection made by the plaintiff to a question put to one Mossie Lawrence, a witness examined on behalf of the defendant, as upon the merits of the cause, having examined the proceedings, the exhibits filed and the depositions of the witnesses, and having deliberated;

"Seeing that the plaintiff represents that the defendant signed as the guarantor of the maker thirty promissory notes made and signed on the 22nd October, 1889, by one Moss Edward Frank Lawrence to his order, each for the sum of $10, and payable, the first one week after date, and the others successively one week after the other, and that he seeks to recover the sum of $240.90 as the balance of the said promissory notes from the defendant as such guarantor;

"Seeing that the defendant pleads in the first place that he never became, and signed the said promissory notes as the guarantor of the maker, but that he endorsed them at the request and for the accommodation of the plaintiff, to enable him to get them discounted, and that the plaintiff has therefore no recourse against him; and in the next place, that even if he were liable towards the plaintiff, the amount thereof was compensated by a larger amount due by the plaintiff to him;

"Seeing that for the purposes of proving his first defence, the defendant proceeded, on the 17th day of December last (1890), to examine one Mossie Lawrence of Toronto, as a witness, and that having asked him to state the circumstances under which the said promissory notes were endorsed by the defendant, the plaintiff objected to the question as illegal, and not susceptible of being proved by a witness, and Mr. Justice Jetté maintained the objection;

"Seeing that the defendant excepted to such ruling, and at the hearing moved to have the same revised;

"Considering that the Court as presided at the hearing has the power to revise the said ruling under and in virtue of Article 2326 of the Revised Statutes of the Province of Quebec;

Northfield and Lawrence.

"Considering that the present suit is founded on promissory notes, and that in the investigation of facts relating thereto recourse must be had under and in virtue of Article 2341 of the Civil Code, to the laws of England;

"Considering that according to the laws of England parol evidence is admissible to show the real relationship of the parties to a bill of exchange or promissory note. (Story on Promissory Notes, No. 479; Chalmers on Bills of Exchange, p. 206; 8 Appeal Cases, P. C., p. 733, MacDonald & Whitfield);

"Considering therefore that there is error in the ruling excepted to, and that the same should be revised;

"Doth overrule and reverse the decision given on the 17th day of December last, by Mr. Justice Jetté, maintaining the objection made by the plaintiff to the following question put to the defendant's witness, Mossie Lawrence: 'Will "you state the circumstances under which the said promissory notes were "endorsed by defendant?' and proceeding to render the decision which should have been given, doth reject the said objection and allow the said question, and in order to allow the defendant to obtain an answer to such question and to continue the investigation as to the circumstances under which he endorsed the promissory notes sued upon in this cause, and the relationship existing between him and the plaintiff as parties to the said promissory notes, and without pronouncing upon the other ground of defence, doth discharge the cause from the roll of cases under advisement, and doth condemn the plaintiff to pay the costs incurred by the defendant on the motion to revise, of which distraction is granted, etc."

Taillon, Bonin & Dufault, attorneys for plaintiff.

J. P. Cooke, attorney for defendant.

COURT OF QUEEN'S BENCH, 1891.

MONTREAL, MARCH 26TH, 1891.

Present:—CROSS, BABY, BOSSÉ AND DOHERTY, J.J.

J. C. H. LACROIX,

(*Defendant in the Court below*),

APPELLANT

AND

LÉANDRE FAUTEUX,

(*Plaintiff in the Court below*),

RESPONDENT.

HELD:—That where there is a tacit renewal of a written lease, a notice for the purpose of terminating it must also be in writing.

The judgment from which this appeal was taken was rendered in the Superior Court, May 31st, 1890, by His Honor Mr. Justice Wurtele, and is as follows:—

"La Cour, après avoir entendu les parties par leurs avocats, sur le mérite de la cause, avoir examiné la procédure et les pièces produites, avoir entendu à l'audience les témoins produits par le demandeur, et le défendeur examiné comme témoin, et avoir delibéré;

J.O. H. Lacroix and L. Fauteux.

" Attendu que le demandeur, comme propriétaire de la partie non subdivisée du lot No. 1195 du cadastre du quartier St. Jacques, de la Cité de Montréal, avec une maison en pierre à trois étages et autres bâtisses dessus construites, en vertu d'un titre d'achat du 9 novembre 1889, dûment enregistré, avec jouissance des revenus depuis le 1er du mois, réclame du défendeur la somme de $300.00, étant pour loyer de la dite propriété du 1er novembre 1888 au 1er mai 1889, à raison de $600.00 par année, que le défendeur devait, en vertu d'un bail pour une année, à compter du 1er mai 1887, contenu dans un acte de vente de la dite propriété et d'autres propriétés, consenti par le défendeur à Dame Marie Emma Corinne Marcoux, le 13 août 1887, de Mtre. O. Marin, notaire, et par l'occupation du défendeur continuée après l'expiration de la dite année, sans autres conventions, et qu'il demande que le défendeur soit expulsé de la dite propriété, avis de congé lui ayant été donné par le demandeur avant le 1er février 1890;

" Attendu que le défendeur plaide qu'à l'expiration du dit bail d'une année, il aurait continué d'occuper la dite propriété sans bail écrit pour une autre année, à raison de $400.00 pour l'année, comme le locataire du nommé Charles W. Philips, qui avait acquis la dite propriété de la dite Dame Marie Emma Corine Marcoux, et qu'il aurait ensuite été continué par tacite reconduction pour le même loyer annuel de $400.00, qu'il aurait payé ce loyer de $400.00 intégralement au dit Philips, et ensuite six mois de loyer sur le même pied, du 1er mai au 1er novembre 1889, suivant reçu du 22 octobre 1889, au nommé James Baxter qui avait acquis la dite propriété et l'a vendue après ce paiement au demandeur; qu'il aura offert $200.00 au demandeur pour les six mois de son loyer, du 1er novembre 1889 au 1er mai 1890, le 11 février 1890, par le ministère de Mtre. O. Marin, notaire; et que le demandeur ne lui avait pas donné avis de congé dans le délai prescrit par la loi; et que le défendeur a consigné la dite somme de $200.00, avec son plaidoyer;

" Considérant qu'il a été constaté en preuve que le nouveau bail intervenu entre les dits Charles W. Philips et le défendeur a été fait moyennant un loyer annuel, non de $400.00, mais de $500.00, et que le reçu de $400.00 donné par le dit Philips est expliqué par le fait qu'une somme de $100.00 aurait été accordée au défendeur pour des réparations à la charge du propriétaire, qu'il prétendait avoir faites, et par ces mots qu'il contient: 'He paying for all repairs that have been done to the house to this date;'

" Considérant que l'on trouve un commencement de preuve pour justifier la preuve par témoin de la nouvelle convention dans l'allégation contenue dans le plaidoyer du défendeur, " qu'à l'expiration du dit bail le défendeur aurait continué à occuper le dit immeuble sans bail écrit comme locataire du dit Philips," et dans la phrase suivante dans sa déposition: " Il m'a demandé si j'avais un bail; j'ai dit que j'avais un bail verbal; "

" Considérant que la tacite reconduction invoquée par le défendeur après le bail verbal qui s'est terminé le 1er mai 1889, a dû nécessairement avoir lieu pour le même loyer de $500 par année, et qu'il appert en preuve que quand le dit James Baxter a pris les $200 mentionnés dans le reçu du 22 octobre 1889,

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il n'a pas acquiescé à la prétention du défendeur que le loyer annuel était de $400, mais qu'il a pris cette somme de $200, et a signé le reçu en question parce qu'il ne voulait pas entreprendre un procès pour la balance, et qu'il a [illegible] monsieur Geoffrion qui agissait pour le défendeur de tâcher de percevoir pour lui cette balance ;

" Considérant que la somme due par le défendeur au demandeur pour le loyer de six mois du 1er novembre 1889 au 1er mai 1890 est de $250 ; et que partant l'offre légale du défendeur est insuffisante ;

" Considérant qu'un avis de congé peut être donné verbalement et peut être établi par l'aveu du locataire ou prouvé par témoins quand il y a un commencement de preuve par écrit ;

" Considérant que l'on trouve un commencement de preuve par écrit pour permettre la preuve de l'avis de congé par témoins dans la déposition du défendeur où il dit : " j'y suis allé (chez le demandeur) avant le premier février ; j'ai été lui offrir son loyer et savoir si je devais rester dans ma maison. Cela était le 27 janvier ; "

" Considérant que le demandeur a prouvé par le témoignage de son fils Thomas Arthur Fauteux, qu'il a donné un avis de congé le dit 27 janvier 1890, et que la lettre du 5 février 1890, qui contient aussi un avis de congé, a été envoyée d'abondant pour se débarrasser des obsessions du défendeur, qui cherchait toujours à persuader le demandeur de lui laisser la maison ;

" Considérant que le défendeur est mal fondé dans son plaidoyer et que le demandeur a droit de demander son expulsion ;

" Renvoie le plaidoyer du défendeur et déclare ses offres insuffisantes, condamne le défendeur à payer au demandeur la somme de $250, pour six mois de loyer, du 1er novembre 1889 au 1er mai 1890, avec intérêt du 5 mai 1890, date de l'assignation, et les dépens distraits à maîtres Rainville et Archambault, les avocats du demandeur, et ordonne au défendeur de livrer la possession au demandeur du dit immeuble, désigné au long comme suit : (Description of property).

" Et décrète qu'à défaut par lui de ce faire dans le délai de dix jours après la signification d'une copie du présent jugement, il soit expulsé lui et les siens des dits lieux, et que tous les biens meubles qui peuvent s'y trouver soient enlevés et mis sur le carreau sous l'autorité de cette Cour, et que le demandeur soit mis en possession pleine et entière du dit immeuble."

IN THE QUEEN'S BENCH.

BOSSÉ, J. (for the Court) :—Il s'agit d'une action en éviction par un propriétaire contre un locataire.

Le demandeur prétend que le défendeur devait quitter les lieux le 1er mai 1890, parce que son bail par tacite reconduction était alors expiré, et il réclame de plus $250 pour six mois de loyer échu, à cette date, à raison de $500 par année.

Le défendeur dit qu'il n'était pas tenu de déguerpir parce qu'il occupait, par tacite reconduction ne pouvait être mise à fin sans un congé déloger dans le

délai fixé et que ce congé n'avait pas été donné. Il soutient de plus quant au loyer réclamé qu'il ne le doit pour les six mois échus qu'à raison de $400 par an, savoir, $200; qu'il avait déjà offert cette somme avant l'action, et il réitère ses offres et les dépose avec ses plaidoyers.

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Le jugement a renvoyé le plaidoyer du défendeur sur les deux premiers faits de défense, a ordonné l'expulsion, déclaré les offres insuffisantes et condamné le défendeur à payer $250.

C'est de ce jugement dont il y a appel.

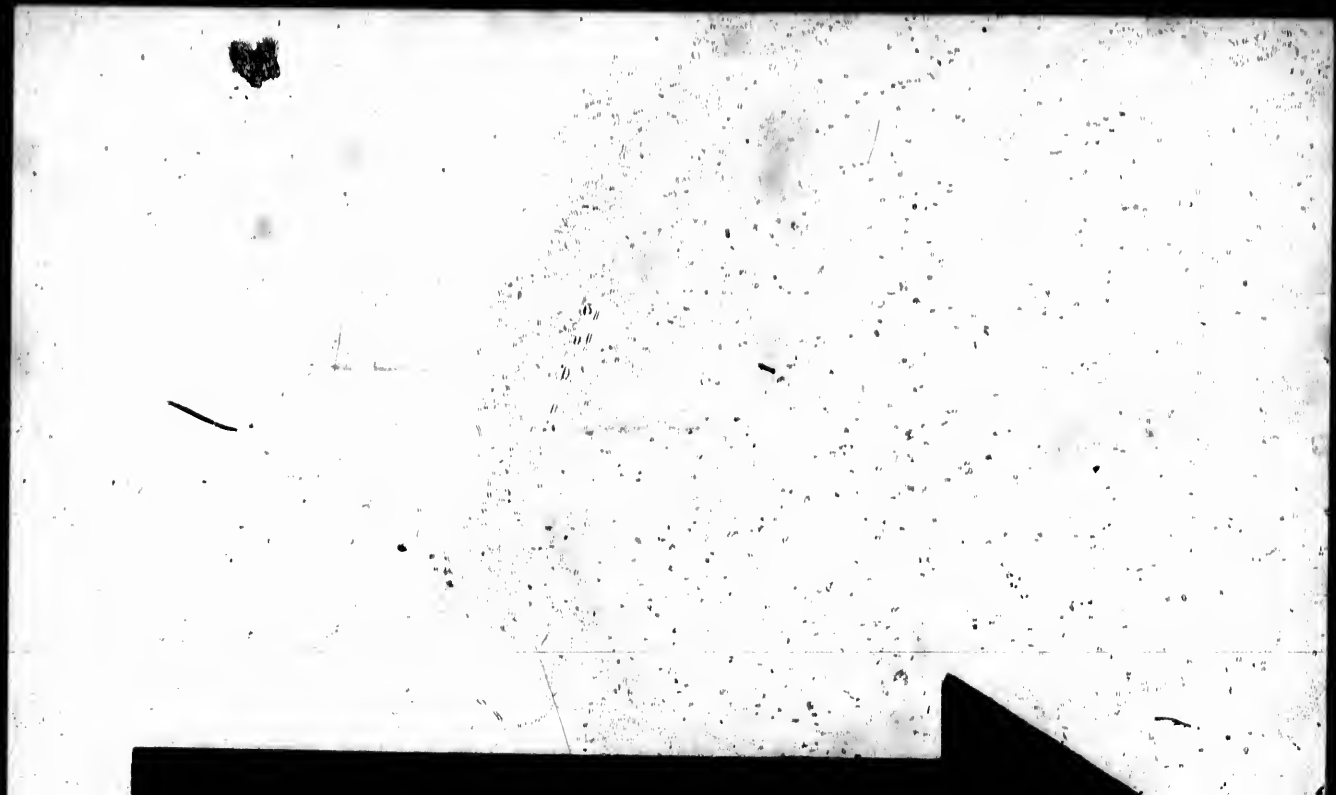
Il se présente ici deux questions. La première : [illegible] loyer annuel ? La seconde : Si un congé déloger était né[illegible]it être donné comment devait-il l'être ?

Première question : Le bail originaire est contenu dans [illegible] vente consenti le 15 août 1887, par le défendeur Lacroix, alors propriétaire de l'immeuble en question, à madame Kérouac, et il est fait pour un an à compter du 1er mai 1887, à raison de $600 pour l'année. Le 5 septembre 1887, Madame Kérouac a vendu la propriété à Philips, et M. Lacroix a continué d'occuper les lieux après l'expiration de son année de loyer, sans qu'il paraisse avoir été, entre lui et le nouveau propriétaire, nouvellement question du montant du loyer jusqu'au 29 décembre 1888, date à laquelle on trouve un reçu de Philips, par son agent Hodgson, pour l'année entière de loyer, du 1er mai 1888 au mai 1889, pour $400; "Lacroix payant le coût de toutes les réparations faites jusqu'à cette date."

Ce reçu est interprété d'une manière différente par les parties, Lacroix soutenant qu'il établit un loyer à raison de $400 pour l'année, et Fauteux de son côté disant que le loyer était de $500, savoir, $400 en argent, montant porté au reçu comme ayant été alors payé, et $100 coût des réparations aussi mentionnées au reçu.

Fauteux a fait entendre Philips pour établir que le loyer était de $500, et Philips a de fait juré que tel était le montant du loyer, mais il ajoute qu'il avait fait la réduction de $600 à $500 parce que Lacroix avait consenti à quitter la maison en aucun temps de l'année, sous un mois d'avis. Cette convention est improbable en elle-même, mais elle devient impossible si on la met en regard du fait que le paiement de loyer fait au 29 décembre l'était pour toute l'année à aller au 1er mai alors prochain, et l'on ne peut guère adopter la théorie que Lacroix se serait soumis à cette condition extraordinaire de vider les lieux en aucun temps de l'hiver, sous un mois d'avis, au bon plaisir du propriétaire, et qu'il aurait, en même temps accédé à cette condition, payé d'avance tout le loyer, pour les quatre mois qui restaient encore à courir, sans savoir s'il pourrait occuper les lieux, pendant toute ou aucune partie de cette période de temps. Hodgson qui avait reçu l'argent et donné le reçu pour Philips n'a pas été entendu.

Ce que l'on peut dire de mieux dans tout ceci en faveur du demandeur c'est que cette preuve n'est pas déterminante; mais les faits subséquents me paraissent donner entièrement raison au défendeur. Le 1er octobre 1889, le curateur nommé aux biens de Philips devenu insolvable, a vendu la propriété à



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Baxter qui, par le même acte est devenu cessionnaire et créancier du loyer qui avait couru depuis le premier mai. Et nous trouvons au dossier, en date du 22 octobre de la même année, un reçu par lui signé pour $200, avec la déclaration que cette somme était pour le loyer du 1er mai au 1er novembre.

L'on a dit que Baxter n'avait consenti à accepter cette somme que comme pis-aller et parce qu'il s'était convaincu qu'il ne pouvait avoir plus. C'est possible; mais il n'en est pas moins vrai qu'il a donné le reçu en connaissance de cause, après examen de tous les faits et mûre délibération. Nul doute qu'il a fait tout en son pouvoir pour obtenir le loyer à raison de $500, au lieu de $400, mais seul propriétaire de l'immeuble, libre d'en disposer à son gré, créancier du loyer, et persuadé, soit que le loyer était véritablement de $400, soit qu'il y avait doute et qu'il lui faudrait un procès pour avoir davantage, il a pris pour acquise et pour vraie la prétention du défendeur, et il y a acquiescé. Et recevant le loyer à raison de $400 il l'a définitivement fixé à cette somme.

Le 9 novembre suivant, il a vendu l'immeuble au demandeur et le lui a transmis avec le loyer ainsi déterminé.

Lacroix en offrant au nouveau propriétaire $200 pour les six mois qui restaient de l'année l'a ainsi offert au taux reconnu par Baxter et ses offres doivent, en conséquence, être déclarées suffisantes.

Seconde question: Le congé déloger était-il dans les circonstances, nécessaire avant le 1er février 1890, et s'il l'était comment devait-il être donné?

Le bail originaire était par écrit. Il est contenu dans l'acte de vente du 5 août 1887. Plus tard, nous ne savons quand, mais avant la date du 29 décembre 1888, il a été réduit, suivant les prétentions du demandeur à $500, suivant les prétentions du défendeur que nous croyons devoir adopter, à $400. Dans un cas comme dans l'autre, le loyer originaire a été chargé dès 1888, pour l'année 1888-89, et la tacite reconduction a commencé le 1er mai 1889.

Il est clair que pour mettre fin à cette tacite reconduction, il fallait un congé déloger. Ce sont les termes mêmes du texte de l'art. 1609. Mais ce congé devait-il être par écrit? C'est la seule question qui reste à résoudre.

S'il s'était agi du bail originaire constaté par écrit dans l'acte de vente, il n'y aurait guère de difficulté à déclarer que la tacite reconduction de ce bail originaire n'aurait pu être mise à fin que par un congé écrit émanant de l'une ou de l'autre des parties. Mais ce bail a été modifié, en autant que le loyer originaire a été réduit, les uns disent à $500, les autres à $400; mais, à tout événement, a été réduit à une somme moindre que celle originairement stipulée. S'en suit-il que le congé déloger nécessaire pour mettre fin à la tacite reconduction qui a suivi cette réduction de loyer ne devait plus être par écrit, mais qu'au contraire il pouvait être prouvé par témoins?

Nous avons vu que l'art. 1609, tout en déclarant que le congé est nécessaire, ne s'explique pas sur la manière dont il doit être donné, et nous sommes forcés d'avoir recours aux règles générales. Or, l'art. 1067 dit: "Le débiteur peut être constitué en demeure, soit par les termes mêmes du contrat, lorsqu'il contient une stipulation que le seul écoulement du temps pour l'accomplir aura cet

effet ; soit par l'effet seul de la loi ; soit par une interpellation en justice, ou une demande qui doit être par écrit, à moins que le contrat lui-même ne soit verbal."

Ainsi, règle générale, la mise en demeure doit être soit par une interpellation en justice, soit par une demande qui doit être par écrit, à moins que le contrat ne soit verbal.

Si le contrat est lui-même verbal, la mise en demeure peut être de même verbale, et il est raisonnable de dire que si les parties se sont contentées de leur parole respective, et s'en sont rapportées à la bonne foi de l'une et de l'autre, pour la preuve du contrat lui-même, l'on ne doit pas exiger davantage pour la mise en demeure d'exécuter ce même contrat.

C'est là l'exception et la seule exception de l'article. Dans tout autre cas la mise en demeure doit être, soit par interpellation judiciaire, soit par écrit.

Nous sommes ici en présence d'une tacite reconduction, bail légal, ou plutôt bail légalement présumé, et résultant du fait de la continuation de la possession par le locataire, pendant plus de huit jours après l'expiration du bail, sans opposition ou avis de la part du locateur.

La loi fait résulter de ces circonstances la présomption légale de l'intention des parties d'avoir voulu faire un bail aux mêmes conditions que l'ancien, et pour une autre année si l'ancien bail était pour un an ou plus.

Or, ce bail, qui est ainsi légalement présumé, est un nouveau bail. Pothier nous l'enseigne distinctement, et tout le monde est d'accord sur ce point ; et appliquant l'art. 1067, il ne peut être question en cette cause d'un contrat verbal, ni de la mise en demeure verbale qui peut s'en suivre, comme la seule exception, à la nécessité de la mise en demeure par un écrit.

Ceci est d'ailleurs conforme aux principes généraux, et résulte de la comparaison de l'art. 1067 avec les arts. 1235 et 1690.

L'on peut encore dire qu'il s'agit ici d'un droit à la possession d'un immeuble, droit au sujet duquel le contrat, quel qu'il soit, bail ou autre, ne saurait être établi que par un écrit, et dont partant, la résolution ne pourrait être constatée autrement que par un autre écrit, et enfin que l'admissibilité de la preuve par témoins doit être encore plus restreinte lorsqu'il s'agit non d'un contrat où les deux parties ont contracté des obligations réciproques, mais d'un acte unilatéral n'engendrant de droits qu'en faveur d'une des parties, sans aucune obligation de la part de l'autre ; et c'est probablement là une des raisons de la rigueur de l'art. 1067.

Pour ces raisons, je crois que dans l'espèce, le congé devait être par écrit. Or, le seul que l'on trouve au dossier est contenu dans la lettre du 5 février, écrite par Fauteux à Lacroix, et reçue par ce dernier le 7.

Il était signifié trop tard, et il est partant sans effet pour mettre fin à la tacite reconduction.

Il paraîtrait de plus pouvoir, par ses termes, être difficilement concilié avec le congé verbal antérieur prouvé par Fauteux fils, et donnerait lieu de croire qu'il y a eu malentendu, et que Fauteux fils a fait erreur ou s'est mépris quel-

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que part lorsqu'il dit que le demandeur avait, dans les derniers jours de janvier, donné congé verbal au défendeur.

A tout événement, la lettre ne vaut pas comme congé, parce qu'elle a été tardivement écrite.

Pour ces raisons, je suis d'opinion de maintenir l'appel ; de déclarer les offres de $200 bonnes et valables ; que le congé verbal ne pouvait pas être prouvé par témoins ; qu'il n'y a pas eu congé par écrit en temps opportun, et que l'action, pour le surplus du montant offert, doit être renvoyée.

The following is the judgment of the Court of Queen's Bench :—

"La Cour, etc.

"Considérant qu'il résulte de la preuve faite en cette cause que le loyer convenu était de $400 par année ; que la somme de $200 pour loyer du 1er novembre 1889 au 1er mai 1890, a été offerte par l'appelant à l'intimé dès avant l'institution de l'action ; que ces offres ont été renouvelées avec les défenses, et que le montant en a été déposé avec les dites défenses ;

"Vû le congé déloger donné par le demandeur au défendeur dans la lettre par lui écrite et envoyée au dit défendeur le 5 février 1890 ;

"Vû qu'il n'est prouvé aucun autre congé déloger du 5 février a été tardivement donné, et comme tel est sans effet ;

"Et considérant que la preuve testimoniale d'un congé déloger verbal ne peut valoir pour mettre fin à la tacite reconduction qui a existé de l'immeuble No. 1195 du cadastre du quartier St-Jacques, en question en cette cause ; qu'en autant il y a erreur dans le jugement de la Cour Supérieure siégeant à Montréal, le 31me jour de mai 1890, dont est appel, cette Cour renverse le dit jugement, et procédant à rendre le jugement que la dite Cour de première instance aurait dû rendre, déclare les offres susdites bonnes et valables et renvoie l'action avec dépens contre le dit Léandre Fauteux, tant devant cette Cour qu'en Cour Supérieure."

Judgment reversed.

Geoffrion, Dorion & Allan, attorneys for appellant.
Rainville & Archambault, attorneys for respondent.

SUPERIOR COURT, 1891.

MONTRAL, APRIL 9TH, 1891.

Present:—THE HONORABLE MR. JUSTICE WURTELE.

DUNCAN,

AND PLAINTIFF;

FOY ET VIR,

DEFENDANTS.

HELD:—That where a husband and wife, who are separate as to property, have appeared jointly by the same attorney in an action against the wife, a petition by the wife to quash a writ of attachment before judgment in such suit, unless authorized by the husband, is null, and will be dismissed on demurrer.

"The Court, having heard the plaintiff and the female defendant by their counsel upon the answer in law to the petition of the female defendant, asking that the writ of attachment before judgment issued against her in this cause and the seizure made thereunder be quashed;

"Seeing that the said answer in law alleges that the female defendant and petitioner was not authorized by her husband Edward Haig to make and present the said petition to quash, and that the same is therefore null and without effect;

"Seeing that the female defendant and her husband appeared in this suit by a joint appearance, but the male defendant has neither expressly declared that he authorized his wife to make the said petition to quash nor has joined with her in the same;

"Considering that a wife cannot appear in judicial proceedings without her husband or his authorization (C. C., art. 176), and that in defending a wife is deemed to be sufficiently authorized when she and her husband appear jointly by the same advocate, and the husband joins with her in her pleadings (Pothier, Puissance du mari, No. 75);

"Considering that she does not appear to have been properly authorized to make the said petition to quash, and that it is therefore null and without effect;

"Doth maintain the said answer in law, and doth reject the said petition to quash, but without costs, as the female defendant was not authorized by her husband to contest the said answer in law, and the plaintiff has not asked that she should be judicially authorized to contest such answer in law."

Petition dismissed.

DeMartigny & DeMartigny, attorneys for plaintiff.
Cruickshanks & Murphy, attorneys for defendants.

SUPERIOR COURT, 1891.

MONTREAL, MAY 29TH, 1891.

Present :—HIS HONOR MR. JUSTICE TAIT.

T. S. VIPOND ET AL., PLAINTIFFS ;

vs.

FINDLAY ET AL., DEFENDANTS.

HELD :—That where defects, such as sourness and unsoundness, were apparent by smell when the goods (salted salmon) were opened, they are not latent defects against which by law the seller is obliged to warrant the buyer.

That if the goods are sold without warranty, and subject to inspection, the buyer must make an inspection of such goods within a reasonable time after delivery.

That an action brought five months after delivery, complaining of the quality of such goods, is not brought within a reasonable time.

The facts of the case appear from the remarks of Mr. Justice Tait in delivering the judgment of the Court, and also from the judgment, both of which are given below.

TAIT, J.—The plaintiffs are T. S. Vipond & Son, merchants of this city, and the defendants are Findlay, Durham & Brodie, merchants of Victoria, B.C., and Robert Dalglish, commission merchant of this city.

The action is brought to recover part of the price of 334 barrels of salted salmon, which the defendant Dalglish, acting for the Victoria firm, sold to plaintiffs, and of which they took delivery and paid for.

The plaintiffs allege that the sale was made about the 13th of November, 1889, by Dalglish in his own name, but that he also acted for foreign and undisclosed principals, who were the other defendants. An examination of plaintiffs' declaration shows their case to rest upon the following grounds:

1, That the salmon was warranted by the bill of sale and by defendants as "Prime Red Sockeye Salmon."

2. Instead of being of this quality, it was affected by serious latent defects, being unsound and sour, which defects had existed from a time anterior to the sale, and which were of such a nature that they could only be discovered in actual cooking or upon special examination by experts, and therefore could not be seen or known by plaintiffs by actual or usual inspection thereof.

3. That defendants were guilty of fraud, as they knew before the sale that the salmon was so affected.

4. That plaintiffs used due diligence in notifying defendants of the bad quality of the salmon as soon as they discovered it; and in holding an inspection thereof after notice by Messrs. Baird, Munn & Leonard, who found the goods depreciated by reason of the defects stated to the extent of $1,453.75. For this sum, together with $40 cost of inspection, plaintiffs ask judgment.

The defendants Findlay, Durham & Brodie admit selling the salmon at the

price plaintiffs mention, but say it was sold without warranty as to its quality and soundness; that it was open to inspection at the time of the sale, and was accepted without reserve, and paid for on the 5th of December; that the words "Prime Red Sockeye Salmon" were mere words of description, and did not constitute a warranty as to quality or soundness; that it is contrary to custom to sell such goods with such warranty, and Dalglish was not authorized, but, on the contrary, was specially instructed not to give any warranty by a letter of date 29th October, 1889, which he read to plaintiffs at the time of sale; that after the delivery of the fish on the 13th November, plaintiffs used and sold it without any notice to the defendants of any defect, and about the 31st of January, 1890, had it inspected by L. E. Morin, and again on the 26th of February, who declared it to be No. 1 best quality, and in good order and condition, and delivered his certificate to plaintiffs to that effect; that the inspection by Messrs. Baird, Munn & Leonard was irregular and without notice; that the fish was in good order, and in any case plaintiffs have lost any right of action by want of diligence in notifying defendants of defects in inspecting the fish and in bringing their action.

Defendant Dalglish says he only acted as the agent of the other defendants, as plaintiffs well knew, as he exposed to them his authority and put them in possession of all the facts and circumstances in regard to such agency. He denies any personal reponsibility, and, moreover, pleads that the sale was made without warranty, and sets forth the same facts in connection with the sale as are set forth in the plea of the other defendants.

We have first to enquire what the terms of the contract were as to warranty of quality or soundness—and this necessitates deciding whether Findlay & Co.'s letter to Dalglish of the 29th October, 1889, was read by him to plaintiffs. The letter is in these words:

"Referring to our letter of the 12th instant, we now beg to advise having shipped to your consignment this day 173 barrels salted salmon, 322 half barrels do., and for which we enclose bill of lading and invoice. The shipment is made by Canadian Pacific Railway, and quick transport is promised. The fish is 'Prime Red Sockeye Salmon,' heads off, and ten packages just opened show contents in most satisfactory condition, and we trust therefore the shipment will give satisfaction on arrival at destination.

"Please to sell on arrival and after inspection by purchasers, so that there shall be no disputes thereafter as to the quality or weights.

"We are prepared to guarantee quality to-day after the inspection we have just made, but we never guarantee anything after shipment, and we find the most satisfactory course is for buyers to judge for themselves.

"Please not to hold the shipment, but sell to best advantage on arrival so as to close accounts quickly."

Mr. Dalglish declares in the most positive manner that he read every word of this letter to Mr. Vipond, one of the plaintiffs, and received an "offer of "$9.75 per barrel, two halves equal to one barrel, purchaser paying freight and

T. S. Vipond et al. vs. Findlay et al.

"balance cash less two per cent.;" which he wired to his principals on the 13th of November, and received reply by wire on the same day, accepting—upon which the invoice was made out in which the salmon are described as "Prime Red Sockeye Salmon."

At this time the salmon was here either in the care or at the freight sheds of the Canadian Pacific Railway Company. Some days after, it was taken to plaintiffs' warehouse, and put in the cellar, except about 50 barrels and half barrels, which were kept on the first floor. The plaintiffs paid the freight, and received and accepted the goods—and only paid the balance less two per cent. on the 5th of December.

The plaintiffs put two witnesses in the box to contradict Mr. Dalglish's statement, that he read to Mr. Vipond, one of the plaintiffs, every word of the letter of the 29th of October. One is Mr. George Vipond, who is the son of one of the plaintiffs and a cousin of the other, the other is Mr. T. Alexander Vipond, a nephew of plaintiff T. S. Vipond, and a cousin of the other plaintiff.

Both these gentlemen say that Mr. Dalglish did not read the clauses in the letter commencing with the words "Please to sell on arrival and after inspection so that there will be no disputes thereafter as to the quality or weights; we are prepared to guarantee quality to-day after the inspection we have just made, but we never guarantee anything after shipment, and we find the most satisfactory course is for buyers to judge for themselves, etc."

This case was pending at the date of the recent act of the Quebec Legislature, permitting a party to a suit to give testimony on his own behalf in every matter of a commercial nature, so that Mr. Dalglish could only be examined on behalf of Messrs. Findlay & Company, who have pleaded separately.

Being a joint defendant, he is of course interested in the event of the suit; but I may say that his manner impressed me with the belief that he was giving a straightforward and truthful account of the whole transaction.

The young men were sitting at the time at another desk in another room separated by a curtain which was partially drawn. They say they could hear and see what was going on. They were engaged in another work, and it does not seem probable that they could have given such special attention as to be able to recollect so well as Mr. Dalglish, who went there for that purpose only, whether the entire letter was read.

Mr. George Vipond says Mr. Dalglish read the clause "Fish is Prime Sockeye Salmon, heads off, and ten packages just opened show it is in satisfactory condition, and we trust therefore the salmon will give satisfaction on arrival at destination," but did not read the balance of the letter.

He says he does not remember if he read the clause "Shipment is made by the Canadian Pacific Railway, and quick transport is guaranteed."

Now Mr. T. Alexander Vipond says Mr. Dalglish read a clause in the letter, the purport of which was that it was "No. 1 Sockeye Salmon." Then the witness, looking at the letter, says he, Dalglish, read the clause, "The fish is Prime Red Sockeye Salmon, with heads off," and nothing more. On cross-

examination, he says he cannot remember whether Dalglish put in the words "No. 1" or not, but persists in stating that the clause "ten barrels just opened show contents in most satisfactory condition" was not read—but that he stopped reading when he got to the words "heads off." It will be seen therefore, that while George Vipond swears the clause "ten barrels just opened, etc.," was read, T. Alexander Vipond states the contrary; the first does not remember if the clause "The shipment is made by the Canadian Pacific" was read, and the other does not remember if the words "No. 1" were stated or not. I mention these particulars to show that it is not altogether safe to rely upon the memory of persons who were present, but who had no immediate interest in the matter, and who say they did not hear the clauses in question read, in preference to one who went there for the express purpose of making the sale, and who states positively that he did read them.

There is another point worthy of notice in this connection. I allude to the fact, that when plaintiffs wrote to Dalglish on the 17th of December, complaining that some of the salmon had proved unfit for use, and stated they had bought "good, sound, sweet salmon, etc.," he sent a reply on the 24th of the same month, in which he states, "No doubt you will remember when I offered "you the fish, that I was particular in reading their (Findlay & Company's) "letter to me word for word, and here it is again," and he repeats the letter.

Now, it does appear to me that if Mr. Dalglish's assertion that he had read the letter word for word was regarded by the plaintiffs as untrue, it called for an immediate and absolute denial, instead of which we find no denial until we see it in plaintiffs' declaration in the case, wherein they state "that said Dalglish never read to plaintiffs the letter of his principals, as he pretends in his said letter." In their answer to Dalglish's letter of the 24th of December, plaintiffs say: "In reply, we purchased from you good salted salmon, and paid you for the same. We had every confidence in the shippers, etc." But no direct allusion is made to Dalglish's assertion regarding the reading of the letter in that or any subsequent letter.

To my mind, the fact that Dalglish at once, upon the claim being put forward by plaintiffs, and when the matter was fresh, took the ground that he had read the letter word for word, furnishes a very strong presumption of his good faith and the truthfulness of his testimony. It is quite possible that Messrs J. & T. A. Vipond did not hear the entire letter read, but, at the same time, I believe Mr. Dalglish read it, and I hold it proved that he did. He was, as plaintiffs knew, the agent of the defendants, Findlay & Co., and by this letter upon which the contract was made, his authority was limited to selling after inspection by purchasers, so that there might be no disputes as to quality and to selling without warranty, the buyers to judge for themselves; it was upon these conditions, I think, that plaintiffs' offer was made and accepted, they received the bill of lading and took control of the goods on the 13th when the invoice was furnished, and it was not till the 5th of December, some twenty-two days after, during which period ample time was afforded to inspect the goods, that they paid for

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them. The fact that the goods are described in the invoice as "Prime Red Sockeye Salmon" did not alter or enlarge the responsibility of defendants as to warranty. I do not mean to say that description in an invoice may not in some circumstances afford some proof of warranty, but here the sale had been of goods of that description without warranty and at purchasers' risk, and the invoice corresponded to the description of the goods sold.

But supposing the letter in question had never been read to plaintiffs, what would be the responsibility of defendants? According to Art. 1523 of our C. C., the seller is not bound for defects which are apparent and which the buyer might have known of himself. The buyer is bound to inspect and examine for himself, and where he does not possess sufficient knowledge of the thing sold to detect defects which can be ascertained by inspection, he is bound to employ some one to make the examination for him. So Pothier says (Vente No. 207):

"Et quand même il ne l'aurait pas connu, il ne serait pas encore recevable à "se plaindre du tort qu'il souffre de ce contrat; car c'est par sa faute qu'il le "souffre; il ne tenait qu'à lui d'examiner la chose avant de l'acheter, ou de la "faire examiner par quelqu'un s'il ne s'y connaissait pas lui-même. Or, un "tort qu'une personne souffre par sa faute n'est pas un tort auquel les lois "doivent subvenir, les lois n'étant pas faites pour entretenir la négligence."

Aubry & Rau (Vol. 4, 387) put it thus: "Les vices apparents, c'est-à-dire "ceux dont l'acheteur aurait pu se convaincre par une vérification exacte de la "chose vendue, ne donnent lieu, sauf convention contraire, soit expresse, soit "tacite, à aucun recours contre le vendeur, lors même que cette vérification "aurait présenté plus ou moins de difficultés au moment de la vente."

Laurent (Vol. 24, No. 284) remarks:

"Quand les défauts sont-ils apparents? L'article 1642 donne, sinon une "définition, du moins une explication des défauts apparents, en disant que ce "sont ceux dont l'acheteur a pu se convaincre lui-même; il n'est donc pas néces-"saire qu'ils frappent les regards; l'acheteur doit examiner la chose, et la véri-"fier, et s'il la vérifie, il s'apercevra des défauts qui la vicient. Mais, s'il ne "fait pas cette vérification, pourra-t-il prétendre qu'il ne connaissait pas le vice? "Non; on lui répondrait avec l'article 1642, qu'il a pu s'en convaincre lui-"même, et que s'il ne l'a pas fait, il doit supporter les conséquences de sa "négligence.

"Le point de savoir si le défaut est apparent ou caché est une question de "fait qui, par sa nature, est abandonnée à l'appréciation du juge.

"Si l'acheteur peut se convaincre du défaut en vérifiant la chose, il n'a droit à "la garantie; la loi ne distingue pas si la vérification est plus ou moins difficile; "tout ce que le juge doit constater, c'est si l'acheteur a pu se convaincre lui-même "du défaut."

I will only cite one more author, one of the best French authors on commercial law, Bédarride, Droit Commercial, Des achats et ventes, No. 274, p. 355.:

"Il n'y a de caché que le défaut que l'acheteur ne pouvait actuellement dé-"couvrir, qui ne devait se manifester que dans l'emploi de la chose qui le recèle.

"La première condition exigée par la loi n'existe donc pas, si le défaut, quoique "non apparent, pouvait être facilement connu et constaté. Le premier devoir "de l'acheteur est de vérifier et d'examiner soigneusement la chose qu'il se pro- "pose d'acheter. A défaut de connaissances spéciales, il doit recourir à des "personnes capables et expérimentées, et n'agir qu'après leur examen.

"S'il manque à ce devoir, dont l'accomplissement eût amené la découverte du "défaut ou du vice, il s'est mis dans le cas d'être accusé de légèreté et d'im- "prudence, et tenu des conséquences plus ou moins fâcheuses qui en résulteraient "pour lui; la doctrine et la jurisprudence sont unanimes à cet égard."

Although it is hardly necessary to go into the English law, as this case must be decided according to ours, yet it seems to me there is no substantial difference, and, if anything, the English law is less favorable to the purchaser.

Mr. Benjamin says (3rd English Edition, p. 633): "The maxim of the common law, *caveat emptor*, is a general rule applicable to sales, so far as quality is concerned. The buyer (in the absence of fraud) purchases at his own risk, unless the seller has given an express warranty, or unless a warranty be implied from the nature and circumstances of the sale." "To this general rule, there would seem to be no exception in the case of a sale by description where the purchaser has had no opportunity to inspect, in which case the purchaser has a right to expect a saleable article answering the description in the contract.

In Gardner *vs.* Gray (which was a sale by description where the buyer had not inspected the goods), the defendant made a sale of twelve bags of "waste silk." The declaration contained a count alleging a sale by sample, but on this the proof failed. There were other counts, charging the promise to be, that the silk should be of a good and merchantable quality. Lord Ellenborough said: "Under such circumstances the purchaser has a right to expect a saleable arti- "cle answering the description in the contract. Without any particular war- "ranty, this is an implied term in every contract. Where there is no opportu- "nity to inspect the commodity, the maxim of *caveat emptor* does not apply. "He cannot without a warranty insist that it shall be of any particular quality "or fineness, but the intention of both parties must be taken to be that it shall "be saleable in the market, under the denomination mentioned in the contract "between them. The purchaser cannot be supposed to buy goods to lay them "on a dung hill." (Benjamin, p. 649.)

Meller, J., in delivering the judgment in the case of Jones *vs.* Just, decided by the Queen's Bench in February, 1868, reviewed all the decisions, and classified them. They will be found in Benjamin, pp. 649, 650.

The first class were described as follows: "Where goods are *in esse* and may "be inspected by the buyer, and there is no fraud on the part of the seller, the "maxim *caveat emptor* applies, even though the defect which exists in them is "latent, and not discoverable on examination, at least where the seller is "neither the grower nor manufacturer. The buyer in such a case has the "opportunity of exercising his judgment upon the matter, and if the result of "the inspection be unsatisfactory, or if he distrusts his own judgment, he may, "if he chooses, require warranty, etc."

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Campbell on sales, p. 304: "Further, under a contract of sale of goods of a "specific description which the buyer has no opportunity of inspecting, and so "far as relates to defects, not discoverable on inspection, it is an implied con- "dition of the essence of the contract, that the goods must not only, in fact, "answer the description, but must be saleable or merchantable goods of the "description sold."

In this case, there is no question as to the plaintiffs having had an opportunity to inspect, for they had the goods in their possession or under their control from the 13th November to the 5th of December before they paid for them. The only question is whether, by inspection, they could have ascertained the defects of which they complain, admitting for the present that they did exist.

They say the defects consisted of unsoundness and sourness, and they rely on the evidence of Messrs. Baird, Munn & Leonard, who inspected the fish in February, 1890, to establish these defects. Mr. Baird says he judged of the condition of the fish from their offensive odor, and from their general appearance; he says it is quite easy to distinguish a good from a bad salmon by the general appearance, that the article speaks for itself; if inferior, it is tainted and has an offensive smell, the smell is one great point. He went on that and the general appearance. It had not the good color of good fish.

He says, moreover, that if the fish had been opened and examined after their arrival here while they were still cold, the defects would have been quite apparent.

Mr. Leonard also says, that if he had examined it on arrival he would have found the fish the same as he did when he made his inspection.

According to two of plaintiff's own witnesses, these alleged defects were discoverable by smell and appearance of the fish. Mr. Laurent, already cited, says that the question whether a defect is hidden or latent is a question of fact to be left to the appreciation of the judge. Accepting Messrs. Baird & Leonard's testimony on this point, I can have no hesitation in saying that the defects were apparent, and were such that the plaintiffs might have known of themselves, or might have ascertained by proper inspection such as they were required by law and usage to make.

I therefore think plaintiff's action is unfounded for this reason also.

Again, I do not consider that the action was brought with reasonable diligence. I do not propose to go into details on this point. I have already remarked that the sale took place on the 13th November, 1890. Now the action was not instituted until the 14th of April, 1891, nor served till the 21st of April, five months after the sale.

The defendant Dalglish, as soon as he heard of the claim, promptly referred plaintiffs to the fact that he had read to them the letter of his principals of the 29th of October already referred to, while Messrs. Findlay & Company also repudiated the claim at once. The plaintiffs, by the end of January, were duly notified of the position taken by Findlay & Company, and had threatened inspection and immediate suit. They went on holding inspections by Mr. Morin

on the 31st of January, and on the 18th and 25th and 26th of February. The final result of Mr. Morin's inspection, who was selected by themselves, and who was evidently a man of great experience, having been for fifteen years official inspector of fish and oils at Montreal, was against them, he deciding, after resorting to the test of cooking the salmon, that it was No. 1 quality, and answered to the description of prime salmon.

The inspection by Messrs. Baird, Munn & Leonard was held on the 27th of February, and they decided that the fish as a whole was unsound and unmerchantable, and must have been so when shipped, and they estimated the depreciation at $3.75 per barrel and $2.50 per half barrel, relatively with merchantable value of sound fish.

But it was not till about six weeks after this that the action was instituted. I would refer counsel to the case of Lewis *vs.* Jeffrey, 18 L. C. J., p. 132, and the authorities there cited.

One of the learned counsel for plaintiffs referred to the Act respecting the fraudulent marking of merchandise, chap. 166 of the Revised Statutes of Canada, sections 20 and 21, and argued that the Court should apply the provisions of these sections to this case.

The declaration contains no allusion to the brands on the barrels, and the action does not, and I feel convinced was not intended to rest upon any warranty resulting from the branding of the barrels. During the trial it came out incidentally that the barrels bore different brands, such as "Extra boneless Salmon," "Scandinavian Fishery," "River Helgesen and Rivers Hillets;" but as to being branded "Prime Red Sockeye Salmon," the evidence is very weak. Mr. Munn speaks as if they had been; but the certificate of himself and co-inspectors does not give any such brand. The certificate, as well as Mr. Morin's, only give the brands I first mentioned, and Mr. Morin did not see any other. But I say the action is not based on any warranty of brand, and the defendants had no opportunity to meet such a pretension.

On the whole, I am of opinion that the action should be dismissed for three reasons:

1. Because the sale was made without warranty, and subject to inspection.

2. Because the defects complained of, if they existed, as plaintiffs' witnesses say they did, were not hidden or latent defects, but were such that might have been known by the plaintiffs if they had inspected the fish as they were bound to do.

3. Because plaintiffs did not take their action with reasonable diligence.

JUDGMENT.

The Court having heard the parties by their counsel upon the merits of this action, having heard the witnesses, examined the proceedings, and deliberated. Seeing plaintiffs seek to recover from the defendants part of the price of a quantity of salmon which they purchased from defendants Findlay, Durham & Brodie, through their agent, the other defendant Dalglish, and received and

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paid for; plaintiffs alleging that said salmon was warranted to be "Prime Red Sockeye Salmon," instead of which it was affected by a serious latent defect which had existed from a time anterior to the sale, and which consisted of unsoundness and sourness, and that defendants were guilty of fraud as they knew before the sale that the salmon was so affected;

"Considering plaintiff has failed to prove that said salmon was warranted as alleged, but that defendants, Findlay, Durham & Brodie, have pleaded and proved that said salmon was sold, subject to inspection and without warranty as to quality;

"Considering that the alleged defects in the said salmon to which plaintiffs' witnesses, Messrs. Baird, Munn & Leonard, who inspected said salmon at plaintiffs' request, have testified, were not latent defects, but were defects which (according to the testimony of Messrs. Baird & Leonard) were apparent, and which the plaintiffs might have known of themselves by a proper and reasonable inspection, such as they were by law and custom, and according to the contract, bound to make of said salmon;

"Considering plaintiffs had ample time and opportunity to make such inspection before paying for said salmon, they having received the invoice of said goods and delivery and possession thereof, at Montreal, on the 13th day of November, 1890, while they did not pay for them till the 5th of December following;

"Considering, moreover, that defendants have pleaded and established that plaintiffs did not use such diligence as is required in such cases in their proceedings anterior to their action, and especially did not use due diligence in bringing their action which was not instituted till the 14th of April, five months after the sale;

"Considering plaintiffs have failed to prove the material allegations of their declaration, doth dismiss plaintiffs' action with costs distraits, etc."

Trenholme, Taylor & Buchan, attorneys for plaintiffs.
Selkirk Cross, attorney for defendant Dalglish.
Abbotts, Campbell & Meredith, attorneys for the other defendants.

COURT OF REVIEW, 1891.

MONTREAL, JUNE 27TH, 1891.

Present: JOHNSON, C.J., TASCHEREAU AND TAIT, J.J.

McRAE, PLAINTIFF;

vs.

MACFARLANE, DEFENDANT.

HELD:—That a partnership between contractors, formed for the purpose of doing business as railway contractors, and the building of railways, is a commercial partnership, and any claim between such partners arising out of the partnership is subject to the prescription of five years.

The judgment from which this inscription in Review was taken was rendered by the Superior Court, Montreal, by Mr. Justice Lorangeр, January 31, 1891, and is as follows :

La Cour, etc. "Attendu que le demandeur se pourvoit par une demande en reddition de compte par le défendeur, et allègue : qu'en 1876 le demandeur et le défendeur, tous deux contracteurs de chemins de fer, ont formé une société pour la construction de chemins de fer dans la Province de Québec, à profits et pertes égales ; qu'ils étaient dans l'habitude de se rendre compte de temps en temps, et qu'en 1879 il est intervenu un règlement de compte, par lequel le défendeur s'est reconnu endetté envers le demandeur en la somme de $859.11, qui est encore due au dit demandeur ; que dans le mois de septembre 1879, le demandeur et le défendeur ont entrepris, pour la compagnie du chemin de fer du sud-est, un pont sur la rivière Yamaska ; que l'exécution de ce contrat a été confiée en entier au défendeur qui en a reçu la valeur ; que le contrat a reçu son exécution en entier, et que le défendeur est resté en possession de tous les comptes et pièces justificatives qui concernent ce contrat ; qu'il a été souvent mis en demeure par le demandeur de rendre compte des argents qu'il avait reçus, mais a toujours refusé et négligé de le faire ; que la part des profits du demandeur réalisés sur ce contrat est de $4,000 ; que le défendeur est resté en possession de tous les outils et instruments qui ont servi à l'exécution du dit contrat, et se les est appropriés ; que ces instruments et outils valent une somme de $6,000, sur laquelle le demandeur réclame celle de $3,000, et le demandeur conclut à ce que le défendeur soit condamné à lui rendre compte comme susdit, et à son défaut de le faire, à lui payer la somme de $8,059, y compris la dite somme de $859.11 ;

"Attendu que le défendeur nie qu'il ait été en société avec le demandeur pour la construction du chemin de fer ; qu'il nie également qu'il ait entrepris en société avec lui la construction d'un pont sur la rivière Yamaska, pour la compagnie du chemin de fer du sud-est, et ajoute qu'il est vrai qu'il a été question de ce contrat entre le demandeur et lui, mais, qu'en réalité, il n'y a jamais eu de société ; que si le nom de la société appert au bas du contrat, c'est par erreur que le défendeur l'y a apposé, ou dans l'espoir où il se trouvait que le défendeur entrerait en société avec lui pour la construction de ce pont ; qu'à tout événement il n'a réalisé aucun bénéfice, que c'est le nommé Ross, le contremaître commun, partie en cette cause, qui a exécuté le dit contrat et qui est resté en possession de tous les livres, comptes et pièces justificatives qui s'y rapportent, qu'il (le défendeur) a payé pour le demandeur une somme de $1,435.90 qui était due à des créanciers communs, et il offre cette somme en compensation à l'encontre de la demande de $889.11 ;

"Considérant que le défendeur n'a pas prouvé son plaidoyer, qu'au contraire, interrogé sur faits et articles, il admet qu'il a été en société avec le demandeur aux époques mentionnées dans la déclaration pour la construction de chemins de fer dans la Province de Québec, et qu'il a entrepris avec lui, également en société, la construction du pont ci-dessus mentionné sur la rivière Yamaska, aux termes du contrat produit par le demandeur comme Exhibit A à l'enquête ;

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"Considérant qu'il est en preuve par l'Exhibit No. 1 du demandeur, que le défendeur lui devait, lors de l'institution de la présente action, indépendamment de la construction du pont sur la rivière Yamaska, une somme de $141, balance due sur les premières entreprises des parties, déduction faite des sommes d'argent payées par le défendeur pour le profit de la société, et conséquemment son exception de compensation est renvoyée pour le surplus;

"Considérant qu'il est en preuve que le défendeur a eu le contrôle absolu de l'exécution du contrat qu'il a fait en société avec le demandeur pour la construction du dit pont sur la rivière Yamaska; qu'il a reçu de la compagnie du chemin de fer du sud-est des montants considérables sur le prix et l'exécution des dits travaux, et n'en a rendu aucun compte;

"Considérant qu'il est en preuve que le défendeur a reçu de la compagnie du chemin de fer du sud une somme de $21,155.52 pour l'exécution du contrat qu'il a fait comme susdit en société avec le demandeur pour la construction d'un pont sur la rivière Yamaska, et n'a rendu et refusé aucun compte au dit demandeur, non plus que des outils et instruments qu'il a gardés en sa possession, malgré qu'il ait été mis en demeure de le faire;

"Considérant que le contrat intervenu entre les parties est un contrat civil, et que le plaidoyer supplémentaire de prescription est mal fondé;

"Considérant que le demandeur a prouvé les allégations de sa déclaration et que le défendeur n'a pas prouvé celles de sa défense;

"Renvoie la défense, maintient l'action du demandeur, et condamne le défendeur a payer au dit demandeur la somme de $141 avec intérêt du 27 septembre 1887, jour de la signification de l'action, condamne de plus le défendeur a rendre au demandeur sous un mois de cette date un compte fidèle et détaillé des argents reçus par lui sur et en exécution du contrat ci-dessus mentionné pour la construction d'un pont sur la rivière Yamaska, des profits produits et réalisés sur le dit contrat, des sommes payées et dépenses encourues pour son exécution, avec pièces justificatives au soutien; aussi de rendre compte des outils, instruments et matériaux de la dite société que le defendeur retient en sa possession et de leur valeur, et sur le défaut du dit défendeur de rendre le dit compte dans les délais susdits, il est condamné à payer au demandeur la somme de $2,000 pour sa part lui revenant comme profits dans le dit contrat, la valeur des matériaux, outils et instruments qu'il (le défendeur) retient en sa possession comme susdit, le tout avec dépens distraits, etc."

JOHNSON, CH. J.—(In Review). The plaintiff's action alleged that the parties entered into a co-partnership as railway contractors in 1878 to build railways and works connected with them in this province and elsewhere upon equal shares; then, that they contracted to build, and did build, a bridge for the North Eastern Railway Company; that the defendant did all the active work and took all the money; that the partners had a settlement of accounts in 1879, by which $859 were shewn as due by the defendant to the plaintiff; and he asked for an account and also a separate condemnation for the $859.

The only plea in the case requiring consideration is the one of prescription

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for five years, which was overruled below, the court finding that the action, being one to get an account rendered by one partner to the other, and the contract for a partnership being a civil contract, the limitation did not apply. Of course I admit that the formation of a partnership between any two or more individuals may be considered in itself, and irrespective of the object in view, as a mere civil contract; but it must also be admitted that our law expressly recognizes commercial partnerships as such, and of various kinds, for Art. 1858 C. C. says in express terms that "Partnerships are also either civil or commercial;" and Art. 1863 says: "Commercial partnerships are those which are contracted for carrying on any trade, manufacture, or other business of a commercial nature, whether general or limited to a special branch or adventure."

Such being the law, the next question is whether this was a commercial partnership. By the action, the plaintiff demanded an account of monies said to have been left in the defendant's hands to settle partnership debts, and of profits of a contract for building a railway bridge. Under the Insolvent Act of 1875, among those who are held by law to be traders, we find builders expressly mentioned. Again, under the Act for the registration of partnerships, reproduced in the Code (Art. 1834), we find trading partnerships obliged to register, including those for manufacturing or mechanical purposes, or for the construction of dams or bridges. The cases cited for the defendant show also that contracts for building houses are contracts of a commercial character, and for that reason the English rules of evidence applied to them. What we have to do with here is of course not the applicability of the English rules of evidence, but the cases were cited to show that those rules were applied for the express reason that the cases concerned commercial matters; and I would add to those cases, the one I mentioned at the hearing—the once celebrated case of McKay & Rutherford—in which the Privy Council expressly held that a contract to supply stone for the locks of the Lachine canal was a "commercial matter" (13 English Jurist, p. 17). The modern French commentators all hold the same opinion. I will only refer to 1 Pardessus, No. 36. Then, if this is the case; if commercial partnerships are expressly recognized by the law as distinguished from mere civil contracts, and if this is one of them, the next question will be (and I think it is the only debatable question in the case), is the plea of five years' prescription a good plea? The five years' prescription is substituted in our modern law for the old statute of limitations. Our Civil Code, Article 2242, lays down the general rule: "All things, rights and "actions, the prescription of which is not otherwise regulated by law, are pres- "cribed by thirty years." Is the prescription to such an action as the present "otherwise regulated by law"? In my opinion it is. I think it is a "claim of a commercial nature" within the terms of section 4 of Article 2260 C. C. That Article introduced the five years' prescription in all the cases it enumerates. Number 4 gave it in actions upon bills of exchange, promissory notes, or notes for the delivery of grain or other things, and whether negotiable or not; and then introduced in brackets the words ("or upon any claim of a commercial

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nature"). If, then, the partnership was a commercial partnership; if the object of it made the partners traders within the meaning of the insolvent law; if what they did in pursuance of it was a commercial matter, and was completed, as the evidence shows, in 1880, since which neither of them pretends to have acquired any claim against the other, I should hold under the express addition made within brackets, which is of course new law, to No. 4 of Article 2260, that this action is a claim of a commercial nature prescriptible by five years; that the general rule of the thirty years' prescription "where not otherwise regulated by law," which is the language of Article 2242, does not reach to "claims of a commercial nature" to which the five years' prescription is extended by Article 2260.

But it was suggested that this is an action *pro socio*, and that there is a distinction to be drawn between claims due by or to outside parties, and those made *inter se* by one partner against the other. In the first place, this is not merely an action for an account of the profits under the firm's contract for building the bridge; there is an express allegation that, besides those matters, the defendant owed the plaintiff the specific sum of $859, due on a settlement of accounts between them in 1879, and for which a separate condemnation is asked, besides the accountabilty for the management of the bridge work. In the second place, if it was an action to account pure and simple, I should still hold the prescription to apply.

In looking at the history of the introduction of this extension of the five years' prescription beyond notes and bills to any claim of a commercial nature we find in the first report of the codifiers that the addition and amendment in our present Article 2260 was suggested expressly for the purpose of applying it to the action of account and some others not previously embraced in it; and even if the codifiers had not told us what they meant, and we were left with the mere text, without any explanation, I should not see my way to holding that this is not a claim of a commercial nature. This view of the case has the effect of reversing the judgment below, and of allowing the plea of five years' prescription, and dismissing the plaintiff's action with costs.

TAIT, J. :—On the 20th November, 1878, the plaintiff and defendant caused to be registered a declaration, in accordance with the provisions of the law, requiring public notice to be given of trading partnerships, in which they set forth that they had carried on trade and business, and intended to carry on business as railway contractors, in partnership, under the name and firm of "McFarlane & McRae."

On the second day of September, 1887, the present action was instituted by McRae, in which he alleged that in 1876, "he and defendant entered into "a partnership as railway contractors, to carry on the trade and business of "building railways and portions thereof, and building roads and works in con- "nection therewith in the Province of Quebec and elsewhere, the shares of the "partners being equal."

He further, in substance, alleged that it was their custom to furnish to each

other separate accounts of each contract carried out, and to show the balance coming to each partner, and that in 1879 they drew up a statement, showing the then state of the accounts between them, and that defendant then acknowledged that he owed plaintiff the sum of $859.11, plaintiff, however, being liable for one-half of such principal sum and costs as the firm might be condemned to pay in a suit then pending against them; that in September, 1879, the firm entered into a contract with the South Eastern Railway Company, to build a bridge over the Yamaska river and a pier in connection therewith, and to furnish materials, which contract was carried out under the sole management of the defendant, and large profits were made of which plaintiff's share was $4,000; that defendant, after the completion of this contract, took possession of and appropriated to his own use cars, plant and machinery of the firm, of the value of $6,000.

The plaintiff further alleged that the partnership had long since been dissolved by mutual consent, and he concluded by asking that defendant should be condemned to pay him $859.11, the amount acknowledged due on the settlement of the account in 1879, with interest, etc., and to render him an account of the co-partnership business since that settlement, showing the profits on building the bridge, etc., the value and disposition of the plant, and in default to render an account, he should be condemned to pay him the further sum of $4,000, with interest and costs.

The defendant's first plea is a very lengthy one, but it is not necessary to refer to it, except to say that, among other things, defendant alleged that he paid out a large sum in settling certain suits against the firm, and that the one-half of this sum, which plaintiff was bound to reimburse him, was more than sufficient to compensate the $859.11, which plaintiff claimed on the settlement of account in 1879.

The defendant subsequently filed, by special leave of the Court, a supplementary plea, stating that the alleged causes of action in plaintiff's declaration were wholly of a commercial nature; that the partnership had been dissolved more than seven years previous to the institution of the action, and that plaintiff and the defendant had had no dealings within said period, and that plaintiff's action was therefore prescribed.

By the judgment now under review, it was held, that after deducting the amounts paid out by defendant for the firm, there remained of the $859.11 a balance due by defendant to plaintiff of $141.00; that the contract of partnership was a civil contract, and that the plea of prescription was unfounded. Defendant was therefore condemned to pay the sum of $141.00, and to render an account of the bridge contract and of the plant and machinery within a month's delay, or, in default, to pay plaintiff $2,000.00.

The defendant has relied in this Court solely upon his plea of prescription. He says plaintiff's claims are of a commercial nature, within the meaning of Article 2260, paragraph 4, and his action is therefore prescribed.

As I have already stated, the plaintiff alleged that the partnership was dis-

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solved by mutual consent long before the institution of the action. He does not state the date, but the evidence shows that the partnership did not transact any business, nor had the partners any dealings between themselves for more than five years prior to the institution of this action. The building of the bridge and pier for the South Eastern Railway Company was completed in 1880, and this was the last work the firm did.

Article 2260 says an action "upon any claim of commercial nature reckoning from maturity" is prescribed by five years. Supposing plaintiff's claims to be of this nature, when did they mature? As to the first claim for $859, balance on an account stated and acknowledged by defendant in 1879, surely it matured then, and the five years prescription, if it applied at all, applied to that. As to the claim for an account, it matured according to the allegation of plaintiff's declaration when the contract for the bridge was finished, for he says it was their custom to render a separate account of each contract when completed and to strike a balance showing amount due each partner therein.

In any case, it would mature upon the dissolution of the partnership (1898 C. C.), and it was dissolved evidently after the completion of this contract, as it ceased its operations then, and plaintiff's allegation, that at the date of the institution of the action it had long since been dissolved by mutual consent, must naturally have reference to that time. I think, therefore, that plaintiff's claims had matured more than five years before the action was taken. But the main question to determine is whether they fall under the operation of the five years' prescription, and this, of course, involves the question whether they were claims of a commercial nature.

Was this a commercial partnership? Article 1857 C. C. says: "Partner-"ships are either universal or particular; they are also either civil or com-"mercial." Article 1863 says: "Commercial partnerships are those which are "contracted for carrying on any trade, manufacture or other business of a com-"mercial nature, whether general or limited to a special branch or adventure. All "other partnerships are civil partnerships;" and Article 1864 C. C.: "Com-"mercial partnerships are governed by the rules common to other partnerships, "when these are not inconsistent with the rules contained in this section, and "with the laws and usages specially applicable to commercial matters."

Now, both plaintiff and defendant are described in the writ as contractors, and in the declaration of partnership, which was registered, as well as in the plaintiff's declaration it is stated that the partnership was formed for the purpose of carrying on the trade and business of building railways. They were to carry on together the business of contractors, *entrepreneurs d'ouvrages*, their principal business being to build railways. I have no doubt they would have been regarded as traders within the meaning of the insolvent law of 1864, as may be seen by looking at the authorities collected by Mr. Abbott in his notes on the first section of that Act; and that by the Act of 1875, which may be regarded as declaratory of the law, it was enacted that "brickmakers, builders, "carpenters.....and persons and partnerships exercising like trades or employ-"ments," shall be deemed to be traders.

In Rolland de Villargues, verbo "Commerçant," section 3, traders are defined to be those "qui exercent des actes de commerce et en font leur profession "habituelle;" and as to an "Acte de commerce," it is said "nulle difficulté ne "s'élève a l'égard de ceux qui exercent constamment les professions d'entre- "preneurs d'ouvrages."

Marcadé & Pont say at No. 104, "Société": "Nous connaîtrons donc la nature "de la société à son objet et à son but; et nous la tiendrons pour commerciale "quand elle sera fondée pour exercer un commerce quelconque. En d'autres "termes, toute association tendant à faire en commun certains actes dont l'ac- "complissement par une personne ferait de cette personne un commerçant sera "nécessairement une association commerciale. En présence des mêmes actes "là où l'individu serait commerçant, la société sera une société de commerce."

Troplong, at No. 351, Société, says: "S'agit-il d'entrepreneurs de profes- "sion? on doit déclarer que leur entreprise est commerciale." And, after explaining why, he proceeds to say: "La société formée par ces entrepreneurs "pour seconder leur œuvre et en partager les bénéfices ne peut donc être "qu'une société commerciale."

I would also refer to Marcadé & Pont, Société, No. 116, and to Troplong, Société, No. 350, as showing that a partnership formed for building either a railway, a canal or a bridge would be considered in France, under the "Code de Commerce," as a commercial partnership.

Our own Courts, in deciding upon applications for jury trials and upon questions of evidence, have had to determine whether the claim in issue was a commercial one or not. Several cases are reported.

In Kennedy *vs.* Smith, 8 L. C. R., p. 260, it was held that a contract by a carpenter and joiner to build a house for a person not a trader is a commercial matter.

In Fahey *vs.* Jackson, 7 L. C. R., p. 27, it was held that a contract between a bricklayer and mason and a railway builder is a commercial matter, as being one which in France would have been within the jurisdiction consulaire.

In McGrath *vs.* Lloyd, 1 L. C. J., a contract to furnish materials for a house and to build it was held to be a commercial contract.

In Mackay *vs.* Rutherford (13 English Jurist 21), a contract entered into with commissioners appointed under an Act of Parliament, to provide stone for making a canal, was held by the Privy Council to be a commercial matter.

In Larose *vs.* Patton (17 L. C. J. 52), the late Mr. Justice Sicotte held that a contract made by two persons, by which they obligated themselves to furnish to a railway company a quantity of railway ties, at so much a thousand, the price to be divided between them, constituted a commercial partnership between them, within the meaning of chap. 65 C. S. of L. C. and Art. 1834 C. C., requiring the registration of a declaration of the formation of such partnership.

In Couturier *vs.* Brassard, 18 L. C. J., it was held that a partnership between a sheriff and lawyer for working a saw mill was a commercial partnership.

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The particular contract, in connection with which plaintiff demands an account by this action, was a commercial matter. It was, as already stated, a contract for building a railway bridge over the Yamaska river and work in connection therewith ; the partnership was to furnish all the materials, the lumber at so much per foot, etc.

Seeing then that :—

(1) The partners in this partnership were traders ; that

(2) The work which the partnership was formed to do was commercial in its nature ; that

(3) The partnership was registered as a commercial one,

Surely we are safe in saying that this was a commercial partnership within the meaning of Arts. 1863 and 1864, and that it must be governed, as stated in the latter, by "the laws and usages specially applicable in commercial matters."

Now, as to the application of the five years' prescription, I think it can hardly be open to doubt that a claim by one partner of a commercial firm upon the other for a specific sum, as being the balance due upon an account stated and acknowledged, is a claim of a commercial nature within the meaning of Art. 2260.

Was it intended that this prescription would apply to an action to account?

As we know, and as will be seen by reference to p. 437, Vol. 1, of the Codifiers' Reports, the prescription of claims of a commercial nature rests upon the English Statute of limitations. Under it, it is enacted *inter alia*, that all actions of accounts and for not accounting, and suits for such accounts as concern the trade of merchandise between merchant and merchant must be commenced and sued with six years next after cause of such action or suit, and not afterwards ; and the article of our code as first drafted by the Codifiers read as follows (Art. 100, p. 574) :

"The prescription of actions to account....in commercial matters...acquired by six years, etc." They suggested an amendment, in which the words "of actions to account" were omitted, and the words "all actions of a commercial nature" were put in, and finally the article took its present from "upon any claim of a commercial nature," which words are included in brackets as new law. It seems to me clear that an action by one partner of a commercial partnership against another, to obtain an account of the result of a commercial contract undertaken and carried out by the firm, is a claim of a commercial nature, and is subject to the prescription of five years, just as much as the claim plaintiff has put forward for the balance on the account rendered between them more than five years before suit.

I am, therefore, of opinion that plaintiff's claims are of a commercial nature, that his action was not taken within five years from their maturity, that the debt is absolutely extinguished, and that no action can be maintained thereon (Art. 2267 C. C.) ; and I think that the judgment should be reversed and plaintiff's action dismissed with costs of both courts.

The judgment of the Court of Review is as follows:—

"The Court having heard the parties by their respective counsel, upon the demand of the defendant, for revision of the judgment rendered in the Superior Court, in and for the district of Montreal, on the 31st of January, 1891, having examined the record, etc.;

"Considering that there is error in the said judgment of the 31st January, 1891, doth reverse the same, and this Court sitting in Review proceeding to render the judgment which should have been rendered by the Court below;

"Considering that the plea of prescription pleaded by defendant to plaintiff's action is well founded, and ought to have been allowed; that the partnership existing between the parties was a commercial partnership according to the terms of Art. 1863, Civil Code; that by Art. 2242, Civil Code, all things, rights and actions not otherwise regulated by law are prescribed by thirty years; that the action set up by the plaintiff is otherwise regulated by law, to wit: by paragraph 4 of Art. 2260, Civil Code, being a claim of a commercia nature within the terms of that paragraph, and therefore is prescriptible by five years; doth maintain the said plea of prescription pleaded by the defendant, and doth dismiss the plaintiff's action with costs in the Court below and in this Court, distraits, etc."

Judgment reversed.

Robertson, Fleet & Falconer, attorneys for plaintiff.
James O'Halloran, Q.C., attorney for defendant.

SUPERIOR COURT, 1891.

MONTREAL, JUNE 30TH, 1891.

Present:—HIS HON. MR. JUSTICE DAVIDSON.

LA BANQUE NATIONALE,

PLAINTIFFS;

vs.

THE MERCHANTS BANK OF CANADA,

DEFENDANTS.

Banking usage.—Return of unaccepted cheque.—Rules of clearing house.

An unaccepted cheque drawn by T on M, a bank, and member of the Clearing House Association, was passed in the ordinary way, and credited to N, another bank, and member of the clearing house. At 3.30 on the same day M tendered back the cheque to N, there being no funds to meet it. N refused to take it back, on the ground that it was offered too late; that by a rule of the clearing house it should have been returned before noon; that in consequence of his neglect they had given up the notes for which the cheque was given in payment, and so had suffered loss. No usage or custom was shown at the trial requiring the return of a cheque before noon, but only a temporary rule of the association which had not been acted upon.

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HELD:—That such a custom, in order to derogate from the common law, must be strictly proved. That a mere temporary rule of such an association as proved herein, and which had not been acted upon, could not derogate from the ordinary rule of law applicable to such cases.

The facts of this case appear from the opinion of His Honor Mr. Justice Davidson and the considerants of the judgment, both of which are given below.

DAVIDSON, J.:—A clearing house for banks was organized in this city on the 26th of December, 1888. It was and is a purely voluntary association. Its purposes are to provide simple and expeditious facilities for the daily settlements of the banks with each other, by the effecting at one place and at one time of the daily exchanges between the several associated banks and the payments of the differences resulting from such exchanges.

These objects are carried out in this way: Every morning at 10 o'clock, each bank has at the clearing house all the cheques and other demands it has received against all the other banks during the preceding day, making them up into separate bundles for each bank, with a statement on the cover showing the aggregate of the contents of each bundle. The settlement is made on these statements without regard to the fact whether the contents of the bundle were correctly ticketed or formed good claims against the bank charged; thus each messenger is, in a few minutes, able to receive and take to his bank all the claims of the other banks against it. To attempt to examine and challenge securities at the clearing house would make its purposes inoperative. Those temporary clearing house balances are subsequently verified at the bank by a scrutiny of the cheques and other demands of which they are composed.

On the 30th of June, 1890, the Banque Nationale received from W. & G. H. Tate the firm's cheque on the Merchants' Bank for $5,759.39, to retire certain overdue endorsed paper which the bank, however, continued to retain awaiting payment of the cheque. At 10 o'clock on the morning of the 2nd of July—the first having been a holiday—the plaintiffs duly enclosed this cheque in its package of demands to be charged against the defendants, and received, but at what hour does not appear, a clearing house payment for the amount.

Upon examination the Merchants Bank found that there were no funds to the credit of the Tate account to meet the cheque, and it was as a consequence, on the same day, but at some time after noon, sent back to the Banque Nationale for redemption. It was refused, on the ground that the bank had already delivered up the notes, and, as a consequence, lost its recourse against their endorsers. It refused to take the risk of collecting the cheque, the badness of which was, in fact, determined by the failure of the Tates four days afterwards.

To justify their course, the Banque Nationale relied on rule 5 of the Association, which required dishonored cheques to be returned before 12 o'clock of the day on which they had been put though the clearing house. Thereupon the Merchants Bank protested the cheque and all concerned.

It so happened that plaintiffs, whose head office is at Quebec, had a con-

siderable account current with defendants, and against the balance at its credit the latter forthwith charged up the cheque. Naturally objecting to having the difficulty solved after so summary a fashion, the plaintiffs now take action to recover the balance to which they would otherwise be entitled.

Out of these issues these leading questions result :

By law, or as between members, and under the rules and usages of the Association, must a bank to which a cheque drawn upon it has been presented through the clearing house return it, if not provided for, before noon of the same day, under pain of being held absolutely liable to the holder for the amount ?

How far, if at all, is the presenting bank affected by the fact that it has not, during the overtime, altered its position or been in any way prejudiced by the delay ?

It is almost surplusage to assert that the defendants' return of the cheque was sufficiently diligent, so far as common law was concerned. Previous to the clearing house the undisputed practice was to return at three o'clock. To hand in a cheque to a bank creates no obligation on its part to notify the holder that it will not be paid. The duty lies upon the latter to call and enquire. Jeune *vs.* Ward, 2 Stark 226 ; Overman *vs.* Hoboken City Bank, 1 Vroom 61, 2 Vroom 563 ; Chitty, Bills, 175 ; 2 Parsons, Bills and Notes, 284 ; 1 Morse, Banking, 409.

In Bellasis *vs.* Hester, 1 Ld. Raym. 280, twenty-four hours was not thought too long for a bank to investigate its accounts before answering whether it would pay or return. See also Kilsby *vs.* Williams, 2 Barn & Ald. 515 ; Boyd *vs.* Emerson, 2 Ad. & E. 184. Some United States decisions are to the same effect.

We are thus left to enquire if there existed between these parties some special contract or usage, or mode of dealing, which separately or unitedly created a liability against defendants which would not have existed under any general principles of the commercial law.

At an adjourned meeting of bankers held on the 20th December, 1888, the committee appointed to frame a constitution reported " that they deemed it " advisable to defer that question until a later date, but submitted the follow- " ing rules under which the clearing house could be temporarily managed." Thereupon these rules were unanimously adopted, and I find them introduced into the minutes under the following heading : " The undersigned banks agree " to the following rules and regulations for the temporary arrangement of the " Montreal Clearing House." As a matter of fact they were not signed, but an agent of defendant was present at the meeting. Rules 3 and 5 are those which now interest us, and read thus :

3. The hour for making exchanges at the clearing house shall be 10 o'clock a.m. precisely. All debit balances must be paid into the clearing bank between 12 and 12.30 o'clock of same day ; and between 12.30 and 1 o'clock p. m. the creditor banks shall receive from the clearing bank the balances due to them

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respectively, provided that the balances due from the debtor banks shall then have been paid. But on no condition shall any creditor balance or portion thereof be paid until such debtor balances have been settled. The medium to be used in clearing shall be legal tenders of the largest possible denomination.

5. Errors in the exchanges and claims arising from the return of cheques, or from any other cause, are not to be adjusted through the clearing bank, but directly between the banks interested; and all cheques, drafts, notes or other items in the exchanges, constituting such errors, shall be returned without intentional mutilation to the bank from which they were received, before 11.45 (altered by resolution of the Association 17th January, 1890, to 12 o'clock noon) of the same day; and in case of the refusal or inability of any bank to promptly refund to the bank presenting such cheques, drafts or other items returned, the bank holding them shall report the amount of same to the manager of the clearing house, whose duty it shall be to take from the settling sheets of both banks the amount of such cheques, drafts, or other items so reported, and to readjust the clearing statements and declare the correct balances in conformity with the changes so made; provided that such report of default shall be given to the clearing house manager before 12 o'clock noon, after which hour any differences must be adjusted without reference to the clearing house.

At the annual meeting held on the 17th January, 1890, it was resolved, *inter alia*: "Also the association discontinue the use of debit slips for "returned cheques between banks as likely to lend to abuses, and that payment "be made in cash, as at first; and that the hour for returning cheques be "extended until 12 o'clock noon."

It is not contended, on behalf of plaintiffs, that rule 5 by itself, or any proven or like usage by itself, or both combined, would be sufficient to hold defendants because of a mere failure to return the cheque before noon. Argument at the bar did not go beyond the point of asserting that the liability would exist if the presenting bank had, by reason of the default, been induced to alter its position, as, for example, to abandon securities in the belief, that the conditional acceptance of the morning had been verified and made absolute by the receiving bank. Some of the authorities speak of [illegible] of this kind as being like one made under mistake, but I can only [illegible] assimilate. Even if the receiving bank knew that the bundle [illegible] worthless cheque it would still pay, subject to after-correction. In Preston *vs.* Canadian Bank of Commerce, 23 Fed. Rep. 179, absolute effect was given to a somewhat like rule, irrespective of whether the refusing bank had changed its position or not. The weight of jurisprudence in the United States, however, is in the direction of considering the rule as effective unless there has been a consequent loss. [illegible] it has received a very strict reading. Merchants National Bank [illegible] National Bank, 101 Mass. 281; Manufacturers' National Bank *vs.* Thompson, 129 Mass. 438; National Exchange Bank *vs.* N. B. of N. A., 132 Mass. 147; Mer. N. B. *vs.* N. B. of Commonwealth, 139 Mass. 513; Stuyve-

sant Bk. vs. N. Mechanics Banking Assn., 7 Lans. 197; 1 Morse, Banking, par. 349 et seq.

The evidence on defendant's allegations of usage and practice makes dead against them. Mr. Giroux, of the Hochelaga Bank, says that his bank refuses to receive cheques returned after twelve. Mr. Brunet, plaintiff's manager, naturally thinks a bank entitled to refuse. An instance of a refusal by the Bank of British North America, and of another by the Hochelaga Bank, are also given.

On the other hand, representatives from leading banks in the city testify that no such usage or practice exists, and that the rule is practically and in reality a dead letter. Mr. McDougall, manager of the Quebec Bank, and chairman of the Association, says that the rule "is not acted upon." Mr. Penfold, local manager of the Bank of British North America, says that the cheques returned after noon are, "as a general rule, paid." He recalls the one refusal above referred to. "By no means," he adds, "would I consider that the passing of the hour was sufficient to make me think the cheque was paid."

Mr. King, accountant of the Canadian Bank of Commerce, says that he has never known a cheque to be refused; he always considered it in time if on the same day: "the hour made no difference."

Mr. Wilgress, Bank of Montreal, does not know of a case of refusal; the return of cheques after twelve is of "daily occurrence."

We have to add to these distinctive statements the fact that the rule was only passed as a "temporary arrangement." In the clearing houses, whose rules were at issue in the cases just referred to, I find, so far as I have been able to pursue them, that a formal constitution existed, duly passed and officially signed by each of the banks. The Boston clearing houses rules, to which all the Massachusetts decisions referred, and also, unless I am mistaken, the Preston case, after fixing the time of return, add the words "and in no case shall be returned after." Custom results from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent. Civil Code of Louisiana, ch. 1, art. 3. Ferrière, Dict. de droit, *verbo coutume*. The observance of a practice by an isolated bank, or isolated instances of refusal by other banks, do not constitute a usage. We must also remember that the usage claimed is not one which leads us to some large and equitable method of business affairs. Its application means a condemnation to pay without value received. It is highly in the nature of a forfeiture, and moreover a forfeiture not expressed in terms in the rule under consideration. In all the cases cited the rules and course of business ran hand in hand. In Overman *vs.* The Hoboken City Bank, the usage and forfeiture is expressly declared thus:—"The said bank thus failing to "return the said cheque shall be liable to the holder thereof to pay the amount "of the cheque, whether having funds of the drawer or not." (1 Vroom 61.) "Custom and usages," said the Chief Justice Whelpley, "in derogation of the "common law must be strictly pleaded, and when well pleaded the court must

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"show a case clearly within the usage. If a case can be conceived calling for "the application of the rule, it is the present, where it is attempted to make the "defendant liable, by mere force of usage, to pay a cheque of a drawer without "any funds of his in its hands" (1 Vroom 65). In the Court of Appeals, express mention was made of the proof of usage (2 Vroom 566).

I have so far dealt with the case as if the details of the transaction as stated by the plaintiffs stood unchallenged. But many of the more important of them are seriously disputed. W. & G. H. Tate's liability at the close of the bank on the afternoon of the 30th of June was as follows:—

Note endorsed D. Hatton & Co., protested 20th June, for	$ 850 00
Draft protested for non-acceptance on 23rd June, for	1,302 30
Note endorsed by J. & R. Weir, said to be "noted for protest" 29th June	2,500 00
Note endorsed by D. Hatton & Co., said to be "noted for protest" 30th June, for	1,100 00
	$5,752 30

Mr. Brunet, plaintiff's manager, swears that when the cheque was brought in at about 3.30, he asked why it was not accepted, and was answered that it was too late. He replied that he would not give up the notes until he saw if the cheque was good. G. H. Tate, on the other hand, swears that he informed them there were no funds, and that he would try and cover it on the 2nd. He asked them not to present it until then. Mr. Brunet made some remark about its having to go through the clearing house. Both witnesses testified in this and other respects in evident good faith. Whichever recital is correct, the circumstances were such as to excite great caution in dealing with the cheque.

Again, Mr. Brunet swears that between 12.30 and 1 on the 2nd July, Tate appeared at the bank and asked for the notes, that he (Brunet), in turn, asked the teller if the cheque were all right; that the teller answered "yes, it has been paid," and that thereupon the notes were delivered over. Tate, on the other hand, swears that he only received the notes on the 3rd, and that they were voluntarily and without request delivered up to him. Presumption is in favor of the notes having been delivered on the 2nd, for such was the reason stated by Brunet to have been given to the Merchants Bank clerk, Durand, when offering the cheque, and Durand has not been called to contradict it.

On the other hand, presumption is in favor of Tate's statement that the notes were not asked for. It is hard to believe that he would have ventured to make such a request, knowing as he did that his cheque was not covered. But one other fact remains to be noticed. Durand was not the first who tendered the cheque. A messenger named Fulton, now dead, had been previously entrusted with its return. Mr. Benoit, the assistant manager, recalls that some person, not a bank officer, did offer it to him, and that he referred him to the manager. Of that interview Mr. Brunet does not speak. What the position of the plain-

tiffs then was as to possession of the notes is not shown. I have asked myself if the plaintiffs, on being paid the clearing house balance, became eager to be rid of the notes as soon as 12 o'clock had passed. I do not feel that the evidence justifies an affirmative answer.

Objection was taken at the argument both to the form of the action and the form of the pleadings. No law issue was raised, and it appears to me that the pretensions of both parties are before the Court in a reasonable and common sense form. It is admitted that previous tenders supplemented by the deposit made with the plea discharge defendants from liability, unless they can be held for the amount which the Tate cheque represented. I do not find it necessary to enter upon the question of whether a promissory note could under the old law be lawfully "noted for protest," instead of being fully protested on the due date. The informal manner in which rule 5 was passed, its alleged temporary character, its non-user, the non-existence of a usage such as plaintiffs allege, the contradictions as to fact, the ample reasons which plaintiffs had for being wary of the cheque, the penal nature of the claim, the strict proof to which plaintiffs must be held of the existence of their claim in law and fact, all unite in leading me to the conviction that the action ought to be, as it is, dismissed with costs.

The following is the judgment:—

"The Court, etc., seeing plaintiffs allege that their account with defendants at the date of the institution of this action (13th September, 1890) stood as follows:

1890.	9th August, on deposit	$6,000 00
	28th August, interest credited	727 98
	18th August, cost of protest	10 00
	15th September, interest from 7th July on $5,761.93 at 2½ per cent	27 68
	15th September, interest from 28th August on $238.07 at 2½ per cent	0 27
		$6,765 88

"Seeing plaintiffs further allege that, on the 9th August, 1890, the bank's cheque payable to bearer for $6,000 was presented to defendants, and payment was refused, whereupon it was duly protested, and plaintiffs have a right to recover the amount of their said deposit account; wherefore plaintiffs pray judgment for $6,765.99 with interest at 6 per cent. from date of service."

First plea:

"Seeing defendants plead that on the 2nd day of July, 1890, the clerks of the defendants and plaintiffs and other banks met for the purpose of striking a balance as between all the said banks; that plaintiffs' clerks tendered for the purpose of being included in such general balance an unaccepted cheque of the firm of W. & G. H. Tate, dated 30th June, 1890, drawn on the Merchants Bank for $5,759.39; that, for the purpose of arriving at a balance, this and all

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other like checks were included as if there were funds for them, and said cheque was placed to the credit of plaintiffs and to the debit of defendants, in arriving at the general balance for the day, it being understood that any cheque dishonored should either be returned within a reasonable time, so as to be struck out of the balance, or else be made good by the bank which had received the credit for it; that it was found that there were no funds for said cheque, and defendants forthwith notified plaintiffs, and caused said cheque to be tendered back, but plaintiffs refused to receive it or give credit, pretending that defendants should bear the loss; whereupon defendants protested the cheque;

"Seeing defendants further allege that they thereupon charged up against the balance standing to plaintiffs' credit the amount of the cheque, and that when the cheque for $6,000 set forth in plaintiffs' declaration was presented, there was only $240.61 at plaintiffs' credit, which said sum in reply to the demand of the notary was tendered with the Tate cheque;

"Seeing defendants further allege that the final balance at plaintiffs' credit was $966.05, which was never demanded, and is with the Tate cheque tendered and deposited with the plea; wherefore defendants pray that said tenders be declared good and that plaintiffs' action be dismissed."

Second plea:

"Seeing defendants, by a second plea, deny plaintiffs' allegations, and especially that they are legally liable for the cost of protest of the Tate cheque."

Third plea:

"Seeing defendants, by a third plea, allege that at the time plaintiffs' $6,000 cheque was presented for payment, the plaintiffs were indebted to the defendants in the sum of $5,759.89, amount of the Tate cheque, for which plaintiffs had received credit by error and inadvertence at the time of the making of a general balance between certain city banks, and defendants had at the same time been made to appear debtors for the amount; that the Tates had no funds to meet their cheque; that the cost of protesting this cheque was $2.54; that the amount at the credit of plaintiffs when their $6,000 cheque was presented had been compensated and extinguished to the extent of the Tate cheque and the cost of its protest; that defendants are only indebted in the sum of $966.-05, which is deposited with plea; wherefore it is prayed that the tender be declared good, and plaintiffs' action be dismissed."

Answer to first plea:

"Seeing that the first answer is general;

"Seeing that by their second answer plaintiffs allege that the Tate cheque was handed by that firm to the bank for the purpose of retiring certain promissory notes duly endorsed by solvent third parties of said firm then in possession of the plaintiffs under discount; 'that, in according the said cheque, 'the plaintiffs agreed to surrender to the said firm of W. & G. H. Tate the 'above mentioned notes, provided the said cheque was not returned by the 'defendants as worthless at the usual hour on the 2nd day of July last, in

'accordance with the rules and regulations of the Montreal clearing house and 'the custom of trade and banks; that in due course the said cheque was passed 'through the said clearing house, and credited to plaintiffs and debited to defend- 'ants; that said cheque was handed to defendants' bank and received by them; 'that thereupon, when the time had passed within which, by the rules of the said 'clearing house and by the custom of trade and banks, the said cheque if worth- 'less should have been returned to plaintiffs, the plaintiffs surrendered the said 'notes to the said firm of W. & G. H. Tate; that by the retaining of the said 'cheque beyond the time set forth above, the defendants induced the plaintiffs to 'consider that said cheque had been duly honored and placed to their credit in 'their account with the defendants' bank; that the rules of the said clearing house 'were and are binding on the plaintiffs and defendants, who consented to the same; 'that by the custom of trade and banks the defendants are liable to plaintiffs to 'the amount of said cheque; that by reason of the carelessness and negligence 'of the defendants in not returning the said cheque within the proper time, 'they have caused to plaintiffs a loss of the amount of the said cheque.'"

Replication to third plea:

"Seeing plaintiffs' replication to the third plea is general."

Answer to fourth plea:

"Seeing that plaintiffs, by their answer to the fourth plea, allege 'that by 'receiving the said cheque of W. & G. H. Tate, and by carelessly and negli- 'gently failing to return the same to plaintiffs or to notify them in due time 'of its worthlessness, in accordance with the rules and regulations of the Mont- 'real clearing house and the custom of trade and banks, the defendants 'rendered themselves liable to plaintiffs for the amount of said cheque.'"

Defendants' replication to answer to second plea:

"Seeing that defendants, by their replication to plaintiffs' answer to second plea, allege that said defendants are ignorant of the purpose for which the Tate cheque was handed to plaintiffs; that it was worthless; that no notes were surrendered as alleged; that plaintiffs did not sustain any loss; that defend- ants are not aware of any rule of the clearing house which would have the effect of rendering them liable for the amount of the cheque in the absence of funds to meet it; that plaintiffs were notified of the dishonor of the cheque within ordinary and sufficient time according to the usage and custom of the trade and of banks in the province of Quebec, and in sufficient time to enable the plaintiffs to protect themselves in their relations with the said firm of W. & G. H. Tate; that the cheque was tendered on the day it was received by defendants."

Replication to plaintiffs' answer to fourth plea:

"Seeing that defendants have also filed a replication to plaintiffs' answer to fourth plea, alleging 'that the defendants never received the said cheque of 'W. & G. H. Tate otherwise than for the purpose of arriving at a general 'balance between banks, and never received or accepted the same as acknow- 'ledging the possession of funds to pay the same, and were not guilty of any

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'carelessness or negligence in connection with the return of the same to the 'plaintiffs, but, on the contrary, they forthwith notified the plaintiffs within the 'ordinary time, according to the usages and custom of trade and of banks in 'the province of Quebec, that there were no funds for the purpose of meeting 'the said cheque, and they tendered the said cheque back to the plaintiffs who 'refused to receive the same';

"Considering that a clearing house for banks was organized in this city as a purely voluntary association on the 20th of December, 1888;

"Considering that, to carry out the purposes of the association, each bank delivered at the clearing house, at ten o'clock in the forenoon each day, all the cheques and other demands it has received against all the other banks during the preceding day, making them into separate bundles, each bank, with a statement on the cover, showing the aggregate of the contents of each bundle;

"Considering that the settlements are made on these statements, without regard to the fact whether the contents of the bundle were correctly ticketed or formed good claims against the bank charged, and that such temporary clearing house balances are subsequently verified at the banks by scrutinies of the cheques and other demands of which they are composed;

"Considering that on the 30th of June, 1890, the Banque Nationale received from W. & G. H. Tate the firm's cheque on the Merchants Bank for $5,759.39 to retire certain overdue and in part endorsed paper, which the bank, however, continued to retain, awaiting payment of the cheque;

"Considering that said paper consisted of the following: 1. Note endorsed H. Hatton & Co., protested 20th June for $850; 2. Draft protested for non-acceptance on June 23 (but without endorser) for $1,302.30; 3. Note endorsed by J. & R. Weir, due 29th June (said to have been noted for protest, but in fact not protested on its due date) for $2,500; 4. Note endorsed by D. Hatton & Co., due 30th June (said to have been noted for protest, but in fact not protested on its due date) for $1,100;

"Considering that at — o'clock on the morning of the 2nd of July, the first having been a holiday, the plaintiffs enclosed said cheque in its package of demands to be charged against the defendants, and received, but at what hour does not appear, a clearing house payment for the amount;

"Considering that upon examination the Merchants Bank found that there were no funds to the credit of the Tate account to meet the cheque, and it was, as a consequence, on the same day, but at some time after noon, sent back to the Banque Nationale for redemption;

"Considering that its return was refused, on the ground that the bank had already delivered up the notes, and as a consequence lost its recourse against their endorsers; that it would not take the risk of collecting the cheque, and that, in fact, the Tates failed four days afterwards;

"Considering that the Merchants Bank thereupon protested the cheque and all concerned, and charged the amount thereof against the balance then standing at the credit of an account current which plaintiffs had at defendants' bank;

"Considering that no issue of law hath been raised, and the pretensions of both parties are before the Court in a lawful and pertinent manner;

"Considering it is admitted that the plaintiffs, if entitled to succeed, are entitled, in addition to the deposit made, to the amount of said cheque with 2½ per cent. interest up to the date of this demand, and 6 per cent. interest since, while defendants, if entitled to succeed, are entitled to have the action dismissed and the tenders made with plea declared good and valid;

"Considering that at an adjourned meeting of bankers held on the 20th December, 1888, the committee appointed to frame a constitution reported as follows: 'That they deemed it advisable to defer that question until a later 'date, but submitted the following rules under which the clearing house could 'be temporarily managed';

"Considering that the following appears in the minutes of said date: 'The 'undersigned bankers agree to the following rules and regulations for the tem-'porary management of the Montreal clearing house';

"Considering that among said rules and regulations appears the following (Rule 5 quoted in the opinion);

"Considering that while a clerk of said defendants was at said meeting, the said rules and regulations have never been officially signed by defendants;

"Considering said rules were declared to be only temporarily passed;

"Considering that so far as common law was concerned the return of said cheque was sufficiently diligent, and that to hand a cheque to a bank, as a general rule, creates no obligation on its part to notify the holder that it will not be paid;

"Considering that McDougall, manager of the Quebec Bank, and chairman of the clearing house, swears that said rule 5 'is not acted upon';

"Considering that Penfold, manager of the Bank of British North America, swears that cheques returned after noon are 'as a general rule paid,' and adds: 'by no means would I consider that the passing of the hour was sufficient 'to make one think that the cheque was paid';

"Considering that King, accountant of the Canadian Bank of Commerce, swears that he has never known of a cheque returned after noon to be refused, that he always considered the return in time if on the same day, and that 'the hour made no difference';

"Considering that Wilgress, accountant of the Bank of Montreal, which is the bank of the Association, swears that he does not know of a case of refusal to accept return of a cheque offered after noon, and that such returns are of 'daily occurrence';

"Considering that plaintiffs have failed to prove the practical existence of the rule by them invoked, or of the usage and custom of banks by them alleged and relied on;

"Considering that the existence of any such rule and usage would need to be strictly proved, and the more especially as any condemnation of defendants would be in the nature of a penalty, and moreover of a forfeiture not expressed in terms, in any contract or agreement between the parties;

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"Considering that Tate, the person by whom said cheque was delivered to Brunet, plaintiffs' manager, on the 30th June, swears in contradiction of the latter, that he stated there were then no funds to cover it, but hoped to supply them on the 2nd July; that he did not receive back the paper in question on the 2nd but on the 3rd of July; that it was then delivered up to him voluntarily and without request;

"Considering, moreover, that said cheque was admittedly given after banking hours, without acceptance, for overdue paper and under circumstances which ought strongly to have put plaintiffs on their guard against delivering up said overdue paper;

"Considering that the said cheque was first tendered back by defendants, through a messenger named Fulton, then in their employ, but now dead; that he was referred to plaintiffs' manager (see evidence in defence of Shaw, and in rebuttal, of Benoit), and that there is no evidence that at the time of said first offer the plaintiffs had altered their position as to said overdue paper;

"Considering plaintiffs have failed to prove the material allegations of their declaration;

"Considering that defendants' tender and deposit are good and sufficient;

"Doth declare the said tender of $966.05, and deposit of said cheque of W. & G. H. Tate to be good, valid and sufficient, and doth dismiss the action with costs distraits, etc."

Geoffrion, Dorion & Allan, attorneys for plaintiffs.

Abbotts, Campbell & Meredith, attorneys for defendants.

SUPERIOR COURT, 1891.

(IN CHAMBERS.)

MONTREAL, JULY 17TH, 1891.

Present:—HIS HONOR MR. JUSTICE WURTELE.

THE ONTARIO EXPRESS & TRANSPORTATION COMPANY,

PETITIONERS;

AND

THE GRAND TRUNK RAILWAY COMPANY,

RESPONDENTS.

HELD:—That in the case of a complaint made by an Express Company against a Railway Company, that the latter has not granted them equal privileges with other Express Companies, the Railway Committee of the Privy Council has jurisdiction to hear such complaint, and a sufficient remedy being thus provided a mandamus will not lie.

This was a petition for a writ of mandamus to compel the respondents, the Grand Trunk Railway of Canada, to give the petitioners the same privileges as respondents gave to other Express Companies. The writ was refused for the reasons which, as well as the judgment, are given below:—

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WURTELE, J. :—The petitioner represents that it has been lately reorganized, and that it is now prepared to do an Express business throughout the Dominion of Canada. It alleges that it is regularly incorporated and organized, and that it is desirous of doing an express business on the lines of the Grand Trunk Railway Company of Canada. It states that other companies have got certain facilities from the defendant, and that by section 242 of the Railway Act it is entitled to equal facilities. It represents that the Grand Trunk Railway Company has refused to grant it such facilities; that it has demanded them; and that in consequence of the refusal of the Grand Trunk Railway Company it has to have recourse to a writ of mandamus in order to obtain its rights under the Railway Act.

The writ was issued, and on its return the defendant pleaded, first, by exception to the form, and afterwards, by demurrer and peremptory exception. It pleads by the exception to the form that the petitioner was never regularly organized, and that it has no regular corporate existence. In the other pleas it alleges that no specific demand was ever made to the defendant indicating what special facilities it required nor to what extent it required the facilities which were granted to other companies; that the vagueness of the demand is such that no judgment could be given which could be enforced; and it also pleads incidentally that it cannot be called upon to give equal facilities immediately because it would require months to make the necessary preparations, which would cost a very large sum of money, and, even supposing the petitioner to be entitled to what it demands, that it would be impossible for the defendant now to grant those facilities.

With respect to the preliminary plea, although I am decidedly of opinion, from what evidence was adduced, that the petitioner has not got a regular corporate existence, that the Act under which it claims to be incorporated lapsed on the 1st of June, 1879, for non-compliance with the preliminary conditions, I will not give judgment on that point, because I think that the question should be raised directly and not incidentally, and that it would not be fair to give judgment on that point without affording the petitioner an opportunity of making a full answer. I might arrive at a different conclusion if the petitioner were offered an opportunity to give a full answer and adduce other evidence. So I pass that over.

What is a writ of madamus granted for? It is granted to afford a remedy and enable a party having a right to enforce the exercise of that right when no other remedies exist. When there is a remedy the writ does not lie; it is a great power, but an exceptional one placed in the hands of the Court, in order that justice and right may be done where right exists and no specific action or remedy is provided for the purpose of obtaining the exercise of such right. The rule is clearly established. I will quote from High on Extraordinary Legal Remedies:

Par. 15. "The writ never lies where the party aggrieved has another ade-
"quate remedy at law, by action or otherwise, through which he may attain

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"the same result which he seeks by mandamus.*** The existence of another "specific, legal remedy, fully adequate to afford redress to the party aggrieved, "presents a complete bar to relief by the extraordinary aid of a mandamus."

Par. 16. "Whenever, therefore, an express remedy is afforded by statute, "plain and specific in its nature, and fully adequate to redress the grievance "complained of, mandamus will not lie."

Whenever the Court, therefore, find that an express remedy is afforded by statute, plain and specific in its nature, and fully adequate to redress the grievance complained of, the writ will not lie. It must, however, be remarked that such legal remedy, to prevent the use of a writ of mandamus, must not only be an adequate remedy in the general sense of the term, but it must be specific and appropriate to the particular circumstances of the case. High, par. 17. I would also refer to "Tapping" on Mandamus, where we find the same principles, and to "Redfield," on Railways. Here is what we find in Redfield, vol. 1, page 693:

"It will not lie when the statute has provided another adequate remedy.

"The remedy is discretionary, and will never be awarded where there is an "other sufficient remedy."

Now, is the writ of mandamus the proper remedy in this case? Is there any other remedy provided by law? I say there is, and that it is to be found in the very statute which confers the right claimed by the petitioner. The very statute under which the petitioner claims the right which it seeks to enforce also contains the remedy to be applied to obtain the exercise of that very right. The right is conferred by section 242 of the Railway Act, which reads thus: "Every company which grants any facilities to any incorporated express com- "pany or person shall grant equal facilities on equal terms and conditions to "any other incorporated express company which demands the same." What is the right? It is the exercise of traffic arrangements between an express company and a railway company; and in point of fact, section 242 is found in that sub-division of the Railway Act which is headed "traffic arrangements," and forms part of that portion of the statute. Now, turning back to section 8 of the Railway Act, we find that Parliament has created a tribunal which is called "The Railway Committee" and is composed of the Minister of Railways, the Minister of Justice, and two other ministers to be named by the Crown. Amongst other duties conferred on the Railway Committee, we find that it has power to enquire into, hear and determine any application, complaint or dispute respecting traffic arrangements, respecting unjust preferences, discrimination, or extortion, and, lastly, respecting any matter, act or thing which by the Railway Act is sanctioned, required to be done or prohibited. Anything, therefore, required by the Railway Act to be done by a railway company comes under the jurisdiction of the Railway Committee, which is the proper tribunal to enforce its performance. Under section 242 it is required that every railway company should grant to an express company the same facilities that it has granted to others; it is a thing which is required to be done by the Railway Act, and it,

therefore, falls under the special jurisdiction of that tribunal which is called "The Railway Committee." That committee is in fact, for many things, a regular tribunal, it has the right to name a commissioner to take evidence, to summon witnesses, and to give decisions and make orders; and it is provided by section 17 that any of its decisions or orders may be made an order of the Exchequer Court of Canada or of any Superior Court of any province. The means are provided by which any order of the Railway Committee can be enforced, where I could not enforce it, that is through the whole Dominion of Canada; by submitting an order to the Exchequer Court, it will be made an order of that court, and execution will be given to it throughout Canada. The Act provides also that any person or company refusing to obey such an order is subject to a penalty not exceeding $5,000.

The facilities which the petitioner demands, if it has the right to them, can be granted to it by the Railway Committee, and can be enforced by the Exchequer Court, or within this province by the Superior Court, if the order should be submitted to this court, with a demand that it be made executionary within the limits of its jurisdiction.

The Railway Committee is a regular tribunal, having full jurisdiction in the matter now in controversy, and it is to that tribunal that this application should have been submitted; and most properly so too, because all I could do as a judge of the Superior Court would be to order the Grand Trunk Railway Company peremptorily to carry out an order to grant to the Express Company the same facilities as have been granted to the Canadian Express Company, whether it should be politic or impolitic to force it to do so. Now it might be very unfair to do a thing like that; I have no authority to grant or impose conditions, whereas the Railway Committee has the right to investigate the whole thing, to ascertain what business the Express Company would probably do, and to order the Railway Company to provide only the necessary number of cars, and not, as in the case of the Canadian Express Company, twenty-five cars a day. The Railway Committee can give a delay, after which the facilities should be granted; it can impose conditions, fair both for the Express Company and for the Railway Company.

An adequate and complete remedy having been given under the Railway Act for the exercise of the right given by that statute which is sought to be enforced, the mandamus in this case does not lie. I hold that the writ of mandamus was issued improvidently, and I therefore quash it, but without costs, as the defendant proceeded to evidence on the merits, and did not plead at the argument the improvident issue of the writ.

Under these circumstances it becomes unnecessary to adjudicate upon the petitioner's motion for leave to amend its petition and the judge's order for the issue of the writ.

JUDGMENT.

"The Court having heard the parties by their counsel, as well upon the exception to the form as upon the merits of the demand, and also upon the peti-

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tioner's motion for leave to amend its position and the judge's order for the issue of the writ of mandamus, having examined the proceedings and the exhibits produced, and having heard the witnesses of both parties in open court;

"Seeing that the petitioner seeks to compel the defendant by writ of mandamus to grant to it, for the purpose of carrying on an Express business over the lines of the defendant's railway, facilities equal to those which it has granted to other Express companies and among others to the Canadian Express Company;

"Seeing that the defendant pleads by exception to the form that the petitioner was never regularly organized, and that it has no legal corporate existence, and by pleas to the merits that no specific demand was ever made, indicating what facilities were required, nor to what extent it required the facilities which were granted to other Express companies, and that the vagueness of the demand is such that no judgment could be based thereon which could be enforced, and incidentally that it cannot be called upon at the present time to give equal facilities to the petitioner as are granted to other Express companies, as it would require months and a large expenditure to make the necessary arrangements, which renders an immediate grant of such facilities impossible;

"Seeing that both parties have adduced evidence on the issue raised by the exception to the form and also on the merits of the case;

"Seeing that the petitioner has moved for leave to amend its petition and the judge's order for the issue of the writ of mandamus;

"Considering that the right which the petitioner claims and seeks to enforce is founded on section 242 of the Railway Act (51 Vict., chapter 29), which enacts that 'every (railway) company which grants any facilities to any incorporated express company or person shall grant equal facilities on equal terms 'and conditions to any other incorporated express company which demands the 'same,' that is to say,—that it shall make and carry out with any incorporated express company demanding it the same traffic arrangements as it has made and is carrying out with any other incorporated express company;

"Considering that the Railway Act also provides by section 11 that 'the Railway Committee (of the Privy Council) shall have power to enquire into, 'hear and determine any application, complaint and dispute respecting,—(n.) 'traffic arrangements; (p.) unjust preferences, discrimination or extortion; or '(r.) any matter, act, or thing which by (the Railway Act) is sanctioned, required 'to be done, or prohibited,' and by section 17, that 'any decision or order 'made by the Railway Committee may be made an order of the Exchequer Court 'of Canada or of any Superior Court of any province of Canada, and shall be 'enforced in like manner as any rule or order of such court;'

"Considering that the Railway Act has thus provided an adequate and sufficient remedy for the redress of the grievance complained of by the petitioner, and that, consequently, the writ of mandamus does not lie in the present case;

"Considering that the writ of mandamus in this case was therefore improvidently issued, and must be quashed;

"Considering that it is therefore unnecessary to adjudicate upon the issue raised by the exception to the form or upon the petitioner's motion to amend;

"Considering, however, that the defendant proceeded to evidence on the merits, and did not plead or suggest at the argument, the improvident issue of the writ, and is not entitled to costs on the quashing of the writ for a ground not raised by it;

"Doth quash the writ of mandamus issued in this cause, but without costs, each party to bear its own."

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Chapleau, Hall, Nicolls & Brown, attorneys for petitioner.

George Macrae, Q.C., attorney for defendant.

W. W. Robertson, Q.C., and C. J. Fleet, counsel.

SUPREME COURT.

OTTAWA, JUNE 12TH, 1890.

Present:—SIR W. J. RITCHIE, C. J., STRONG, TASCHEREAU, GWYNNE AND PATTERSON, J.J.

FARWELL AND WALBRIDGE AND FARWELL AND THE ONTARIO CAR & FOUNDRY CO.

Under a trust conveyance which granted a first lien upon the railway property, etc., of the South Eastern Railway Company, executed under the authority of 43-44 Vict., Q., Cap. 49, and 44-45 Vict., Q., Cap. 43, the trustees of the bondholders took possession of the railway, the company having failed to pay the interest on the bonds according to the stipulations of the deed, actions were brought by the appellants for the price of certain cars and rolling stock used for operating the road, for work done and materials furnished to the company after the date of the Deed of Trust, but before the trustees took possession of the railway.

HELD:—1. Confirming the judgments of the Court below, that the trustees were not liable.

2. That the appellants lost their privilege of unpaid vendors of the cars and rolling stock as against the trustees, because such privilege cannot be exercised when moveables become immoveable by destination (as was the result with regard to the cars and rolling stock in this case), and the immoveable to which the moveables are attached is in the possession of a third party or are hypothecated. Art. 2017 C. C.

3. But even considered as moveables, such cars and rolling stock became affected and charged by virtue of the statute and mortgage made thereunder, as security to the bondholders, with right of priority over all other creditors, including the privileged unpaid vendors.

PER GWYNNE J.—That the appellants might be entitled to an equitable decree, framed with due regard to the other necessary appropriations of the income in accordance with the provision of the trust indenture, authorizing the payment by the trustees "of all legal claims arising from the operation of the railway, including damages caused by accidents, and all other charges," but such a decree could not be made in the present action

PER STRONG J.—Quære: Whether the principle as to the applicability of current earnings to current expenses, incurred either whilst or before a railway comes under the control of the Court, by being placed at the instance of mortgagees in the hands of a receiver, in preference to mortgage creditors, whose security has priority of date over the obligation thus incurred for working expenses, should be adopted by Courts in this country.

The appeals in the present case were from the judgments of the Court of Queen's Bench for Lower Canada, reported at pages 85 and 126 respectively

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of this volume, both appeals being argued together. By the judgment of the court given below both appeals were dismissed.

Sir W. J. Ritchie, C. J.—I agree in the judgments prepared by Mr. Justice Taschereau in these cases.

Strong, J.—I concur in the judgment which has been prepared by my brother Taschereau, and I only desire to add a few words to guard against any misconstruction of my acquiescence in that judgment, as it may be invoked as a precedent in future cases, especially in cases arising in the Provinces subject to the English system of law.

The actions in the present case seek to make the trustees personally liable for the debts of the railway company, incurred in the purchase of rolling stock. This, I am clear, cannot be done, and therefore, I agree in dismissing the Appeal. I also entirely concur in the view of my brother Taschereau as regards the loss of the vendor's privilege by reason of the cars and rolling stock having become, under the express provision of the law, immoveables by destination.

What I desire to explain, however, is this. In assenting to the judgment of the Court dismissing these appeals, I do not by any means intend to preclude myself in future, should the question be raised in proper form and in an appropriate case, from considering whether the principle which is now universally recognized in the United States as to the applicability of current earnings to current expenses, incurred either whilst or before railway property comes under the control of the Court by being placed at the instance of mortgagees in the hands of a receiver, in preference to mortgage creditors whose security has priority of date over the obligation thus incurred for working expenses, should be adopted by our Courts. This doctrine is now firmly established in the United States, where railway mortgages exactly resemble those in use with us, and which do not at all resemble the securities of debenture holders under the English system of securities for borrowed capital; and the practice referred to is so pregnant with justice, good faith and equity that there may be found strong reasons for applying it here when the question arises. It certainly does not arise in the present case, where the defendants are not receivers, but trustees, and where it is sought to recover a personal judgment against them, which is entirely inadmissible.

Taschereau, J.—By the Quebec Act, 43–44 Vic., ch. 49 (1880), the South Eastern Railway Company, being in financial difficulties, was authorized to issue mortgage bonds to a certain amount, and for the purpose of securing the payment of the same and interest thereon, to convey its railway, franchise and all its property, tolls and income to trustees, to be named, when required, by the shareholders of the Company.

By section 4 of the said Act, it was enacted that in any such Deed of Conveyance, the Company and the trustees might stipulate as to who should have the possession, management and control of the said railway, receive the tolls and income thereof, and dispose of them, as well before as after default in the pay

ment of said mortgage bonds or of the interest thereof, with power also to stipulate how, in case of such default, the Company might be divested of all interest, equity of redemption, claim or title to the said railway franchise, and other property so conveyed, and how the same might become vested absolutely in the said trustees in satisfaction of the said bonds.

By section 5, the said trustees were empowered, upon default in the payment of the bonds, or of any interest coupons, to take possession of and run, operate, manage and control the said railway as fully and effectually as the company might do the same.

Section 7 enacts that the said conveyance shall be to all intents valid, and create a first lien, privilege and mortgage upon the said railway.

Section 10 enacts that neither the present proprietors of the said road, nor those contemplated under the said Act, shall have the power to close or cease running the said road.

On the 12th August, 1881, mortgage bonds having been issued by the company, a deed of trust was executed, by which the said railway was conveyed by the company to the present respondents as trustees, for the purpose of securing the payment of the said bonds, as contemplated by the said Act. It was stipulated in the said deed that the company should remain in full possession of the said railway, as if the deed had not been passed, until ninety days after default of payment of said bonds or interest thereon, after which ninety days the said trustees were empowered to enter into possession. The deed then provides that in case of default of payment, during six months, the trustees may become full owners of the road, after certain notices and lapse of time therein specified.

This Deed was registered in March, 1884.

Under the terms of this deed the company continued in possession of the railway, until the 5th October, 1883, when, interest on the said mortgage bonds being overdue for more than 90 days, upon the request of the said trustees, the company gave them up the possession and control of the railway, voluntarily and in good faith, as alleged in the appellant's declaration.

These trustees are the respondents in this Court, defendants in the Superior Court. They are sued by the appellant for work done for and materials delivered to the company, from the 9th of May, 1882, to 20th September, 1883, that is to say, after the execution of the deed of trust aforesaid, but before they, the trustees, came in possession on the 5th October, 1883.

They pleaded to this action, that they are not liable for the appellant's claim, and that there is no privity of contract between them and the appellant. They also pleaded *res judicata*, but abandoned their contentions on that point at the hearing before us.

The Superior Court gave judgment for the appellant, on the ground, "that the deed of trust to the respondents constituted a pledge of this railway, with the statutory power, against the common law rules concerning pledges, to leave the pledge in the hands of the pledger, as long as the interest on the bonds was

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paid as accrued, that as in law the pledger is bound to the preservation of the thing pledged, under Article 1973 Civil Code, the respondents, as such pledgees, were bound to satisfy the appellant's claim, which is for work and materials necessary for the working of the said railway."

The Court of Appeal reversed that judgment, and dismissed the appellant's action, upon the ground that the work done and the materials sold, which he claims in his action, were not furnished or done to or for the respondents, but to and for the company, to whom alone he had given credit.

The appellant now appeals from this last judgment.

Since the judgment of the Superior Court was given in this case, the Privy Council has, in a case of Redfield *vs.* Wickham (13 App. Cas. 467), given an authoritative opinion on the construction of the Quebec Statute of 1880, under which the respondents are now in possession of this railway. The only observation of their lordships, however, which can have any bearing on this present case is the following :

Their lordships do not doubt that the effect of the trust conveyance of 12th of August, 1881, followed by possession in terms of the deed, was to vest the property of the railway and its appurtenances in the appellants, and to reduce the interest of the South Eastern Company to a bare right of redemption.

The appellants there were the trustees, respondents in the present case.

These remarks of their lordships, however, have perhaps no direct application here, because, clearly, their lordships thereby refer solely to the conveyance to the trustees when followed by their possession, whilst the appellant's claim is for goods sold to the company when the company was still in possession, before the trustees exercised their right to take possession.

This raises the question, not determined by the Privy Council, as to the nature and legal character of the possession by the company after the deed of trust of 1881 till the 5th October, 1883. A question which, of course, I need consider here only as its solution may affect the present case.

Now, conceding with the Superior Court for the sake of argument, that the deed of 1881, as long as the company retained possession, constituted a pledge (which, of course, implies that the company also remained proprietor), it is evident that this pledge was not for the benefit and in the interest of the Company's creditors generally, but only and exclusively for the benefit and in the interest of the mortgage bondholders. The appellant contends, however, and the Superior Court gave countenance to that contention, that, as under Article 1973, the debtor is obliged to repay to the creditor the necessary expenses incurred by him, the creditor, in the preservation of the thing pledged, the respondents are here liable towards him, the appellant, because such was the nature of the materials sold and the work done by him for the Company. I cannot adopt this view of the case. It is true, in fact, and admitted in the record, that the work done and materials sold by the appellant were necessary for the working of the railway ; but, assuming there was a contract of pledge, the company being allowed, exceptionally by the Statute, to remain in posses-

sion of the thing pledged, though at common law the pledgee must have the possession, it follows that Article 1973 can have no application whatever to the appellant's claim. In the first place, it is not the creditor here who has incurred expenses for the preservation of the thing pledged by his debtor and still belonging to his debtor, but it is the debtor who, according to this theory, allowed to remain in possession of the thing pledged, has incurred the expenses for the preservation of his own property. In the second place, if these expenses were recoverable at all against the trustees, it is the company, and the company alone, who could recover them. I cannot see on what principle the appellant, a third party, can have an action against the trustees on that contract of pledge, if such contract there ever existed before the trustees' possession. The appellant contracted with the company, and the company alone. To the company alone he gave credit. He sued the company, and obtained judgment for these very same advances he now claims from the trustees. This fact, it is true, is not by itself a bar to his present action, but is as full and complete evidence as can be had that his dealings were with the company. There is no *lien de droit*; there was no privity of contract between the appellant and the trustees, and I cannot see that any legal liability ever was created in his favor against the trustees by this contract of pledge, if it ever existed, for the sum now claimed.

Then this Article 1973 C. C., upon which this argument is based, seems to me the very enactment that proves its unsoundness. This article says that the pledger is always responsible for the expenses incurred for the preservation of the thing pledged, even when the thing pledged is in the pledgee's possession. By what reasoning can it be contended that when, as here, by exception, the pledger retains possession, these expenses will then fall, not on the pledger but on the pledgee? I cannot see it. I take this article to lead to the very opposite conclusion, and, when applied to this case, to clearly throw on the company alone all the expenses now claimed from the trustees.

I have so far considered the deed of 1881, as creating till the 5th of October, 1883, a contract of pledge with the possession and title in the pledger.

I have done so, however, only argumentatively. I cannot see in the deed, as long as the company remained in possession, a contract of pledge. Possession by the pledgee is such an essential feature of that contract that there cannot, in my opinion, exist any such thing as a contract of pledge with the pledge in the pledger's hands.

Now, if the deed of trust of 1881, as argued in the alternative by the appellant, is to be considered as an actual sale, one by which the title to this railway became vested immediately in the trustees with equity of redemption, even before default of payment of the interest on the mortgage bonds, and before they exercised their right to take possession of it, is the appellant's action maintainable? In that case, the respondents are the vendees, allowing their vendor to remain in possession. The vendor in possession incurs expenses for the preservation of the thing sold, say, expenses absolutely necessary, and of which the vendees must eventually benefit. He incurs these expenses, and contracts for them in

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his own name with third parties. He himself may, perhaps, then under certain circumstances, have an action against his vendee for the reimbursement of the monies so expended for his benefit, though, as a general rule, till delivery, the property is at the vendor's risks and charges as a depositary; but would this give those who have contracted with him, the vendor, in his name, for these expenses, a right of action against the vendee personally, for the payment thereof? I should say, clearly not; and, to apply this to the present case, supposing that the company might maintain an action against the trustees for the expenses necessarily incurred on the road after the deed of 1881, and before the 5th October, 1883, yet I cannot see that this would give to the appellant, a third party, the right to claim from the trustees the advances he made to the company, or, in other words, the right to be paid by any one else than by the party he dealt with. Whether in such a case the appellant would have under Article 1031 C. C., the right to exercise the company's action against the trustees is a question which does not arise. He claims to act here in his own name and to exercise his own personal right of action. And for the same reason, I may as well immediately remark, the appellant's attempt to have his action considered as one *de in rem verso* (Vide 20 Laurent, No. 334) cannot help him. The action *de in rem verso* would, under the facts disclosed in the present case, be an action by and in the name of the company against the trustees. The doctrine upon which such an action rests cannot be invoked by the appellant to create a *lien de droit* between him and the trustees.

To follow Mr. Laflamme's able argument for the appellant, I have so far considered the deed of trust of 1881, before the respondents came into possession, either as creating a pledge or as an actual and complete sale of this railway, and I have said why, in my opinion, admitting it to be either one or the other, the appellant has no action against the trustees. I need hardly remark the contradiction between these two grounds of reasoning. If a pledge, the railway company remained the owners. If a sale, the trustees became owners. Was that deed, however, anything else than a mortgage or hypothec of this railway, as long as the company remained in possession, within of course the sense and meaning that these words have in the Province of Quebec, where the hopothec is a kind of pledge in which the pledger retains both ownership and possession of the thing pledged, in contradistinction to the contract of pledge, pignus, where the pledgee is put in possession, the title remaining in the pledger. It seems to me impossible to see in that deed, as interpreted in the light of the statute of 1880, anything else than a hypothecation of this railway in favor of the bondholders, not precisely the hypothecation of Article 2016 C. C., but with the exceptional right, given by the statute, of the mortgagee to enter into possession, in default of payment, after the exercise of which right the contract between the parties became one of cantissement, with, of course, *droit de retention*, till paid, joined to the hypothec. The term "sold" is used in the deed, it is true. But the statute of 1880 authorizes only to convey as security *transporter*, says the French version. Then a deed called a sale may be

nothing else but a contract of pledge; Ross *vs.* Thompson (10 Q. L. R. 308); Farmer *vs.* Bell (6 Q. L. R. 1); Canada Paper Company *vs.* Cary (4 Q. L. R. 323).

Now, what is a hypothec, or rather its origin at common law?

Troplong (Hypothèque, No. 7) answers:

L'on en vint donc par la suite à établir qu'une simple convention suffirait pour que le débiteur engageât son fonds, sans en abandonner la possession, à condition toutefois de devoir en être dessaisi, en cas de non paiement au temps fixé par le contrat. Ce fut un établissement que le droit prétorien emprunta à la civilisation grecque. Aussi le terme dont on se sert pour exprimer cette convention est-il purement grec.

This is, in my opinion, precisely the nature of the contract that has taken place between the parties here. The company were to remain in possession as long as they satisfied, as accrued, their liabilities to the bondholders. They might never have lost the possession, and have continued to work the railway themselves, the railway, however, by the authority of this Statute, all the time remaining vested in the bondholders, or the trustees for them, till the complete satisfaction of their bonds, in 1901, as security therefor. I must confess that I can see nothing else in this deed, before the trustees took possession, than a hypothecation of the railway, which hypothecation took the character of an antichresis, when the trustees took possession, or, to use the English law terms of their Lordships of the Privy Council, in the Redfield case (13 App. Cas. 467), a conveyance by a debtor to his creditor, coupled with possession, with right of redemption, in security of a debt. (See also Laurent, 28 Vol., Nos. 480, 543.)

Now, as before remarked, it is for a debt contracted by the company, before default, and during the possession of the company, for the company, that the appellant now sues the trustees. That the mortgagee is personally liable for the debts created by the mortgagor in possession upon the property mortgaged could not be contended for. Yet the appellant goes that far, when he argues that the company, during the interval between the deed of trust of 1881 and the 5th October, 1883, were the agents or mandataries or *negotiorum gestor* of the trustees.

A word now as to the question of privilege, upon which the appellant at the hearing strenuously relied. Admitting, for the sake of argument, that he had a privilege on the railway for his claim, under Arts. 1996 and 2009 C. C., as being for work done in the common interest of the creditors, I cannot see how this can support his action. 1st. There is no question here of preference or priority amongst creditors. 2nd. The privileged creditor has no personal action against the *tiers détenteur* of an immovable affected by a privilege, but only a real action. 3rd. The privilege given for the expense incurred in the common interest of the creditors cannot be exercised against a subsequent purchaser, or pledgee in possession, if it has not been registered.

It is true that Art. 2084, as does Art. 2107 of the French Code, exempts such

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a privilege from the necessity of registration, but this must be read as applying merely to the respective rights of the creditors amongst themselves, when a distribution of the price of sale of the property takes place. It has no application to subsequent purchasers or pledgees of the property, whose titles are registered. Art. 2056. (See also Arts. 2015 and 3030 C. C.; Pont., 2 Vol. 1123; Aubry & Rau, 3 Vol., par. 269; Massé, 5 Vol. 806; Rolland de Villargues, Privilège, No. 334; Persil, Régime hypoth. 2107; Dalloz, Privilège, and ch. 1, sec. 4; Boileux, 7 Vol., pp. 557, 558; Troplong, Priv. and Hyp., 265, 273, 922; and Zachariæ, par. 269.) 4th. The trustees for the bondholders have, by the Act of 1880, confirmed in this respect by the Act of 1881, 44-45 Vic., ch. 43, the first lien and privilege on this railway, with the *droit de retention*, till all arrears due on these bonds are paid. Consequently, the plaintiff, if he has this privilege attached to expenses made in the interest of the mass of the creditors, which, undoubtedly, under Art. 1996, would include those incurred for the preservation of this railway, cannot have the benefit of his privilege before disinteresting the bondholders. Being vested by the Statute and the Deed with the *droit de retention*, as a first lien and privilege, the bondholders and the trustees for them cannot be deprived of it till they are entirely paid. (Compare Arts. 1967, 1969, 2001 C. C.) This question does not directly arise in this case, however, as the appellant's action is merely a personal action against the trustees. I have noticed it solely in answer to the appellant's contention as to the rank of this privilege under the Code. It is clear to my mind that the Statute of 1880 has given to the bondholders a privilege which carries priority to the appellant's claim, whatever rank his privilege would have had under the Code, and consequently, if the appellant was at all entitled to invoke his right of privilege in support of his action, he could not do so without having, as a condition precedent, paid all the bondholders. (See 28 Laurent, Nos 500, 540 C. C.) It has been argued for the appellant that the statute merely says that the conveyance shall be "a first charge," and that this does not mean "the" first charge. But, to my mind, there is no ground whatever for that distinction. A first charge must mean second to none.

Some of my remarks in the next case may apply to this one. I would dismiss the appeal.

ONTARIO CAR COMPANY *vs.* FARWELL.

TASCHEREAU, J.—In this case, the same trustees are sued by the Ontario Car Company for cars sold, on credit, to the South Eastern Railway, to the amount of over $45,000.00, after the Deed of Trust of 1881, and before the 5th October, 1883,—that is to say, as in the preceding case, before the trustees were put into possession of the railway. Here also, as in the previous case, the Superior Court gave judgment for the plaintiffs, now appellants, and the Court of Appeal reversed that judgment. I need not repeat here my reasoning in the

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previous case, which applies almost entirely to this one. The two, however, are not precisely identical. Here, the Car Company's action prays as follows :—

That the transfer and delivery of the said cars by the said Company to the defendants and their predecessors be declared fraudulent, null and void, and be set aside. That the indenture of mortgage of the 12th of August, 1881, the resolution of shareholders authorizing the same, and foreclosure and taking possession thereunder upon the 5th of October, 1883, be also declared fraudulent, null and without effect, and be set aside so far as respects the said cars. That the said South Eastern Railway Company be impleaded to hear said transfer, indenture, resolution and foreclosure set aside and hear the final judgment thereon. That the trustees, defendants, be adjudged and condemned to pay and satisfy the plaintiffs the sum of $45,556.97 damages for the use and detention of said cars, from the 5th October, 1883, to this date, with interest.

That the defendants be ordered not to use, and be enjoined and prevented from holding or using, said cars or any of them, as long as said plaintiffs shall not be paid therefor the sum of $45,556.97 with interest, and be condemned to surrender and deliver the said cars, within fifteen days from the final judgment to be pronounced in the case, in as good order and condition as when taken by the said trustees, to a guardian to be named by said Court, and that the same be sold in satisfaction of the plaintiffs' claim, and in default of so doing, and failing to deliver the same, that they be adjudged and condemned to pay jointly and severally the said sum of $45,556 97.

By these conclusions, the Car Company do not ask for a direct personal condemnation against the trustees. Neither do they claim the cars themselves, they merely claim a *jus ad rem* on them, and that they be sold *en justice* in satisfaction of their claim. It is only on the failure by the trustees to deliver up these cars so that they be so sold that the car company ask, that they, the trustees, be condemned to pay the plaintiffs' claim. And I cannot see that it would have been possible, in any case, upon these conclusions, to condemn the trustees to pay the amount claimed, without option, as the Superior Court has done.

This action, I notice, was instituted in December, 1886, over 3 years after the trustees entered into possession of the railway. The argument of Counsel at bar had led me to understand that the car company based their action on a claim to a right of privilege, as unpaid vendors. There is not a word of it, however, in their declaration. The only grounds of their conclusions are that the deed of trust of 1881, and the delivery of possession in 1883, were fraudulent, null and void, and, strange to say, though the general issue was pleaded, only one witness was examined by the plaintiffs, and that one, merely as to the necessity of these cars for the working of the railway. An admission covering certain facts is to be found in the record, but there is nothing in it that can be connected in any way whatever, that I can see, with the plaintiffs' allegations of fraud. The insolvency of the railway company, in 1883, when they bought these cars, is admitted, but I fail to see that the trustees, authorized by

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Act of Parliament to take possession of the railway, and everything connected with it, including these very cars, as security towards the bondholders, can be said to have participated in a fraud, when they did the very thing the statute was passed to authorize. If a fraud at all, all I can say is, that it was a fraud authorized by statute, and a statute enacted precisely because the railway company was insolvent. It is not even proved that when they entered into possession on the 5th October, 1883, the trustees were at all aware of the car company's claim against the railway company.

Upon the general issue alone the plaintiffs' action, it seems to me, fails. But were it otherwise on that first plea, and taking it for granted that it may be gathered from the general allegations of their declaration that their claim is based on their privilege as unpaid vendors, on the defendant's exception, by which they plead the privilege and mortgage given by the statute on this railway and all its rolling stock in favor of the mortgage bondholders, the result must be the same.

It is clear that by the deed of trust of 1881, as I said in the previous case, the railway and everything connected with it became a security towards the bondholders with a first lien, privilege or mortgage on everything thereby conveyed, either moveable or immoveable, comprising all cars, locomotives, tenders, etc., etc., then owned by the company, or that might from time to time thereafter be acquired by the company. Now, the very cars upon which the plaintiffs claim a right became, by operation of the statute, at the very moment they came into the railway company's possession, and whether they are to be considered as moveable or immoveable property, affected and charged as security to the bondholders, with right of priority over all other creditors, including the privileged unpaid vendor. And even if it might be contended that this privilege and lien did not so attach immediately at the moment the railway company bought these cars and added them to their rolling stock, it seems to me unquestionable that, when on the 5th of October, 1883, the trustees got possession of them with the railway, as pledgees by antichresis, as additional security to their statutory mortgage, their *droit de retention* became a first charge and lien, with priority over every other creditor, even the unpaid vendor, and that consequently the trustees cannot be dispossessed, except upon payment of all accrued interests on these bonds. Article 2001 C. C.

To give the plaintiffs a right of preference over the trustees or to deny to the trustees the *droit de retention* on these cars, would clearly be setting the statute at naught. Under Article 1543 Civil Code (Article 5811 Revised Statutes), the right of an unpaid vendor to demand the rescission of the sale of moveable things can only be exercised while the things sold remain in the possession of the buyer. The railway company here were the buyers, not the trustees. The contention that they, the company, acted merely as agent or *negotiorum gestor* for the trustees is untenable. I have referred to this point in the previous case. The railway company was then the owner in possession with a statutory mortgage on the property in favor of the bondholders. When

the statute gives to the trustees a lien or mortgage on the railway, it clearly implies that the trustees were not, at first, to be owners. One does not require a lien or mortgage on his own property for the payment of his claims. Then the statute and the deed provide when and under what circumstances the trustees might become later absolutely owners of the railway. This also implies that they were not yet owners, and still further, there was no price of sale, so there was no sale; *pretium* is a requisite of this contract, as much as *res et consensus*. The fact that trustees for the bondholders benefited by the sale of these cars to the railway company does not help the plaintiffs. A hypothecary creditor always benefits from the improvements made and expenses incurred by his debtor on the property hypothecated.

As to the unpaid vendor's right of revendication, under Article 1998 Civil Code, it clearly cannot be claimed by the plaintiffs: 1st, because they had given delay to the railway company for the payment of these cars; 2nd, because those cars are now in the hands of a third party; 3rd, because they are too late. Articles 1998, 1999 Civil Code, and cases cited in *de Bellefeuille's* code under there articles, Rhode Island *vs.* South Eastern (31 L. C. J. 86). I need not dwell on this any longer, however, as the action here is not one of revendication.

But further, are these cars now moveable property? It is a well established jurisprudence that the rolling stock of a railway is immoveable property, and part of the freehold. The appellants argue, however, that the immobilisation of a moveable does not operate against its unpaid vendor. Admitting this to be so, and the weight of authorities now seems to incline that way, the rule applies only between the vendor and the vendee as long as the vendee is in possession of the thing sold, but does not operate against a third party who comes into possession of an immoveable to which are attached moveable things, which by law are immoveable *par destination*, nor against a mortgaged creditor. I think that the point is now not open to discussion. I refer to the cases of Chretien (S. V. 36-2-347), and Camus (S. V. 40-1-412) in that sense. So that, putting aside the general rule that "les meubles n'ont pas de suite" (Laurent 29 Vol. No. 478; Bourjon, 1 Vol. No. 145), on this other consideration, I do not see how the action can be supported. The immobilisation takes effect against an unpaid vendor in favor of the mortgaged creditor, even if the buyer is still in possession. Marcadé (Vol. 6, p. 301) says:—

La seconde question est de savoir si la résolution de la vente mobilière, qui est impossible quand le meuble vendu est passé dans les mains d'un tiers de bonne foi qui l'a acheté ou reçu en gage, est également impossible quand ce meuble est devenu immeuble par destination, et qu'il se trouve soumis au droit d'un créancier hypothécaire de l'acheteur.

M. Troplong (addit. au No. 465) et plusieurs arrêts décident que la résolution peut encore avoir lieu. L'acheteur, disent-ils en substance, n'a pas pu transférer plus de droits qu'il n'en avait lui-même; or, la transformation du meuble en immeuble par destination ne met pas cet acheteur à l'abri de l'action

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du vendeur, la preuve en est dans l'article 593, puisque la loi, après avoir prohibé en principe, dans l'article 592, la saisie exécution des meubles immobilisés par destination, la permet dans cet article 593 au vendeur non payé. Cette doctrine nous paraît inexacte, et nous pensons, avec M. Duvergier (1439) et des arrêts postérieurs à ceux indiqués ci-dessus, que l'action résolutoire n'est pas admissible ici.

Il est très vrai que du vendeur à l'acheteur l'immobilisation dont il s'agit ne nuit en rien au droit de ce vendeur, mais il en est autrement entre le vendeur et le tiers qui acquiert un droit sur le meuble vendu, et il est faux de dire que le tiers ne puisse pas avoir plus de droits que n'en aurait l'acheteur. M. Troplong reconnait que vû l'effet de la possession de bonne foi sur les choses mobilières, celui à qui le meuble aurait été revendu par mon acheteur serait à l'abri de mon action en résolution, tandis que mon acheteur, lui, s'il avait encore le meuble, ne pourrait pas s'en garantir.

Le tiers peut donc avoir plus de droits que l'acheteur, et c'est tout simple, puisque c'est un effet de la bonne foi de ce tiers, bonne foi dans l'acheteur qui ne paye pas ne saurait argumenter. Si celui à qui le meuble a été revendu est à l'abri de l'action résolutoire, s'il en est de même du créancier dont ce meuble est devenu le gage mobilier, pourquoi en serait-il autrement de celui dont il est devenu, par son immobilisation, le gage hypothécaire ?

Le droit de ce dernier n'est pas moins favorable, et c'est avec raison que la jurisprudence se fixe dans ce sens.

See in the same sens, Pont (1 Vol., No. 154); Aubry & Rau (Vol. 3, p. 409) also say:—

Il importe peu, quant aux immeubles par destination, que les objets réputés tels aient déjà existé en cet état au moment de l'établissement de l'hypothèque, ou que le propriétaire de l'immeuble hypothéqué ne les y ait attachés que plus tard. On doit en conclure que le vendeur d'objets mobiliers, par exemple de machines incorporées par l'acheteur à l'immeuble hypothéqué, ne peut exercer ni l'action résolutoire ni le privilège établi par le No. 4 de l'article 2102, au détriment des créanciers hypothécaires de ce dernier, qu'ils soient antérieurs ou postérieurs à la vente.

See also Zachariae (5 Vol., p. 143, note 27), and Dalloz (87-1-394).

According to these authors, these cars are now immoveable property, as forming part of the railway, and the trustees' mortgage and privilege on the railway extends to them, even if they, the trustees, were not vested with the possession.

A case of Detouche *v.* Neustadt (S.V. 68-1-9), in the Cour de Cassation, is in point.

See also Philion *v.* Bisson (23 L.C.J. 32), and article 2017 Civil Code.

But if they are moveables, the plaintiffs are not in a better position.

Le droit de résolution et le privilège supposent que l'acheteur est encore en possession de la chose (29 Laurent, No. 471).

The Colebrook Rolling Mills *v.* Oliver (5 Q.L.R. 72); Thibeaudeau *v.* Mills (M.L.R., 1 Q.B. 326).

See also Laurent (29 Vol., Nd. 526, Nos. 470, 487). Bedarride, Achats et Ventes (Nos. 327, 328).

Article 1996 Civil Code, relating to disbursements incurred for the preservation of the property, has been cited by the appellants, but it hardly applies to the facts of this case. But should it apply, the Statute here again intervenes, and sets at rest all possible controversy as to the relative rank of the claim for these expenses, or that of the unpaid vendor's and that of the trustees, by enacting that the trustees shall be first.

Another point upon which there can be no doubt is that when the vendor has given credit, the pledgee's claim has priority over the vendor's. (See 1 Pont, No. 152, Art. 2000 C.C.)

And again :—

La résolution de la vente mobilière à la poursuite du vendeur non payé ne peut avoir lieu contre un tiers à qui le meuble a passé de bonne foi en gage (S.V. 38, 2, 97 ; Moss *v.* St. Jean, 15 R.L. 353).

Article 417 Civil Code, which enacts that the proprietor must re-imburse to the possessor the necessary expenses incurred on the property, was also invoked by the plaintiffs, and is referred to by the Superior Court ; but it has no application. The expenses here were made by the railway company as owners in full possession and for themselves. The plaintiffs sold these cars to the railway company, and on that sale they have no personal action against the trustees. This article, if applied at all, would give an action to the railway company against the trustees, but cannot give one to the car company.

Articles 1043 and 1046 Civil Code were also relied upon by the Superior Court. This last article enacts that he whose business has been well managed by a *negotiorum gestor* is bound, first, to fulfill the obligation that the *negotiorum gestor* has contracted in his (the person whose business has been well managed) name ; secondly, to indemnify him for all personal liabilities which he has assumed ; and thirdly, to reimburse him all necessary or useful expenses. In the Wallbridge case, the Superior Court treated the railway company pending their possession after the deed of trust, as the *negotiorum gestor* of and acting for the trustees. This, in that case, under Article 1046, would have given an action to the railway company against the trustees, but not to the plaintiff. The railway company did not contract with the plaintiff Wallbridge in the trustees' name, and it is not pretended that they did. Then the railway company were not *negotiorum gestor* at all for Wallbridge, as I said in that case. In the present case, the Superior Court, another judge presiding, held that it is the Ontario Car Company that was the *negotiorum gestor* for the trustees. I cannot adopt that view of the facts. I cannot see how the Ontario Car Company, by the simple fact of selling cars to the railway company acting for itself, became the *negotiorum gestor* of the trustees. By this line of reasoning the bondholders, instead of a security on this railway, would have been liable to all the expenses even before getting the control and revenue.

As to the plea of *res judicata*. It appears on this record that, in previous ac-

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tions, the present plaintiffs attempted seizure *en revendication* of these very same cars, and that by judgments, which are now *chose jugée*, these seizures were quashed, on the ground that these cars were now immoveable property, as forming part of the rolling stock of this railway.

Le vendeur qui a succombé sur la demande en revendication d'objets mobliers, est-il ensuite recevable à former une demande en résolution de la vente des mêmes objets? Non, suivant la Cour de Cassation (S.V. 37-1 42).

The annotator, however, brings strong arguments against that decision, and I do not determine this question of *res judicata*. I would hesitate, however, to say that it is not *res judicata* between the parties that these cars now form part of the freehold. The seizures were quashed on that only ground.

L'autorité de la chose jugée s'attache aux motifs d'un jugement quand ils ont été sanctionnés par le dispositif (S.V. 76-1-448, 81 2-145; Bonnier, 2 vol. 459; Demolombe, 7 vol. des oblig., par. 291; S. V. 39, 1, 119; Dalloz, 88-2-210).

It might perhaps have been contended that the plaintiff's action was nothing else but the action Paulianna, to set aside the deed of August, 1881, as made in fraud of creditors. Articles 1039 and 1040, however, would have been in their way, apart from the statute of 1880, passed for the very purpose of authorizing that deed. That is probably why they have not attempted to support their action, as one of that character.

I would dismiss the appeal.

Since I wrote down these reasons for my conclusion, it has been suggested by my colleagues that as the deed puts upon the trustees the obligation to pay the running expenses of the road, they are liable for the appellants' claim. But I cannot adopt this conclusion.

1.—I read the deed as stipulating that the trustees, after they come into possession, shall be bound to pay the expenses of the road incurred during their possession, but cannot see that they covenanted to pay the expenses incurred or expended by the company itself during the possession by the company.

2.—Such a construction of the deed would put on the trustees all the debts incurred by the company, even those incurred prior to the deed of trust.

3.—If this was the true construction, the statute of 1881 would have been altogether unnecessary, and I take that statute as a legislative interpretation that the bonholders' lien has priority over all other creditors whatever.

4.—By this construction, the enactment which gives to the mortgage-bondholders a first lien on the road and all its appurtenances is set at naught.

5.—This construction has not been thought of, even by the appellants, and is inconsistent with their declarntion, and particularly with their conclusions, as, were it to prevail, it would necessarily entail a direct condemnation against the trustees for the amount claimed, with execution of course, against the railway itself and all its appurtenances, a condemnation which in this case would clearly be *ultra petita*.

6.—Even if that was the true construction of the deed, the appellants' action

would fail for want of privity of contract; as it is clear that a covenant between the company and the trustees that the trustees should pay the expenses incurred by the company would not give to the appellants a right of action against the trustees.

GWYNNE J.—The decision in these cases must depend upon the construction to be put upon the terms and provisions of the trust indenture by way of mortgage, executed by the South Eastern Railway Company, under the authority of the Quebec Statutes 43 and 44 Vic., ch. 49, and 44 and 45 Vic., ch. 43. By the former of these acts, the company was authorized to issue certain bonds, and for the purpose of securing the payment of the same and interest thereon, to convey the railway, franchise and all property, rights and interests owned, possessed or enjoyed by it, and the tolls, income, profits, improvements and renewals thereof, and additions thereto, to trustees in trust for that purpose, and it was enacted that the trustees to whom such conveyance should be made should be designated by the shareholders at a meeting of the shareholders authorizing the issue of such bonds, and that the said conveyance should be made in such form as the shareholders at such meeting should direct, and that the company and the said trustees might therein, among other things, stipulate as to who should have possession, management and control of the said franchise and other property therein conveyed, and receive the tolls and income thereof, and how the same should be applied and disposed of, while such bonds should be outstanding, as well before as after default should be made in the payment thereof, or of any of the coupons thereto attached, and might make such other provisions therein, not contrary to law, as might be considered necessary or convenient for the purposes of such trust; and the trustees were by the act authorized, upon default being made in payment of the said bonds or coupons, to take possession of and run, operate, maintain, manage and control the said railway and other property conveyed to them as fully and effectually as the company might do the same; and it was further enacted that the said conveyance should be to all intents valid, and should create a first lien, privilege and mortgage upon the said railway and other property thereby conveyed; and it was expressly declared that neither the said company, who were the proprietors of the road at the time of the passing of the said act, nor those contemplated to become proprietors under the act, namely, the trustees and eventually the bondholders, should have power to close or cease running any part of the said road. Under the authority of these acts the trust indenture therein referred to was executed by the company to certain trustees therein named, whereby, after recital of the issue of the bonds authorized by the act, the company granted, bargained and sold to the trustees, the railway of the company as the same was then located and constructed, and as the same might thereafter be located and constructed, and all branches thereafter to be built, and all the lands, etc., etc., then owned or that thereafter might be acquired by the company for the uses of the railway, together with the franchises of the company, and all rights secured to the company by its charter, and also all cars,

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locomotives, tenders, wood ties, steel and iron rails, tools, machinery, supplies, and personal property of every description then owned by the company, or that might from time to time thereafter be acquired by the company for the purpose of operating and maintaining the said railway and transacting the business thereof, and also all the right, title and interest of the company in two certain railways, called the Newport & Richford Railway, and the Lake Champlain & St. Lawrence Junction Railway, to have and to hold to the trustees upon the trusts thereinafter specified, and among such trust, upon trust, that until default should be made in the payment of the said bonds, or of some portion of the interest thereon, and such default should continue for the space of 90 days, the company should be entitled to retain possession of all the railway property, rights and interest thereby conveyed, and to run, operate and manage the same, and to take and receive all and singular the tolls, receipts, income and profits of the same, and the business thereof for their own use, benefit and advantage, in all respects as fully and absolutely as if the indenture had not been made; but that upon such default happening, then the trustees should be entitled, and have the right to take and receive immediate possession of the said railway and all the property, rights and interests by the said indenture conveyed, and to run, operate and manage the same, and to take and receive all and singular the tolls, receipts, income and profits of the same, and the business thereof, as fully and absolutely as the company might otherwise do, and use, pay out and disburse said tolls, receipts, income and profits in the payment and settlement of all expenses of running, operating, managing and maintaining the said railway and other property, rights and interest thereby conveyed, including all rents due for the use of any and all railways and property leased to the company, as specified in the leases thereof, or agreements in respect thereto, and all expenses and liabilities incurred by the trustees, their successors and assigns in that behalf, and a reasonable compensation to them for their services; and also all expenses of renewing, repairing and increasing the said railway and other property for the purpose of keeping the same in good condition for the transaction of the business thereof; and all taxes and assessments and said property thereby conveyed, and all legal claims thereon arising from the operating of said railway, including damages caused by accidents, and all other charges, and the balance of said tolls, receipts, income and profits after paying or providing for the payment of all and singular the expenses and payments aforesaid, to use, pay out and disburse semi-annually to the owners and holders of the bonds aforesaid, and the residue, after paying all such bonds to the company.

Now in the month of November, 1883, the plaintiff Wallbridge recovered a judgment in the Superior Court of the province of Quebec, against the South Eastern Railway Company for the sum of $7,970.00 and interest for lumber and ties supplied to the company for the necessary use and working of the railway, between the months of August, 1881, and September, 1883, and the plaintiffs, the Ontario Car & Foundry Company, in the month of July, 1884, recovered

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three several judgments against the railway company for the sum in the whole of $45,556.97, exclusive of interest for :—1, 200 railway platform cars delivered to the railway company in the month of February, 1883, for the necessary use and working of the railway ; 2, for 50 coal cars delivered to the company in the month of May, 1883, for the like necessary use and working of the railway ; and 3, for 20 cattle cars delivered to the company in the month of July, 1883, for the like necessary use and working of the railway. On the 5th October, 1883, the trustees under the said trust indenture took possession of the railway and of all the above material and plant so as aforesaid supplied, for the necessary use of the railway, and made use thereof under the provisions of the said 43 and 44 Vic., chap. 49, and of the said trust indenture, in operating and working the said railway, which, by the act, they were under the obligation to continue to run and operate, and the question is whether, for the purpose of obtaining satisfaction of the said judgments which still remain wholly unsatisfied, the parties who supplied the materials and plant above described, and which was all necessary for the working of the railway, have any remedy against the trustees personally, or against the receipts, income and profits coming to their hands from the working of the railway, and the use of the said material and plant.

That the bondholders, in whose interest and for whose benefit the trustees are operating, as they are by the act obliged to keep the railway in operation, have obtained the benefit of the plant and material in question, there can be no doubt ; and as deriving the benefit, it is not unreasonable that some provision for such a case should have been made in the trust indenture ; it would certainly, I think, be but just and equitable that there should be, and the only question appears to me to be whether there has been. If the material and plant had not been provided by the company, the trustees, I apprehend there can be no doubt, would have taken possession much sooner than they did, and, upon taking possession, in order to operate the railway as they were obliged by the statute to do, in the interest of the bondholders, must needs have supplied themselves with the material and plant ; and, in that case, they must have been personally responsible to whomsoever should supply, for the price thereof ; but the material and plant in question having been delivered to the railway company before the trustees took possession, although the latter, as trustees of the bondholders, derived all the benefit, and could not continue to operate the railway without such material and plant, they cannot, I agree in thinking, be made personally responsible. It was argued, that the true construction of the trust indenture is that the company's possession of the railway, after the execution of the indenture prior to the railway being taken possession of by the trustees, was as agents merely of the trustees, in whom the property was vested by the trust indenture, and that, therefore, the trustees should be held to be liable for material and plant, necessary to keep the railway in operation, provided for the benefit of the trustees by their duly authorized agent ; but this contention cannot be entertained in face of the express provision in the trust

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indenture, that until default, the company should be at liberty to retain their possession of the railway, etc., etc., for their own use, benefit and advantage, as fully and absolutely as if the indenture had never been made. The Statute, however, enacts that it is whatever the "conveyance," that is, the trust indenture, provides for, that shall become a first lien, privilege and mortgage upon the railway and other property thereby conveyed. Now, the trust indenture in express terms provides for many things as being payable out of the income and receipts from the railway before anything shall be paid to the bondholders.

The trustees, on behalf of the bondholders, are by the Statute bound to keep the railway in operation, consequently all claims and expenses incurred by the trustees in their operating the railway became a first charge upon the income and receipts coming to their hands, as a necessary incident upon the obligation imposed upon them to keep the railway in operation, without any express declaration in relation to such claims and expenses. However, the trust indenture, apparently, *ex majori cautelâ*, does declare the trust purposes towards which the trustees shall apply the income and receipts coming to their hands, namely :—

1st.—In payment of all expenses of running, operating, managing and maintaining the railway and other property vested in them by the trust indenture, including all rents due for the use of any railway leased to the company.

2nd.—In paying reasonable compensation to themselves for their services.

3rd.—In payment of all expenses of renewing, repairing and increasing the railway and other property for the purpose of keeping the same in good condition for the transaction of business.

Now, these trust purposes so declared seem to cover and include everything having relation to expenses and claims arising from the operating of the railway by the trustees. But the trust indenture provides further, that the trustees, out of the income coming to their hands from the railway, shall pay :

4th.—"All taxes and assessments, and all legal claims on the property thereby conveyed arising from the operating of the railway, including damages caused by accidents and other charges."

All charges and claims of the nature comprised under this last head, which should arise or accrue during the period that the trustees should be operating the railway, had already been provided for in express terms; the question, therefore, appears to me to be resolved simply into this: Is this provision to be construed also as wholly and solely relating to claims and charges arising while the railway is being operated by the trustees? To my mind, there appears to be a difficulty in so construing it, for, as already observed, the previous provisions in express terms provided for the application of the income by the trustees towards the payment of every one of the items enumerated under this fourth head, if they occurred while the railway was in the possession of, and operated by the trustees; the implication, therefore, would seem to be that what is here provided for cannot be limited, at least, to matters occurring wholly during the period that the railway is so operated. Sufficient provision has already been

made for the payment of all taxes accrued during the possession of the railway by the trustees, as expenses necessarily incident to the running, operating, managing and maintaining the railway and other property in good working order and condition. Now, assuming taxes to have accrued due and payable before the trustees took possession, which still remained unpaid after they had taken possession, they surely would be justified, under this provision of the trust indenture, in paying out of the income coming to their hands, all taxes which were overdue before they took possession. Taxes, it may be said, stand on a peculiar footing—granted; but in this sentence in which this provision as to taxes is made, the other charges mentioned are connected by the copulative "and all legal claims," etc., etc., etc. Is there, then, any reason why the trustees should not in like manner, under the language of this provision, be justified in paying, and, if justified, liable to be compelled to pay, out of the income coming to their hands, "all legal claims arising from the operating of the railway, including damages caused by accidents, and other charges," which had occurred in connection with the operating of the railway prior to their taking possession, and which then still remained unpaid? As, for example, supposing that while the railway was worked by the company, the wages and stipend of those engaged in working it had not been paid in full, but that a portion had been suffered to fall into arrears, would not the trustees upon their taking possession, and finding such wages and stipend to be in arrear, be justified, under this provision in the deed, in paying such arrears by degrees out of the income and receipts coming to their hands? Again, supposing that an accident had occurred on the railway a day, a week, or a month or more before the trustees took possession, which accident had caused damages to individuals, the amount of which had not yet been ascertained, or that it had been ascertained but not yet paid, when the trustees took possession, would not the trustees be justified, under this provision in the trust indenture, in applying, and if justified, could they not be compelled to apply, some portion of the monies coming to their hands towards payment of such damages? And if they would be so justified, and could be compelled so to do, why should they not be equally justified in paying and be equally liable to be compelled to pay all other charges, which, like those in the present case, are for the direct improvement and beneficial increase in the value of the property vested in the trustees, and absolutely necessary for the operating of the railway by them on their taking possession, although such charges accrued due and payable three months or more, or it might be only a week or a day before the trustees should take possession?

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The peculiar language of the trust indenture, in defining the trust purposes to which the trustees are authorized and directed to apply the income and receipts coming to their hands, presents a great difficulty, as it appears to me, in limiting the authority and direction to matters accruing wholly while the railway is in the possession of the trustees, and being worked by them; but if the plaintiffs be entitled to relief in virtue of the provision of the trust indenture, under consideration, it could be by an equitable decree framed with due regard to the other necessary appropriations of the income, in accordance with the pro-

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visions of the trust indenture, a decree which could not be made in the present actions, which are not framed for that purpose, but are framed solely for the purpose of obtaining judgment against the trustees, personally, which, as I have already said, I concur in thinking that the facts and law do not warrant. I must concur, therefore, in dismissing the appeals.

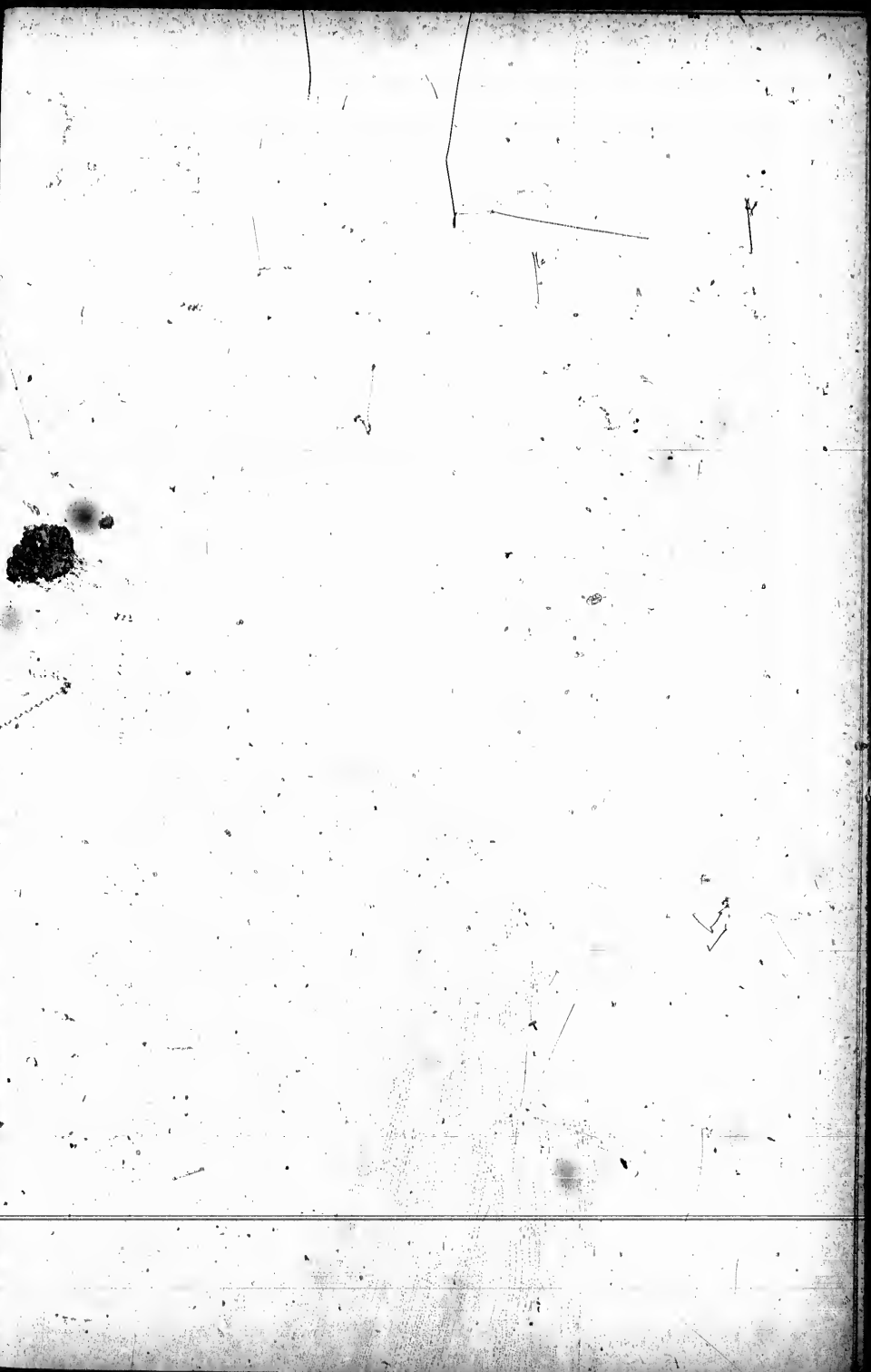
PATTERSON, J.—I concur in dismissing these appeals on the grounds stated by my brother Taschereau. I also agree with the views expressed by my brother Gwynne, whose opinion I have read, so far as they affect the present actions in which the trustees personally are charged.

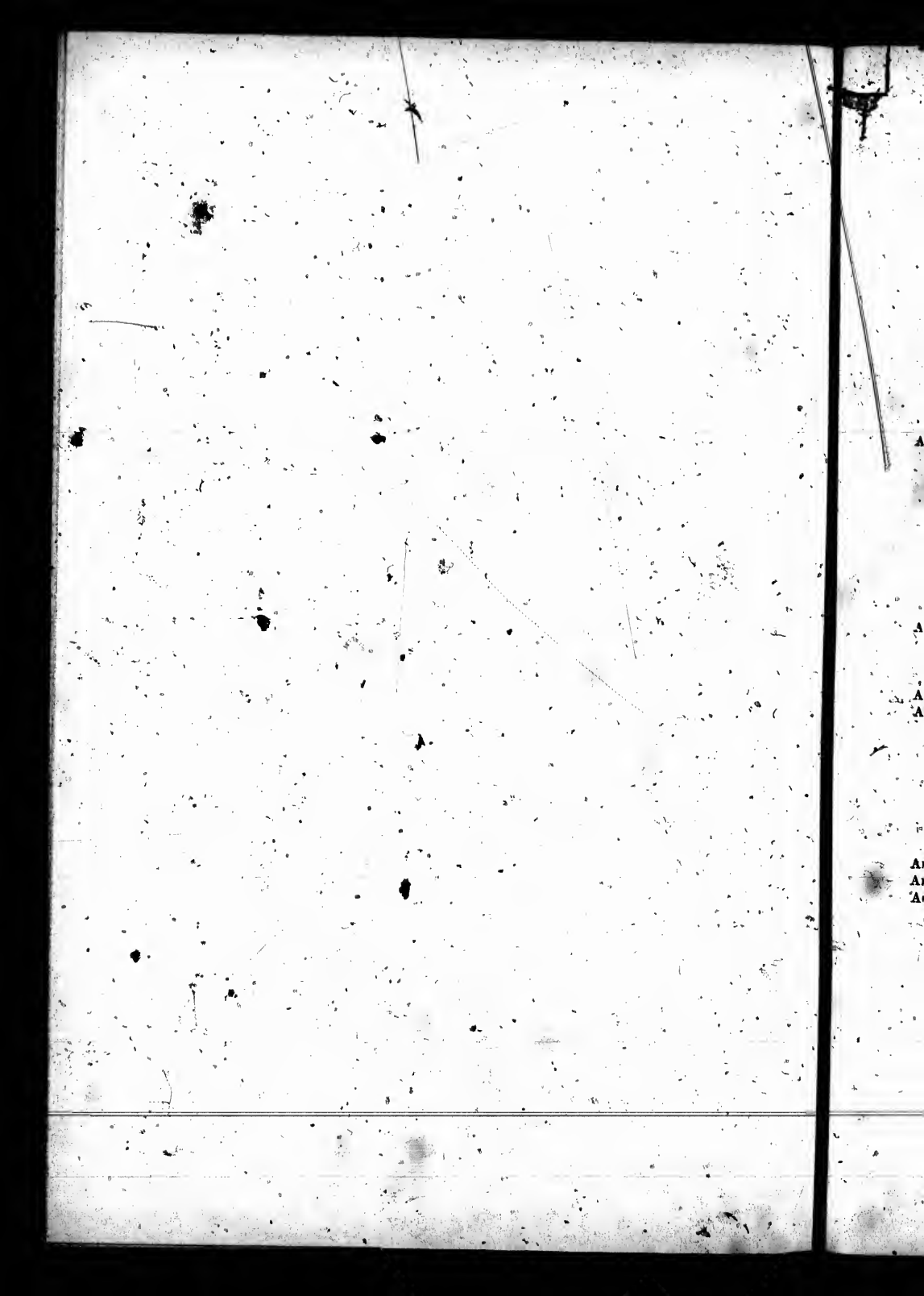
I am not prepared to express an opinion as to the trustees being justified, and being compellable in any form of action to provide for claims such as those of these plaintiffs. By the terms of the mortgage deed, they are to hand over from time to time to the company all surplus income not required for the payment of the overdue bonds and coupons. Such surplus monies, if any such should be forthcoming, would form a fund to which these plaintiffs could have recourse. But to construe the trusts as including among the specified charges, debts incurred before the trustees took possession of the road, thus giving those debts priority over the bonds and coupons, would seem to be in effect abandoning the limit of $12,000 a mile, or $2,000,000 in all, affixed by the Statute to the borrowing powers accorded to the company, and so far impairing the security offered to purchasers of the bonds.

I should, therefore, require to consider maturely the suggestion that the income in the hands of the trustees was chargeable with debts of this class in any form of action, before venturing an opinion upon it.

Appeals dismissed with costs.

Laflamme, Madore & Cross, solicitors for appellants.
James O'Halloran, solicitor for respondent.





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