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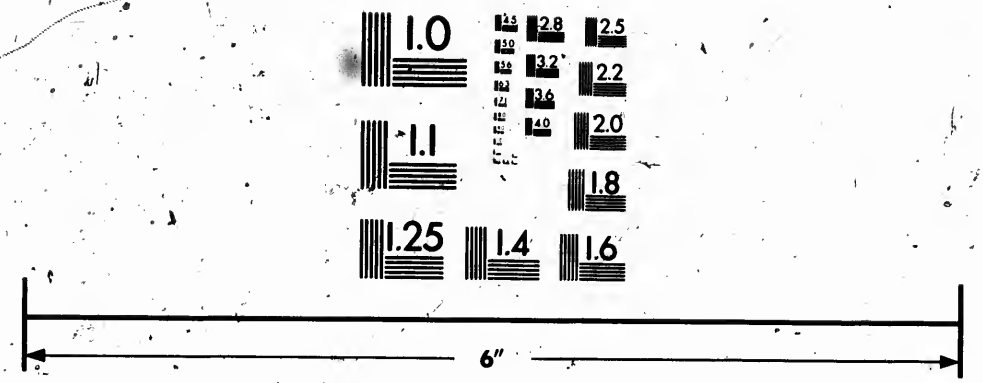

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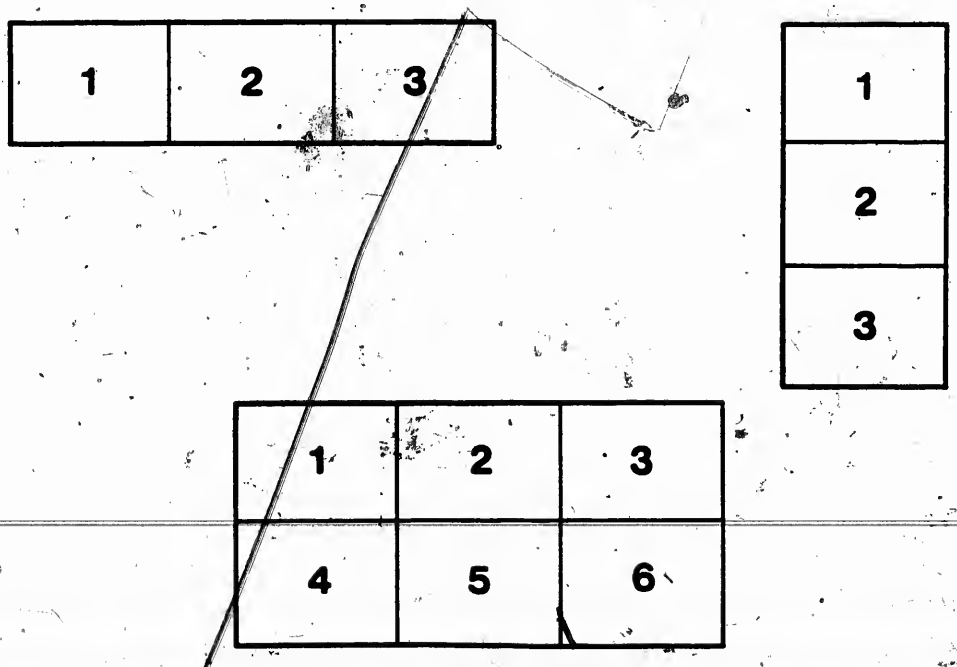

THE

LOWER CANADA

Jurist.

COLLECTION DE DECISIONS

DU

BAS-CANADA.

VOL. XV.

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

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Erratum.—At p. 305, seventh line from foot, for "was caused" read "was *not* caused."

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OF THE

LOWER CANADA JURIST.

COMPILED BY

STRACHAN BETHUNE, Q.C.

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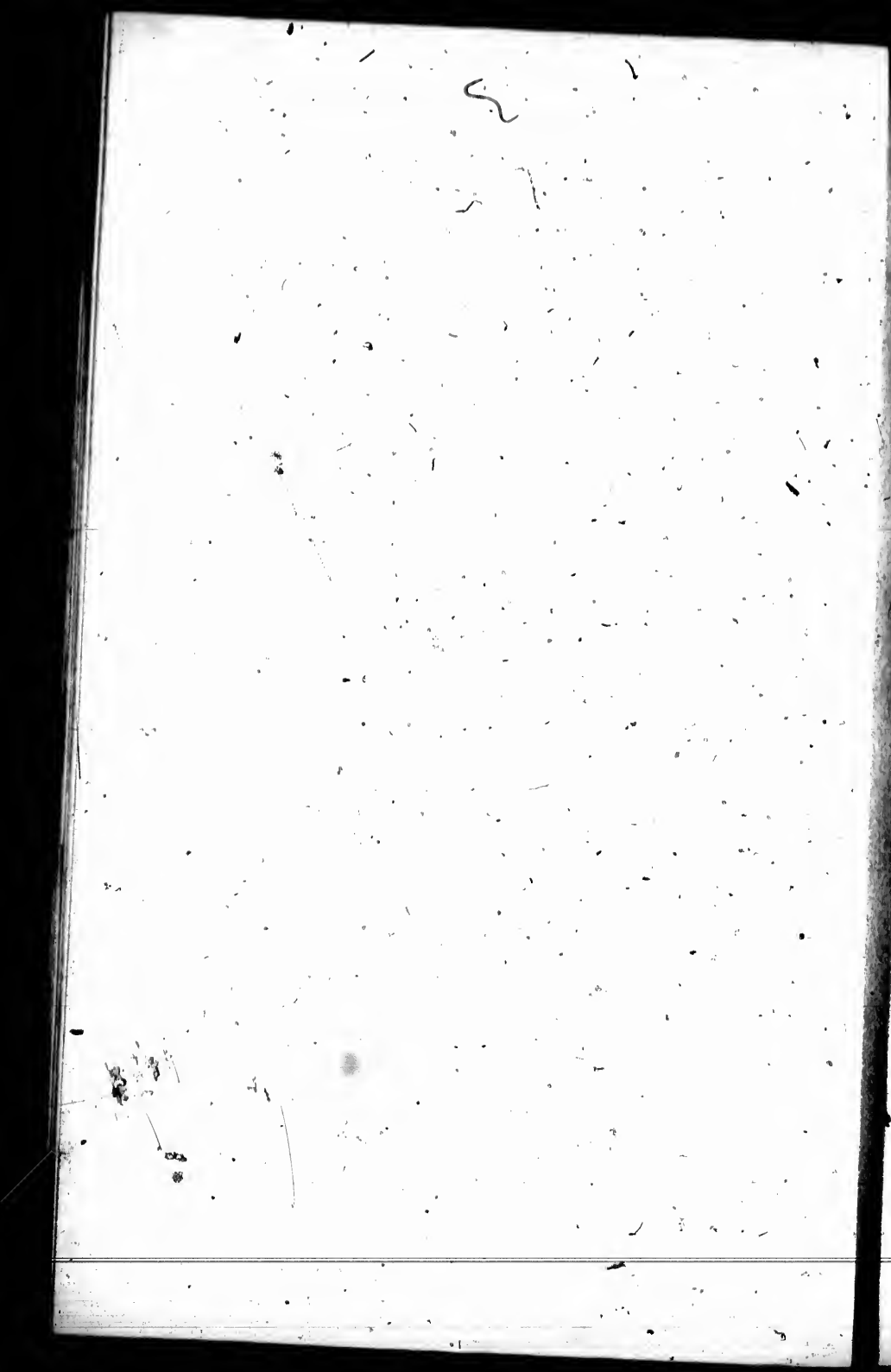

COURT OF QUEEN'S BENCH, 1869.

MONTREAL, 2ND JUNE, 1869.

Coram DUVAL, CH. J., CARON, J., MACKAY, A. J., LORANGER, J., *ad hoc*, JOHNSON, J., *ad hoc*.

No. 30.

SENECAL,

APPELLANT;

AND

THE RICHELIEU COMPANY,

RESPONDENT.

HELD:—1. That the verdict of a Jury, which is contrary to law and evidence, will be set aside, and a new trial granted.

2. That the Respondent was not responsible for the loss of a trunk said to contain a large sum of money, which the Appellant left in charge of the baggage keeper, contrary to the advice and instructions of the captain of the steamer, who indicated the office as the proper place of deposit; the Appellant stating at the time, in answer to the Captain, that he would take care of the trunk himself.

This was an Appeal from a judgment rendered in the Court of Review at Montreal by JUSTICES BADGLEY, BERTHELOT and MONK, on the 31st day of March, 1865, as follows:

"The Court now sitting here as a Court of Review, having heard the parties "by their respective Counsel upon the Judgment rendered in the Superior Court "sitting at Montreal, district of Montreal, on the 1st day of December, 1864, "having examined the proceedings had in this cause, the said Judgment and the "reasons assigned by the said Defendant, and having deliberated; Considering "that the verdict of the Jury made and rendered in the above cause on the 15th "day of October last past is contrary to law and the evidence adduced in the "said cause, doth revise and reverse the Judgment rendered in the said Superior "Court on the 1st day of December, 1864, rejecting the motion by the Defendant "among other things, for a new trial; and the Court here doth grant the said "motion in so far as the same seeks to obtain a new trial in said cause, and a new "trial of the issue joined between the parties is hereby ordered, and the plaintiff "is condemned to pay the costs of the proceedings in Revision."

CARON, J. (*dissentiens*):—L'action est par l'Appelant contre la Compagnie du Richelieu, pour la valeur d'une valise contenant de l'argent et autres effets, déposée à bord de l'un des bateaux de la Compagnie, et qui aurait été perdue, ainsi qu'il l'allègue, par la faute et négligence des employés; perte dont elle serait responsable d'après la loi et les circonstances particulières prouvées dans la cause.

La Compagnie a repoussé cette responsabilité en niant toutes les allégations de l'action et en prétendant, par exception, que le demandeur en avait déchargé la Compagnie, en refusant de laisser mettre cette valise dans un endroit particulier, dans lequel, à la connaissance du dit demandeur, d'après les règlements de la Compagnie, les argents et autres objets précieux transportés sur les bateaux étaient déposés et confiés à une personne spéciale, chargée de la garde de tels effets, et aussi en déclarant au capitaine du bateau que lui, le Demandeur, se chargeait du soin de la dite valise, et cela dans la vue de s'exempter de payer une

Sénécal and The Richelieu Company.

certaine somme exigée en sus pour le transport d'objets de cette nature. Par son exception, la Compagnie alléguait en outre que le Demandeur n'avait pas informé le Commandant du bateau que la valise en question contenait des argents et autres objets précieux.

Devant le Jury auquel la cause a été soumise, de nombreux témoins ont été entendus de part et d'autre, du témoignage desquels résulte la preuve dont l'analyse est rapportée plus bas.

Les parties ayant consenti, par écrit, à ce que les Jurés rapportassent un verdict *général*, il en a été ainsi; dix de ces Jurés ayant été d'avis que leur verdict devait être en faveur du Demandeur pour la somme de $1600 "in consequence of the gross negligence on the part of the officers of the steamer "'Montreal.'" Sur ce, motion a été faite pour un nouveau procès devant le Juge Smith, qui a renvoyé cette application; cette décision soumise à la Cour de Révision (Badgley, Berthelot and Monk) a été renversée, et un nouveau procès a été accordé par jugement du 31 Mars, 1865. C'est là le sujet du présent Appel.

Les motifs de ce jugement sont: "That the verdict of the Jury is contrary to "law and the evidence adduced in the cause."

Voyons d'abord quant aux faits. Il est abondamment prouvé que la valise, apportée sur le quai par l'Appelant, a été livrée avec d'autres effets lui appartenant aussi, à un des employés de la Compagnie, qui, lui, l'a portée à bord du bateau et l'a de fait livrée au gardien du bagage (Lajeunesse), et a, par ce dernier, été reçue et déposée dans la chambre destinée à cette fin, et placée par lui, et de lui-même, à l'endroit qu'il jugeait le plus convenable; le contenu de cette valise et la valeur de ce contenu ne fait pas difficulté; la preuve sous ce rapport me paraît suffisante et légale; quant à la perte, elle est admise de toutes parts.

De ces faits prouvés, pris isolément et à part de ceux de la défense, la conclusion légale à tirer, c'est que la Compagnie est responsable de cette perte, et tenue d'indemniser l'Appelant du dommage qui lui en résulte: sur le montant duquel le Jury était seul compétent à statuer. Mais de la part de l'Intimée, il est prétendu que d'autres faits également prouvés font disparaître cette responsabilité, et la font retomber sur l'Appelant. Or ces faits sont en substance—que le Capitaine du bateau (Côté) voyant son employé porter la valise sur le bateau et s'apercevant qu'elle contenait de l'argent, a ordonné cet employé de la déposer dans le bureau ou office, lieu distinct de celui où se dépose le bagage ordinaire; que cet ordre a été entendu par l'Appelant, qui a déclaré qu'il voulait l'avoir dans la chambre du bagage, avec ses autres effets; que le Capitaine n'a pas insisté, et s'est contenté de dire à l'Appelant qu'il *ferait mieux de faire mettre sa valise dans l'office*, et de laisser le porteur se rendre à la chambre du bagage où elle a été remise au gardien. Ce dernier s'est absenté pour un court espace de temps de la chambre ou elle était déposée et en a laissé la porte ouverte; que la disparition de la valise n'a été remarquée que lors de l'arrivée du bateau à Sorel, et que malgré toutes les recherches pratiquées, elle n'a pu être retrouvée.

Tels étant les faits prouvés de part et d'autre, surgit la question de savoir si les Jurés ont décidé contrairement à la preuve en déclarant que la perte de la valise avait été occasionnée par la négligence grossière des employés de la Compagnie. Quant à moi, je n'hésite pas à dire que Lajeunesse, le gardien du bagage, qui venait de recevoir et placer cette valise qu'il savait contenir de l'argent, commettait une grande imprudence, une faute grossière, en s'absentant de sa chambre et en laissant la porte ouverte; il y a tout à parier que s'il fût resté à son poste, comme il le devait, ou si en sortant il avait fermé la porte en clef, la valise n'aurait pas été volée, et le présent procès n'aurait pas eu lieu. Or la faute de cet employé est la faute de la Compagnie, elle est responsable de ses actes, et si l'appelant par sa conduite ne l'a pas déchargé de cette responsabilité, le Jury avait raison de dire qu'il y avait une faute grossière de la part de cet employé de la Compagnie, et en faisant cette déclaration, il ne me paraît pas avoir décidé contre la preuve.

Mais ce qui s'est passé entre le Capitaine du bateau et l'appelant au sujet de l'endroit où serait déposée la valise, tel que prouvé dans la cause et analysé plus haut, est-il de nature [illegible], à décharger la Compagnie de toute responsabilité? Ce qui nous conduit à examiner si de fait le verdict est contraire à la loi; comme l'énonce le jugement dont est appel.

La loi, quant à la responsabilité des voituriers, peut s'exposer dans les termes de l'art. 1675 de notre Code Civil, qui sous ce rapport n'est pas introductif de droit nouveau, savoir: " Ils (les voituriers) sont responsables de la perte et des " avaries des choses qui leur sont confiées, à moins qu'ils ne prouvent que la " perte ou les avaries ont été causés par cas fortuit ou force majeure." Or dans l'espèce, il est prouvé que la valise a été remise à la Compagnie, d'abord à celui qui l'avait prise sur le quai, et ensuite à celui qui était préposé à la garde des bagages, et cela à la connaissance, et, je dis plus, du consentement du capitaine, qui aurait pu refuser de recevoir à bord la valise en question à moins que l'appelant ne se conformât à l'ordre donné de la déposer dans le lieu indiqué. Rien ne l'obligeait de laisser mettre cette valise avec le bagage ordinaire, il avait en son pouvoir l'autorité nécessaire pour faire exécuter son ordre. Au lieu d'insister, il s'est contenté de donner à l'appelant un simple avis en lui disant: " Vous feriez mieux de mettre cette valise dans l'office." En n'insistant pas d'avantage, il est présumé avoir acquiescé au désir de l'appelant, et dans ce cas l'on ne peut prétendre que sous ces circonstances la Compagnie fût déchargée de sa responsabilité. Non; en consentant à ce que le dépôt fut fait dans le lieu préféré par l'appelant, le capitaine devenait, pour la Compagnie, garant et responsable de la sûreté de l'objet déposé de même que s'il eut été placé dans l'endroit d'abord indiqué.

La Compagnie s'est donc chargé du transport des effets en question, avec la responsabilité ordinaire.

Or, la perte étant constatée, pour n'en être pas responsable, il lui aurait fallu prouver cas fortuit ou force majeure. Non seulement, elle ne l'a pas fait, mais cette perte doit naturellement être tracée à la négligence, à la fraude du gardien qui, en s'absentant comme il l'a fait, et sous les circonstances énoncées plus haut, a commis une faute inexcusable, et même justifié à croire que son absence, toute

Sénécal and The Richelieu Company.

courte qu'elle ait été, a cependant été suffisante pour lui donner le temps de remettre à un complice le trésor en question, dont il aura ensuite partagé le produit. Cette dernière manière d'expliquer la chose n'a rien d'impossible ni même d'improbable. C'était à la Compagnie à faire disparaître ces présomptions; elle ne l'a pas fait, et si l'on en croit le Jury, comme il me semble que l'on doit faire, ce n'est pas au cas fortuit ou à la force majeure que l'on doit attribuer la perte, mais bien à la négligence ou à la fraude des employés de la Compagnie.

Mais l'on a cité un nombre d'autorités pour établir une proposition que personne ne peut nier, savoir: que le voiturier n'est pas responsable des sommes considérables d'argent ou des autres objets précieux qui se trouvent dans les valises des voyageurs, à moins que déclaration n'en ait été faite et qu'il ne s'en soit chargé positivement et implicitement.

Rien de plus juste et de plus raisonnable que cette mitigation apportée à la responsabilité du voiturier telle qu'exposée plus haut. Par ce moyen il connait l'étendue des risques qu'il encourt, il lui est loisible de refuser de s'en charger, si ce n'est à certains termes et conditions, et il est mis à portée de veiller à la garde de ces objets précieux avec un soin proportionné à leur valeur.

Sans cette déclaration, le voiturier a raison de croire que la valise dont il se charge ne contient que les objets ordinaires et requis pour un voyage, et que son risque ne s'élève pas au delà d'une somme modique qui ne peut varier considérablement. Cette limitation à la responsabilité du voiturier peut se formuler comme suit: "Les voituriers ne sont pas responsables des sommes d'argent "contenues dans les paquets à eux confiées lorsque ces sommes n'ont pas été "déclarés par celui qui a remis le paquet." Il en est de même des bijous et de tous autres objets précieux qui ne se portent pas généralement en voyage.

Tout en admettant l'existence et la justice de cette modification, il ne me parait pas que l'on puisse en faire, dans notre espèce, l'application à l'Intimé.

La preuve constate qu'il y a eu déclaration suffisante que non-seulement la valise contenait de l'argent, mais qu'elle en contenait beaucoup, puisque celui qui la portait a dit qu'elle était pesante et qu'elle devait contenir une bonne somme. C'est sur cette information et sur l'apparence de la valise que le Capitaine Côté avoue qu'il s'est aperçu qu'elle contenait de l'argent, et que là dessus il a donné l'ordre de la porter dans le bureau. C'est aussi sur cette information qu'il a conseillé à Sénécal de l'y faire déposer, sans cependant insister à ce qu'elle le fût.

Le conversation entre lui et le Capitaine démontre que ce dernier savait que la valise contenait de l'argent; l'Appelant l'a déclaré au gardien, ainsi que ce dernier en convient. Le Capitaine était donc suffisamment informé pour être en mesure soit d'insister à ce que le dépôt fut fait dans le Bureau, que la valise fut remise à l'Appelant ou refuser tout à fait de la transporter. Le Capitaine n'a rien fait de tout cela; il a accédé au désir de l'Appelant, la valise contenant de l'argent a été mise à l'endroit d'où elle a été enlevée; le Capitaine a entrepris de la transporter, quoique placée dans cet endroit. Il en a par là assumé la risque, et a lié la Compagnie à la responsabilité des dommages.

Le règlement produit et prouvé de la part de l'Intimé, n'a aucune application au cas actuel. Au reste, s'il y était applicable, s'était au capitaine à le faire

mettre à exécution; en ne le faisant pas, il a montré ou bien que le règlement n'existait pas ou bien qu'il pouvait en exempter quand il le jugeait à propos, puisqu'il le faisait à l'égard de Sénécal.

Pour toutes ces raisons, je pense que le verdict du Jury aurait dû être maintenu.

Le montant qu'il accorde est peut-être plus considérable que je ne l'aurais conseillé, mais il n'est pas exorbitant à un degré suffisant pour engager la Cour à intervenir.

J'infirmerais le jugement de la Cour de Révision, en confirmant celui de la Cour Supérieure qu'il mettait de côté.

LORANGER, J., *ad hoc*, also dissented on the ground that he thought the baggage man, in leaving the door of the baggage-room open, was guilty of negligence, for which the Company should be held responsible.

MACKAY, J.—In July, 1864, the appellant took passage from Montreal in one of respondents' steamers. He had with him a valise, and in it, he says, $1160 in coin. This he put into the baggage-room, in charge of a servant of the respondents, and when he wanted it again, it was not forthcoming. It could not be found. He sued the respondents and obtained a verdict for $1600 against them, from a Jury. This verdict was set aside by the Court of Review, which ordered a new trial; hence the present appeal. I agree with the Court of Review that the verdict referred to was contrary to law and to the evidence. The appellant lost his valise; but is the respondent to be held to indemnify him for undeclared amount of coin alleged to have been in it? Is the carrier liable for indefinite sums of money lost in passengers' trunks? *Sénécal* going on board respondents,' boat, the Captain, on the wharf, on a mere suspicion that money may be in his valise, tells him to place it in the office (bureau) on board. What the Captain meant is plain, he meant the *bureau* as a place of safety, and so Sénécal understood, but he objects and says that he will take *care of the valise himself*, and on going on board puts it into *the common baggage room, avec les gros colis*, as *Marcadé* has it.

He objected to the *bureau* because he knew he would be charged something, a percentage, if he put his money there. He so admits, and that he had paid before on money parcels placed by him in the *bureau*; "*non, non, pas un sacre*," (he said to the captain), "je vais le mettre dans le bagage," "je ne veux pas payer," and he added: "qu'il en prendrait soin lui-même, says the captain." It is proved that the respondents were in the habit of charging extra for money risk, and had a purser specially to take care of money; but the amounts had to be declared; for the respondents' charge was a percentage, and without declaration the proper charge could not be determined.

"Les voituriers percevant d'ordinaire, et tout naturellement, un prix de "transport un peu plus élevé pour les objets précieux, qu'ils placent dans les "endroits réservés, comment celui qui, pour épargner quelques centimes de port, "n'a pas fait connaitre la nature des objets, et les a laissé mettre avec les gros "colis, qu'il est impossible de surveiller autant, pourrait-il faire payer par le "voiturier le dommage qu'il a lui-même préparé par son avarice ou sa négligence," says *Marcadé*. Tome VI. p. 533.

Sénécal and The Richelieu Company.

If Sénécal has lost his $1160 he has himself to blame: he has contributed to the loss, and No. 238 Troplong, Dépôt applies to him, and to discharge the respondents. What did he mean by saying that he would take charge of his valise himself? He assumed a responsibility, I hold.

The Captain was not in fault for not taking *Sénécal's* valise away from him, whether he wished it or not, and putting it into the *bureau*; nor was the Captain bound to turn him off the boat unless he would put his valise into the *bureau*, paying extra freight upon it. The case of *Desrues* is applicable here in favor of respondents. No. 238, Troplong, Dépôt.

Desrues was told by his landlord not to leave his money in his bedroom; he chose, nevertheless, to put it into his bedroom, and it was stolen by a servant. The innkeeper was, by arrêt of the Parliament of Paris, deemed "irresponsible." It was *not* held that the innkeeper was in fault for not having taken Desrues money from him, or for not having, by force, prevented him taking his money into the bedroom.

The respondents ought not to be held liable for *Sénécal's* $1160, under the circumstances of this case, and in absence of declaration of the amount of money that was in the valise referred to. The mere fact that the Captain had a suspicion that *some* money was in the valise is not fatal to the respondents, seeing all that is proved; nor can it warrant condemnation of respondents in a sum so large as $1160. Query—Whether they are liable even for the value of the valise? See further *Sirey*, of 1848, 2nd part, p. 452, and *Sedgwick* (on damages) [468].

Upon the whole, I am of opinion that *Sénécal* is without right to complain of the judgment of the Court of Review, and that his appeal ought to be dismissed.

The majority of the Court being of the same opinion, the judgment appealed from is confirmed, with costs.

Judgment of Court of Review confirmed.

Dorion & Dorion, for Appellant.
Cartier, Pominville & Béthune, for Respondent.
Strachan Bethune, Q.C., counsel.
(S. B.)

COURT OF REVIEW, 1869.

MONTREAL, 30th SEPTEMBER, 1869.

Coram MONDELET, J., MACKAY, J., TORRANCE, J.

No. 2462.

Martin vs. *Jones.*

HELD:—That a petitory action will not lie, for an alleged encroachment in the erection of a dwelling, shed and fence, on the line of division between the Plaintiff's and Defendant's lots, acquired by them from a common *auteur*, when such erection has been effected with the knowledge and consent of the party complaining, and specially so, in the absence of any legal *bornage* of the respective properties.

This was a hearing in review of a judgment rendered by the HON Mr. JUSTICE MONDELET, in the Superior Court, at Montreal, on the 30th day of December, 1868, maintaining the plaintiff's action.

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The action was a petitory one, claiming also the demolition of a portion of the wall of a dwelling house and shed, and of a wooden fence which the plaintiff alleged the defendant had erected on the line of division between their respective properties, and in the erection of which he had encroached to the extent of one foot on the front and four inches on the rear of the plaintiff's lot.

The defendant purchased his lot from one Grierson, on the 1st of May, 1867, and Grierson and plaintiff purchased their respective lots, from Sir Samuel Morton Peto, on the 13th of August, 1864.

The defendant (denying the encroachment to the extent alleged and admitting a small encroachment in front to the extent of two inches, compensated by a similar one by plaintiff in rear) pleaded in effect, that the erections complained of were made by Grierson, with the full knowledge and consent of the plaintiff.

The following was the judgment complained of:—

The Court *** considering that since the 13th day of August, 1864, the plaintiff hath been and now is the proprietor of a certain lot of land situate at the Point St. Charles, in the City of Montreal, known as lot number eighteen, on a certain plan made by Messrs. Plunket & Brady, deposited of record, in the office of Doucet, Public Notary, at Montreal aforesaid, on the 2nd day of July, 1863, said lot containing twenty-five feet in front by ninety-four feet in depth, the whole English measure, more or less, bounded in front by a road leading to the Grand Trunk Railway *dépôt*, in rear by a lane common to the said lot, and the adjoining lots, on one side by lot No. 17 on said plan, and on the other side by lot No. 19, on said plan, the above mentioned lane being eighteen feet in width;

Considering that the defendant hath, without right, title or authority, for over and during one year before the institution of the present action, unlawfully taken and kept possession and holds unlawful possession of a strip of said lot of land, the whole depth thereof from front to rear, where the same adjoins the said lot number 17, the said strip of land measuring one foot in front on Forfar street, ninety-four feet in depth to the rear, where the same measures four inches, the whole English measure;

Considering that on part of the said strip of land, to wit, on the front and in the rear, the said defendant hath erected a brick wall of a dwelling house and shed, and the other part of the said strip of land, the defendant hath enclosed and hath taken in with the said adjoining lot number 17 by a wooden fence:

It is ordered and adjudged that the defendant do, within fifteen days of this judgment, remove from off the said strip of land the brick wall of the said dwelling house and shed, and remove the said fence from off the strip of land on to the division line between the said lot of land of the said plaintiff, and the said lot number 17, and desist from, quit and abandon the possession of the said strip of land so unlawfully held possession of by him the said defendant and render and deliver up the same to plaintiff.

It is further ordered and adjudged that in default of the said defendant complying with the present judgment, to wit, to demolish and remove the said wall and fence, he do pay to the plaintiff, the sum of $200 currency, and costs of suit. Defendant to pay said costs, in all cases.

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MONDELET, J., (*dissentiens.*)—The plaintiff and defendant were owners of contiguous lots of land at Point St. Charles. The defendant built a brick wall extending about one foot on the land of the plaintiff. The judgment complained of ordered the demolition of the said wall within fifteen days, and in default of so doing to pay $200. I am still of opinion that this judgment is correct. If the $200 damages were too much, the sum might be reduced.

MACKAY, J.—The action was evidently an afterthought, and a speculation on the part of the plaintiff. The two parties owned contiguous lots of land. There never was any legal *bornage* between their lots, but the *auteur* of defendant had first run a fence along what he supposed to be the line, and had afterwards erected a brick wall for a dwelling house on the same line. Martin, the plaintiff, had acquiesced in, and even highly approved all this. He said he wanted to have the right of *mitoyenneté* in the wall, and promised to pay half the price of building it, when he should come to make use of it himself as a *mitoyen* wall. This amounted to a *partage à l'aimable*, and operated as a kind of *fin de non recevoir* against the plaintiff. At all events, the plaintiff acquiesced in the actions of the defendant and his *auteur*, and could not now bring an action petitory. If he had any action it would be an action of damages only, but his action does not pray for damages, which consequently could not be granted. The judgment in favour of plaintiff should be reversed.

The following was the judgment in Review:—

"The Court *** considering that the plaintiff and one George John Grierson (from whom the defendant has purchased the immoveable property designated in the declaration) have both derived their titles to the lots designated and adjoining one another from the same vendors, Sir Samuel Morton Peto and others, by deeds executed on the same day, to wit, on the 13th of August, 1864, before Mtre. T. Doucet and colleague, Notaries, according to, and as marked on a certain plan made by Messrs. Plunket & Brady, and deposited of record in the office of said Mtre. T. Doucet;

Considering that after or since his acquisition of the lot of land mentioned in his declaration, plaintiff has really never taken or had possession of more land than at present, and that defendant's *auteur* since or after his deed had and took possession of all that the defendant now possesses;

Considering that it is not proved that plaintiff has not all that he is entitled to;

Considering that there has been no *bornage* between the plaintiff and defendant or defendant's *auteur*, proprietors of said lots, other than that resulting from the erection of fence and buildings between them, as agreed to by both;

Considering that action petitory such as brought did not and does not compete to plaintiff against defendant in the circumstances of this case;

Considering the plaintiff's action unsustained by the facts and law, and that in the said judgment of the 30th of December, 1868, there is error; this Court revising the same doth reverse said judgment, and rendering the judgment that ought to have been rendered, doth dismiss plaintiff's action, with costs against

plaintiff of the whole suit, to wit, in this Court and in the said Superior Court.

Judgment of S. C. reversed.

Day & Day, for plaintiff.
Perkins & Ramsay, for defendant.
(S.B.)

SUPERIOR COURT, 1870.

MONTREAL, 31ST OCTOBER, 1870.

Coram MACKAY, J.

No. 537.

Leslie vs. *Hervey*.

HELD:—1st. That sect. 16, of C. S. C., cap. 67, which declares it a misdemeanor in any operator or employee of a Telegraph Company to divulge the contents of a private despatch, does not apply to the production of telegrams by the Secretary of the Company, in obedience to a *subpœna duces tecum*.

2nd. That telegrams which have passed between a principal and his agent are not privileged communications, in a suit to which that principal is a party.

MACKAY, J. Mr. James Dakers, Secretary of the Montreal Telegraph Company, was ordered by subpœna *duces tecum*, served at plaintiff's instance, to produce at *enquête* all telegrams or copies of telegrams sent by William Bunten (defendant's clerk) to defendant in July and August, 1869, referring to the shipment of coal oil or petroleum, or the purchasing or forwarding thereof, or to the chartering of any vessel or vessels, or to any matters connected with coal oil or petroleum, and all telegrams or copies of telegrams sent by defendant to the said William Bunten, during the said period, referring to the same matters or any of them; also, a copy of telegram dated 26th August, 1869, sent by said Bunten to David Campbell, referring to the above matters.

Mr. Dakers appeared in obedience to the subpœna. He stated that he had charge and management of the Telegraph Company's office, and has had for many years. He objected to the production of the telegrams. Defendant's counsel also objected. I took these objections *en délibéré*, and am now ready to dispose of them.

The two principal grounds of objection are:—

1st. On behalf of the witness, that the production of the telegrams in question would be a misdemeanor under 16 Viet. Chap. 10, Sec. 11.

2nd. On behalf of the defendant, that the said telegrams are to be regarded as confidential communications, and entitled to the privilege of secresy.

To take up the second objection first. Communications made by one person to another are privileged when they relate to matters confidentially disclosed to the witness: 1st. In his character as a priest or minister; or, 2nd, as a legal adviser; or, 3rd, as an officer of state, when public policy is concerned. Communications made by a principal to his agent, or *vice versa*, in relation to the business of the principal are not privileged. If the communications which have

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passed between the principal and his agent have been made through the intervention of a third person, the knowledge of facts thus acquired by the third person is no more privileged than the same knowledge in the possession of the agent.

The Telegraph Company is in the position of a third person, or secondary agent, employed to convey communications between the principal and his agent. If the knowledge of his employer's business possessed by defendant's witness (Bunten), and the communications which have passed between him and the defendant are not privileged when Mr. Bunten himself is under examination, neither can the same communication be regarded as privileged in the hands of a third person, (as the Telegraph Company here,) to whom they have been confided for transmission.

2nd. As to the objection made by the Secretary of the Company, founded on 16 Vict., c. 10, the questions involved in it has been thoroughly discussed in foreign courts though not in our own. In most of the United States, the Acts relating to Telegraph Companies contain a clause similar to that of our own Statute. Examples might be given from the Statutes of the different States to show with what variety of expression the same end is sought to be attained by all. Agents and operators of Telegraph Companies every day obtain knowledge of facts of the greatest importance affecting the business of individuals in all classes of society, and it is obvious that stringent means must be taken to guard against idle or wilful disclosure by them of things or facts the knowledge of which they have acquired merely from their employment. But this guarantee is taken to protect the rights of each individual sender or receiver of a message, and cannot be extended further than do these rights themselves. When, therefore, the rights of others come into play, as when a suit is pending between the sender or receiver of a message and a third party with whom he is alleged to have contracted, the right of this third party to compel the disclosure of all facts bearing on the subject matter of the suit takes precedence for the time of the general right (subject to the law's limitations,) which belongs to every man, to prevent his private affairs being enquired into by others. By our law every witness except those exempted for special reasons (as husband and wife, priest, legal adviser, or officer of state,) is bound to disclose all the facts within his knowledge which it is the interest of either party to know, and "to produce any document in his possession touching the matter in issue." To contend that the prohibition against divulging the contents of any private telegraphic despatch should apply to evidence compelled to be given by order of the judge in a court of justice in regard to facts "pertinent and relevant to the matters at issue," is to contend either that telegraphic messages passing between a principal and his agent are to be treated as "privileged communications," or that an enactment intended to protect society against wicked or idle disclosures by telegraphic operators, should be so interpreted as to defeat the administration of justice by exempting a witness in a cause from disclosing, though under the orders of a competent Court, facts which it is necessary for that Court to know before finally pronouncing upon the questions at issue in the cause. In the matter of Waddell, before the Court

in Newfoundland, cited in Scott and Jarnagin, p. 379, the Chief Justice held that communications or messages sent through a telegraph office are not in law privileged communications; and that as the operators or other servants of the company are compelled to attend a judicial proceeding, they are bound to disclose the contents of messages, and he cited the opinion of Lord Ellenborough, in Lee v. Birrell, (3 Camp. 337, as supporting his view in a case analogous.

The language used in our Statute is very similar to that of the Acts passed in the United States. The object in view is to prevent the unlawful exposure of another's business or acts. If we are asked what are lawful exposures of business or acts communicated through telegraph, the answer would seem to be, exposures made in courts in the course of the administration of public justice. See judgment in Heinsler v. Freedman, cited in Scott and Jarnagin, pp. 378-380.

As to the objection that the Secretary of the Telegraph Company cannot be required to part with possession of messages which are the property of the Company, it is easily met by a reference to Art. 276, Code de Procedure, which authorizes the prothonotary to make and certify copies of private writings.

As to another objection, that the evidence offered is only secondary, it is to be observed that the witness is called on to produce "all telegrams," that is, of course, original telegrams, or "copies of telegrams." Those sent by Mr. Buntin, from Montreal, will be original in his own handwriting. As to telegrams sent by the defendant from the West to Montreal, if copies are preserved by the Telegraph Company, defendant must be notified to produce the originals, or the originals must first be resorted to or accounted for, before the copies can make proof. At the future *enquête* the right of all parties in this respect will be preserved. But the witness Dakers has not improperly been subpœnaed to bring along with him copies and originals. All the objections referred to are overruled.

The *considérants* of the judgment are as follows:—

The Court having heard the plaintiff and the defendant and the witness James Dakers on the objections taken at *enquête* sittings on the 6th October, 1870, by said defendant, and by said witness, to the production of certain telegrams and copies of telegrams sent by or through the Montreal Telegraph Company by William Bunten of Montreal, clerk to the said defendant, or by the defendant to the said William Bunten, in July and August, 1869, relating to the matters referred to in the question put to said witness by said plaintiff in the deposition in this cause commenced on the 6th day of October instant, and having deliberated, doth overrule said objections and doth order that the said James Dakers do bring with him and produce before this Court, at *enquête* sittings on the 2nd of November next, the said telegrams and copies of telegrams above referred to, to be used and availed of by plaintiff according to law and subject to what objections the defendant may have right to urge at the proper time against proofs by copies; except in manner and form and under the exceptions prescribed by law.

Objections overruled.

Cross & Lunn, for plaintiff.
L. N. Benjamin, for defendant.
W. Rose, for James Dakers.

(A. H. L.)

SUPERIOR COURT.

In Review.

MONTREAL, 28th FEBRUARY, 1870.

Coram MONDELET, J., MACKAY, J., TORRANCE, J.

No. 98

Batchelder vs. *Smith* et al.

HELD:—That the testimony of the defendants, sued for the recovery of the amount of a promissory note signed by the defendants, as joint makers, cannot be rejected.

This was an action upon a promissory note against three defendants, as joint makers, for the sum of $1300, to the order of Smith Curtis, and by him endorsed in favor of Hiel Curtis and by the latter endorsed in favor of plaintiff.

The defendants severed in their defence. Two defendants pleaded together, and the third by himself. The pleas, however, of both issues are substantially the same. The defendants are father and sons.

They pleaded that the note was without any consideration, for special reasons alleged in their plea.

The judgment rendered at Sherbrooke, in the District of St. Francis, by the Superior Court, (Short, J.) maintained the motion made by the plaintiff for setting aside the testimony of the defendants, who had been examined as witnesses, and condemned the latter to the payment of the note.

The cause having been inscribed for revision at Montreal, the plaintiff contended that the defendants could not depose for one another as each defendant was severally liable to pay the note.

The plaintiff stated his pretensions on this point in his factum as follows:—

"The defendants have made no proof of fraud on the part of Curtis or of his having made the partnership matter, part consideration of the note, except what each deposes for the other. This cannot be.—*Code Civil Proc. Art.* 251. This article is more or less incomprehensible, but one thing is certain, that by it a party is not permitted to make evidence for himself. Each defendant is severally liable to pay this note. His evidence for his co-defendant is, in fact, evidence for himself. To maintain that, upon such evidence, uncorroborated, a promissory note can be set aside is a proposition too glaringly untenable to require answer."

MONDELET, J., differing. The transfer of the note to plaintiff, who is a *bona fide* holder, was made before it matured. Although this settles the case, it may, nevertheless, safely be asserted that the defendants have altogether failed in making out the allegations of their pleas. A motion was made by the plaintiff to have the evidence and testimony of defendants rejected, inasmuch as they are joint makers of the promissory note sued upon in this cause; this motion was granted, and, in my opinion, correctly so. The judgment should be confirmed.

The majority of the Court of Review rejected the motion and dismissed the action. The judgment is *motived* as follows:

"The Court, * * * considering that there is error in the said judgment of the 26th December, 1868, to wit: in rejecting the depositions of defendants

upon plaintiff's motions, also in condemning the defendants to pay to plaintiff, Batchelder, the amount of the promissory note sued on, interest and costs; doth, revising said judgment, reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises, doth order that plaintiff take nothing by his motions referred to, and, considering that the said plaintiff, Batchelder, is a mere *prête-nom* for Smith Curtis, who was, at the date of the institution of this action, the only real owner of the note sued on, and that he, Batchelder, ought not, under the proof of record, to be held to have better right to have and obtain from defendants the amount of said promissory note, interest and costs, than said Smith Curtis, from whom he really did get possession of said note, though by indorsement from Hiel Curtis, considering that said Smith Curtis, if nominally and actually plaintiff, could not have compelled nor could compel defendants to pay him said note amount, or interest, or costs under the circumstances of this case, particularly under the circumstance of the consideration for said note having failed through the acts and deeds of said Smith Curtis, doth dismiss plaintiff's action. The Honourable Mr. Justice Mondelet dissenting.

Judgment reversed.

Sanborn & Brooks, attorneys for plaintiff.
Hall & Johnson, attorneys for defendants.
(P. R. L.)

COURT OF REVIEW, 1869.

MONTREAL, 30TH SEPTEMBER, 1869.

Coram MONDELET, J., MACKAY, J., TORRANCE, J.

No. 46.

Allis vs. *Foster*.

HELD:—1. That a tenant is responsible for the destruction by fire of the leased premises, through the negligence of his servants.
2nd.—That the *onus probandi* is on the tenant to prove that the fire was not the result of negligence on the part of his servants, when the premises are burnt whilst in their occupation.
3rd.—That prior to the Code no prescription short of thirty years existed against the landlord's right of action.

This was a hearing in review of a judgment rendered by the Superior Court, at Sherbrooke, in the District of St. Francis, on the 24th day of October, 1868, maintaining the plaintiff's action.

The facts and pleadings are fully related in the remarks of the Honorable Judge, who pronounced the judgment complained of, as follows:—

SHORT, J.—This is an action of damages occasioned to the plaintiff by the burning of his barns, alleged to have been done through the negligence of defendant's servants. This occurred some fourteen years ago. Two questions arise, one of law and one of fact. The defendant has pleaded prescription. If this plea is well founded it would be useless to consider the evidence, except as to lapse of time. The defendant by his first plea, alleges that the action is

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prescribed by lapse of ten years; by his second plea he alleges that more than five years have elapsed since the cause of action, and therefore it is prescribed.

I am clearly of opinion that, by the law as it existed prior to the Code, which applies to this case, none of the shorter prescriptions apply to an action of this nature: that no prescription short of thirty years would apply. The Code has enacted, as introducing new law, a prescription of two years, as a *fin de non recevoir* to certain actions of damages, but it would be quite doubtful if that prescription, had the same been law when the facts occurred on which this action is based, would apply here, inasmuch as the damages here claimed have respect to real property. The plea of prescription is overruled. It becomes necessary to weigh the evidence adduced which it is claimed attaches liability to the defendant. The facts are these:—It seems the defendant was a contractor on the Quebec and Richmond Railway, near Danville, where plaintiff had a dwelling-house, barn and other outbuildings. He rented of plaintiff his house and barn and a shed, which defendant, after hiring it, converted into a cow-barn; he occupied the house with his family while he was completing his contract, and the barn and shed-barn he used to keep his horses in, while his work was progressing.

When the contract or his section was completed, or nearly so, he left the dwelling-house, giving it up to plaintiff, and removed his horses, except two horses and some tools which were kept in the shed-barn. After his teams had been away about three weeks, he found it necessary to take them back for some purpose to Danville; he ordered his men to take them back to the same place where they had been kept before. They did so, and some of these teams arrived a considerable time before the others. Some of the witnesses say that the first teams arrived at Danville at nine o'clock in the evening. As to time the evidence is conflicting, but from all the circumstances I think it must have been considerably later than nine o'clock when the first teams arrived. Some time after all the teams had arrived and the horses had been put into plaintiff's barn, a fire occurred by which both barns were consumed with their contents. All the witnesses agree that the fire originated in the large barn. When a fire occurs in premises occupied by a tenant the presumption is against the tenant, that it was caused by his negligence, and it is for him to rebut that presumption. This does not fully operate here, because plaintiff had two cows in the large barn, and there is, to a certain extent a divided responsibility, so far as the presumption goes. One witness (Berthelet), says that a candle was placed over the manger in the large barn on the scaffold, in front of the horses.

This witness is contradicted by some of defendant's witnesses. Bessette says he gave the men a lantern and it is said that the lantern was used in the rear of the horses, and that they could not see by a candle placed in the position mentioned by Berthelet. Julien Melançon, however, says that the horses were fed from the barn floor, this would require a light in front. It is said by defendant that the fire must have originated in the cow stable. Julien Melançon says that there was hay in front of the horses on the barn floor which might have communicated the fire to the cow stable, and he is the only witness who was not [illegible] stood as being one of the party. Berthelet was not a teamster, but an ordi-

nary laborer, and has not so strong a temptation to color his evidence to escape blame as the teamsters have. Melançon, it seems, had placed his horse in the stable of the large barn before defendant's teams arrived. It was taken out by defendant's men and placed in the cow stable. This shows that some of defendant's men must have been in the cow stable, and had there been fire there then, they ought to have seen it: whether the fire originated in the cow stable, or in the other part, the inference forces itself upon one, that it must have been occasioned by some of defendant's men.

It is contended that there is no more reason to suppose that it was caused by defendant's men than by plaintiff himself. The defendant's men were there, and it is clear from all the evidence that plaintiff was not there, nor any one in his employ: defendant's men had been drinking, and some say they were intoxicated, and although a majority of them deny it, it is extremely probable that they were more or less intoxicated. They were noisy, and cannot give any intelligible account of the origin of the fire, although there were ten or twelve of them, and most of them slept in the shed-barn. They were sent there at a late hour when plaintiff was in bed, and had no reason to expect them.

If the fire was caused by plaintiff or his servants, of which supposition there is no evidence to render it probable, it would have shown itself before eleven o'clock and past, when the fire was first discovered. From all the evidence, the presumption is very strong that it was occasioned by the negligence of defendant's servants, who were there as defendant admits pursuant to his orders.

The damages consist of the loss of the two barns, a double waggon, two cows and some hay, which have been proved by witness Boutelle to be worth $450, for which judgment is rendered with interest from the *demande judiciaire*, and costs.

MONDELET, J., (*dissentiens*).—This was before the Superior Court for the District of St. Francis an action in damages claimed by the plaintiff for the alleged burning of his barns, through the negligence of several teamsters in the pay of the defendant. It is as well to observe at the outset, that the fire complained of occurred in August, 1854, and that plaintiff brought his action only on the 18th day of March, 1867, about thirteen years after the fire. It is by no means explained, much less satisfactorily accounted for, why this action should not have been brought at the time the plaintiff suffered the pretended damage complained of. This circumstance must not be overlooked, inasmuch as there cannot be, in the evidence now before us, that certainty as to facts, or at least, that guarantee of the reliance to be placed on the evidence which there would have been had the *enquête* been taken at or shortly after the occurrence of the facts in question. This action was met by two pleas: first, prescription by lapse of ten years, and second, prescription of five years. In accordance with the Court below, I am of opinion that there is no such prescription as opposed by the defendant to the present action. On the merits, which consist in affirmations on the one side, and denegations on the other, the evidence must be attentively perused, and from such perusal I have arrived at the conclusion that it is altogether unsatisfactory to prove the plaintiff's case. On the other hand, the evidence

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adduced by the defendant is either a contradiction of that adduced by the plaintiff, in which case the benefit of the doubt, should any doubt result, should be in favour of defendant, or, (as I am of opinion it does) it establishes the important fact that the fire did not originate in the building in which the teamsters of defendant slept, so relieving them from all responsibility. It is I believe clearly made out that the fire commenced on the side of the stable where the cows were, and not where the horses were. It appears to me evident that, if the fire had originated at the end of the large barn, which the defendant's horses were in, it would have been at once communicated to the small stable before reaching the place where the plaintiff's cows were, for the obvious reason that the wind blew towards the small building, which would clearly have been destroyed before the large one. The contrary is well made out. Such being the facts, I am of opinion that the plaintiff's action (brought thirteen years after the fire), should have been dismissed, and the judgment appealed from reversed.

MACKAY, J., said that great importance was attached to the place where the fire originated, it being proved that it must have originated in the large barn which was not occupied by the defendant's men: that Julien Melançon, the only witness not interested as one of the party, says that there was hay in front of the horses on the barn floor which might have communicated to the cow stable. Melançon had placed his horse in the stable of the large barn before defendant's teams arrived. It was taken out by defendant's men, and placed in the cow stable. This shows that some of defendant's men must have been in the cow stable, and had there been fire there then they ought to have seen it. Whether the fire originated in the cow stable or in the other part of the barn, the inference forces itself upon one that it was caused by the defendant's men. They went into the barn at a late hour when plaintiff did not expect them: they had lights in the barn, as one witness says, placed in a dangerous position near hay, and it was clear that the fire must have been caused by their negligence.

TORRANCE, J., said that when a fire occurred in a building occupied by a tenant, the presumption was that it was caused by the negligence of such tenant. The judgment of the Superior Court, St. Francis, must be confirmed.

Judgment of S. C. confirmed.

Sanborn & Brooks, for plaintiff.
Felton & Felton, for defendant.
(S. B.)

PRIVY COUNCIL, 1870.

WINDSOR CASTLE, 29TH NOVEMBER, 1870.

Coram THE QUEEN'S MOST EXCELLENT MAJESTY, LORD PRESIDENT, LORD PRIVY SEAL, EARL GRANVILLE, LORD CHAMBERLAIN, MR. SECRETARY BRUCE, MR. GLADSTONE.

EX PARTE

THOMAS KENNEDY RAMSAY, Q. C.,

PETITIONER.

HELD, 1:—That a Judge of the Court of Queen's Bench, whilst sitting alone in the exercise of the criminal jurisdiction conferred upon that Court, has no jurisdiction over an alleged contempt, for publishing a libel concerning one of the Justices of the Court, in reference to the conduct of such Justice while acting in his judicial capacity, on an application to him in Chambers for a Writ of *Habeas Corpus;* the matter being only legally and properly cognizable by the full Court of Queen's Bench.

2:—That the issuing of a Rule for Contempt, by the Judge himself, against whom the contempt is alleged to have been committed, without any evidence that the party charged had committed the contempt, is most irregular.

3:—That an admission in writing, by the party charged, at the instance of the Judge, for the purpose of settling the dispute between them, must be held to have been written without prejudice, and cannot avail as evidence in support of the Rule for contempt, in case the Judge refuse to accept it as a sufficient apology.

4:—That a fine imposed by the Judge under such circumstances will be remitted.

This was a petition, under the Imperial Act 3rd and 4th William the Fourth, ch. 41, s. 4, praying Her Majesty to grant the petitioner relief from the judgment reported in the 11th L. C. Jurist, pp. 152 and *seq.*

The petition having been referred by Her Majesty to the Judicial Committee of the Privy Council, was duly reported on by the Committee, and thereupon Her Majesty, by and with the advice of Her Privy Council, pronounced the following judgment:

Whereas there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 26th day of November instant, in the words following, *viz:*—

"Your Majesty having been pleased, by your Special Order in Council of the 7th November, 1868, to refer unto this Committee the humble petition of Thomas Kennedy Ramsay, an inhabitant of Montreal, in Lower Canada, in the Province of Canada, setting forth that the petitioner is an Attorney, Advocate and Queen's Counsel, residing and practising his profession at Montreal aforesaid: That the petitioner appeared on the 24th day of August, 1866, before Mr. Justice Drummond, one of the judges of the Court of Queen's Bench for Lower Canada, to oppose, on behalf of the Attorney General for Lower Canada, an application for a writ of *Habeas Corpus* made on behalf of a prisoner named Lamirande, who had been arrested under a warrant granted under the provisions of the Extradition Treaty between Great Britain and France for an alleged forgery said to have been committed in France; that Mr. Justice Drummond adjourned the application till the next day, but before the next day the French police authorities presented to the gaoler having charge of Lamirande the duly authenticated warrant of the Governor-General, in obedience to which the said gaoler gave up the said prisoner, who was immediately taken on board a steamer and carried away

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to France. That after the next day the said Mr. Justice Drummond, after he knew that Lamirande was out of the jurisdiction, issued his writ of *habeas corpus*, to which the gaoler duly returned the warrant of the Governor-General; that on the following day, the 26th day of August, 1866, the said Mr. Justice Drummond, in Chambers, made some observations on the case of Lamirande, in the course of which he reflected most severely on some persons whom he did not name, but by whom he was universally supposed to mean, amongst others, the petitioner. That these remarks, (which as the petitioner submits were extra judicial) were reported in the Montreal *Herald* of the 27th August, 1866. That the petitioner addressed to the Montreal *Gazette* a letter in which he answered the imputations of the said learned Judge: That on the 28th day of August, 1866, the said Mr. Justice Drummond delivered a judgment in the matter of the said application for a writ of *habeas corpus*, in which again he reflected most severely on some persons whom he did not name, but by whom he was universally understood to mean, amongst others, the petitioner; that these remarks were reported in the Montreal *Herald*; that the petitioner thereupon, on the 29th day of August, 1866, addressed another letter to the Montreal *Gazette*, wherein he replied to the strictures of the said learned Judge; that on the 3rd day of October, 1866, the said Mr. Justice Drummond, of his own motion, and sitting alone, issued a Rule out of the Court of Queen's Bench (Crown Side) calling upon the petitioner to show cause why he should not be punished for writing and publishing the said two letters: that the said Mr. Justice Drummond endeavoured to make the petitioner answer upon oath whether he had written and published the said articles, but the petitioner declined so to answer and the said Mr. Justice Drummond could do nothing in the said matter because he could get no evidence that the petitioner was the author of the said letters; that the said Mr. Justice Drummond then said in open Court that he had been mistaken in being supposed to refer to the petitioner in the remarks he had made upon Lamirande's case, and the petitioner thereupon at the suggestion of the Attorney-General, took the next opportunity when in Court, of adverting to what the learned Judge had said, and on ascertaining that the learned Judge had said what had been reported to the petitioner, expressed his regret that he should have so understood the learned Judge, and his desire to withdraw everything in the said two letters disrespectful to the learned Judge: That at the suggestion of the learned Judge this spoken withdrawal was reduced to writing, and the form of such writing submitted to and approved by the learned judge and fyled in the said Court of Queen's Bench, Crown Side: That the said learned Judge, greatly to the surprise of every one concerned in the matter, then adjourned the rule against the petitioner to the next day, and on that day delivered a judgment and made an Order of the Court, fining the petitioner $40 for contempt of Court in publishing the said letters: That the petitioner brought his writ of error to the Court of Queen's Bench, but that Court (the said Mr. Justice Drummond sitting as a member thereof in spite of the protest of the petitioner and, as the petitioner believes, in spite of the provisions of the Act of the Canadian Legislature) decided that no writ of error lay, and refused the petitioner leave to appeal to Your Majesty in Council: That the petitioner duly presented to this Committee of Your

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Majesty's Most Honorable Privy Council, a petition for special leave to appeal; That the said petition was heard on the 24th day of February, 1868, Mr. Wills being of counsel for the petitioner: That upon the hearing of the said petition the Lords of the Privy Council present were the Right Honorable Sir William Erle, the Right Honorable Sir Robert Phillimore, the Right Honorable Sir James Colvile, and the Right Honorable Sir Edward Vaughan Williams. Their Lordships appeared to consider that it was a matter of grave doubt whether a writ of error lay in the particular case in question, but their Lordships intimated that they considered the matter to be proper to be brought before them by special reference from your Majesty. That the petitioner, acting upon the suggestion made by their Lordships, has withdrawn the petition which was presented as aforesaid to your Majesty in Council, and heard on the 24th day of February, 1868, and in lieu thereof presents his present petition to your Majesty and humbly prays that your Majesty will be graciously pleased to refer the matter of his petition to the said Judicial Committee of your Majesty's most Honorable Privy Council for hearing under the provisions of the Act of Parliament, 3rd and 4th William 4, c. 41, sec. 4, and that your Majesty will be graciously pleased to afford to the petitioner such redress or relief as your Majesty may see fit and just. The Lords of the Committee, in obedience to your Majesty's said order of reference, have taken this petition into consideration, and, having heard counsel on behalf of Thomas Kennedy Ramsay (the Honorable Mr. Justice Drummond not having appeared or lodged a case) their Lordships do agree humbly to report to your Majesty that in their judgment the Honourable Mr. Justice Drummond whilst sitting alone in the exercise of the criminal jurisdiction conferred upon the Judges of the Court of Queen's Bench by the 77th of the Consolidated Statutes of Canada, had no authority to issue the Rule of the 23rd October, 1866, or to adjudge that Thomas Kennedy Ramsay had been guilty of a contempt of Court in publishing the two letters of the 27th day of August, and the 30th day of August, 1866, or to impose a fine of forty dollars upon the said Thomas Kennedy Ramsay: And that all proceedings against the said Thomas Kennedy Ramsay for the said alleged contempt in publishing letters reflecting on the conduct of the said Honourable Mr. Justice Drummond, whilst acting as a Judge of the Court of Queen's Bench, under Chapter 95 of the Consolidated Statutes of Canada, could only legally and properly be taken before the full Court of Queen's Bench: Their Lordships are also of opinion that the proceedings against the said Thomas Kennedy Ramsay were in other respects most irregularly conducted. The Rule of the 25th of September, 1866, was issued without any evidence that the said Thomas Kennedy Ramsay was the person who had written and published the letters, and the only evidence which was ever obtained of the said Thomas Kennedy Ramsay having written the letters consisted of an admission, in writing, made by the said Thomas Kennedy Ramsay at the instance of the said Honourable Mr. Justice Drummond, for the purpose of settling the dispute between them, and which, if not accepted as a sufficient apology, ought to have been treated as written without prejudice. On the whole their Lordships humbly report to Your Majesty that although there are expressions in the letters of the said Thomas Kennedy Ramsay of which their Lordships cannot approve,

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and of which the Honorable Mr. Justice Drummond had a right to complain, yet that, for the reasons above stated, in the opinion of their Lordships the fine of $40 imposed upon the said Thomas Kennedy Ramsay ought to be remitted."

Her Majesty having taken the said report into consideration was pleased, by and with the advice of Her Privy Council, to approve thereof and to order, as it is hereby ordered, that the said fine of $40 be remitted. Whereof the Governor-General, Lieutenant-Governor, or Commander-in-Chief of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

ARTHUR HELPS.

Petition granted and fine remitted.

Sir Roundell Palmer, Q.C., Mr. Wills, and Mr. Sturge, Counsel for the petitioner.
Ashurst, Morris & Co., Solicitors.
(S. B.)

(The Report to Her Majesty was made by The Right Honourable Lord Justice Mellish, The Right Honourable Lord Justice James, The Right Honourable Sir Robert Phillimore.—*Reporter's Note.*)

SUPERIOR COURT, 1870.

MONTREAL, 31st JANUARY, 1870.

Coram MACKAY, J.

No. 2136.

Maguire vs. *Dackus et al.*

HELD:—That where a party sells a moveable to two different persons, the one of the two who has been put in actual possession is preferred, and remains owner of the thing, although his title be posterior in date, provided he be in good faith.

This was an action *en revendication* to recover possession of two carriages in the possession of the defendants, E. I. Bancroft & Co., accompanied by a demand in damages against the defendant Dackus.

The declaration alleged a purchase of the carriages by the plaintiff from Dackus, on the 11th August, 1869, for $150 in silver, whereof $5 were paid in cash at time of sale, but admitted that they had never been delivered to plaintiff.

The defendants, E. I. Bancroft & Co., on whom the carriages were seized, alleged in defence a purchase from Dackus, on the 14th of August, 1869, for $200 cash, accompanied by actual delivery to and possession by Bancroft & Co.

The judgment dismissed the plaintiff's action *quoad* E. I. Bancroft & Co., (allowing $40 damages against Dackus), assigning the following reasons:—

"Considering that the plaintiff never had delivery made to him of the carriages sold to him by defendant, Frederick Dackus, but that, after the sale to plaintiff of them, the said defendant, Dackus, sold and delivered said carriages to defendants, Bancroft & Co., to wit, between twelve and one o'clock on the 14th of August, 1869, and that said Bancroft & Co., in so taking them, were not in bad faith."

"Considering that at date of institution of this action said carriages were the property of said Bancroft & Co., and still are". * * *

Action *quoad* Bancroft & Co. dismissed.

Curran & Grenier, for plaintiff.
William H. Kerr, for defendant.
(S. B.)

COUR DU BANC DE LA REINE.

En Appel.

MONTREAL, 10 SEPTEMBRE, 1870.

Coram Caron, J., Drummond, J., Badgley, J., Beaudry, *Juge suppléant.*

No. 33.

AMBROISE SENECAL, père,

et *Appelant ;*

NAPOLEON COLLETTE, et al.,

Intimés.

Juge:—1o. Que dans l'espèce actuelle le montant du jugement était divisible de sa nature.
2o. Que le syndic a le droit d'accorder du délai au débiteur du failli pour le paiement d'un jugement en voie d'exécution par le Shérif, à la poursuite du failli.

L'appelant, par son factum, a exposé sa cause en ces termes :—

Les demandeurs en Cour Inférieure, qui étaient au nombre de trois, Collette, Contant et Thérien, ont, le 10 juin 1867, obtenu un jugement contre l'appelant pour la somme de $1341.66⅔ avec intérêt du 1er novembre 1863.

Ce jugement fut confirmé par la Cour de Révision le 28 décembre 1867. Le 23 janvier suivant, Collette, l'un des demandeurs, est tombé en déconfiture et a fait une cession de ses biens à Tancrède Sauvageau, syndic officiel, résidant en la cité de Montréal, sous l'acte concernant la faillite de 1864.

Le 2 avril 1868, les demandeurs firent émaner un bref d'exécution contre les meubles de l'appelant, pour satisfaction de ce jugement.

Ce bref fut déposé au bureau du Shérif à Montréal, le 3 avril, et exécuté le 4 du même mois.

L'appelant déposa immédiatement entre les mains du Shérif le montant qui revenait à Contant et Thérien, deux des demandeurs, ainsi que les frais de l'exécution et de la saisie.

Quant à la part du dit jugement revenant à Collette, il produisit et fila au bureau du Shérif un ordre du dit Tancrède Sauvageau en sa qualité de syndic, requérant le Shérif de suspendre tous procédés sur le dit bref d'exécution.

Les demandeurs persistant dans leur exécution, l'appelant fit une opposition afin d'annuler, demandant à ce qu'il fut sursis aux criées et vente de ses biens meubles, cette opposition fondée sur le paiement de la part de deux des demandeurs dans le jugement en question, et le délai obtenu de l'autre demandeur pour la balance.

Les demandeurs contestèrent cette opposition, prétendant que le jugement rendu en leur faveur était leur propriété commune et indivisible, et que le défendeur n'avait pas droit d'assigner un tiers du montant de ce jugement à chacun des demandeurs, et que le syndic n'avait pas le droit, pouvoir ou autorité de faire suspendre l'exécution pour aucune partie du dit jugement, le dit jugement étant en loi indivisible et chacun des demandeurs étant créancier du total du dit jugement.

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Les demandeurs alléguaient en outre au soutien de leur contestation qu'en supposant que le dit Jugement serait divisible par parts égales entre les demandeurs, et que le dit Collette fut devenu incapable de prendre et recevoir sa portion dans le montant du dit jugement, cette incapacité avait cessé en autant que Thérien, l'un des demandeurs, était en droit de recevoir la portion du dit jugement afférant au dit Collette, en vertu d'un acte de vente et cession du fonds de commerce et crédits du dit Collette, que lui avait consenti le dit Tancrède Sauvageau en sa qualité de syndic, le 13 mai 1868 devant Jobin, notaire.

Avec leur contestation, les demandeurs ont produit une copie authentique du dit acte du 13 mai 1868 qui constate que Collette a fait une cession au dit Tancrède Sauvageau le 23 janvier 1868; que le 4 Mai suivant le syndic a été autorisé à faire la vente du fonds de commerce et des dettes dues à Collette par ses livres, au dit Césaire Thérien, et que le 13 mai, il lui a fait cette vente.

Cette contestation fut d'abord soumise à la Cour Supérieure tenue par l'Honorable Juge Monk, qui, le neuf juillet 1868, a débouté l'opposition de l'appelant avec dépens.

L'appelant ayant inscrit la cause en révision, jugement a été rendu le 30 décembre dernier en substance comme suit :—

Considering that the order of Sauvageau could not avail to stay the proceedings under the execution; considering that the deposit with the Sheriff of $1120 and costs of execution, was a valid payment as regards M. Contant and C. Thérien: The Court doth reform the judgment, and doth maintain the opposition, as regards the portion of the Judgment payable to said Contant and Thérien. Considering further that the opposition is unfounded as regards the one-third part of the Judgment payable to the Plaintiff Collette, doth dismiss the said opposition, as regards the one-third part of said Collette, and condemn the Opposant to pay the costs of contestation of his opposition in the Court below, and adjudge that each party pay his own costs in Review.

L'appelant ne se trouve pas encore satisfait de ce jugement qui, tout en lui accordant la plus grande partie de ce qu'il demandait, le condamne à des frais considérables.

La Cour, par son jugement, déclare que Contant et Thérien sont payés, par conséquent ils ne pouvaient pas contester l'opposition et leur contestation était mal fondée. Quant à Collette, il ne pouvait pas non plus contester l'opposition de l'appelant car il était sous la loi de faillite, et son syndic seul pouvait le faire.

Et loin de vouloir contester l'opposition, le syndic donne un écrit à l'appelant autorisant le Sherif à suspendre ses procédés.

Les Honorables juges qui ont rendu le jugement en Cour Inférieure, ont assimilé ce cas à celui où un syndic représente un défendeur et veut faire suspendre la vente de ses biens sous saisie, en vertu de la section 17 de l'acte de faillite de 1865.

Dans ce cas, il faut que le syndic obtienne un ordre de la Cour, mais ici la chose est bien différente. Le syndic représente le Demandeur. Il est le maître d'exécuter son jugement ou non. Le failli n'a rien à y voir. Le véritable Demandeur ici c'est Sauvageau. Collette n'a plus rien à faire dans la cause et n'avait aucune qualité pour contester l'opposition de l'appelant.

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Du moment que le demandeur dans une cause consent à suspendre ses procédés sur une exécution, personne ne peut lui contester ce droit.

Sauvageau était le seul qui aurait pu intervenir dans la cause et contester l'opposition s'il y avait eu lieu de le faire.

Les Intimés soumirent leur cause devant la Cour d'Appel en substance comme suit :

Les Intimés ayant obtenu en Cour Supérieure à Montréal le 10 juin 1867 un jugement contre l'appelant en cette cause pour un montant de $1.341,66 pour les causes et raisons mentionnées en leur dit jugement, firent émaner, le 2 avril 1868, un bref d'exécution, adressé au shérif du district de Montréal, contre les meubles et effets de leur débiteur, le dit appelant, lui ordonnant de prélever le montant entier du dit jugement, savoir, la dite somme de $1,341,66 avec intérêts. Le shérif, au lieu d'exécuter le dit bref tel qu'il lui était ordonné, rapporta le 16me jour d'avril 1868 le dit bref d'exécution devant la Cour Supérieure et fit rapport à la dite Cour qu'il avait été fait dépôt et consignation entre ses mains de la somme de *mil cent cinquante deux piastres* et trente-sept centins, avec en outre une somme de vingt dollars pour ses frais et aussi une opposition afin d'annuler de la part du dit appelant.

Par son opposition, l'appelant allègue que les demandeurs sont au nombre de trois et que le montant du jugement prononcé contre lui leur appartient à chacun pour un tiers, que Collette, un des dits demandeurs, est en faillite et qu'il a fait depuis au delà d'un mois une cession de ses biens, sous l'acte concernant la faillite 1864, à Tancrède Sauvageau qui, par suite de cette cession, est devenu le propriétaire de la portion du susdit jugement appartenant au failli ; que le dit syndic avait dès avant l'émanation du bref d'exécution en cette cause, donné terme et délai au dit appelant pour le paiement de la dite portion du dit jugement : c'est-à savoir, pour le tiers du montant du dit jugement : et que quant aux deux autres tiers du dit montant, le dépôt en était fait entre les mains du Shérif. Delà l'opposant conclut que l'exécution en cette cause a émané mal à propos et il demande que la saisie pratiquée sur ses biens et meubles soit annulée et il en demande mainlevée avec dépens.

Les Intimés ont contesté cette opposition par une réponse en droit niant la divisibilité du montant du jugement en cette cause et aussi le droit du syndic de faire surseoir à la vente des effets du failli et d'ordonner la suspension de l'exécution d'une partie du jugement ; par une autre réponse, les intimés nient les allégués de la dite opposition et alléguent de plus que Césaire Thérien, un des demandeurs, avait acheté du dit Tancrède Sauvageau, tout le fonds de commerce et les crédits du dit Collette et qu'il est par là devenu en droit de recevoir valablement le tiers du montant du dit jugement appartenant au dit Collette dans le cas que ce montant serait déclaré divisible, suivant qu'il apparait à un acte de cession produit au soutien de cette réponse, (voir pièce 31 du dossier.)

L'appelant a répondu généralement à cette contestation.

Les parties, par leur procureurs respectifs, ont convenu d'être entendues sur la réponse en droit en même temps que sur le mérite de cette opposition.

La cause fut ensuite inscrite pour enquête et mérite pour le 25 juin 1868 et

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le même jour les parties furent entendues, sans enquête, et la cause fut prise en délibéré.

Le 9 juillet dernier, son Honneur M. le juge Monk rendit le jugement suivant:

" La Cour, après avoir entendu les parties par leurs avocats, tant sur l'opposition " afin d'annuller, faite et filée en cette cause par le dit Ambroise Sénécal, père, " que sur la contestation de la dite opposition, faite en cette cause par les dits " demandeurs contestant, et sur la réponse en droit à la dite opposition, avoir " examiné la procédure, la dite opposition et la dite contestation et avoir déli- " béré, maintient la dite contestation comme bien fondée et a débouté et déboute " la dite opposition, avec dépens, distraits.....

Aussitôt après le prononcé de ce jugement l'appelant s'est pourvu pour faire reviser le dit jugement et les parties ont été entendues devant la Cour Supérieure siégeant comme Cour de Révision.

C'est de jugement de la Cour de Révision que le présent appel est interjeté.

Les intimés soumettent respectueusement que ce jugement doit être maintenu et confirmé et qu'ils ont plus de raison de se plaindre de ce jugement que l'appelant.

En effet par le rapport du shérif, il appert que l'exécution a émané avant la consignation faite entre ses mains d'une partie du jugement, de sorte que l'exécution a émané régulièrement; et quant à l'opposition, les demandeurs ne pouvaient pas se séparer pour la contester; l'opposition ayant été renvoyée quant à une partie, les demandeurs avaient droit à leurs frais et ils ont certainement raison de se plaindre du jugement de la Cour de Révision qui les leur refuse; toutefois les Intimés n'ont pas jugé à propos de se plaindre de ce fait et ils ont raison d'avoir confiance que le dit jugement sera confirmé par cette honorable Cour.

BADGLEY J.—The three plaintiffs below, Collette, Contant and Thérien, obtained a judgment in their favor against Sénécal. Collette, one of the three, became insolvent and assigned to Sauvageau, an official assignee; subsequently a writ of execution was issued for the judgment debt, interest and costs, in the name of the three plaintiffs, creditors, against the goods of the debtor Sénécal, who forthwith paid into the sheriff's hands the two thirds of the amount of the debt as due to Contant and Thérien, whereby he was relieved from their demand for their shares of the judgment; and having arranged with Collette's assignee, from whom he obtained delay for the payment of the other third, he filed with the Sheriff the assignee's order to suspend all proceedings upon the execution which was effected, and the execution in consequence was suspended for this last third, the other two plaintiffs having received each his own third. The assignee some time after this sold Collette's estate to Thérien, one of the three plaintiffs, who persisted in enforcing the execution notwithstanding the arrangement with and suspension of proceedings by the assignee, and Sénécal has therefore been compelled to fyle his opposition *afin d'annuller* which was dismissed by the judgment in revision confirming the original judgment en première instance, neither of which this Court can maintain.

The debt was originally divisible amongst the three plaintiffs: the writ of execution was a means only of collecting it as it was. Collette had control of his third of the debt and of the execution for that one-third. The other two plaintiffs had

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no interest or privity in Collette's one-third, and Collette's insolvency covered that third, his assignee becoming, by the insolvent law, absolutely vested with it and controlling it independent of Collette himself or of the other two plaintiffs. The subsequent conveyance of it by the assignee to Thérien could not of itself merely interfere with or set aside the suspensive order of the assignee, as to the non enforcement of the debt, which he gave to Sénécal, and his conveyance to Thérien, a *tiers* as to Collette's one-third, therefore only placed Thérien in the place of the assignee with the existing conditions of payment imposed upon the one-third, as well as the suspension of execution as to that one-third, ordered by the assignee, and which could not be set aside without the express sanction of the debtor Sénécal, to whom it was given and which does not appear. Thérien had no original right or interest in Collette's third transferred to him and could have none except by his purchase as a stranger or third person, and he therefore took it as it stood at the time with the assignee's suspensive order attached to it. The judgment must be reformed : the first part confirmed, the second part reversed, and the opposition *afin d'annuller* filed by Sénécal against the enforcement of the execution must be maintained with costs in both Courts.

Le jugement rendu en appel est motivé comme suit.

La Cour considérant que le jugement obtenu par les demandeurs intimés contre le défendeur appelant en date du 10 juin 1867, sur lequel a été faite la saisie pratiquée en cette cause des effets du dit défendeur, est divisible de sa nature et que chacun des demandeurs avait droit de recevoir sa part du dit jugement et pouvait y être contraint par le défendeur.

Considérant que le syndic auquel Collette, l'un des demandeurs tombé en faillite, a fait cession de ses biens, avait légalement le droit d'accorder au défendeur délai pour le paiement du tiers appartenant à Collette dans le dit jugement, considérant que le dépot fait par le défendeur entre les mains du shérif, des deux tiers du dit jugement a acquitté les parts afférantes aux nommés Thérion et Contant deux des dits demandeurs.

Considérant que le délai accordé au dit défendeur par le syndic Sauvageau pour le tiers appartenant à Collette, a eu l'effet de suspendre l'exécution du dit jugement quant à ce dernier tiers.

Considérant que lorsque la dite opposition a été produite, le défendeur se trouvait avoir payé et acquitté deux tiers du dit jugement et avait délai pour le reste et que partant la dite opposition était bien fondée.

Considerant que dans le jugement rendu sur la dite opposition et dont est appel, il y a erreur en ce que tout en admettant la divisibilité de la créance des Intimés et la légalité du paiement fait des deux tiers de Thérien et Contant, et maintenant quant à eux la dite opposition, il la renvoie quant au tiers de Collette, tandis qu'elle aurait dû être maintenue quant à lui aussi et la contestation produite par les Intimés renvoyée en entier, casse et annulle le dit jugement et maintient la dite opposition avec dépens. M. le Juge Beaudry dissentiente.

Jugement infirmé, opposition maintenue.

Dorion & Dorion, Avocats de l'Appelant.

Cartier, Pominville & Bétournay, Avocats des Intimés.

(P.R.L.)

SUPERIOR COURT.

IN REVIEW.

MONTREAL, 30th DECEMBER, 1869.

Coram MONDELET, J., BERTHELOT, J., TORRANCE, J.

No. 849

Taplin vs. *Beckett et al.*

HELD:—That the appointment of *experts* in the case was valid; and that the judgment based on their report, and on the evidence, was correct.

The accounts connected with the business of the manufacture of wooden matches in question in this cause, and which were produced by the defendants, being very voluminous, both parties made application to the Court for a reference to *experts*, which the Court, without entirely adopting the motion made by either party, granted in the following terms: "That *experts* be named to examine into the accounts fyled by defendants in this case, and to compare them with the books of account of defendants, and to ascertain and determine what items of account should be charged against the revenues of the match business, to ascertain during what periods the accounts in question accrued, and for what periods the accounts of the carrying on of the match business by defendants, under the agreement that forms the basis of this action, have been furnished by defendants, and for what period not furnished; to ascertain whether the accounts furnished are correct, and furnish the true balance sheet of expences and receipts of the business, and, if so, from what date to what date, with power to such *experts* to examine witnesses, or any of the parties in this cause, with reference to such accounts, or any items thereof, and with power to ascertain and determine whether the charges in said accounts are reasonable, and whether the same were incurred in the match business, as contemplated by said contract, and how much thereof should be charged against the annual profit of the business; to ascertain, so far as practicable, by such accounts whether the business could be carried on profitably or otherwise, and if it could have been carried on at a profit, what amount of profit would have been realized by an economical and prudent management of the said match business *per annum*.

Three experts were accordingly named, and were unable fully to agree in a report, and reported separately. Two experts agreed, and the remaining expert, although concurring generally with their report, found himself unable to agree to the eighth clause, and made a separate report.

The judgment rendered by the Superior Court, sitting at Sherbrooke, in the District of St. Francis, on the 26th December, 1868, in favor of the defendants, is as follows:

"The Court having heard the parties by their respective counsel, as well on defendants' motion to homologate the report of the *expert* Joseph G. Robertson, and plaintiff's motion to homologate the report of the *experts* Charles Brooks and John Griffith, as upon the merits, examined the record and deliberated, doth

homologate and confirm the report of the said Joseph G. Robertson, and so much of the report of the said Charles Brooks and John Griffith as is adopted and concurred in by the said Joseph G. Robertson, and considering that by the said reports (reasonable regard being had thereto) and the evidence adduced, it is established that they, the said defendants, in conformity with the contract made and entered into, by and between them and the said plaintiff on the 29th April, 1861, before Thomas and colleague, notaries, stated in plaintiff's declaration, carried on the match-factory mentioned in the said contract until the 4th June, 1862, and that then, having ascertained that said factory had been carried on at a great loss to them said defendants, and that they could not continue to carry it on without loss, they, the said defendants, closed the same, as in and by the said contract they had a right to do; considering that it does not appear that the plaintiff has been damnified by any act or omission of the said defendants, doth maintain the exception pleaded by the said defendants and dismiss the plaintiff's action.

In Review at Montreal, this judgment was confirmed by the majority of the Court.

MONDELET, J., *dissentiens*. This was a most complicated case before the Superior Court of the District of St. Francis, arising out of difficulties between the parties touching the manufacturing of wooden matches. Numberless accounts and statements of a most minute and complicated nature are fyled, and form part of the record.

On motion of plaintiff, the Court (SHORT, J.) referred the matter to *experts*.

It is sufficient to read the reference by the Court of the 31st January, 1867, to see at once that the reference such as *motivé* could not, in law, be the subject matter of an expertise.

The matter or matters detailed in that judgment might have been submitted to an accountant, but nothing had to be visited. "En toutes matières sujettes à visitation," (art. 184, Cout. de Paris.) In the commentaire on la C. P. (petite) No, 1—"De cet article il s'ensuit 1er qu'en matière sujette à visitation, c'est-à-dire en différents qui ne peuvent être jugés qu'auparavant il ne soit fait visitation des ouvrages ou des héritages pour lesquels il y a contestation entre les parties, le juge ne peut nommer les experts de son autorité, à moins que les parties ne refusent d'en choisir, &c." Ord. 1667 tit: 21 art. 8, "les jugements qui ordonneront que les lieuxseront vus, visités ou estimés par experts, &c."

The accounts comparing with the books, to ascertain and determine whether the charges in such accounts are reasonable, &c., are what *experts* are to examine and determine.

The above reference has thus, against law, assigned to *experts* what is out of their province. So much so, that the *experts* assume to decide upon the evidence adduced, which they say they have analyzed. They had no right to do any such thing. That was the business of the Court, or might have been done by *arbitres* or *amiables compositeurs*.

The 322nd article of the Code of Procedure has not changed the definition or character of what, by law and in and by universal jurisprudence, both in France and here, is clearly defined to be an *expert*; it has neither revoked or

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modified the 184th article of the Custom of Paris. The only change is the power conferred upon the Court to order an *expertise* of its own accord. Here is the article: "Whenever the facts in contestation between the parties can only be verified *by view* of the object or premises, or whenever the evidence produced by each party is contradictory, or when the nature of the contest requires it, the Court may, &c."

By view of the object, that is, in accordance with the *Coutume de Paris*, or when the evidence relative to object or premises should be visited, this is a matter of course.—

But are we to refer to *experts* all cases where the evidence *upon any matter* is contradictory? Surely not. Otherwise any case whatever, where the evidence is conflicting, should be referred to *experts*, than which nothing more absurd or ridiculous could be pretended.

Moreover, the Code has very wisely provided for such cases of complicated accounts by the 340th article: "In matters where accounts have to be considered or adjusted, or which require calculations to be made, and in matters of separation of property or partition of community or succession, the Court may refer the case to one or more persons skilled in such matters, and such persons are subject to the rules above prescribed concerning *experts*."

I understand that in any case of dispute between relations concerning partitions, or other matters of fact, which it is difficult for the Court to appreciate, the Court may of its own motion, or upon the application of one of the parties, refer the case to arbitrators under the article 340 C. C. P.

But as to *experts*, the wording of the interlocutory of the 31st, January, 1867, above adverted to, leaves its illegality, its excess of jurisdiction, on its very face.

I am, therefore, of opinion that all the proceedings from and including the motion of defendants of the 21st January, 1867, should be set aside, the interlocutory and the final judgment rendered on the 26th day of December, 1868, be reversed, and that the record be sent back to the Court below, to the end that such proceedings be had as to law and justice may appertain.

TORRANCE, J., said that the majority of the Court were of opinion that the judgment of the Court below, which was based on the report of the one *expert*, was correct, and must be confirmed.

Judgment confirmed, MONDELET, J., dissenting.

Dorman, Attorney for plaintiff.

Ritchie & Barlow, Attorneys for defendants.

(P.R.L.)

SUPERIOR COURT.

IN REVIEW.

MONTREAL, 30TH NOVEMBER, 1870.

Coram MONDELET, J., MACKAY, J., TORRANCE, J.

No. 151.

Tourville vs. *Ruchle.*

A barge on a voyage by river and canal having, when navigation was about to close, received damage by an accident and partly sunk in shallow water, by which the greater portion of her cargo was rendered nearly worthless, though a portion remained sound; and the shipper, before the raising and repair of the vessel, having abandoned the cargo as a total loss to his insurers, by endorsement of Bill of Lading, and they, having removed the cargo to shore, sold the damaged and stored the sound, with the knowledge of the master; and the shipper not accepting the master's offer, afterwards made, to complete the voyage when his repairs were finished (which might not have been in time for that season's open navigation):—

HELD 1:—That the cargo cannot be held "wholly perished" under Art. 2451, C. C., so as to found an action to recover freight advanced by the shipper.

2:—That this is such an acceptance by the shipper of the cargo short of the original destination, as binds him to pay freight *pro rata itineris peracti*, calculated by distance, on the damaged portion of cargo, removed and sold by his assignees (the insurers.)

3:—That the master is entitled to full freight, per Bill of Lading, on the sound portion remaining stored in the possession of the shipper's assignees.

The action was brought for the recovery of $274.75, equivalent of $350, U. S. cy., paid by plaintiff to defendant, (Master of the barge "Lewis Miner ly," of Rondout, N. Y., and himself of that place) at Montreal as an advance on account of freight of a cargo of barley, 4160½ bushels, shipped on defendant's barge, under Bill of Lading with the usual risks excepted, at Valleyfield for transportation to Albany, at rate of 16 cts. U.S. cy., or to New York at 18 cts. U. S. cy., per bushel.

After setting up the shipment and the payment in advance, the Declaration alleges that the defendant proceeded on his voyage until, on the 2nd Nov., 1869, about 12 miles above St John's, on the Richelieu, his barge "was totally wrecked and "said cargo totally lost, the same being abandoned to and accepted by the British "American Insurance Company, with whom plaintiff had insured the same," and on this plaintiff alleged that defendant was bound to refund the $350 U. S. cy., advanced, and claimed a lien and privilege on the barge therefor; he also alleged intent to depart, and upon affidavit as above, prayed for and obtained a Writ of *Saisie Arrêt avant Jugement*, under which the boat was attached by the Sheriff of Iberville. The conclusions were in the usual form for seizure and for judgment for $274.75, Canadian cy., equivalent to $350 U. S. cy., and that plaintiff be declared to have a lien therefor.

The Plea, after general denials, details the nature of the voyage down the St. Lawrence with its difficult navigation and the ascent of the Richelieu to the place of accident, with the distances traversed, and alleges that the defendant had transported the cargo over the more dangerous part of the voyage undertaken, when, by an accident of the rivers and navigation, (as to which no question was raised,) his barge was damaged and leaked, and the cargo in part wetted, and the boat beached in shallow water, but neither boat nor cargo *totally lost*, as alleged by plaintiff. That, on being notified thereof, plaintiff abandoned the cargo, damaged and sound, to his Insurance Company, and that the said company took delivery of and

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removed the same at said place, stored the sound and sold the wet portion. That defendant, having caused repairs to be made to his barge and set her afloat, was willing and would in a short time, if she had not been seized, have been ready to reship and transport the cargo in his boat according to the Bill of Lading, if plaintiff had not accepted and removed the cargo, whereby defendant became entitled to his full freight. Further, that in transporting the cargo from Valleyfield to said place, where plaintiff and his agents took delivery thereof, defendant had performed a portion of the voyage and carried the cargo, both as regards distance traversed and as regards difficulties of navigation overcome, greater, compared with those of the whole voyage, than the sum advanced bears to the whole freight payable under the Bill, and that therefore defendant has a right, if not to full freight, at least to freight *pro rata itineris peracti*. Plea further avers that defendant was not about to abscond, and that plaintiff had no lien. Prayer for dismissal. A *défense en fait* was also fyled. Plaintiff answered generally.

From the evidence it appeared that on the 2nd Nov., by an accident, when passing a bridge at St. John's, the barge had a plank in her bow "stove off" about the water line. This seems to have escaped notice at the time, and it was only when 12 miles up the river that it was found that she had leaked badly and was sinking. Defendant, to prevent more serious loss, therefore beached the boat; there her deck was 1½ feet above water, but the whole cargo became badly damaged by wet and heating, except 800 bushels on the top. Defendant forthwith notified plaintiff of the accident, and at the same time called upon the Western Insurance Company of Buffalo, with whom he had insured the hull, to raise and repair the boat. The plaintiff at once abandoned the cargo to the British America Ins. Co., by endorsing over his Bill of Lading, both he and the Company treating it as a total loss. A few days afterwards Mr. Davidson, Inspector of that Company, arrived at the scene, found, he says, nothing then done to save cargo, and removed the 800 bushels of dry barley to shore and stored them in a barn for the benefit of his Company, without objection on the part of the master; soon thereafter Mr. Crittenden, Inspector of the Western Insurance Company of Buffalo, also arrived to have the barge repaired for the defendant. Davidson sold the damaged barley to farmers on the spot as nearly valueless, (7 cts. per bushel) and it was gradually removed by purchasers. At the same time Crittenden "plugged the leak," got men and pumps at work and had just raised the boat and had her afloat, when she was attached by the Sheriff. At this time her repairs were not completed, but according to Crittenden, the chief witness on the point, they could have been made in a temporary manner, where she lay "in half a day" so as to enable her to re-ship and carry on her cargo; though to repair her in a thorough manner as he, Crittenden, and defendant seem to have intended, she would require to go to dry dock at Whitehall, which would occupy a few days, but once in dock one hour, Crittenden said, would be sufficient. The Sheriff took the boat back to St. John's the day after, when further repaired. About this time, 13th Nov., 1869, the close of navigation was at hand, and there were some verbal offers by defendant in respect of the voyage; among others it seems that, being anxious to obtain the release of his barge at once and thus avoid wintering in Canada and losing the winter business in the United States, defendant offered verbally that

if, on a calculation of *pro rata* freight to the place of accident being made by distance, he should not be entitled to what he had received, he would refund the difference if released at once, but this was not entertained by plaintiff. Later, after the seizure, by notarial *acte* defendant, for the first time, 1st Dec., notified his readiness to complete the voyage and protested against his detention over the winter and against the seizure. The navigation closed a few days after the seizure, and it seems uncertain whether the boat, if not seized, could have been repaired even in the temporary manner alluded to, reloaded in time and proceed with her cargo; but the evidence was conflicting as to whether she had time to go to Whitehall Dock for thorough repairs, return, reload and then get through before the close of navigation by ice.

The distances on the route were shown to be as follows:—

Valleyfield to Montreal, 40 miles; Montreal to St. John's, 102 miles; St. John's to place of accident, 12 miles; total distance accomplished, 154 miles. Place of accident to Whitehall, 138 miles; Whitehall to Albany, 72 miles; tota of intended voyage, 364 miles.

As to the comparative difficulties of navigation on the parts of the voyage accomplished and not accomplished, Davidson, plaintiff's and an experienced witness, admitted, "I consider that the boat had, at the time of the accident, over-"come fully half of the dangers of navigation between Valleyfield and Albany," and to this other witnesses agreed.

On the 30th April, 1870, the Superior Court, BAUDRY, J., dismissed plaintiff's action, rendering the following judgment:—

"La Cour, considérant que le 30 Octobre 1869, le défendeur a entrepris de transporter pour le demandeur de Valleyfield aux Etats Unis la quantité de 4160½ minots d'orge, à raison de 16 centins, monnaie américaine, par minot pour Albany et 18 centins pour New York; considérant qu'à environ 12 miles de St Jean, sur la rivière Richelieu, le bâtiment du défendeur a éprouvé une avarie et coulé à fond, sans qu'il apparaisse aucune faute du dit défendeur; que par suite de cette avarie toute la dite cargaison d'orge, moins environ 800 minots, a été avariée et mouillée et tirée du bâtiment afin de mettre en état de le relever et que là et alors le demandeur ou l'assurance qui était à ses droits a vendu le grain avarié et a mis à terre et en sûreté les 800 minots qui n'avaient pas été gâtés ni endommagés; et considérant qu'après la réparation du bâtiment, et après la saisie, le dit défendeur à différentes reprises et nommément le 1er Décembre 1869, a offert de compléter le voyage pourvu qu'on libérât le bâtiment ce qui n'a pas été accepté par le demandeur, et considérant qu'au temps où le demandeur ou ceux qui étaient à ses droits ont pris possession du dit grain, le défendeur avait gagné sur le grain endommagé une proportion du fret, et vu ses offres de continuer le voyage, aurait pu gagner le fret sur les 800 minots non endommagés, si la saisie n'eut pas été pratiquée en cette cause, arrêtant sa barge, et l'empêchant de continuer sa route; et que le défendeur avait en conséquence droit à une somme égale à celle qu'il a reçue du demandeur et que la dite saisie arrêt et action du demandeur était mal fondée. Déboute la dite action et saisie-arrêt avec dépens, &c.

Plaintiff thereupon inscribed the case for hearing in Review.

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Girouard for plaintiff: In consequence of the extremely damaged state of the cargo, its insignificant value after the salvage, and the impossibility of completing the voyage during that season, plaintiff had a right to treat his cargo as a total loss, and it is to be held constructively "wholly perished" in the words of Art. 2451, C. C.

"Freight is not due upon goods lost by shipwreck, taken by pirates, or cap-
"tured by a public enemy, or which, without the fault of the freighter, have wholly
"perished by a fortuitous event otherwise than as mentioned in the last preceding
"article, (*i. e.*, Art. 2450, relating to goods jettisoned). If the freight or any
"portion of it have been paid in advance, the master is bound to return it, unless
"there is an agreement to the contrary."

This case must be governed by that article. The Court below applied Art. 2448, C. C. "If, without any previous fault of the master or lessor, it becomes
"necessary to repair the ship in the course of the voyage, the freighter is obliged
"either to suffer the necessary delay, or to pay the whole freight. In case the ship
"cannot be repaired, the master is obliged to engage another; if he be unable to
"do so, freight is due only in proportion to the part of the voyage which is accom-
"plished."

But that article refers only to cases where the ship is detained without damage to the cargo. In cases of loss of cargo, such as this, Art. 2451 must govern.

Defendant's plea maintains his right not only to *pro rata* freight but to full freight per Bill of Lading. The Court, however, rejected the latter pretension and maintained the former. He rests his claim to freight on two grounds; 1. Because he could repair his boat and complete his voyage, and 2. Because the plaintiff accepted the cargo at the place of accident, short of the destination.

I. As to the 1st ground, plaintiff, from his view of the evidence contends,

1. That defendant did not make proper effort for repair of his boat, he waited till Crittenden appeared, and used no diligence to save cargo or ensure completion of voyage that season.

2. That after Crittenden's arrival it was impossible to take the boat to Whitehall for repair, return, reship, and get through with cargo.

3. That defendant had no intention of prosecuting the voyage with the cargo, but had treated the voyage as broken up.

4. That, as was not denied, no effort was made to engage another ship.

Defendant, therefore, clearly cannot have *full* freight, and under Art. 2448, *pro rata* freight is due in certain conditions only. None of those circumstances and conditions are in this case. The rules laid down in Art. 2448 obtain also in the jurisprudence of France, England, and the United States. *Vide* authorities under the Art. Also Pardessus, No. 644. 1 Emerigon, Des Assurances, ch. 12, sec. 16, p. 427, &c. Abbott, Shipping, 394, et seq., Lond. Ed., 1857. But if the master use not due diligence to save wrecked cargo and repair his ship, or to supply another, he is not entitled to *any* freight. Abbott, Shipping, 398; Parsons, Mercantile Law, 350; Chitty, Carriers, No. 201; Bork vs. Norton, 2 McLean's, C. C. R., 422, cited in Peter's Digest, Vo. Freight, No. 77.

II. As to defendant's 2nd ground. To entitle the master to *pro rata* freight

the acceptance must be voluntary, dispensing with the completion of the voyage, otherwise no undertaking to pay it can be implied. Maclachlan, Merc. Ship., p. 410; Caze vs. Baltimore Ins. Co., 7 Cranch. p. 558 per Story, J. The ship Nathaniel, McLean's C. C. R., 422, and cited in Peters' Digest, Vo. Freight, No. 75; Maude & Pollock, Merc. Ship., pp. 272, 275; Chitty, Carriers, No. 201. But plaintiff's acceptance was compulsory from the nature of the case, in order to save the sound portion of the cargo from damage and the damaged from total destruction by wet and heating. He relies on his refusal to entertain defendant's proposal for a calculation of *pro rata* freight, as shewing that there can be no implied undertaking to pay that or any freight. The cargo was unloaded for the benefit of all concerned, not only of freighter and insurer, but also of the master, who could not have his boat repaired without unloading. Defendant contended, in the Court below, and the Court seemed to hold that the sale of the damaged barley was tantamount to dispensing with its being forwarded; but that course was forced upon plaintiff by the master, who was not ready to continue the voyage, either with his own or with another ship, in which case no *pro rata* freight is due. Vlierboom vs. Chapman, 13 M. & W. 230, also quoted in Chitty, Carriers, 292 et seq.; Hurten vs. Union Ins. Co., cited in note p. 329, Story's Ed, Abbott's Shipping; Parsons, Merc. Law, 350. Griswold vs. New York Ins. Co., 1 Johnson p. 211, per C. J. Kent.

Plaintiff submits that neither of defendant's positions are tenable and that the judgment should be reversed and entered for plaintiff. He refers also to the following precedents as bearing on the case. Blaso vs. Fletcher, 4 C. B., N. S., 147, cited in Maude & Pollock, Ship. 275. Watson vs. Daywich, 3 Johnson, p. 335. Welch vs. Hicks, 6 Cowan, 504; Phelps vs. Williamson, 5 Sand, 578, cited in Abbott's Digest Vo. Ships, No. 191. Howland vs. The Lavinia, 1 Peter's Adm. 126.

Ramsay, (*R. A.*) for defendant. Under the case disclosed in evidence plaintiff cannot recover the cash advanced, but defendant is entitled not only to it, but to full freight, when he sues for it, and, if not to that, at least to freight *pro rata itineris peracti* which is more than the advance.

I. When a cargo is once delivered to the ship, the master has the right and it is his duty to carry it to the destination. 1 Parsons, Maritime Law, pp. 126, 459. In cases of *absolute* total loss, (foundering, capture, &c., being those referred to in Art. 2451,) he has no claim for freight and advances must be refunded. This article is that invoked by plaintiff. But damage to the cargo however great, (though it amount even to a loss constructively total as regards insurance) does not break up the voyage or deprive the master of the right of completing it and earning his *full* freight. Flanders, Ship., 507, 545. Abbott Ship., 383, 392. Smith, Merc. Law, 392, note. Pothier, Charte. Partie. No. 59. 2 Boulay Paty, 488. Kent, Comm. 247. Maclachlan, Ship. 398.

Though the boat was certainly damaged and required repair, and the cargo partially wet and heated, the fact that plaintiff and his insurers treated it as a total loss *quoad* insurance, does not affect this question. The term "total loss" has different meanings in questions of freight and in those of insurance. Abbott,

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Ship., 392; per Lord Mansfield, in Baillie v. Mondigliani, Park, Mar. Ins. p 90. The total loss in matters of freight, which deprives the master of all claim, is *absolute* total loss only; there is no *constructive* or *technical* total loss admitted in freight as in insurance cases.

As to this damage to the boat, plaintiff was bound to wait repairs, Code C. 2448. Smith, Merc. Law, 392 and note. Abbott, Ship. 323, 327, 328. Lord Denman, in Shipton v. Thornton, 9 Adol. & E., 314. Pothier, Charte Partie, 83. The evidence shows that they could easily be made, and even if they could not in time to enable the barge to escape being ice bound for the winter, plaintiff must wait. For the fact that the season was about to close does not relieve the shipper of this duty. Delay from this incident of our river and canal navigation is "an act of God" excepted by the Bill of Lading, Angell, Carriers, 160, 259, 332. Unloading for repairs does not break up the voyage. Parsons, Mar. Law, 160. Story, J. in Jordan vs. Warren Ins. Co., 1 Story, 342. The master has right to do everything in reason to earn his freight. Defendant used all possible diligence, considering the position of the boat. He notified shipper and sent for and obtained assistance to raise and repair his boat. But plaintiff, without waiting to ascertain whether the boat could be repaired, hastened to abandon his cargo, drew his insurance money, indorsed over his Bill to the Company, who *instanter* removed and stored the good cargo and sold the wet before the state of the barge could be properly ascertained, and thus having prevented the completion of the voyage by his hasty conduct, he must pay full freight. Flanders, Shipping, 512, 3, Abbott, Ship. 391, 393, 402. Angell, Carriers., 406. Parsons, Maritime Law, 126, 459. Pothier, Ch. Part. 73, &c. Lees, Ship., 239, Maclachlan, Ship. 406. Lord Mansfield in Luke vs. Lyde, 2 Burr. 882, and 1 Black. Rep. 190. Lord Stowell in The Ship 'Friends,' 1 Edw. Ad. Rep. 246. Lord Ellenborough in Hunter vs. Prinsep, 10 East. 378.

From Art. 2448 itself, it is clear that so long as the damage is repairable, the master may do so, and carry on the cargo in his own ship, and shipper must wait. The transhipment referred to in the latter part of the Art. only applies when the ship is not so repairable and the *pro rata* payment there alluded to due when being in such condition, no other ship is obtainable for transhipment. This does not apply to the present case, which is met exactly by the first part of the article, requiring payment of full freight, where the shipper, as in this case, declines to suffer the delay requisite for repairs.

II. The judgment appealed from allows defendant full freight on the 800 bushels of sound grain and *pro rata itineris peracti* on the damaged, on the ground that he *had* earned such *pro rata* freight on the damaged grain accepted by plaintiff and sold there, and *could*, by the continuance of his voyage, as offered, have earned full freight on the sound 800 bushels, which were unsold. Defendant seeks confirmation for the judgment on the broader claim for his *full* freight, and submits that under the case disclosed there is no ground for such distinction, but even if it be now maintained, it will be found that such freight calculated by distance alone, (without considering the fact clearly proven that the cargo had been carried over fully half the risk) amounts to more than plaintiff's advance. He holds that the nice distinctions and interesting questions discussed in the

books, relative to payment of *pro rata* freight, do not properly enter into this contention, but if they are to be considered it will be found that, under none of the recorded cases can defendant be held debarred from having any freight. He must have some, and even if it be only *pro rata* as above, there is enough due him to confirm the judgment. That he is entitled to this at least, he cites Abbott, Ship. 385 et seq., where a full summary of all the cases is given. Also Angell, Carriers, 332, 404. Maclachlan, Ship. 406 et seq. Parsons, Merc. Law, 165.

What acceptance will bind freighter to pay *pro rata?* Smith, Merc. Law, 400, notes; Angell, Carriers, 407. Parsons, 3. Mar. Law. 165, et seq. Abandonment to his insurers by freighter is such acceptance. Lutwidge vs. Grey, cited in Abbott, Ship. 387. Angell, Carriers, 407, note *a* Parsons, Mar. Law, 167.

III. Defendant further urges that the action cannot be maintained by this plaintiff, for he has indorsed his Bill of Lading to his insurers, and thereby assigned all his rights in respect thereof to them (including, of course, this claim). Code, 2421. He has been paid his loss and the Company alone is now vested with any right such as that now urged, and alone is competent to bring this suit.

Defendant therefore submits that, at least in its effect, the dismissal of the action, the judgment must be confirmed, though the *motives* may be modified.

On the 30th Nov., 1870, the Court of Review confirmed the judgment appealed from.

MONDELET, J. — Les faits de cette cause sont comme suit. Le 30 Octobre, 1869, le Défendeur entreprit de transporter pour le Demandeur, de Valleyfield aux Etats Unis, 4160¼ minots d'orge, à raison de 16 cents, monnaie américaine, par minot pour Albany, et 18 cents pour New York. A environ 12 miles de St. Jean, sur la rivière Richelieu, la barge du Défendeur eut un accident, une avarie et coula à fond Il ne parait pas par la preuve qu'il y eut de la faute du Défendeur. Par suite de cet accident, il n'y eut que 800 minots d'orge qui ne furent ni avariés ni mouillés. Ces 800 minots furent tirés de la barge afin qu'on put la relever. Alors, l'assurance qui était aux droits du Demandeur qui aurait assuré la cargaison, vendit le grain avarié et mit le grain sauvé en sureté à terre. Il s'écoula quelques jours avant qu'on réparât la barge, ce qui arriva par le fait que le Défendeur eut à voir ce que ferait l'assurance. Toutefois, comme le Demandeur avait pratiqué une saisie arrêt de la barge ce ne fut qu'après la saisie que le Défendeur offrit plusieurs fois et entre autres le 1er Décembre, de compléter le voyage, pourvu qu'on levât la saisie, ce qui fut refusé par le Demandeur. Le Défendeur, en conséquence, prétend que si la barge n'avait pas été ainsi arrêtée par saisie il aurait pu gagner le fret sur les 800 minots non endommagés, ce qui lui aurait rapporté avec le fret au *pro rata* sur la quantité acceptée et vendue un montant égal à celui que lui avait payé d'avance le Demandeur.

Le Demandeur se plaint que la Cour de première instance s'est appuyée pour débouter son action sur l'article 2448 du Code Civil au lieu de suivre les dispositions de l'art: 2461 du même code. Le jugement a décidé que le Défendeur ayant été, par la saisie de sa barge pratiquée par le Demandeur, empêché de continuer sa route après avoir réparé la barge comme il a offert de le faire, il avait droit à une somme égale à celle qu'il a reçue du Demandeur, et que la

Tourville vs. Ruehle.

saisie et l'action du Demandeur étaient mal fondé, et ont été en conséquence débouté. Le calcul qu'a fait la Cour de première instance est comme suit.

Sur 800 minots à 16 cents, d'après le *Bill of Lading*..... $128

Sur 3360¼ minots de Valleyfield à 12 miles au dessus de St. Jean, suivant l'allégation du Demandeur, au *prorata*, viz. 154 milles sur 364..... 227.46

$355.46

Ce qui forme une somme excédant celle de $350 que le Défendeur a reçu du demandeur. Il me paraît que la Cour a fait une application correcte de la loi, après avoir sainement apprécié la preuve. J'opine pour la confirmation du Jugement dont est appel.

MACKAY, J., and TORRANCE, J., concurred.

D. Girouard, for Plaintiff.
R. A. Ramsay, for Defendant.
(R. A. R.)

Judgment confirmed.

COUR SUPERIEURE EN REVISION.

MONTREAL, 28 FEVRIER, 1868.

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

No. 330.

Lynch vs. *Duncan*.

JUGE: Que suivant les dispositions de l'article 164 du Code de Procédure Civile, une demande pour inscription de faux peut être faite en tout état de cause jusqu'à la cloture de l'Enquête et que la règle de pratique du 4 janvier 1854 est rappelée par suite de cet article. (1)

Le 14 novembre, 1867, la Cour Supérieure à Beauharnois (Johnson, J.,) rejeta une requête du défendeur pour permission de s'inscrire en faux contre un des exhibits du demandeur.

Une des raisons de ce jugement, est que cette demande du défendeur était trop tardive, vu que cet exhibit avait été produit par le demandeur à l'appui de son action, lors de son rapport, le 18 mars, 1867, et qu'aucune raison n'était donnée de ce retard et que d'ailleurs dans sa défense le défendeur déclarait ce faux.

Ce jugement avait été rendu conformément à la Règle de Pratique de la Cour Supérieure en date du 4 janvier 1854 et à plusieurs décisions.

Le défendeur en faux prétendait que l'acte de transport de la créance qu'il devait, avait été passé un dimanche le 3 décembre 1865, au lieu du 2 que comportait l'acte. Le demandeur en faux répondait que le défendeur n'avait aucun intérêt à opposer ce prétendu faux; vu qu'il devait nécessairement payer sa dette soit au cédant, soit au cessionnaire et il citait:

(1) Vide 6 vol. Jurist p. 243, & 1 vol. L. C. R., p. 90.

5 vol. L. C. R. Reports, p. 430.
9 Nouv. Den. p. 444.
9 Toullier, p. 295, No. 188.
Merlin, Vo. faux, p. 532.
2 Carré et Chauveau, p. 362.

Lynch vs. Duncan.

Le jugement de la Cour de Révision a infirmé le jugement de la Cour Supérieure et il est motivé comme suit :

The Court *** considering that there is error in the judgment appealed from, to wit, the said judgment of the 14th November, 1867, rejecting the petition by defendant fyled on the 13th November, 1867, praying that said defendant be permitted to inscribe *en faux* against the minute of a certain deed of transfer in the said petition mentioned and described, fyled in this case by plaintiff, inasmuch as the prayer to the Court as in said petition was regularly made and was supported by a power of attorney in due form, from defendant to his attorney *ad litem* in said cause.

Considering further, that the Court below should first have granted defendant, *acte* of his *interpellation* to plaintiff to declare whether he made use of said transfer; Considering lastly that no adjudication in the matter should further have been had until after the defendant had produced his *moyens de faux*, and the parties heard upon their sufficiency or insufficiency as the case might be, and the same had been considered by the Court. The Court doth reverse, annul and set aside the said judgment.

Jugement infirmé.

Branchaud, avocat du demandeur.
Elliott, avocat du défendeur.
(P.R.L.)

COUR DU BANC DE LA REINE, 1870.

EN APPEL.

MONTRÉAL, 9 SEPTEMBRE, 1870.

Coram DUVAL, J. C., CARON, J., DRUMMOND, J., BADGLEY, J.
LORANGER, J., *ad hoc*.

No. 9.

PAUL PARENT, *et al.*,
(*Opposants en Cour Inférieure et contestant le rapport de distribution,*)
APPELLANTS;

ET

FRANÇOIS LALANDE, DIT LATREILLE,
(*Opposant, colloqué en Cour Inférieure,*)
INTIMÉ.

JUGÉ: Que le mari survivant ne peut pas hypothéquer, durant la continuation de sa communauté qui n'est pas demandée par les enfants mineurs, leur part afférante dans un immeuble ameublí par son contrat de mariage, vu que cette part devient propre naissant des enfants qui y succèdent.

Le jugement final rendu par la Cour Inférieure à Montréal (Monk J.), le 8

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novembre, 1867, ayant été infirmé en Révision le 30 octobre 1868, par la Cour de Révision à Montréal, présidée par les honorables Juges Mondelet, Berthelot et Monk, est rapporté au 13e vol. du L. C. Jurist, page 231.

Les appelants ont exposé en substance leur cause en appel comme suit:

Il n'était pas nécessaire que le contrat de mariage du 23 janvier 1838 eut été enregistré pour assurer les droits des appelants qui réclamaient un droit de propriété, en vertu de ce contrat de mariage antérieur à l'ordonnance d'enregistrement et par là même exempt de la formalité de l'enregistrement.—Voir Ordonnance d'Enregistrement 4 Vict. ch. 30, sec. 4—Nadeau *vs.* Dumon, 2 Rev. Jud. B. C., p. 196. Syms et Evans, 10 Rap. Jud., p. 301.

Dans le premier considérant, la Cour de Révision déclare, que l'immeuble en question n'avait été ameubli que pour les fins de la communauté, et qu'il devait reprendre sa nature de propre aussitôt après la dissolution de la communauté.

L'effet de l'ameublissement est de faire tomber, dans la communauté, la propriété ameublie, d'en faire une partie intégrante des biens de la communauté, de manière à l'inclure dans le partage de la communauté, et c'est une erreur de dire, comme l'a fait la Cour de Révision, qu'à la dissolution de la communauté, il redevient propre de l'époux qui l'a ameubli.

Pothier, de la communauté, No. 307.

Il est bien vrai, que si l'autre époux ou ses héritiers renonçaient à la communauté, ou si par l'effet du partage, cet immeuble échéait en tout ou en partie dans le lot de celui qui l'aurait ameubli, il rentrerait dans son patrimoine avec la qualité de propre qu'il avait lorsqu'il en est sorti.

Pothier, de la communauté, No. 312.

Mais si, par le partage de la communauté, cet immeuble tombait dans le lot de l'autre conjoint, prétendra-t-on pour un instant qu'il serait encore propre de l'époux auquel il aurait cessé d'appartenir, la chose serait par trop absurde. Il est vrai qu'ici il n'y avait pas encore eu de partage de la communauté, ainsi que la Cour le reconnaît dans son considérant, mais cela ne change nullement la question; tant que les biens n'ont pas été partagés, le conjoint survivant et les héritiers du conjoint prédécédé qui ont accepté la communauté sont propriétaires par indivis de tous les biens de la communauté. Or comme les propres ameublis font partie des biens de la communauté, les héritiers du conjoint prédécédé sont propriétaires de la moitié indivise des propres ameublis comme des autres biens de la communauté, et le conjoint qui les a ameublis n'est propriétaire que de l'autre moitié indivise. Il est oiseux de citer des autorités sur une proposition aussi évidente que celle-là.

La Cour Supérieure (MM. les Juges Bowen, Duval et Mérédith siégeant;) l'a ainsi jugé en 1852, dans la cause de Nadeau et Dumon déjà citée. Voir aussi Code Civil, Art. 1393.

Dans le second considérant, la Cour de Révision affirme qu'il y a eu continuation de communauté entre le défendeur et ses enfants, jusqu'à l'inventaire de la communauté fait le 11 novembre 1862, et clos le 6 mars 1863, et que pendant cette continuation de communauté, le mari qui en était le chef, a pu hypothéquer les immeubles provenant de la première communauté, qui faisait partie de la continuation de communauté.

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La continuation de communauté ne résulte pas nécessairement du défaut d'inventaire et de partage des biens de la communauté. Il faut qu'elle soit demandée, et il n'y a que les enfants qui étaient mineurs lors de la dissolution de la communauté qui peuvent la demander.

Coutume de Paris, Art. 240.—Code Civil, Art. 1323.

Ici, les enfants qui étaient mineurs lors de la dissolution de la communauté n'ont pas demandé qu'elle fut continuée; au contraire, ils réclament la moitié du prix de l'immeuble vendu sur le défendeur, comme étant leur part d'un immeuble qui a appartenu à la communauté et non pas à la continuation de la communauté.

La continuation de la communauté est une peine que la loi prononce contre le conjoint survivant, qui n'a pas fait inventaire pour constater l'état de la communauté,—(Pothier, de la communauté, No. 711) et cependant, c'est en faveur du défendeur, conjoint survivant, et de ses créanciers, et à l'encontre des enfants, que la Cour prononce qu'il y a eu continuation de communauté, comme si c'était une chose qui existerait de plein droit, et non une faveur toute spéciale que la loi accorde aux seuls enfants mineurs pour leur protection.

De ces prémisses, la Cour de Révision a tiré la conséquence que le défendeur pouvait hypothéquer l'immeuble en question, tant comme chef de la communauté continuée, que comme étant un bien qui lui était propre. (Voir le 3e considérant)

Nous avons déjà démontré que le propre ameubli devenait un bien de la communauté et cessait d'être propre. C'est ce que cette Cour a jugé dans la cause de Moreau et Mathews, (5 Rap. Jud., p. 325) en déclarant que le propre ameubli n'était pas sujet au douaire coutumier. Il nous reste à signaler une autre erreur, c'est celle dans laquelle la Cour Supérieure est tombée en affirmant que, pendant la continuation de communauté, le conjoint survivant, comme chef de la communauté continuée, pouvait hypothéquer la part de ses enfants dans les immeubles qui avaient formé partie des biens de la communauté. Ces immeubles de la communauté, devenus propres naissant des enfants pour la moitié à laquelle ils succèdent, ne demeurent dans la continuation de communauté que quant à leurs revenus et ils en sont exclus quant à la communauté. Le défendeur ne pouvait donc pas plus hypothéquer cette moitié d'immeuble qu'il n'aurait pu hypothéquer ou aliéner les autres propres de ses enfants.

Pothier, de la communauté, No. 820.—Code Civil, Art. 1329.

Il faut donc dire, que l'immeuble vendu n'était pas un propre du défendeur quant à la moitié dont les appelants avaient hérité de leur mère;—qu'il n'y a pas lieu à la continuation de communauté entre le défendeur et ses enfants, et qu'enfin, lors même que cette continuation de communauté aurait existé, le défendeur n'aurait pas pu hypothéquer la moitié de l'immeuble vendu en cette cause dont les appelants avait hérité de leur mère et qui, par conséquent, n'aurait pas pu faire partie de cette continuation de communauté. Le jugement de la Cour de Révision ne repose donc que sur des considérants qui sont radicalement erronés.

Le jugement de la Cour n'Appel est motivé comme suit:

La Cour, considérant que par le contrat de mariage du défendeur, Paul Parent

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avec Angélique Bissonnette, l'immeuble vendu en cette cause a été ameubli par le dit Paul Parent, et que l'effet de cet ameublissement a été de le faire tomber dans la communauté créée entre eux par le dit contrat de mariage, que l'effet de cet ameublissement n'a pas cessé par la dissolution de communauté arrivée le 15e jour d'août 1838 à raison du décès de la dite Angélique Bissonnette, et que le dit immeuble n'a pas repris sa nature de propre ainsi que faussement énoncé par la Cour de Révision, du jugement de laquelle est appel, qu'au contraire le dit immeuble est resté dans la communauté jusqu'au décret qui en a été fait sur le défendeur de façon à attribuer la propriété pour moitié aux appelants pour chacun un septième dans icelle moitié, faisant un quatorzième dans la totalité du chef de la dite Angélique Bissonnette, comme ses héritiers et l'autre moitié au défendeur; que le défaut d'inventaire par le dit Paul Parent n'a pas non plus eu l'effet de continuer de plein droit la communauté entre les appelants et lui, de manière à lui attribuer le droit d'aliéner ou hypothéquer le dit immeuble, la continuation de communauté entre le chef survivant et les enfants mineurs issus de lui et de l'épouse prédécédée étant un bénéfice créé en faveur des mineurs, lequel doit être invoqué par eux et ne peut avoir lieu à leur préjudice, ce qui serait le cas dans l'espèce actuelle, si comme le soutient encore erronément la Cour de Révision, on pouvait forcément prononcer cette continuation de communauté contre les appelants et donner au chef de cette communauté continuée le droit de disposer des biens qui la composent, et qu'enfin le défaut de partage ne peut non plus être invoqué contre eux, par l'intimé.

Considérant que les appelants qui, lors du décret, n'avaient pas cessé d'être comme dit plus haut propriétaires de la moitié de l'immeuble vendu, avaient le droit de convertir en opposition afin de conserver sur les deniers provenant de la vente de cette moitié, l'opposition afin de distraire qu'ils avaient eu le droit de faire, mais qu'ils n'avaient pas faite.

Considérant cependant, que n'ayant pas fait cette opposition afin de distraire et ayant souffert le décrêt, ils ne peuvent réclamer sans charge des dettes de la communauté qui ont frappé l'immeuble, la totalité des deniers représentant leurs droits de propriété en icelle moitié ainsi qu'ils le prétendent faussement, que ce n'est que sur la balance réduite par ces dettes qu'ils peuvent exercer leur recours, mais que cette balance, réduction faite encore des frais du décrêt et de distribution et des créances privilégiées, doit leur être attribuée en entier, vu le défaut de preuve de l'avancé de l'intimé qui a soutenu que les hypothèques sur lesquelles sont fondées les collocations contestées par les appelants, hypothèques qu'en thèse générale, le défendeur n'avait pas le droit de créer, l'ont été dans l'espèce pour des dettes de la communauté, infirme, etc.

Jugement infirmé.

Dorion, Dorion & Geoffrion, avocats des appelants.
A. D. Bondy, avocat des appelants.
(P.R.L.)

SUPERIOR COURT, 1870.

MONTREAL, 20TH OCTOBER, 1870.

Coram MACKAY, J.

No. 1828.

Parsons vs. *Graham* et al.

The defendant in an action on a promissory note pleaded in compensation a debt alleged to be due by the plaintiff, (but not evidenced by any proof in writing,) being part of a sum of money borrowed by plaintiff from a third party, the transfer of which debt to defendant had been signified on plaintiff after the institution of the action:

HELD:—That such debt was not equally *claire et liquide* under Art. 1188, C. C., and could not be pleaded in compensation to an action on a note.

The action was for the sum of $227 on a promissory note made and signed by defendants.

The defendants pleaded "that the sum of money demanded by the said action was compensated, paid and extinguished by reason of a larger sum, to wit, the sum of $244, part of a larger sum of $500, due by the said plaintiff to Dame Maria Prengle, of the Township of Hinchinbrooke, in the District of Beauharnois, widow of the late Thomas McLeary Gardner, and by her lent theretofore and advanced to the said plaintiff at his request, which said sum of $244 was by her transferred and made over to the now defendants by transfer, executed and made before McDonell, notary public, at Huntingdon, in said District, on the 1st of August, 1870, which said transfer was afterwards, to wit, on the 13th August aforesaid, duly signified to the said plaintiff, by means of which said several premises the said defendants were and are invested with the said sum of $244 so transferred as aforesaid, and are entitled to invoke the same in compensation and extinguishment of the debt sought to be recovered by said action, and do hereby set up and invoke compensation as aforesaid."

The transfer was not signified until after the institution of the action.

The plaintiff demurred to the plea of compensation on the ground that the debt offered in compensation was not equally liquidated and demandable, under art. 1188 of the Civil Code. The plaintiff also relied on the ground that the transfer of the debt to defendant was not signified until after the institution of the action. Toullier, Obligations, vol. vii, No. 369 et seq.

MACKAY, J., was of opinion that the demurrer must be maintained, on the ground that the claim offered in compensation was not *claire et liquide* without an *enquête*. The plea was indefinite in several respects. The sum transferred was acquired for the purposes of the defendant, it might be said, after the institution of the action; and it was described in the transfer as part of a larger sum that Parsons got for a purpose stated, but misused, and refused to give back. For these among other reasons, his honour considered the amount set up in compensation unclear and debateable.

The judgment is motivé as follows:

The Court, etc., considering the clearness of the plaintiff's demand, and that the claims set up in compensation of it are not alike clear, are evidenced by no writing proceeding from plaintiff, are evidently debateable, and are not *claires et*

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liquides to found such a plea of compensation upon as defendants' plea in this case.

Considering particularly the claim set up by defendants, against plaintiff, alleging his liability for, or in respect of, wrongful conversion of money by him as a bailee of money, and that such a claim, unclear as it is, is also, presumably, one debateable, and that plaintiff would contest, doth maintain said answer in law, and therefore dismiss said defendants' said plea of compensation, &c.

Demurrer maintained.

N. W. Trenholme, for Plaintiff.
A. & W. Robertson, for Defendants.
(J. K.)

COURT OF REVIEW, 1866.

MONTREAL, 31st DECEMBER, 1866.

Coram SMITH, J., BERTHELOT, J., MONK, J.

No. 1924.

Hart vs. *O'Brien.*

HELD:—That an *employe* occupying a house belonging to his master, by his permission, and as part consideration for the services of such *employé*, is liable to ejectment under the Lessors and Lessees Act, so soon as he ceases to be in the employ of the owner of the house.

This was an inscription in Review of a judgment rendered in the Circuit Court, at Montreal, on the 6th day of December, 1866, by THE HON. MR. JUSTICE MONK.

The action was in ejectment under the Lessors and Lessees Act, against the plaintiff's gardener, who was alleged to have been hired at a specified rate per month and to have been allowed the use of a certain dwelling house so long as he remained in plaintiff's employ, as part consideration for his services; the plaintiff contending, that as the defendant had ceased to be in his employ his right to occupy the house had terminated.

The defendant pleaded a *défense en droit*, to the effect that he was in no sense a servant of the plaintiff, and was not therefore amenable to summary ejectment under the Act, and he also pleaded to the merits.

The honorable judge decided in favor of the plaintiff, assigning the following reasons:—"considering that the plaintiff hath established the material allegations of his declaration in this cause fyled, and that the matters and things set forth in said declaration cannot be defeated, by reason of anything pleaded and proved in this cause by the defendant, doth dismiss the *défense en droit* and exception, &c., &c."

The judges in Review, "considering that there is no error in the said judgment," confirmed the same in all respects with costs.

Judgment of the Circuit Court confirmed.

L. N. Benjamin, for Plaintiff.
Hon. J. J. C. Abbott, Q. C., Counsel.
Ryan & Sénécal, for Defendant.
(S. B.)

SUPERIOR COURT, 1870.

MONTREAL, 30th OCTOBER, 1870

Coram BERTHELOT, J.

No. 923.

Ex parte Whitehead, Petitioner for a Writ of *Certiorari*.

HELD:—That the hearing on the merits of the cause under the Writ of certiorari, must be had in one of the two divisions of the Court for the hearing of cases on the merits.

On the 27th October, 1870, a motion was made in this cause to quash conviction. Judgment ordering the inscription to be carried to one of the two divisions for the hearing of cases on the merits.

Perkins & Ramsay, Attorneys for Petitioner.

(P. R. L.)

COUR SUPERIEURE, 1870.

MONTREAL, 20 SEPTEMBRE, 1870.

Coram BEAUDRY, J.

No 368.

Duhaut vs. *Lacombe, et al., et Dame Eliza Brunelle, Demanderesse par reprise d'instance, et Tranchemontagne et ux., Opposants.*

JUGE:—Que la permission de procéder *in formâ pauperis*, ne dispense pas la partie du dépot et consignation des frais qui pourraient être accordés au procureur de la partie adverse.

La Demanderesse par reprise d'instance, ayant obtenu la permission de procéder *in formâ pauperis*, fila une exception à la forme à l'opposition des Opposants.

Les Opposants firent motion pour faire rejeter cette exception, à raison de ce qu'aucun dépôt n'avait été fait lors de la production de cette exception à la forme.

Le jugement de la Cour qui renvoie l'exception à la forme est comme suit :

" La Cour, après avoir entendu les Opposants et la Demanderesse par reprise d'instance sur la requête sommaire des dits Opposants faite le 17 du courant, aux fins de rejeter l'exception à la forme plaidée par la dite Demanderesse à l'opposition et en avoir délibéré ; considérant que la permission de procéder *in formâ pauperis* ne dispense la partie du dépôt et consignation de deniers que quant à ce qui peut être dû et payable au protonotaire ou greffier, et que l'exception à la forme de la dite Demanderesse par reprise d'instance n'est pas accompagnée d'un dépot quant aux frais qui pourraient être accordés au procureur de la partie adverse, renvoie la dite exception à la forme avec dépens."

Exception à la forme rejetée.

Piché, avocat de la Demanderesse par reprise d'instance.

Bernard & Paguelo, avocats des Opposants.

(P. R. L.)

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 10th DECEMBER, 1870.

Coram DUVAL, C. J., CARON, J., BADGLEY, J., MONK, J., LORANGER, J., *ad hoc.*

No. 73.

THE CHAUDIERE GOLD MINING COMPANY,
(*Plaintiffs in the Court below,*)
APPELLANTS.

AND

GEORGE DESBARATS, *et al.*,
(*Defendants in the Court below,*)
RESPONDENTS.

HELD:—1. That by the laws of the Province of Quebec corporations are under a disability to acquire lands without the permission of the Crown or authority of the Legislature.
2. That a foreign corporation which had purchased lands in the said Province without such authority, and was evicted, had no action of damages against the vendor.

This was an appeal from a judgment rendered by the Superior Court, Montreal, TORRANCE, J., on the 31st of May, 1869, a report of which will be found 13 L. C. Jurist, p. 182.

A Cross, Q.C., for the appellants:—

The appellants, "The Chaudière Gold Mining Company, of Boston, in the "State of Massachusetts, one of the United States of America, a body politic "and corporate, duly incorporated under the laws of the said State of Massa- "chusetts, for the purpose of, and now actually carrying on the business of a Mining "Company, there and at the township of Watford, in the County of Dorchester, "and elsewhere in the Province of Quebec," brought this suit against the representatives of the late George Desbarats, among other things, alleging, that by deed before Hunter and Colleague, Notaries, on the 24th November, 1863, said George Desbarats sold, with warranty, to James Foley, a Mining property in the township of Watford, consisting of twenty-five several-lots separately described, which Desbarats therein stated he had acquired from the original grantees of the Crown severally named, together with the usual addition of rights, members and appurtenances, as well as the clause of subrogation in rights, &c. The consideration was, among other things, $20,000 in cash paid

That by an indenture, dated the 25th November, 1863, Foley sold the same property, with warranty, to the now appellants, for the consideration of $200,000, paid and acknowledged received. That appellants had purchased in good faith, as mining property, and to establish mining operations. Desbarats and Foley had sold for that purpose, at the augmented price, beyond the ordinary value of lands. That at the time of the respective sales, Desbarats and Foley knew that they were not the proprietors, but they nevertheless sold for mining purposes, Desbarats expecting to secure the titles at the price of lands for ordinary purposes, and thereby secure his vendee from eviction, which he knew he would otherwise be exposed to. Under their deed, and confiding in the representations of a good title, the appellants entered and laid out on the premises $30,000 in improvements and mining, to develope the property.

That said lands had, in fact, remained Crown lands, up to the 5th March, 1867, when they were granted by a new survey, by letters patent to Thomas McGreevy; by force and virtue whereof, full seizin and possession thereof were confirmed to McGreevy, who took possession, and the appellants were evicted, dispossessed, expelled, and could pretend no title to the lands. Wherefore they prayed that the respondents should be held bound to indemnify and hold harmless the appellants from and against the damages they had sustained, to the amount of $250,000 currency, for which the respondents should be declared liable and adjudged to pay the same to the appellants.

The respondents, among other pleas, demurred to this declaration.

Of the several reasons given, the sixth only is understood to have been insisted on, and was adopted by the learned Judge in the Court below, who thereupon, on the 31st May, 1869, dismissed the appellants' action. It is as follows:—

"That it does not appear, by the allegations of the plaintiffs' declaration, that "they had any right to acquire lands or real estate in the Province of Quebec, "but on the contrary, at all and every period mentioned in the plaintiffs' decla- "ration, the said plaintiffs, as a body corporate and politic, (*main morte*) had no "right to acquire any real estate within the said portion of the late Province of "Canada, now constituting the Province of Quebec, and cannot therefore claim "any damages by reason of the pretended sale from James Foley to them, which "sale, by the allegations of their declaration, is shown to be absolutely null and "void, and could not convey to the plaintiffs any right or title to the lands "therein mentioned."

There is no question as to the validity of the deed from Desbarats to Foley, nor of the liability of Desbarats, but it is questioned if he is liable to the appellants, whereon the following propositions may be submitted:

Does the present action, which seeks merely indemnity in damages, (a recourse purely personal,) and not perpetuation of property in the hands of a corporation, in any respect involve the validity of a title taken by the appellants?

Have the respondents a right to invoke an alleged nullity of the title of the appellants, while no such nullity is pretended or claimed by Foley, to whom they are legally bound, and who is the vendor of the appellants?

Does our own Statute Legislation not virtually abrogate any penalties against foreign companies suing for rights? See Con. Stat. L. C., cap. 91, 2. C.C. P., part 1, sec. 14.

Do any of the penalties denounced against communities by the ordinance of 1743 apply to the present case?

If they apply, to what extent, and in whose favor?

If they apply, do they afford a sufficient answer to this action on demurrer?

Have the appellants not a right to prove that they possess the necessary letters of amortissement, if such be required, and do all pains and forfeitures not disappear on procuring such letters, even after action brought?

Can the reasoning urged by the respondents apply in any respect to the $30,000 which the appellants allege they expended in the lawful prosecution of mining

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operations on property Foley had put them in possession of, and in respect of which they were in his rights?

The ordinance of 1743 was directed against the absorption of immoveable property by Ecclesiastical Corporations, not industrial enterprises for the development of the resources of the country,—these last have received every facility and encouragement from our own Legislature, and a mere formality of registration would entitle the Company to the advantages of a Canadian Incorporation or Joint Stock Company. See Con. Stat. Canada, cap. 63.

Where the party interested in claiming the nullity does not interfere, can any but the Crown claim the forfeitures denounced by the Ordinance of 1743?

To what extent are the penal or forfeiture clauses in force at all?

The appellants respectfully submit that the Judgment of the Court below should be reversed, and proof should be had of the appellants' allegations.

Hon. A. A. Dorion, Q.C., for the respondents:—It is only necessary to refer to the "*Declaration du Roi concernant les ordres religieux et gens de main morte établis aux Colonies françaises*," known as the Edit of 1743, (Edits et Ord. vol. 1, p. 576,) to show that no other judgment could be rendered by the Court.

This ordinance, article 1st, expressly prohibits the establishment of any corporate body or *communauté*, lay or ecclesiastical, within the French Colonies of America, except under letters patent duly enregistered in the *Conseils supérieurs* of said colonies, and article ten is in these words:

"Faisons défenses à toutes les communautés religieuses et autres gens de "main-morte établis dans nos dites Colonies, d'acquérir ou de posséder aucun "bien immeuble, maisons, habitations ou héritages situés aux dites colonies, ou "dans notre royaume, si ce n'est en vertu de notre permission expresse portée par "nos lettres patentes, etc."

The article 21st says: "Tout le contenu en la présente déclaration sera "observé à peine de nullité de tous contrats et autres actes qui seraient faits "sans avoir satisfait aux conditions et formalités qui y sont prescrites, même à "peine d'être, les dites communautés, déchues de toutes demandes en restitution "des sommes par elles constituées sur des particuliers ou payées pour le prix des "biens qu'elles acquerraient sans nos lettres de permission, etc."

It has never been doubted that this Edit or Ordinance made expressly for the French colonies in America, and registered by the "Conseil Supérieur de "Québec," was, until the code, in force in that part of the late Province of Canada now constituting the Province of Quebec, (Des Rivières & Richardson, Stuart's Reports pp. 237 and 238.—Freligh & Seymour 5 L. C. Rep. pp. 492, and 503) and that under its provisions no corporation or main-morte whether Canadian or Foreign, (for it would be absurd to suppose that a foreign corporation could exercise rights which the law on grounds of public policy denied to Canadian corporations.—Westlake on Private International Law, *p.* 209,) could acquire real estate in the said Province, without being thereto authorized by the crown or by parliament.

The Civil Code of Lower Canada, although not governing this case, has provided similar disabilities with regard to corporations holding real estate in the Province of Quebec.

This Court cannot therefore do otherwise than affirm the judgment of the Court below.

LORANGER, J., *ad hoc* (dissenting.)—On a soulevé en cette instance la question vivement débattue en ce pays, et décidée dans la négative en 1859 par la Cour d'Appel dans la cause de Kierskowski et la Compagnie du Grand Tronc, de savoir si les Sociétés Industrielles et Commerciales à fonds commun, érigées en corporations politiques, sont des main-mortes soumises aux restrictions de la Déclaration de 1743, relativement à l'acquisition immobilière. Dans l'espèce présente la Cour de première instance a jugé dans l'affirmative, en déboutant la compagnie appelante, mais à mon sens, ce jugement est reprochable non parce qu'il a résolu comme il le fait la question que les intimés lui ont soumise, mais en motivant sur sa solution l'irrécevabilité de la demande; car, à mon avis encore, cette question ne se présentait pas. Je m'explique.

Le 24 novembre 1863, feu M. George Desbarats dont les représentants sont les intimés, vendit au nommé Foley une propriété minière située dans le township de Watford. Prix $20,000 payées comptant.

Le 25 novembre, le lendemain, Foley revendit cette propriété à la compagnie appelante, The Chaudière Gold Mining Company of Boston, un corps politique incorporé en vertu des lois de l'Etat de Massachusetts pour des fins d'exploitation minière. Prix $200,000, payées également au comptant.

La compagnie allègue ces faits et ajoute qu'ayant ainsi acquis de bonne foi et se croyant en sûreté sur ses titres, elle a dépensé $30,000 en frais d'exploitation; que quand Desbarats a vendu il n'était pas propriétaire, n'ayant jamais eu de titre à la propriété qui était restée à la Couronne, laquelle l'a concédée le 5 mars 1867, à Thomas McGreevy, qui en a pris possession, et elle réclame de la succession Desbarats $230,000 pour indemnité.

Par une défense en droit, les intimés ont plaidé entre autres moyens, que la corporation demanderesse, corporation étrangère, n'allègue pas qu'elle ait eu le droit d'acquérir des propriétés immobilières en cette Province de Québec, et que comme corporation étrangère (et main-morte), la compagnie appelante n'a pu acquérir de propriétés immobilières en cette Province, et ne peut réclamer de dommages des intimés à raison de la vente faite par leur auteur Foley, laquelle est nulle et de nul effet.

La Cour de première instance accueillit ce moyen et débouta l'appelante.

Si la demande eut été intentée pour obtenir la délivrance de l'immeuble, peut-être le vendeur eut-il pu invoquer la nullité de la vente, comme faite à une main-morte, et affectée de nullité d'ordre public: mais peut-on douter que dans l'hypothèse de cette nullité il eut pu se refuser à la restitution du prix?

Ici la demande est pour dommages résultant non de la non-délivrance de l'immeuble, mais de la vente faite par le vendeur du bien d'autrui. L'action exercée ici n'est pas l'action *ex empto*. Elle n'est pas intentée par l'acquéreur immédiat, mais par un second acheteur, qui usant du bénéfice de la cession de droits de garantie contre le premier vendeur, cession virtuellement renfermée dans la seconde vente, réclame une indemnité plus forte que le prix originaire reçu par le premier vendeur, il est vrai, mais qui le renferme essentiellement. Laissant de côté cet excédant du prix originaire, c'est-à-dire le surplus du prix payé par la com-

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pagnie à Foley sur ce que ce dernier a payé à Desbarats, et les frais d'exploitation de la compagnie qu'elle réclame par forme de dommages, supposons que la compagnie eut limité sa demande à la répétition de la somme de $20,000, prix de la première vente (et cette supposition est parfaitement légitime, et s'adapte complètement à la situation légale des parties sur la défense en droit, car un plaidoyer de ce genre ne peut être maintenu qu'en autant qu'il s'applique à la demande entière, et il est indifférent pour le faire rejeter que la demande contienne une plus pétition si elle est fondée en droit pour une partie), supposant, dis-je, que l'action eut été originairement pour le premier prix de vente, et par Foley lui-même au lieu de l'être par son cessionnaire; est-ce que la nullité de la vente eut pu être l'objet d'une défense en droit? Le demandeur eut-il pu dire, votre déclaration ne révèle pas un droit d'action contre moi, parce que le prix que vous répétez a été le prix d'une vente affectée de nullité. Depuis quand le vendeur du bien d'autrui et qui a reçu le prix peut-il en refuser la restitution, sous le prétexte d'une nullité quelconque dont la vente aurait été affectée?

Dans l'espèce, ce n'est pas la nullité de la vente à Foley que Desbarats invoque, mais c'est de celle de Foley à la compagnie. La distinction est de nulle importance et ne touche en rien à la question de responsabilité du vendeur, ainsi qu'elle vient d'être posée. Quel intérêt imaginable peut avoir Desbarats, vendeur payé de la chose d'autrui, à dire à la compagnie, "J'ai vendu, il est vrai, une "chose qui ne m'appartenait pas, j'ai reçu le prix que vous répétez, mais je ne "vous le rendrai pas, parce que mon acquéreur, se croyant de bonne foi, maître "de la chose quand il l'a revendue, l'a revendue à une main-morte qui n'avait "pas le droit de l'acquérir?"

Encore une fois, si la compagnie étant une main-morte et n'ayant pas le droit d'acquérir l'immeuble, ce qu'il n'y a pas lieu d'examiner, en demandait la délivrance, cette défense pourrait peut-être valoir, car Desbarats pourrait dire à l'appelante: la loi qui vous défend d'acquérir des immeubles et vous en dénie la possession repousse votre demande en délivrance. Foley est resté vis-à-vis moi l'acquéreur de la mine, et si j'en dois à quelqu'un la délivrance, c'est à lui et non à vous que je la dois.

Ainsi caractérisée, je comprendrais la défense que dans l'espèce je ne puis concevoir.

Il est au demeurant un moyen fort simple d'élucider la question: supposons que la compagnie, s'apercevant que Foley lui avait vendu une chose qui n'était pas sienne par défaut de titres en la personne de Desbarats, eût réclamé de lui (Foley) son prix de vente purement et simplement, et qu'il eût appelé Desbarats à garantir, ce dernier plaidant pour Foley, eût-il pu invoquer la déclaration de 1743, et les prohibitions qu'elle contient pour repousser la demande principale? Qui oserait le soutenir? Autant vaudrait dire que Foley lui-même pouvait invoquer cette prohibition, ce qui n'entrerait dans l'esprit de personne.

En effet, le vendeur qui a participé à une vente nulle par défaut de capacité d'acquérir en la personne de l'acquéreur doit la restitution du prix en vertu de la maxime que personne ne peut s'enrichir au préjudice d'autrui, *Jure naturæ*

æquum est neminem cum alterius detrimento et injuriâ fieri locupletionem. Il la doit s'il est de bonne foi, et dans le cas, contraire, il le doit encore en vertu de la même règle de droit, supportée par cette autre que nul ne peut profiter de sa fraude. *Nemo ex suo delicto meliorem suam conditionem facere potest.*

Ici la compagnie n'a pas recherché Foley, et Desbarats n'a pas été mis en cause comme garant. Il l'a été directement et comme partie principale par la compagnie pour éviter un circuit d'actions qu'elle avait droit d'épargner. Sur cette demande la situation des parties contendantes étaient absolument la même qu'elle l'eût été dans l'hypothèse posée de la double demande; puisque ce n'est qu'à la condition que les rôles de demandeur principal et de garant soient, sur l'action directe, les mêmes qu'ils seraient sur l'action double, que cette action directe est permise; et qu'en ce cas seul la loi dispense d'un circuit inutile. Le défendeur Desbarats n'avait donc pas plus de droit dans une hypothèse que dans l'autre.

Pour ces motifs, je suis d'opinion que la question de main-morte sur laquelle je ne me prononce pas, quand même elle serait résolue en un sens favorable aux intimés, ne pouvait leur offrir un moyen valable de défense en droit, et je suis d'avis d'infirmer le jugement.

Il est d'ailleurs une autre objection hostile au jugement. L'Edit de 1743 ne rend pas absolument nulles toutes les acquisitions faites par des main-mortes. Elles ne peuvent acquérir qu'avec permission souveraine. Ne peut-on pas dire ici que cette permission était matière de preuve, et qu'elle ne devait pas nécessairement être l'objet d'une allégation de la déclaration dont l'absence fut fatale à l'action? Ce dernier considérant est cependant subsidiaire.

DUVAL, C. J., also dissented.

CARON, J.—Toute la question paraît se réduire à savoir si la compagnie appelante est une main morte, ou bien une simple association commerciale ordinaire.

Avant tout, voir la cause du Séminaire vs. La Bourse de Québec, rapportée au 3ème Volume of Lower Canada Reports, page 76. Il faut aussi remarquer que nous avons un Statut Provincial qui permet aux Compagnies Etrangères de poursuivre dans nos Cours.

L'audition, qui a donné lieu au jugement dont est appel, a été sur un *Demurrer*, produit par les défendeurs à l'action, se composant de plusieurs allégués qu'il faut voir au factum de l'intimé, pages 1 et 2; c'est sur la sixième raison du *Demurrer* que s'est restreinte la discussion, et c'est sur ce seulement qu'a été rendu le jugement dont est appel, lequel approuvant cette sixième raison, maintient le *Demurrer* et renvoie l'action des demandeurs.

(Jugement, 31 mai, 1869, Juge Torrance.)

La question décidée par le jugement est de savoir si les Corporations de la nature de celle qui porte la présente action, ont droit, d'après notre Loi, d'acquérir des biens immeubles dans la Province, sans la permission de la Couronne ou l'autorité de la Législature. Le jugement qui nous est soumis a décidé la question dans la négative, et a renvoyé l'action des appelants.

L'intimé pour soutenir le bien jugé, réfère à l'Edit ou Déclaration de 1743, (1er Vol. Edits et Ordonnances, page 576) fait exprès pour le Canada et enre-

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gistré au Conseil Supérieur; cet édit, suivant l'intimé, a toujours été et règardé en force dans le pays jusqu'à la promulgation du Code; ainsi que l'ont décidé les tribunaux dans plusieurs espèces qu'ils citent. Or, à la clause première, il y est statué qu'aucun établissement ou fondation ne sera fait dans le pays, sans la permission expresse de la Couronne. La clause dix, défend à toute communauté religieuse ou autres gens de main-morte d'acquérir des immeubles, sans lettres patentes de la Couronne; et par la clause vingt-unième, cette défense est faite à peine de nullité.

S'il est vrai que lors de l'achat fait par les appelants, la loi ci-dessus était encore en force, et s'il est vrai aussi, que les demandeurs sont gens de main-morte, dans le sens qu'on l'entendait sous le droit ancien, la conclusion est que l'acte de vente, sur lequel ils fondent leur action, est nul et ne peut donner lieu en leur faveur, à aucune demande pour dommages ou autres causes.

Que les Corporations de la nature de celle qui poursuit, soient main-morte d'après le droit ancien, la chose n'est pas douteuse. Pour se satisfaire à ce sujet, il ne faut que référer au Répertoire Guyot, Verbo *Main-morte*, page 97. Dictionnaire de Droit, Verbo, *Main-morte*.

Notre Statut, chap. 91, S. R. B. C., qui permet aux corporations étrangères de poursuivre devant nos tribunaux, ne change en rien la loi ancienne, quant au droit d'acquérir des immeubles. Nos propres corporations n'ont ce droit d'acquérir des immeubles, qu'en autant qu'il leur est accordé; aussi dans chaque acte d'Incorporation, trouve-t-on la clause nécessaire à cet effet; or, si nos corporations n'ont pas ce droit sans autorisation, il serait absurde de prétendre que les étrangères l'auraient plutôt que les nôtres.

La cause du Séminaire contre La Bourse de Québec, dont il a été fait mention, n'est pas applicable au cas actuel. Ce n'était pas le titre de La Bourse qui était contesté; il n'était pas prétendu que cette corporation n'avait pas le droit d'acquérir; au contraire, son acte d'incorporation lui accordait ce droit; mais la question était, quant au droit du Séminaire, comme Seigneur, de réclamer indemnité sur cette acquisition.

Je suis enclin à croire que le jugement est correct, et je le confirmerais.

C'est justement parce que La Bourse avait par son acte d'Incorporation le droit d'acheter et vendre des immeubles que l'action du Séminaire a été renvoyée.

BADGLEY, J.—In the plaintiffs', appellants', declaration filed in this cause, they qualify themselves as "The Chaudière Gold Mining Company of Boston, in the "State of Massachusetts, one of the United States of America, a body politic "and corporate, duly incorporated under the laws of the said State of Massachusetts, for the purpose of and now actually carrying on the business of a "Mining Company there and at the Township of Watford, in the County of "Dorchester, and elsewhere in the Province of Quebec," and complain of the defendants, the respondents, as "the universal legatees of the late George Desbarats and his legal representatives," and aver, that by deed of sale executed at Montreal, on the 24th of November, 1863, the said late George Desbarats sold to James Foley of Montreal, for the consideration of $20,000 in cash paid

to the said George Desbarats, the several described and numbered lots of land in the Township of Watford, in Lower Canada, to wit, the Province of Quebec, together with all the rights, privileges and appurtenances thereunto belonging, subject only to the reserves and conditions therefor *that might be mentioned in the patents from the Crown that might be issued* therefor, but with warranty by the said George Desbarats in favour of said Foley against all mortgages, debts and dowers thereon. That by indenture or deed of sale executed on the 25th of November, 1863, the said James Foley, for the consideration of $200,000 alleged paid to him, sold to the said corporation with his warranty of possession to them, and of freedom from incumbrances on the said lots of land, the said severally described and numbered lots of land in the Township of Watford, sold to him by the said George Desbarats.

That the corporation purchased the said lots of land from the said Foley in good faith as mining property and for mining purposes.

That at the said several sales, the said vendors respectively, Desbarats & Foley, knew that they had no title to the said lands, but expected to secure titles to them.

That trusting to the representations of the said vendors in that respect, the corporation took possession of the said lands, and expended thereon in mining improvements and operations before their eviction $30,000.

That the said lots of land were ungranted Crown Lands, were never granted to the said vendors, who never had titles therefor, and were afterwards patented to Thomas McGreevy, by letters patent of 5th March, 1867, who then took possession of the lands and evicted the corporation, the appellants, therefrom.

That the said George Desbarats died at Montreal in 1864, and by the terms of his will, constituted his children, the respondents, his universal legatees, who accepted his estate and are his legal representatives.

That at the time of the eviction of the corporation the said lands had increased in value and were worth $250,000, which the corporation has suffered in damages.

That by law and specially by force of the Statute in such case and specially of the 126th article of the Code of Procedure of Lower Canada, the respondents are liable to the corporation for the said damages, and are bound to warrant and indemnify the corporation against the said damages; wherefore the corporation conclude against the respondents, and that they may be held to the alleged indemnity in favour of the corporation, and to the payment to them of the said sum of $250,000. The defendants, respondents here, demurred to the declaration upon a variety of grounds stated, amongst which were the want of privity between the corporation and the respondents, the legal disability of the corporation, being a foreign corporation, to acquire or hold lands in this Province, their want of corporate existence from the Crown or the Provincial Legislature, their want of recognized provincial status from their being a foreign corporation, &c., &c.

Before proceeding further it will be seen that the Appellants have contented themselves by merely qualifying themselves as a foreign corporation, but have made no averment in the declaration by what authority or power they were so

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constituted, nor the powers and privileges granted to them by their charter of creation, but are satisfied as plaintiffs to style themselves a foreign corporation, so constituted by the law of a foreign state; in other words, the special authority under which they act and exist is not made known or in any way averred in their declaration: they name their character, but do not assert and aver their capacity or powers.

The judgment appealed from was given upon the law issue raised by the demurrer, and particularly upon the objection that the corporation being a foreign corporation, without legal capacity therefor, either from the Crown or from the Provincial Legislature, was under legal incapacity and disqualification to acquire or hold lands in the Province, and consequently that their alleged acquisition of and property in the lands referred to by the corporation was an absolute nullity and gave them no right of action.

Incidental to the above is the further objection against the right claimed by the foreign corporation to a direct recourse against the respondents under the special averment of the 126th article of our Code of Proc., which applies to *arrière garants*, there being no privity or engagement between the corporation and respondents.

The sixth ground of the demurrer alleges the main objection, that as a foreign corporation they could not acquire our Provincial lands, and that they show no lawful right or power to do so; and therefore that their purchase from Foley was a nullity and could give them no legal property or title in the lands, nor right against respondents for damages by reason of the corporation having been evicted from those lands.

Assuming the appellants to be the foreign corporation which they have qualified themselves to be, established and created in a foreign country by the law of that country only, it must be observed, that by the Provincial Statute-law of Lower Canada, C. S. L. C., chap. 91, sec. 1 and 2, foreign corporations are allowed the general comity right to sue and be sued in our Provincial Courts of Justice, but this permissive right to use those Courts does not confer upon such corporations, the powers, capacities and privileges granted by our local law to our own legally constituted corporations, nor relieve the foreign bodies from the declared disabilities of our law.

The law of the foreign country under which the foreign corporation is constituted is a merely local law, and cannot extend or be extended beyond its own territory, and hence, when such corporations reach beyond the country which establishes them, and contract in a country foreign to that of its creation *ex: gra:* this Province, they are at once subject to our public law which regulates the extent of their contracting power and becomes paramount over the foreign creative law erecting them into bodies corporate and over their foreign charters of incorporation. In these respects they, like all domestic corporations, are upon a different footing to natural persons. Corporations are creatures of limited powers, and are not, and never can be, citizens of the country; they are artificial creatures, beings only in contemplation of law and have no other attributes than those which the law confers upon them, or suffers them to enjoy or exercise, and hence

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as the law of their establishing country has no extra territorial operation, a foreign corporation, merely as such, cannot challenge, as matter of right, the privilege of dealing in a country not under the sovereignty which created it. Its being a trading corporation does not alter the principle applicable to corporations in general, although the Crown or the Provincial Legislature may confer corporate powers locally effective even upon foreign corporations, whilst it is competent for the Provincial Legislature to affix upon all corporations such conditions upon their powers as may be deemed expedient and politic, although such conditions are not imposed upon citizens, and from these conditions, foreign corporations can of right claim no exemption. Instances of these prohibitive conditions are shewn in the public law, forbidding banking business by corporations unless legally authorized, and such prohibition covers foreign as well as domestic corporations, and hence, therefore, the essential requisite of the authority of the Crown or of the Provincial Legislature to give such bodies a legal existence. Without these requisites, corporations have no legal recognition, no legal status as bodies politic in Courts of Justice, and fatal as these objections are to domestic corporations, they are doubly so to foreign ones, because the interdictions of our public law, or public policy expressed by that law, are not to be qualified by the laws or charter grants of a foreign country, and therefore become not only positive disqualifications against foreign corporations, but, moreover, are notice to the corporations themselves and likewise to those who deal with them, as well within the province as without it, when they contravene the public interdictions. In such cases the contravention is fatal, and that objection applies fully to this action.

Besides this general objection of public law, our special local law has been imported into this contention, and cannot be passed over unnoticed.

The paramount authority of our local law over all corporations and their erection in this province is unquestionable, whether those corporations are of domestic or foreign origin, as well as over the powers and capacities granted to them. As to the foreign bodies this law applies absolutely as well in respect of its foreign constituting law as of the charter powers by that law granted to those bodies, because our local legislature has absolute power to forbid corporations to do certain acts, or to make certain transactions, altogether, or under certain conditions, and to impose such disqualifications upon them as the legislature may direct and subjecting those bodies to be brought within the disqualifications of the law. These are legal truisms which need no citations from books to give them support. Assuming, then, the limited local existence and capacity of foreign corporations in this province, it seems plain, that the statutory permission extended to them to sue and be sued in our Courts of Justice with reference to transactions in which they are interested, does not relieve them from the necessity of shewing their legal possession of the rights and privileges of our local law to give validity and effect to those transactions which they use our Courts to enforce or defend, and so equally, on the other hand, must they shew that they suffer none of those disabilities and disqualifications which our law imposes upon all corporations under certain circumstances.

Now, the 3rd chapter of our Civil Code declares the law applicable to corpo-

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rations generally in this province, confers upon them express rights and privileges, and subjects them to special and positive disabilities. It is not necessary to refer to the former, but for the latter, the disabilities, the 364th Article of the Code enacts, "Corporations are subject to particular disabilities, which either prevent or "restrain them from exercising certain rights, powers, privileges, &c., which "natural persons may enjoy and exercise; these disabilities arise either from "their corporate character or they are imposed by law." The 365 Article then declares the disabilities arising from the law, and amongst them, those mentioned in the 2nd subsection of the article, namely, "those comprised in the general laws "of the country respecting mortmains and bodies corporate, prohibiting them "from acquiring immoveable property, or property so reputed, without the permission of the Crown, except for certain purposes only, and to a fixed amount "and value." It is scarcely necessary to observe that the exceptions of this sub-article do not apply in this case. These provisions of the Code are positive enactments, and are not promulgated as new law, but are given as declaratory of the old law of the province, which expresses not alone the general law, but likewise the public policy of the province in regard to institutions of this nature; and it is common knowledge that no Provincial Act or Charter of Incorporation, by the Legislature of religious or secular bodies, has been granted, without the legislative permission being provided therein for their acquisition and alienation of real property. The royal permission of the old French law in force, or its equivalent, the modern legislative charter, is by the Code authoritatively declared to be the general law of the province for corporations in general, and without the royal or legislative permission all corporations are prohibited from acquiring such real property. Whatever doubts might have existed heretofore as to the prohibitive applications of the old law, with reference to merely trading corporations, they have disappeared since the promulgation of the Code, which has declared those old law prohibitions to be and to have been our provincial law. The terms of the Code articles are too plain for a doubtful construction, and in their generality embrace all corporations, secular, lay or trading, and subject them all to the same disqualifications to acquire real property, without the royal or legislative permission first had and obtained. This general law of the country, as by the 2nd sub-section above, respecting both mortmainors and bodies corporate is to be found originally in the Ordinance of Louis XV., of 1743, which was duly registered as municipal law in Canada at the time, and has never been abrogated or repealed, and which the Code by its statutory enactment now assimilates with and applies to the law of corporations and bodies politic in general, extending beyond the religious and eleemosynary institutions of the ordinance. The modern corporation did not exist and was not referred to by the ordinance, but our declaratory Code has extended the ordinance disqualifications to the modern body politic corporation, trading or otherwise, and bound it in the politic prohibitive terms of the old law. The public policy of the ordinance against publicly unsanctioned and unpermitted acquisitions of real property within the province, is the prevailing public policy of our law, binding upon all corporations, and strictly holding this corporation at the date of the execution of their indenture and deed of conveyance to them by Foley. Positive law as well as state policy prohi-

bited the acquisition by the corporation of the lots of land set out in the indenture, and the corporation and their vendor could not *ex mero motu* of both or of either dispense with and set aside the statutory disqualifications of state policy or public law. Pothier, traité des personnes, referring to the French edit of 1749 for France, in this respect similar to that of 1743, above, from which the former was in part copied, says that the incapacity to acquire by *communautés*, (mortmainors) was absolute and they could not acquire *à quelque titre que ce soit, soit à titre gratuit, soit à titre de commerce*, not even in payment of a debt, nor could notaries give their ministry to pass such deeds: power being reserved to the King alone to accord permission to acquire immoveables, &c. It results from all these circumstances, that this foreign corporation is not known to the law as a natural person; that it cannot of right claim the exercise of the rights and privileges of natural persons; that it cannot acquire or hold immoveable property in this province in its own name, without royal or legislative permission therefor first had and obtained, and could therefore suffer no legal eviction from what it could neither acquire nor hold against a positive prohibitory law in accordance with public policy against such acquisition or tenure; and therefore, could claim or demand no damages by reason of its own breach of the law and of public policy, and of its privation of illegally acquired provincial real property. Courts of Justice may sustain a contract by a foreign corporation, but only when they can enforce it agreeably to the rules of the law which the Courts are bound to administer, and not in the peculiar manner of a foreign state, which is unknown to and of no force within the jurisdiction of the adjudging Court. The objection of the demurrer is, therefore, also absolute against this corporation under the provisions of our local law.

The remaining objection to be noticed is that the corporation shew no legal right of direct recourse against the respondents, as the alleged *arrière garants* of the corporation, through Foley, their immediate vendor and purchaser from Desbarats, whom the respondents represent. Upon this it must be observed, that the corporation claim that the damage alleged to have been suffered by them from the enhanced value of the lots of land at the time when the corporation had been evicted from them, and which value they have estimated at $250,000, as already observed, the corporation does not rest upon any privity existing at any time directly between the parties to this suit, but resting specially in this point upon the article of the practice Code they take their direct recourse beyond their privity with Foley their vendor against the respondents as their *arrière garants*. The article applies precisely and specifically *en matière de garantie formelle*, and in such matter only *arrière garants* may be proceeded against directly; but here there could be no *garantie formelle*, no real rights acquired by the corporation against the prohibitions of public policy and the disabilities of the law, whilst the terms of both the original and the second deeds of sale referred to in the declaration contain no such warranty. Without a legally acquired real property, there can be no formal warranty, except by express stipulation to that effect, which would then by a personal contract be the guarantor enforceable directly against him, but not reaching over to his vendor without also a similar

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express stipulation in his favour by the latter. Now none of all this appears in the declaration, and instead, it shews a purchase by the corporation, the appellants, from Foley in defiance of law and public policy, and therefore entirely and absolutely null and void in its legal effects against the respondents without warranty by the respondents.

No real right, no *garantie formelle* is involved in this cause. A speculative loss of an alleged enhanced value of the property by them purchased from Foley is claimed from the respondents, and it is claimed as a personal loss to this foreign unauthorized corporation; but this is not the matter of the *garantie formelle* of the 126 article upon which this action is made to rest. The legal disability above referred to is affixed upon this corporation, and their demand cannot be enforced by the local Courts without setting aside the prohibitions of the law and of public policy which these Courts are bound to administer and sustain. The recourse of the appellants in some way may be against Foley, but is not against the respondents, and their appeal should therefore be rejected.

Judgment confirmed, DUVAL, C. J., and LORANGER, J., *ad hoc*, dissenting.

Cross & Lunn, for the Appellants.

Dorion, Dorion & Geoffrion, for the Respondents.

(J.K.)

COUR DE CIRCUIT, 1870.

MONTREAL, 12 DECEMBRE, 1870.

Coram TORRANCE, J.

No. 5999.

Desjardins vs. *Chretien*.

Jugé :—1. Que dans une action au-dessous de $60, une exception à la forme peut être produite sans dépôt.

2. Qu'une femme mariée paraissant dans une cause sans l'assistance de son mari, sera mise hors de cour.

Deux questions furent soulevées. L'action était pour $2.70, et la défenderesse avait produit une *Exception à la forme* et un autre plaidoyer, qui alléguait que la défenderesse était une femme mariée et qu'elle ne pouvait pas être assignée seule.

Le demandeur objecta que l'exception était inutile et illégale, attendu qu'elle n'était pas accompagnée du dépôt ordinaire de $4.

J. O. Turgeon, pour la défenderesse, répondit que le tarif n'exigeait pas le dépôt dans les actions de cette classe, et il cita la cause de Alie vs. Pamelin, 14 L. C. Jurist, p. 134.

La Cour maintint les deux prétentions du défendeur; mais comme la défenderesse, qui est une femme mariée, était venue en cour sans son mari, contrairement à l'art 176 du Cod. Civil, les deux parties furent mises hors de cour, *sans frais*.

M. Desjardins, pour demandeur.

DeBellefeuille & Turgeon, pour la défenderesse.

(J. O. T.)

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 9TH MARCH, 1870.

Coram DUVAL, CH. J., CARON, J., DRUMMOND, J., BADGLEY J., MONK, J.

No. 2468.

Cheney vs. *Frigon* et al.

HELD:—That an appeal ought to be allowed from an interlocutory judgment which cannot be remedied by the final judgment, unless the Court is clearly of opinion that the judgment complained of must be confirmed.

This was a motion by the plaintiff for leave to appeal from an interlocutory judgment rendered by the Superior Court at Montreal (MACKAY, J.) on the 17th December, 1869, maintaining a partial demurrer to the plaintiff's declaration.

The action was [illegible] against the defendants, Frigon and Bertrand, for damages, in consequence of an alleged infringement of the plaintiff's patent of invention for the manufacture of asphalte pavements.

The Corporation of Montreal was made a co-defendant on the ground that certain monies were owing by the Corporation to Frigon and Bertrand, under contracts with them for the manufacture of such pavements. And the declaration concluded, that the Corporation should be condemned to pay over such monies to the plaintiff.

Frigon and Bertrand fyled a *défense en droit* to that part of the declaration having reference to the monies in the hands of the Corporation. And the Superior Court maintained the demurrer,—"said conclusions involving a *saisie arrêt* before judgment, without there having been any affidavit fyled by plaintiff, warranting any process, direct or indirect, of *saisie-arrêt* before judgment."

DUVAL, CH. J., and BADGLEY, J., dissented from the majority of the Court, and were in favor of rejecting the motion, as it was manifest that the judgment complained of must be eventually confirmed, even if the writ should be allowed; the Chief Justice remarking that this Court has a right to exercise its discretion as to appeals from interlocutory judgments. The Judges did so years ago in the case of Gugy and Sutherland, and have continued to do so over since.

MONK, J.:—This discretion to which the Chief Justice has referred should only be exercised in cases where it is manifestly useless to issue the writ, but should not be exercised in a case like the present.

After explaining the pleadings, the learned Judge continued: I admit the proceeding in the present case, by way of action instead of *saisie-arrêt*, is purely novel, but I see no good reason why it should not be tried here. I think that the ingenuity of counsel might have a very decided effect upon the floating opinions of this Court on this very novel proceeding, and, therefore, I would like to have the case fully argued, and that can only be done by allowing the motion: I am of opinion consequently to allow the writ to issue.

DRUMMOND, J., was of opinion to grant the motion, simply on the ground that the judgment complained of could not be remedied by the final judgment.

CARON, J., concurred.

Motion for Appeal granted.

Perkins & Ramsay, for Plaintiffs.

Trudel & De Montigny, for Defendants, Frigon & Bertrand.

(S. B.)

COURT OF QUEEN'S BENCH (IN APPEAL).

MONTREAL, 7TH SEPTEMBER, 1870.

Coram DUVAL, CH. J., CARON, J., DRUMMOND, J., BADGLEY, J., and POLETTE, J., *ad hoc*.

WILLIAM R. DOAK,
(*Plaintiff in the Court below,*) APPELLANT;
AND

SAMUEL G. SMITH,
(*Defendant in the Court below,*) RESPONDENT.

HELD:—1st. That in an action *pro socio* brought by a surviving partner against the executors of the deceased partner, the heirs and universal legatees must be called into the cause and made parties thereto, to account for the business of the partnership.
2nd. That the Court ought to make such an order, instead of dismissing the action on that ground.

The appellant having brought before the Superior Court at Sherbrooke, in the district of St. Francis, his action *pro socio* against the respondents as executors and administrators of the late Arba Stimson, his deceased partner, it was contested by them on the ground specially that the appellant was "barred by the Statute of Limitations, not having commenced his action within six years from the time the co-partnership ceased trading," and further, "that respondents were not liable to an action of the kind, being merely trustees to the heirs to whom alone they were liable to account."

On the 26th February, 1867, was rendered the following judgment at Sherbrooke by the Superior Court (SHORT, J.): "The Court having heard the parties &c., considering that the defendants have established their plea of prescription, and that more than six years have elapsed from the dissolution of the partnership of the plaintiff and the late Arba Stimson prior to the institution of the plaintiff's action, and that the heirs of the late Arba Stimson have not been made parties to the cause, doth maintain the defendant's plea, and doth dismiss the action with costs.

The cause having been inscribed for review at Montreal, the following judgment was rendered on the 28th March, 1868: (MONDELET, J., BERTHELOT, J., and MONK, J.)—"The Court, considering that there is no error in the said judgment appealed from, but inasmuch as the Court doth not adopt the *considérant* relative to the alleged prescription of six years, the Court modifies the judgment appealed from by retrenching from the said judgment the said *considérant*. Considering that the testamentary executors of the late Arba Stimson have been sued alone, without the heirs of the late Arba Stimson having been made parties to the suit, the Court, adopting the last *considérant* of the judgment appealed from, doth confirm the same with full costs."

The Court of Appeals, reversing both judgments, ordered that the heirs and universal legatees be brought into the suit. The judgment is *motivé* as follows:

"The Court, considering that by the last will and testament of the late Arba Stimson, the defendants were constituted executors thereof, with full power not only to administer all the testator's estate, real and personal, but also to alienate the same, and were charged not to deliver over the estate to the legatees, until all

matters relative thereto had been settled, the term of the execution of the said will being prolonged beyond the year and day to a period limited only by the final settlement of the business of the estate: considering, moreover, that the heirs of the said late Arba Stimson should appear before the Court to account for the business of the co-partnership alleged to have existed between the appellant and the late Arba Stimson up to the time of the decease of the latter, supposing the action to be well founded and not prescribed. Considering, therefore, that instead of dismissing the action of the plaintiff, appellant, the Court of original jurisdiction and the Court of Review should have ordered the heirs and universal legatees of the said late Arba Stimson to be made parties to this cause. Considering, therefore, that in this respect there is error * * * do order that the heirs and universal legatees of the said late Arba Stimson be brought into this cause as parties thereto at the diligence and costs of the plaintiff.

Doak, Attorney for Appellant.

Sanborn, Brooks, and *Borlase*, Counsel.

Robert N. Hall, Attorney for Respondent.

(P.B.L.)

COUR SUPERIEURE, 1870.

MONTREAL, 30 DECEMBRE, 1870.

Coram BERTHELOT, J.,

No. 2255.

Martineau vs. *Béliveau.*

JUGE:—Que le propriétaire d'un cheval est responsable des dommages qu'il a causés par suite de l'imprudence de celui qui le conduisait.

Le défendeur, hotellier, a loué dans le cours du mois d'octobre dernier, son cheval et sa voiture à un étranger, alors pensionnaire de sa maison. Celui-ci conduisait le cheval imprudemment et avec une très grande vitesse, à travers les rues de cette ville, renversa le demandeur, vieillard, de quatre-vingts ans, au moment où il allait atteindre le trottoir d'une rue qu'il venait de traverser, lui causa des blessures qui ont mis sa vie en danger et l'ont retenu depuis sous les soins du médecin. De là, action en réclamation de dommages contre le défendeur, propriétaire du cheval et de la voiture.

Le défendeur a d'abord nié les faits, puis il a plaidé spécialement, qu'aux termes de l'article 1055 du Code Civil, il n'était pas responsable des dommages réclamés, attendu que son cheval n'était à l'heure de l'accident, ni sous sa garde, ni sous celle de ses domestiques.

PER CURIAM: L'article 1055 du Code Civil n'est pas limitatif et tire sa source d'une loi qui ne reconnait pas d'exception à la responsabilité du maître en semblable matière, puisqu'elle établit la solidarité entre lui et celui qui se sert de l'animal. Si cet article était limitatif, il faudrait dire, que même dans le cas où il aurait confié son cheval à un enfant ou à un insensé, le propriétaire ne serait pas responsable des dommages que ce cheval aurait pu causer. Dans l'espèce actuelle, celui qui conduisait le cheval, était un pensionnaire de la maison du

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défendeur, et il est en preuve qu'il ne savait pas le conduire. Le défendeur doit s'en prendre à lui-même d'avoir confié son animal à des mains imprudentes. C'est de plus un étranger qui s'est hâté de quitter le pays pour se soustraire probablement aux conséquences bien fâcheuses qui auraient pu lui résulter des suites de sa coupable imprudence. Où donc serait-la responsabilité s'il n'était pas permis de s'adresser au propriétaire du choval.

La Cour condamne le défendeur à $150.00 de dommages et les dépens en Cour Inférieure.

Jugement pour le demandeur.

Loranger & Loranger, pour le Demandeur.
Dorion, Dorion & Geoffrion, pour le Défendeur.
(L. O. L.)

COUR DU BANC DE LA REINE, 1870.

En Appel.

MONTREAL, 8 SEPTEMBRE, 1870.

Coram Duval, J. C., Caron, J., Drummond, J., Badgley, J., Monk, J.

No. 32.

JOSEPH BOURDON,

(*Défendeur en Cour Inférieure,*)

ET Appelant;

EUSTACHE BENARD, ET AL.

(*Demandeurs en Cour Inférieure,*)

Intimés.

Juge:—Que le droit de faire disparaître les obstructions et empiètements sur les chemins et rues publiques appartient exclusivement aux municipalités, et que les particuliers ne possèdent pas ce droit d'action à moins qu'il ne leur en résulte des dommages réels et spéciaux.

Le jugement final rendu en cette cause par la Cour Supérieure le 27 février 1869, à Montréal, Torrance, J., qui maintenait l'action populaire des demandeurs pour la démolition d'un quai, est rapporté au 13 vol. du L. C. Jurist, p. 233.

La question soumise à la Cour d'Appel était de savoir si les propriétaires dans une municipalité peuvent se plaindre des empiètements commis dans une rue publique.

L'appelant par son factum exposait ses prétentions comme suit:

Le village de Boucherville est incorporé sous l'acte 23 Victoria, chap. 61. Voir Statuts Refondus du Bas-Canada, ch. 24, Sect 12, 13, 36.

Les demandeurs (intimés) ont admis cette incorporation.

Suivant la section 40, par. 18 du chap. 24 des Statuts Refondus B.C., chaque corporation municipale dans le Bas-Canada est propriétaire de tous les chemins sis dans ses limites.

D'après la 43e section, parag. 9, du même chapitre, les rues de village sont assimilées aux chemins. La rue St. Louis dont il est question se trouve sous le contrôle de la corporation du village de Boucherville.

L'appelant prétend que d'après la section 49e du chap. 24 des Statuts Refondus B.C., c'est à la corporation du village de Boucherville qu'il appartient de poursuivre relativement à l'empiètement en question s'il y a nécessité de poursuivre, et non pas aux intimés.

La Cour Supérieure, à Montréal, a été d'un avis contraire, et a déclaré que l'acte municipal n'avait point détruit l'action publique aussi connue sous le nom d'action populaire, et que le droit de poursuivre sous ce rapport existait concurremment en faveur de la corporation et en faveur d'aucun des habitants de la municipalité.

Citations des intimés : —

La cause de Samson et Comtois, No. 1742, jugée à Montréal le 18 avril, 1834.

Grenier et Mallet, jugée en 1848, et Johnson et al. et Archambault, jugée en appel le 9 mars 1864, et rapportée au Tome 8 du Jurist, p. 317.

Curasson, des actions possessoires, pp. 209, 367 et 369, et Pardessus, des Servitudes, t. 2, p. 312.

CARON, J.—Deux habitants, propriétaires dans le village incorporé de Boucherville, se réunissent dans une même action, qu'ils appellent "Action populaire," pour forcer le défendeur, appelant, à démolir un quai qu'il a fait construire sur un emplacement lui appartenant dans le dit village, faisant front sur une rue publique, nommée rue St. Louis, sur laquelle le quai empiète de quatre pieds sur trente trois.

Les demandeurs, intimés, dans leur action conjointe, concluent à ce que cet empiètement soit supprimé, le quai démoli en autant qu'il empiète sur la rue, et qu'une somme de $500, leur soit payée par forme de dommages.

La défense consiste en une défense en droit où il est prétendu que la rue en question, faisant partie du domaine municipal, c'était à la Corporation du Village de Boucherville à se plaindre de l'empiètement et non aux demandeurs en leur capacité privée, et deux exceptions, l'une répétant les allégués de la défense en droit et l'autre alléguant que le Défendeur reconnaissait bien l'empiètement qu'on lui reprochait, et qu'il était convenu avec la corporation de le faire disparaître, mais que la dite corporation lui avait accordé pour ce faire un délai qui n'était pas expiré lorsque l'action des demandeurs avait été intentée.

L'empiètement, la promesse de le faire disparaître, et le délai par la corporation accordé au défendeur, tous ces faits sont admis ou prouvés; ainsi quant aux faits, pas de difficulté.

La seule question dans la cause, qui, du moins ait été soulevée en Cour Inférieure, (Cour Supérieure) a été de savoir si les demandeurs, comme simples propriétaires de terrains donnant sur la rue, ont droit d'action, pour obtenir la démolition d'un ouvrage de la nature de celui en question, et s'ils pouvaient réussir dans cette action, sans avoir allégué et surtout prouvé des dommages spéciaux à eux personnellement résultant des faits du défendeur, dont ils se plaignaient.

Aucun dommage de cette espèce n'a été prouvé; tout au contraire, il résulte

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de la preuve que l'endroit de la rue où le quai empiète, est dans une côte tellement roide qu'il est impossible d'y passer en voiture, qu'il reste encore 14 pieds qui sont plus que suffisants pour les piétons et pour l'usage qu'on en fait: ce qui démontre que les demandeurs n'ont, de fait, éprouvé aucun dommage et qu'ils n'en ont pas à redouter, du moins pour le moment; aussi le jugement dont est appel (Cour Supérieure, juge Torrance, 27 Février, 1869) tout en maintenant leur action, ne leur accorde aucun dommage.

Le jugement (Page 1ère, Factum de l'appelant) ordonne la démolition demandée du quai du défendeur en autant qu'il empiète sur la dite rue, permettant aux demandeurs de le démolir à ses frais, s'il ne le fait pas sous le délai imparti.

En appel, le jugement est contesté par deux moyens que l'on a fait valoir en Cour Inférieure, et pour un troisième dont il ne paraît pas avoir été fait mention lors de l'audition en première instance.

Le premier motif allégué contre le jugement, est que les demandeurs n'avaient pas droit d'action. L'Appelant en déduit ses raisons en son factum, pages 3 et 4, où, référant aux actes des municipalités et surtout à l'acte 23 Vict. ch. 61, par lesquels il prétend établir qu'à la corporation seule, appartient le droit de poursuivre pour faire disparaître l'empiètement en question.

Ces citations et ces raisonnements de la part de l'appelant me paraissent satisfaisants; les autorités additionnelles produites depuis que la cause est en délibéré, et surtout la décision de Brown & Gugy, me font croire que les demandeurs n'avaient pas l'action qu'ils ont portée; que ne souffrant personnellement, pas autrement que le reste du public, c'était à l'autorité chargée de défendre les droits de ce public à prendre les démarches nécessaires pour le protéger des empiètements qui pouvaient être commis à son préjudice.

Si dans un cas pareil, chacun de ceux qui ont droit de faire usage du chemin en question, a droit de se plaindre, si on le rétrécit, les habitants de la paroisse voisine auraient comme ceux de Boucherville, droit de porter l'action qu'ont portée les demandeurs. Et d'après cette manière de voir, le défendeur aurait pu se trouver poursuivi par cent personnes à la fois, pour le même fait.

Toutes ces difficultés disparaissent si l'on donne à la corporation seule le droit de veiller aux intérêts communs, et d'adopter les mesures nécessaires pour les faire respecter et protéger. Rien de plus naturel au reste, que de lui laisser cette tâche exclusivement, puisque d'après le chap. 24 des Statuts Ref. du B. C. Sect. 40, parag. 18, chaque corporation municipale dans le Bas-Canada est propriétaire de tous les chemins dans ses limites. Ainsi je suis enclin à croire que c'est à ces corporations à porter les actions de la nature de celle dont il s'agit ici; dans lesquelles les individus n'ont aucun intérêt particulier et personnel.

S'il en est ainsi et que ce soit exclusivement à la corporation qu'il était loisible de faire les démarches nécessaires pour faire disparaître l'empiètement, elle avait sûrement quant à la manière et quant au temps de le faire, une discrétion à exercer, en vertu de laquelle il devait lui être loisible de donner au défendeur quelque délai raisonnable pour faire remettre son quai au niveau où il devait être; et il me semble que ce n'est pas aux demandeurs, qui ne souffrent nullement de cet état de choses actuel, à se plaindre du délai accordé; et s'ils ont droit de se plaindre, c'est à la corporation qu'ils doivent s'adresser et non au défendeur.

Pour les deux raisons mentionnées aux exceptions du défendeur, il me paraît que l'action des demandeurs aurait dû être renvoyée.

Mais l'on a fait en appel, une objection bien grave à l'action des demandeurs, laquelle ne paraît pas avoir attiré l'attention en Cour de première instance, qui n'est mentionnée dans aucune partie des écritures, ni même dans les factums en appel, c'est lors de l'argument de la cause en appel que l'on a pour la première fois entendu parler de cette objection qui consiste en ce que les demandeurs, qui n'ont aucun intérêt commun, qui ne sont pas propriétaires indivis d'immeubles qui leur appartiendraient en commun et auxquels l'empiétement du défendeur pourrait nuire, portent cependant une seule et même action conjointe, sans montrer l'intérêt commun qu'ils peuvent avoir dans une telle poursuite.

Il ne me paraît pas douteux que cette procédure est vicieuse et aurait dû produire le renvoi de l'action, si l'objection avait été prise à temps et par le mode convenable.

Reste à savoir si, ex officio, cette Cour ne doit pas suppléer cette omission des parties, et si cette objection n'est pas une de celles que la Cour doit suppléer lorsque les parties les ont négligées.

Pour cette raison et pour les autres, savoir, le défaut de droit de poursuivre chez les demandeurs, et le délai accordé par la Corporation, je pense que le jugement doit être infirmé et l'action renvoyée.

BADGLEY, J. :—In the village municipality of Boucherville, the main street ran through the village to the River, and at that extremity the bank of the river was very scarp and not easily used by carts or vehicles of any kind, either in summer or winter. The street was of the breadth of 20 to 22 feet and has been constituted in its length a public street under competent authority many years since. The appellant owned the corner water lot on one side of the street and Benard owned the opposite corner lot, Ernest Roy being his next neighbour. Both Benard and Bourdon utilized the rear of their lots by extending wharves from them into the river, with the difference that Benard's wharf was wholly in the rear of his own ground, whereas Bourdon extended his wharf upon the street, encroaching 4 feet in width by 33 feet in length. The village municipality under the municipal act alone had the charge and control of all the village streets, and of this one amongst the number, and required Bourdon to remove his obstruction, which he finally agreed to do, when the water should lower in the River. The water did lower in July when it was eight feet from his wharf and within a couple of months afterwards the 8 feet became 25 or 30 feet from the wharf. Notwithstanding this easy accessibility [illegible] end of the wharf [illegible]on, took no steps to fulfil his agreement with the Corporation to reduce the [illegible]th of the 4 feet obstruction, and Benard was therefore obliged to extend his wharf farther than he originally intended, and was put to expense, whilst Bourdon was benefiting without cost by the encroachment on the highway, the encroachment extending along the front of Roy's lot as well as along that of Benard. The municipal authorities having failed to enforce Bourdon's agreement to remove the obstruction, the respondents were advised to institute against him what is technically known as a popular action to compel him to remove his encroachment rom the public thoroughfare. Such popular actions were more frequent formerly

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than they can be since municipalities of one description or another cover the face of the country, and the reason is obvious, because there was no intermediate authority between the public and its constituent individuals and the encroaching trespasser but the crown, which could only act criminally by indictment for nuisance. The common law reserved to the public generally the popular action, that is, an action by an individual sufferer acting as it were for the public in the so called popular action against the trespasser to remove the public encroachment. In such actions the plaintiff always claimed damages as against the public encroachment and its author, but this was not essential for the maintenance of the action. Many cases of this description are to be found in our judicial archives. Two will be mentioned, one decided in the Court of K. B. by judges Rolland, Gale and Day, Vallée *vs.* Hamel; the other in the Court of Appeals, Chief Justice Sewell presiding, Porteous *vs.* Eno dit Deschamps. In neither of these were damages claimed allowed, but in both the popular action was maintained. No one [illegible] on or off the Bench, at present would undertake to question the great [illegible] learning and acumen of that eminent Chief Justice, and [illegible] the case cited was clearly sound law. The judgment of the S. C. is precisely similar in principle with the judgments rendered in those cases, refusing the claim for damages, but maintaining the popular action and enjoining the removal of the encroachment. Had the municipal law not changed and abated these popular rights, it would have required some very dogmatic authority to set aside those judgments; but the municipal law has taken its street authority into the power of the municipality alone, and the popular action can no longer avail to individuals; they may compel the municipal authorities to enforce the removal of encroachments on the public thoroughfare, but they cannot any longer themselves enforce the removal. If the individual or the public retained the popular right, the encroacher might be subjected not to one but to a hundred actions, which would be a gross injustice and would be intolerable. The popular action then, in this case, cannot arise in a place where a legal municipality exists. The union of the two respondents in the one action is also objectionable, as claiming together the same damages; it is, however, unnecessary to enlarge upon this objection, there being no action in the case, and, therefore, the judgment of the S. C. must be reversed.

Le jugement rendu sur l'appel est motivé comme suit:

La Cour considérant en droit d'après la loi et notamment par l'acte chapitre 24 des Statuts Refondus du Bas-Canada, les terrains occupés par des chemins ou rues publiques appartiennent aux municipalités locales dans lesquelles ils sont situés, que ces chemins et rues sont sous le contrôle, garde et surveillance des dites municipalités, qu'il est en leur pouvoir et [illegible] leur devoir de faire tenir en ordre les dits chemins et rues et d'en faire [illegible] les obstructions et empiètements; considérant que ce droit appart[illegible] exclusivement aux dites municipalités dans leurs limites respectives et [illegible] individus, à moins que de ces empiètements il ne résulte des dommages [illegible] spéciaux dont ils souffrent personnellement, seul cas où il leur soit loisible [illegible] poursuivre, tant pour la réparation des dommages éprouvés que pour les faire [illegible] et se protéger contre l'avenir.

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Considérant que par suite de ce droit de contrôle et surveillance appartenant aux dites municipalités, elles ont une discrétion raisonnable à exercer quant à la manière et au temps de faire supprimer les empiètements sur les dits chemins et rues, dans les cas où ces empiètements ne causent pas aux individus des dommages et inconvénients réels, effectifs et personnels, cas où telle discretion n'existe pas.

Considérant que dans le cas où les individus ont droit d'action, ils ne peuvent se joindre dans une seule et même demande pour obtenir la suppression des obstructions et empiètements dont ils souffrent et les dommages leur en résultant.

Considérant en fait, que par la preuve et autres pièces du dossier, il résulte que les demandeurs n'ont, des empiétements par eux allégués, éprouvé aucun dommage réel et personnel, et ne sont exposés à aucun dommage pour l'avenir, que l'appelant ayant admis l'empiétement dont on se plaint, avait obtenu de la corporation pour le faire disparaître un délai qui, lors de l'action, n'était pas encore expiré, que les demandeurs intimés, quoique n'ayant aucun intérêt commun, se sont cependant joints dans l'action qu'ils ont portée.

Considérant que pour toutes ces raisons dans le jugement dont est appel, savoir le jugement rendu, &c., il y a erreur et mal jugé en ordonnant la démolition du quai en question en cette cause, casse et infirme, &c.

Jugement infirmé.

Leblanc & Cassidy, avocats de l'appelant.

Dorion, Dorion, & Geoffrion, avocats des intimés.

(P.R.L.)

COUR DU BANC DE LA REINE, 1870.

(EN APPEL.)

MONTREAL, 10 SEPTEMBRE, 1870.

Coram CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

No 12.

MICHEL LANDRY, Fils,

(*Demandeur en Cour Inférieure,*)

APPELANT;

ET

PIERRE EMILE MIGNAULT ET AL.,

(*Défendeurs en Cour Inférieure,*)

INTIMES.

JUGE :—Qu'un bref de prohibition adressé à une corporation, doit l'être à elle-même en son nom corporatif et non pas aux officiers publics qui la composent.

Le jugement rendu en cette cause par la Cour de Révision, à Montréal, le 30 Octobre 1869, infirmant le jugement de la Cour de première instance, est rapporté au 13 vol. du L. C. Jurist, page 325.

Dans son factum l'appelant a exposé ses prétentions comme suit :

La question à décider en cette cause se rapporte à la manière d'adresser le Bref de Prohibition, lorsqu'un litige est soumis à des juges qui n'ont aucune juridiction pour en prendre connaissance.

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Voici les faits :

Par le chapitre 6 des Statuts Refondus du Canada, concernant les élections aux assemblées législatives, il est statué que l'enrégistrement des votes ne se fera que d'après des listes d'électeurs qui, pour être valides, doivent passer par le creuset de la justice et être revisées et homologuées judiciairement par un tribunal spécial. Par la section 12, c'est le conseil de la Paroisse, dans les campagnes, qui est ce tribunal spécial, et dans les cités, c'est un bureau de réviseurs.

Le 15 Juillet 1867, le conseil de la Paroisse de St. David, dans le comté d'Yamaska, après avoir revisé la liste des électeurs de la paroisse de St. David pour l'année 1867, a rendu un jugement homologuant cette liste, sans que personne se soit présentée pour objecter à cette homologation.

Le 29 Juillet 1867, les Intimés Pierre Emile Mignault, Archibald Campbell Wurtele, Aimé Champagne, Charles C. Sheppard, Vivienne C. Wurtele, Michel Lambert, Pierre Pinard et Benjamin Thérien ont porté appel devant le conseil du comté d'Yamaska, du dit Jugement d'homologation, en déposant au bureau du dit conseil de comté une Requête d'Appel *adressée* comme suit : *Au Préfet et aux Conseillers du Comté d'Yamaska* (Voir pièce No. 4 du dossier). Sur le dépôt de cette Requête, le Préfet du Comté d'Yamaska a convoqué une assemblée spéciale des conseillers pour le 13 août suivant.

Il ne peut pas exister de doute que les conseillers du Comté d'Yamaska n'avaient aucune jurisdiction pour prendre connaissance d'un pareil appel. Le dit chapitre 6 des Statuts Refondus du Canada organise des procédures et des jurisdictions spéciales, exclusivement pour des fins politiques, absolument étrangères aux fins municipales. La section 12 dit bien, il est vrai, que les listes électorales seront revisées de la même manière et par la même autorité que les rôles d'évaluation, mais l'intention de cette section et des deux sous-sections de cette section n'est pas autre que de créer le tribunal spécial qui doit dans chaque localité reviser, *en première instance*, les listes électorales, et régler les contestations qui peuvent surgir entre les électeurs d'une localité à propos de la liste électorale de cette localité. La section a encore pour but d'indiquer la forme de procéder devant ce tribunal spécial, lorsqu'il n'y a pas de contestation. La manière de procéder devant ce tribunal spécial de *première instance*, lorsqu'il y a des *contestations à régler*, est indiquée dans la section 13 et les sous-sections de cette section 13.

Après l'organisation, dans les sections 12 et 13 du tribunal spécial, qui doit réviser et homologuer, *en première instance* et avec certaines formalités les listes électorales, la section 14 et ses sous-sections organise une jurisdiction d'Appel, mais indique les formes à suivre pour procéder à tel Appel. Cet appel n'est donné qu'à ceux seulement qui ont porté plainte contre la liste électorale devant le tribunal de *première instance*; l'Appel ne peut avoir lieu que du jugement intervenu sur la plainte ou contestation portée contre la liste électorale. Lorsqu'il n'y a pas tel plainte portée et que conséquemment la liste est homologuée sans contestation, il n'y a pas d'appel.

La Jurisdiction d'Appel organisée par la section 14 est la Cour Supérieure ou la Cour de Circuit, qui seules ont jurisdiction pour prendre connaissance d'un

appel de l'homologation d'une liste électorale ou plutôt d'un jugement sur une plainte portée contre la liste électorale.

Or dans le cas dont il s'agit, les signataires de la dite Requête d'Appel, savoir les intimés P. E. Mignault et autres, n'avaient pas porté plainte devant le conseil ou tribunal de St. David contre la liste électorale et portaient appel devant un tribunal absolument incompétent.

Pour ces deux raisons, il n'y a pas de doute que les intimés Pierre Emile Mignault et les autres signataires de la dite Requête d'Appel, sollicitaient du Préfet et des conseillers du Comté d'Yamaska, l'exercice d'un pouvoir judiciaire qui ne leur avait pas été délégué par l'autorité, et qu'en s'érigeant en tribunal d'appel pour faire droit à la dite Requête d'Appel, les dits Préfet et conseillers municipaux s'arrogeaient une juridiction qu'ils n'avaient pas et auraient fait un étrange abus de pouvoir. Tout électeur de St. David dont le nom était inscrit sur la liste soumise à la révision avait donc intérêt à prévenir une pareille empiétation de juridiction, et le seul remède était le recours au Writ de prohibition.

Aussi le 12 août, jour précédant la réunion des Conseillers du Comté d'Yamaska, Michel Landry, l'appelant, un électeur de St. David et dont le nom était inséré à la liste d'électeurs dont il s'agissait, a demandé et obtenu du Juge résidant dans le District de Richelieu, le Bref de Prohibition émané en cette cause qui a été adressé aux Intimés, savoir, à Pierre Emile Mignault et les autres signataires de la dite Requête d'Appel, et au Préfet et aux conseillers du comté d'Yamaska à qui la dite requête d'Appel était adressée. Le Bref se trouve ainsi adressé aux parties sollicitant la jurisdiction et aux Juges dont on sollicitait la jurisdiction; comme cela se pratique en Angleterre et aux Etats-Unis, ainsi comme il sera démontré ci-après, et comme cela s'est toujours pratiqué dans ce pays ci.

A ce bref, les Intimés, moins deux conseillers, Fortier et Beaupré, se sont unis pour la défense, et ont plaidé une Exception à la forme demandant l'annulation du Bref de Prohibition pour les deux raisons suivantes, les seules données.

1o. "Parceque le dit Bref de prohibition a été adressé aux Répondants (les "Intimés) en leur qualité individuelle, et que le conseil municipal du Comté "d'Yamaska ou la corporation du dit Comté n'a jamais été assignée. 2o. "Parceque la Requête d'Appel des Répondants étant adressée au conseil municipal du comté d'Yamaska, rien ne pouvait empêcher le dit conseil de rendre "connaissance de l'Appel des Répondants, attendu que le Bref ne lui était pas "adressé et ne lui a jamais été signifié."

C'est cette exception à la forme qui donne lieu au présent litige et qui soulève une seule question, la suivante:

Le Bref de Prohibition est-il, suivant la prétention de l'Appelant, valablement adressé, en l'étant aux membres du Conseil du Comté d'Yamaska à qui était adressée la Requête d'Appel qu'il s'agissait de prohiber et aux parties signataires de la dite Requête d'Appel; ou: devait-il, suivant la prétention des Intimés, être adressé à la Corporation du Comté d'Yamaska?

Il y a une grande différence entre défendre avant le fait, comme dans le cas actuel, à chacun des membres, formant le bureau de direction d'une corporation, de prendre part à tel ou tel acte que la corporation est en voie d'exécuter, et

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poursuivre, en responsabilité, après le fait, chaque membre, pour un acte collectif de la corporation, qui ne pouvait être exécuté que par la corporation seule et non par chacun des membres en particulier, comme dans les causes citées par la cour de [illegible] Quinn. La défense de procéder s'adresse personnellement aux membres, tandis que l'action en indemnité ne se poursuit que contre la corporation, parce que seule elle est responsable de son acte.

Enfin soit que le Conseil du Comté d'Yamaska représentât ou ne représentât pas la Corporation du Comté d'Yamaska, pour les fins de l'Appel qu'il s'agissait de prohiber, il y a toujours [illegible] bien certain, c'est que le conseil devait siéger sur l'Appel en question comme tribunal judiciaire, et que les membres du Conseil étaient les juges, composant ce tribunal. Or pour empêcher à son préjudice l'exercice illégale d'une juridiction non-autorisée, l'Appelant devait assigner et mettre en cause et ceux qui provoquaient cette attribution illégale d'une juridiction et ceux qui s'arrogeaient un pouvoir judiciaire qu'ils n'avaient pas; tous ceux enfin qui contribuaient à l'exercice de cette juridiction inautorisée, de manière à les constituer en *mépris de Cour* et les rendre sujets à la contrainte par corps, s'ils n'obéissaient pas au Writ de prohibition.

L'Appelant a suivi en cela les formes et la pratique suivies en Angleterre et suivies aussi aux Etats-Unis. Les autorités qui suivent le font voir surabondamment.

Blackstone, vol. 4 de l'Edition Française, page 182, dit :

" Il (le Writ de Prohibition) *est adressé aux Juges et aux parties intéressées*
" *au procès*, dans quelque Cour Inférieure que ce soit, et *leur enjoint* de cesser
" de suivre l'affaire d'après l'allégation ou suggestion portant, que la cause prin-
" cipale, ou quelqu'une des questions incidentes auxquelles elle a donné lieu, ne
" sont pas dans les attributions de ce tribunal, mais dans celles de quelqu'autre
" cour."

Plus loin, page 183, même vol. il ajoute :

" Et si le *Juge ou la partie* persistent après la prohibition, il peut être décerné
" contre eux pour les punir de leur désobéissance, un *Writ d'attachement*, à la
" discrétion de la Cour dont il émane."

A la page 184, même vol., il donne les formalités à observer pour ces procédures.

" Voici en abrégé, dit-il, les formes de ces procédures. La partie qui se croit
" grévée dans le tribunal inférieur s'adresse à la Cour Supérieure et lui expose
" par une déclaration (*suggestion*) enrégistrée, la nature et le motif de sa plainte,
" alléguant qu'il a été traduit *et aliud examen*, par une jurisdiction ou par une
" sorte de procédure que n'autorisent pas les lois du Royaume. En conséquence,
" si l'allégation paraît suffisante à la Cour, le Writ de Prohibition est immédia-
" tement accordé, et enjoint *au Juge de ne plus connaître de l'affaire et à la*
" *partie de cesser ses poursuites.*"

Lloyd on Prohibition, dit, à la page 1.

" A prohibition is an original Writ, issuing out of a Court of competent autho-
" rity, and *directed to the Judge* of an inferior Court, or *any other whom it may*
" *concern*, commanding that no further proceedings be had *in any particular*
" *cause*".....Whenever a Judge has exceeded his authority,

" the law implies that he has been guilty of a *contempt of the crown* and that he " has caused damage to the party, *he is therefore liable to an attachment*, for " the original excess of jurisdiction. Laudry et Miguault et al.

Page 2. —" A prohibition is, in many respects, the converse of a *Mandamus* ; " and as the one issues when something is not done that ought to be done, the " other goes when something is done that ought not to be done."

" Prohibitions are of two kinds, absolute and conditional ; an absolute prohi- " bition commands the parties to *whom it is directed to* surcease, and there- " upon they cannot proceed until a consultation be awarded.

Page 8,—" And not only will the superior courts interfere with inferior courts " when they exceed their jurisdiction, but the remedy by prohibition is also ap- " plicable to a variety of other cases. *Thus if one claims power to administer* " *justice when he has none*, as etc..... So also it seems that the writ will lie " to *restrain a public nuisance*. (Here divers authorities are cited). It will " also lie to commissioners who, though *not a continuing court, at times* act in " a *judicial capacity* and even in some cases, *when they act only ministerially*. Thus in the case of Chabot vs. The Commissioners of Woods, it was held that " a Prohibition would lie *to a Sheriff* who had summoned a jury to inquire into " the value of land under the provisions of an act of Parliament. "

A la page 22, citant les cas où il y a eu lieu au Writ de Prohibition, il dit : " First, where there is no one having the right to interfere in the matter who " can be prohibited. "

A la fin de cet excellent petit ouvrage de M. Lloyd, sur les Writ de Prohibitions, il y a un bon nombre de formules, et dans toutes l'on voit que le Writ de Prohibition est adressé *au Juge* ou à l'*Officier*, que l'on veut réprimer.

Tous les principes sur le Writ de Prohibition sont contenus dans Comyn's Digest, vo. Prohibition. L'on y voit, comme dans Blackstone et Lloyd, que le Writ doit être adressé à la personne même qui prétend exercer un pouvoir judiciaire qu'elle n'a pas, ou excède celui qu'elle a, en même temps qu'aux parties qui sollicitent l'exercice de tel pouvoir.

Moses on *Mandamus*,—page 200, dit : " A writ of Mandamus to a subordinate " judicial tribunal is properly *directed to the Judge* or *Judges of the Court*. " Page 201—The writ is however sometimes directed to the *Judges by name* and when the object is to compel the signing of a bill of Exceptions, perhaps this is the advisable practice (The State of Ohio vs Todd et al, 4 O. Reports 351.)

Il ne peut pas y avoir pour cette cause d'autorités plus concluantes, plus *ad rem* que celles ci-dessus citées et si elles veulent dire quelque chose, c'est que le Writ de Prohibition est une *prise à partie* contre l'Officier même ou le Juge, qui s'arroge une jurisdiction qu'il n'a pas, sur le principe que telle attribution de jurisdiction est *un attentat aux droits de la Couronne*, qui le rend personnellement responsable ; que c'est à lui-même que le Writ de Prohibition s'adresse pour lui défendre personnellement de procéder et, s'il procède, malgré le Writ qui lui est signifié, il s'expose à un *Writ d'attachment* pour désobéissance.

En présence de ces autorités, il est bien permis de croire que cette Cour maintiendra le writ émané en cette cause et renverra la seule objection soulevée par l'Exception à la forme.

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Les Intimés prétendaient dans leur factum : Que le writ de prohibition aurait dû être adressé et signifié à la corporation du Comté d'Yamaska et non aux membres individuellement du Conseil de la dite Corporation. L'article 1031 du Code de Procédure du Bas-Canada dit que le Bref de Prohibition est adressé à tout tribunal inférieur qui excède sa jurisdiction. Il est poursuivi, obtenu et exécuté comme le Bref de Mandamus, avec les mêmes formalités. La sous-section 2 de la section 12 du chapitre 82 des Statuts Refondus du Bas-Canada, Chap. 88, dit que la signification du Mandamus se fait de la même manière que dans les cas où une personne a usurpé, pris sans permission ou détenu illégalement une charge publique ou franchise ou dans lesquels une Corporation, corps ou bureau public a forfait sa charte.

Or, dit la sous-section 3 de la section 9 du chap. 88 des Statuts, lorsqu'une Corporation, corps ou bureau public sera poursuivi pour avoir exercé aucune franchise ou privilége qui ne lui est pas conféré par la loi, la signification du Bref d'Assignation lui sera faite en laissant de vraies copies de tel Bref d'assignation et déclaration ou Requête libellée, soit au Maire, Président ou autre officier en chef, ou au sécrétaire ou au trésorier de telle association, corporation, corps ou bureau public.

De sorte qu'à moins de mettre le Statut de côté, la signification faite aux Intimés en cette cause individuellement est nulle et d'aucune valeur.

D'ailleurs les lois sur les Corporations sont claires et bien connues. Toute Corporation municipale poursuit et est poursuivie sous son nom collectif. Nos Statuts affirment cette loi à plusieurs endroits, entr'autres à la section 13, chapitre 24, page 158.

Et si maintenant on consulte les autorités anglaises sur la signification du writ de Mandamus, on voit qu'elles sont encore plus explicites.

Willcock *on Corporations*, page 397, section 161, dit que le " Mandamus if directed to a Corporation ought to be served upon the Mayor, "

Non seulement la signification du Bref de Prohibition est nulle, mais la direction ou signification de la requête et la sommation ou injonction du Bref le sont aussi pour les mêmes raisons.

Il suffit de citer sur ce point Willcock à la page 388, sections 131—141.

Voici ce que dit en particulier la section 132 : " If the act commanded must " be done by the whole Corporation, the writ ought to be directed to them in " their Corporate name, and neither by an enumeration of the classes of which the " Corporation consists nor to all the members as individuals."

La section 140 dit : " the writ must not only be directed to the Corporation or " select body in their proper name, but also in their proper capacity, and the ap- " plication must state plainly in what capacity it is intended that the writ shall " be directed to them."

Il n'appert nullement que le Conseil du Comté d'Yamaska n'avait pas le droit de prendre connaissance de l'appel porté devant lui ; au contraire, on sait que les Conseils de Comté ont jurisdiction dans ces matières, et qu'ils ont droit de réviser les listes d'élection, en vertu de la section 6 du chap. 24 des Statuts du Canada.

Où voit-on de plus l'intention de la corporation de prendre connaissance de cet appel ? Qui dit qu'elle ne l'eût pas rejeté s'il n'avait pas été fait conformément

à la loi ? Et comment l'absence de remède pouvait-elle apparaître quand la loi déclare qu'il y a appel des décisions des Conseils de Comté en ces sortes de matières à la Cour Supérieure ?

En sorte que le besoin de ce Writ de prohibition n'apparaît nullement dans la demande du Requérant, et c'est une informalité fatale que les Intimés avaient droit d'invoquer par une exception à la forme.

Quand on consulte le petit nombre d'auteurs qui ont traité du writ de prohibition, on voit que celui émané en cette cause est dénué de toutes les formalités requises et des allégués qui sont essentiels à la substance de ce writ.

Hennen's Digest, P. 1314 au mot Prohibition, page 13, dit ce qui suit : "the "writ of prohibition is an extraordinary one, and should be issued in cases only "of great necessity clearly shown, and when the party has in vain applied to the "Inferior Tribunals for relief."

Dans une cause de Smart vs. Wolf rapportée dans Petersdorf's Abridgment, vol. 14, page 63, au mot Prohibition, il a été jugé que dans le cas de prohibition la question est de savoir si la Cour a juridiction et non pas si cette juridiction s'exerce d'une manière formelle et régulière.

MONK, J., dissenting.—The question was whether the writ was properly directed. It was directed to certain persons as composing the corporation. It was served upon them personally, and not upon the secretary. They appeared in their individual capacity because they contended they had been improperly served. The Corporation as a body did not appear at all. His Honor thought the writ was properly directed.

BADGLEY, J.—The writ of prohibition in this case is addressed to individuals said to compose the municipal Board, but it is not addressed to the corporation or Board itself. The Statute directs that writs of prohibition shall issue to known bodies, Corporations, Boards, etc., and the writ would not be bad because it named the individuals composing the body, provided at the same time, it was directed to the body. The writ of prohibition allowed by the statute only recognizes the body, it does not recognize the individual components forming the body, and the reason of it is plain: because unless the body is coerced and prohibited, the prohibition against its members would be idle, particularly members of the general body,—in this case the County municipality members, who are merely temporary occupants of office and may die or be removed pending the litigation. The 1031 article of the Code of procedure is plain and directs the writ against the body which survives, although the then members may cease to exist. It is possible that the naming in the writ of the individual component members of the body would be mere surplusage if it were directed at the same time to the surviving body, but it is no direction to that body itself by merely naming the members as composing the body. This is in effect a direction to the members individually and not to the body, which is against the Statute. The judgment appealed from is correct and must be confirmed.

Jugement de la Cour de Révision confirmé.

Germain, avocat de l'appelant.

Mousseau & David, avocats des intimés.

(P. B. L.)

COUR DU BANC DE LA REINE.

EN APPEL.

MONTREAL, 10 SEPTEMBRE, 1870.

Coram CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

No. 66.

DAME JULIE LEGAULT DIT DESLAURIERS *et vir*,

(Opposants en Cour Inférieure,)

APPELANTS,

ET

JEAN BAPTISTE BOURQUE,

(Demandeur en Cour Inférieure,)

INTIME.

JUGE :—Qu'un acte authentique passé entre les époux et fait de bonne foi et pour valable considération, en paiement des reprises matrimoniales dues à la femme en vertu d'un jugement en séparation : est un acte valide et légal.

Les appelants par leur factum ont exposé leur cause comme suit :

La Cour Inférieure a repoussé comme mal fondée la proposition des Appelants, " qu'un acte authentique passé entre les époux pour constater le paiement " des reprises matrimoniales dues à la femme en vertu d'un jugement en séparation de biens qu'elle a contre son mari, est un acte valide et autorisé par la " loi."

Le jugement qui a débouté l'opposition des Appelants a été rendu dans la Cour de Circuit pour le District de Montréal, le 30 Décembre 1869, sous la présidence de l'Honorable Juge Mackay, et il est rédigé dans les termes suivants :

" La Cour, après avoir entendu l'Opposante et le Demandeur Contestant " par leurs avocats, tant sur la réponse en droit par la dite Opposante à l'exception péremptoire en premier lieu plaidée par le Demandeur à l'opposition, que " sur le mérite de la dite opposition faite et produite à l'encontre du bref de " saisie-exécution émané contre le Défendeur en cette cause le neuf juillet mil " huit cent soixante-neuf; avoir examiné la procédure, la preuve et les admissions " des parties, et sur le tout délibéré, a renvoyé la dite réponse en droit, et considérant l'opposition de la dite Opposante mal fondée et la contestation d'icelle " bien fondée, maintient la dite contestation et déboute la dite opposition avec " dépens, dont distraction est accordée à Messieurs Moreau, Ouimet et Lacoste, " Procureurs du Demandeur et contestant."

Les termes de ce jugement sont si généraux qu'ils ne nous apprennent rien sur les questions de droit et de fait soulevées dans la cause. Il est donc nécessaire de définir en peu de mots la position respective prise par les plaideurs dans la Cour Inférieure, et de rapporter de mémoire les remarques faites par l'honorable Juge en rendant sa décision ; remarques que les Appelants regrettent de ne pas voir introduites et condensées dans un considérant spécial du jugement même.

Declauriers et Bourque.

Or voici les faits qui ont donné lieu au débat élevé entre les parties en cette cause. Le 21 septembre 1868, l'Appelante, Dame Julie Legault, dit Declauriers, obtient dans la Cour Supérieure à Montréal, un jugement en séparation de biens contre son mari, Pierre Campeau. Elle renonce à la communauté par un acte passé à Vaudreuil, devant le notaire Brulé, le 25 septembre 1868 : cet acte est transcrit suivant la loi dans le bureau d'enrégistrement du Comté de Vaudreuil le 29 du même mois. Un praticien est ensuite nommé suivant l'usage, pour constater les droits et reprises matrimoniales de l'appelante contre son mari; et sur son rapport, la Cour Supérieure à Montréal, le 20 octobre 1868, rend un jugement final condamnant le dit Pierre Campeau à payer à l'Appelante, son épouse, la somme de $1183,33, avec intérêt à compter du 23 avril 1868, et les dépens qui furent taxés à $107.50. Tout ce que le dit Pierre Campeau possédait en biens meubles et effets mobiliers ayant été vendu judiciairement le 29 septembre 1868, à la poursuite de Léon Groulx, un autre de ses créanciers, l'Appelante dut se pourvoir contre la terre de son mari pour le paiement du jugement qu'elle avait contre lui. Cette terre fut saisie par le Shérif du District de Montréal, le 24 novembre 1868, et la vente en fut annoncée et fixée au 29 mars 1869. Le Shérif ne s'aperçut qu'à la dernière heure que le jour qu'il avait ainsi fixé pour la vente, était le lendemain de Pâques, c'est-à-dire un jour férié et non juridique ; et il fut obligé de discontinuer ses procédés sur l'exécution. L'Appelante fait saisir de nouveau le 7 juillet 1869, la terre de son mari, dont la vente est fixée cette fois au 11 novembre 1869. Mais comme le mari se trouve sans ressources pour cultiver sa terre durant le temps qui va s'écouler entre la saisie et la vente, sans grains pour l'ensemencer, sans aucun crédit après la vente judiciaire de ses biens meubles et effets mobiliers qui avait rapporté à ses créanciers le chiffre assez marquant de $364.27, pour un cultivateur ordinaire ; comme la terre devra nécessairement demeurer improductive et sans culture durant l'année 1869, à moins qu'elle ne sorte des mains du mari, les Appelants passent le 7 mai 1869, devant le notaire Brulé, à Vaudreuil, un bail par lequel le mari loue sa terre à sa femme jusqu'au mois de novembre 1869, pour le prix de $100, outre les rentes seigneuriales et les taxes municipales et scholaires, en déduction et paiement d'autant du jugement qu'elle avait contre lui. Notons, en passant, que ce bail donne à l'appelante tout le bois de grève que les eaux de la rivière apporteront sur le rivage de la terre en question pendant la durée du bail ; c'est d'ailleurs l'usage à Vaudreuil où ce bois est considéré comme l'un des revenus de la propriété. Durant que tout cela se passait, l'Intimé, un autre des créanciers du mari, avait obtenu deux jugements contre ce dernier, le premier dans la Cour de Circuit à Montréal, le 21 novembre 1868, pour la somme de $123.50, et l'autre dans la Cour de Circuit à Vaudreuil, pour la somme d'environ $60, le 2 juillet 1869. Le 14 septembre 1869, l'Intimé fit saisir la récolte sur le champ, alors que le grain était à peine coupé : cette saisie a donné lieu à une opposition actuellement pendante dans la Cour de Circuit du Comté de Vaudreuil. Précédemment, l'Intimé avait fait saisir le 15 juillet 1869, le bois de grève amené par les eaux du printemps 1869, sur le rivage de la terre que l'Appelante avait ainsi louée de son mari. C'est le bois ainsi saisi qui a été réclamé par l'Appelante par une opposition dans la Cour de Circuit à Montréal, et qui fait l'objet du litige actuel.

Deslauriers et Bourque.

Cette analyse des faits de la cause ainsi exposés dans leur simple nudité et sans commentaire, est révélée toute entière dans les pièces du dossier et, dans la déposition de l'Intimé lui-même, qui a été examiné comme témoin.

Maintenant au point de vue du droit, la loi de ce pays prohibe-t-elle un acte de la nature de celui intervenu entre les Appelants par le bail du 7 mai 1869?

L'honorable Juge a cité lors du jugement, l'article 1483 de notre Code Civil qui déclare que "le contrat de vente ne peut avoir lieu entre le mari et la femme." Or, si le contrat de vente est prohibé entre les époux, le bail doit l'être également. L'article 1595 du Code Napoléon cité par les Codificateurs du Bas-Canada, reconnait trois cas où le contrat de vente est permis entre les époux, et notamment "celui où l'un des deux époux cède des biens à l'autre, séparé judiciairement d'avec lui, en paiement de ses droits." Or ces trois cas exceptionnels n'ont pas été reproduits dans l'article 1483 de notre Code Civil; et ce silence significatif de nos codificateurs établit manifestement que cet article doit être interprété strictement et à la lettre, et que le contrat de vente entre époux ne peut jamais avoir lieu dans le Bas-Canada. Tel est le résumé des remarques faites par l'honorable Juge lorsqu'il a renvoyé l'opposition des Appelants.

La réponse à cette objection est facile.

Et d'abord il ne s'agit pas ici de vente, mais bien d'un simple bail de 6 mois seulement. La vente est l'un des contrats les plus importants, qui a pour objet l'aliénation même de la propriété, et que la loi civile astreint aux formalités d'une rédaction écrite et d'un acte authentique. Le bail, au contraire, n'est qu'un pur acte d'administration, qu'une question de revenus annuels, qui n'exige aucune forme particulière, qui peut être verbal, et qui résulte même bien souvent d'une présomption née du seul fait de la possession. Nos codificateurs ont sagement reproduit la maxime générale de notre ancien droit, que le contrat de vente n'est pas permis entre les époux. Mais si pour appuyer cette prohibition ils avaient cette puissante raison qu'il ne doit pas être au pouvoir des époux de s'avantager durant le mariage au moyen de ventes ou aliénations des propriétés faites à vil prix, et de changer ainsi la position que la loi ou leur contrat leur avait faite au moment de leur union, nos codificateurs n'avaient pas les mêmes considérations pour défendre également le bail; car la loi laisse sagement les époux, séparés de biens ou non, les juges suprêmes de l'emploi et de la disposition de leurs revenus; libre à eux d'en agir sous ce rapport comme ils l'entendent. Les nullités d'ailleurs sont de droit étroit: elle ne se présument pas et ne s'étendent pas d'un cas à un autre, surtout lorsqu'il y a disparité de motifs et de considérations.

Il n'est pas vrai d'ailleurs, que notre droit réprouve toute vente entre mari et femme, même dans le cas où il s'agit de payer les reprises de cette dernière. Au contraire, non seulement la vente est permise dans ce cas, mais même le mari peut contraindre sa femme à recevoir des immeubles en paiement et remboursement de sa dot. C'est le lieu de dire que l'exception n'est pas une infraction à la règle générale exprimée dans l'article 1483, mais qu'elle en est plutôt la confirmation. Pour se convaincre de l'exactitude de cette proposition, il suffit de jeter un coup d'œil sur le rapport des Codificateurs, et sur les auteurs cités par eux au bas de l'article en question.

Deslauriers et Bourque.

Qui ne voit d'ailleurs qu'une vente, ou qu'un bail, sous de semblables circonstances, n'est pas autre chose qu'une dation en paiement? Faudra-t-il donc qu'à l'avenir les époux séparés de biens ne puissent s'acquitter l'un envers l'autre qu'au moyen de saisies et d'expropriations judiciaires? Faudra-t-il que là où doivent régner la concorde, l'union, l'harmonie dans les relations de la famille, les questions d'argent, beaucoup moins importantes, ne puissent être débattues et résolues définitivement que par la main des huissiers et avec tout l'appareil forcé des contraintes et des saisies? Ce serait assurément une étrange interprétation de notre code dont l'œuvre admirable ne doit pas prêter à de pareilles aberrations.

Mais si l'Intimé, dédaignant cette philosophie du droit, insiste sur le sens sévère, positif et absolu que l'honorable Juge a donné à l'article 1483, les Appelants peuvent lui répondre à leur tour par l'article 1312 de notre code, qui n'est pas moins clair et moins explicite et qui se lit ainsi: "La séparation de "biens, quoique prononcée en justice, est sans effet tant qu'elle n'a pas été "exécutée par le paiement réel, constaté par acte authentique, des droits et reprises "de la femme, soit au moins par des procédures aux fins d'obtenir ce paiement." Ainsi donc notre code lui-même reconnait et sanctionne le paiement volontaire des reprises de la femme par le mari; et ce qui devra encore scandaliser davantage l'Intimé, c'est que l'article 1312 semble même, par sa rédaction, donner le pas au paiement volontaire sur la rude voie de l'exécution.

Ainsi justifiés de l'hérésie légale qui leur était reprochée, les Appelants croient devoir dire un mot de cette autre partie de la contestation de leur opposition par l'Intimé, dans laquelle ce dernier accuse le bail du 7 mai 1869, d'être un acte simulé et frauduleux. Cette question n'a pas été touchée par l'honorable Juge, lors du jugement.

La fraude ne se présume pas, surtout lorsqu'un débiteur cherche à s'acquitter envers son créancier.

L'Intimé n'a pas allégué l'insolvabilité de l'Appelant dans sa contestation. Il ne l'a pas prouvée: l'eût-il fait, que cette preuve serait illégale et non avenue. Le Juge doit décider *secundum allegata et probata*.

La séparation judiciaire n'est pas par elle-même une preuve de l'insolvabilité du mari, puisqu'un simple risque, le péril seul des intérêts de la femme, justifie la demande en séparation aux termes de l'article 1311; et que la femme séparée judiciairement peut, à son choix, accepter ou répudier la communauté.

L'Intimé n'a ni allégué ni prouvé que l'Appelante, lors du bail en question, connaissait l'insolvabilité de son mari, si toutefois cette insolvabilité existe.

L'Appelante a prouvé que la terre de son mari serait demeurée sans culture durant l'année 1869, si elle ne l'eût pas louée et fait ensemencer elle-même. L'on comprend facilement que le mari dépouillé de ses grains et effets par la vente mobilière qui venait d'avoir lieu chez lui, et dont la terre se trouvait alors sous saisie, aurait pu difficilement se procurer la semence et les argents nécessaires pour l'exploitation de la ferme. Même s'il eût pu le faire, il serait dur de blâmer son inaction; car l'on n'a pas encore trouvé et l'on ne verra probablement jamais un débiteur avoir l'héroïsme de cultiver une terre sous saisie, lorsqu'il a la certitude morale que le fruit de ses travaux, au lieu de subvenir à

Desjardins et Bourque.

la vie et aux besoins de sa famille, sera absorbé tout entier dans le gouffre béant de ses créanciers.

Sous ces circonstances, loin de commettre une fraude, n'était-ce pas un service que l'Appelante rendait à la masse entière des créanciers en prenant sur elle la charge du cultiver la terre de son mari et en dégrévant cette terre d'une somme de cent piastres, par la quittance d'autant qu'elle donnait sur le jugement qu'elle avait contre lui? N'était-ce pas donner $100 de plus aux créanciers inscrits après elle? L'Intimé et les autres créanciers du mari y auraient-ils gagné davantage si la terre de leur débiteur était demeurée sans culture cette année-là?

CARON, J.—L'appelante ayant obtenu un jugement en séparation contre son mari, Pierre Campeau, a fait exécuter cette séparation et liquider ses droits qui se sont trouvés monter à une somme assez considérable, en paiement de laquelle elle a fait saisir un immeuble appartenant à son mari; ses meubles ayant été saisis et vendus auparavant à la poursuite d'un autre créancier. Le Demandeur, Intimé, aussi créancier du dit Campeau, a fait saisir comme appartenant à ce dernier, une certaine quantité de bois de grève et billots qui se trouvait, lors de cette saisie, sur la terre du dit Pierre Campeau, le mari de l'Appelante.

L'Appelante a fait opposition à cette saisie, prétendant que cette quantité de bois lui appartenait et non à son mari, en vertu du bail que ce dernier lui avait consenti le 7 Mai 1869, de la terre sur laquelle ce bois avait été saisi; que ce bois apporté par les eaux sur la grève de la dite terre faisant partie des revenus de cette terre, lui appartenait en vertu du dit bail, lequel est en forme authentique et a été consenti pour la somme de $100, laquelle est déclarée par l'acte être à compte et en déduction du jugement obtenu contre son mari par l'opposante comme susdit.

L'opposition est en substance fondée sur ces allégués qu'il faut voir rapportés plus au long au factum de l'Intimé page 1 et 2.

L'Intimé, demandeur, saisissant, a contesté cette opposition par une exception, se pouvant résumer comme suit:

1o. Le bail invoqué par l'opposante est nul, étant une vente ou équivalent à une vente faite par le mari à sa femme, ce qui est prohibé par l'art. 1483 du Code Civil Canadien.

2o. Que ce bail est simulé, frauduleux, fait en fraude des créanciers dans un temps où le défendeur (mari de l'opposante) était insolvable, à la connaissance de l'Appelante.

3o. Que quand même ce bail ne serait ni illégal, ni frauduleux, ou simulé, il n'aurait pas encore, sous les circonstances, l'effet de transporter à l'opposante, la propriété des effets saisis, et qu'elle réclame, n'y ayant jamais eu de mise en possession, et le défendeur Campeau étant comme devant rester en possession de la terre et autres objets baillés.

L'opposante a produit à cette exception une défense en Droit qui est sans importance, ne faisant que nier les propositions de droit émises par l'Intimé en son exception.

L'enquête n'a révélé aucuns faits importants, qui ne fussent pas admis par les parties dans leurs procédures respectives.

Le jugement de la Cour de Circuit (Mackay, juge,) du trente Décembre 1869, a renvoyé la défense en Droit de l'opposante aussi bien que son opposition même.

C'est de ce jugement qu'elle appelle ; il est sans motifs aucuns si ce n'est " que " l'opposition est mal fondée et la contestation bien fondée." Le doute que ce jugement soit correct.

Desaulniers et Bourque.

Les actes faits entre mari et femme sont rarement valables et sont toujours présumés faits dans l'intention de s'avantager et en fraude de quelqu'un ; pourtant il peut y avoir ; et il y a des exceptions, et le cas actuel parait bien en être une. Sur cet important sujet, voir les autorités imprimées, produites de la part de l'Appelante.

La femme ayant obtenu contre son mari un jugement, le condamnant à lui payer une somme assez considérable, pour des considérations très-légitimes, se composant de reprises qu'elle avait droit d'exercer sur les biens de son mari, est devenue à cet égard, un des créanciers de ce dernier et ayant, partant, droit d'user de tous les moyens convenables, pour se faire payer de sa créance. Nul doute que tout autre créancier aurait pu prendre du Défendeur le bail qu'il a consenti à l'opposante, pourvû que la chose se fit sans fraude envers les autres créanciers.

Si le mari avait donné à sa femme $100 à compte de son jugement, ce paiement serait-il nul, s'il était fait sans fraude ? sûrement non. S'il pouvait lui donner cent piastres, pourquoi ne pouvait-il pas lui bailler sa terre, à raison de sa valeur, $100, à déduire sur le jugement qu'elle avait contre lui ?

Ce n'est donc pas parce que le bail aurait été fait par le mari à sa femme qu'il serait et devrait être déclaré nul, mais seulement parce qu'il aurait été fait en fraude des créanciers et surtout de l'Intimé, l'un d'eux. Aussi l'existence de cette fraude est-elle une des prétentions de l'Intimé, et l'un des motifs du jugement. Sauf la présomption dont il a été parlé plus haut, je ne vois rien dans la cause, aucun fait qui soit de nature à impliquer la fraude, s'il était attribué à un créancier ordinaire. Au contraire, le mari étant hors d'état d'ensemencer sa terre, il parait bien raisonnable que dans l'intérêt de la famille, elle adoptât par le bail en question le moyen de faire subsister sa famille, sans toutefois perdre rien de ses droits lui résultant du jugement à compte duquel elle devait déduire les $100, montant du loyer convenu et la valeur de ce loyer.

Je suis à me demander comment cette transaction peut être regardée comme frauduleuse et contraire aux intérêts de l'Intimé et des autres créanciers, surtout de ceux qui, comme l'Intimé, n'avaient pas d'hypothèque, sur la terre du Défendeur ou en avaient de postérieures à celle de l'Appelante.

L'art. 1035 du Code Civil cité par l'Intimé, crée bien une présomption de fraude, mais comme toutes les autres, cette présomption se peut détruire par preuve du contraire, preuve qui me parait faite dans le cas actuel, dans lequel au reste, il n'est nullement démontré que le Défendeur fût en déconfiture et qu'il ne lui restait pas assez de biens pour payer ses dettes.

Je suis donc enclin à croire que l'art. 1483 qui prohibe la vente entre mari et femme n'est pas applicable au cas sous considération, et que l'opposante se trouve dans l'exception admise par tous les auteurs et notamment par, Pigeau, II vol. page 196, et Rapports des Codes, II vol. page 29.

Je suis également d'avis que la fraude qui, dans les cas ordinaires, ne se présume pas et doit être prouvée, ne l'a pas été dans l'espèce.

Delaurier et Bourque.

Quant à l'autre question, savoir si en admettant que le bail était légal et non entaché de fraude, il y a eu l'effet de rendre l'opposante propriétaire du *bois* saisi en cette cause, je pense qu'elle doit encore être décidée en faveur de l'appelante.

D'après la preuve, ce bois est un avantage annuel que les eaux apportent sur la terre des divers individus de cette localité; c'est une espèce de revenu de chaque terre sur laquelle ces bois sont disposés. Or ce revenu annuel est sans contredit la propriété du fermier, et lui appartient comme les récoltes et des autres avantages annuels de la terre affermée. Le fait prouvé, que le mari a aidé à recueillir partie de ce bois et a continué à vivre avec sa femme et à travailler sur la terre, n'est d'aucune importance.

Pour toutes ces raisons, je pense que le jugement devrait être infirmé, et il est à regretter qu'il ne contienne pas de motifs; mais il doit être basé, soit sur ce que le bail est nul, comme fait entre mari et femme, soit parce qu'il a été frauduleux et simulé, soit enfin parce qu'il n'a pas eu l'effet de rendre l'Opposante propriétaire des objets saisis. Or chacune de ces propositions me semblent erronées.

Le jugement rendu par la Cour d'Appel est motivé comme suit:

La Cour considérant que le bail sur lequel est fondée l'opposition de l'appelante, n'est, d'après la preuve, ni frauduleux ni simulé, mais parait fait de bonne foi et pour valable considération; considérant qu'un acte ainsi passé est légal et valable quoique fait entre mari et femme; considérant que le bail a eu, d'après les circonstances prouvés, l'effet de rendre l'appelante propriétaire des objets saisis, lesquels lors de cette saisie n'appartenaient pas au mari de l'appelante, mais bien à cette dernière, laquelle partant avait bien droit de s'opposer comme elle l'a fait à la vente des dits objets saisis; considérant que pour ces raisons la dite opposition aurait dû être maintenue tandis qu'elle a été renvoyée par le jugement dont est appel, casse et annulle le dit jugement.

Jugement infirmé et Opposition maintenue.

D. D. Bondy, avocat des Appelants.

Morean, Ouimet et Lacoste, avocats de l'Intimé.

(P. R. L.)

SUPERIOR COURT, 1870.

MONTREAL, 30th NOVEMBER, 1870.

Coram MACKAY, J.

No. 2286.

Carson vs. *Carlisle et al.*

HELD:—Where notice of a motion for security for costs was not given within four days after the return of the action, that the motion must be rejected, though made in the first term after the return.

MACKAY, J.—The motion for security for costs must be rejected in accordance with several decisions already given, by which the practice of the Court has been fixed. If the defendant chooses to proceed by motion, he must give notice within four days from the return of the writ.

L. N. Benjamin, for the Plaintiff.

A. & W. Robertson, for Defendant Carlisle.

Carter & Hatton, for Defendant McConkey.

Motion rejected.

(J. K.)

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 19TH OCTOBER, 1870.

In Chambers.

Coram BADGLEY, J.

WILLIAM MUIR, GEORGE B. MUIR, AND JAMES MUIR, EXECUTORS, APPELLANTS;

AND

JAMES MUIR, RESPONDENT.

HELD:—1. That one party with others jointly appellants has a right to disavow and refuse to participate in any proceedings to appeal to Her Majesty in Privy Council after judgment granting all parties such appeal.

2. That application to enter Bail and security for three joint appellants will be refused and rejected if one of the parties disavows proceedings and refuses to participate therein.

By judgment *in banco* the 9th September, 1870, judgment was rendered unanimously confirming the judgment of the Court below with costs. Appellants were condemned jointly and severally as executors to pay to one of them (James Muir) personally $458. The same day the appellants as executors (they having as such appeared and pleaded together) obtained permission to appeal to Her Majesty in Privy Council, inasmuch as future rights were involved. They all together offered sureties to execute bail bond. James Muir, as executor, disavowed all proceedings, declined to appeal to England, and desisted from judgment granting him as executor an appeal, and then as such objected to security being received or bail bond being given, inasmuch as two executors could not act without the consent or intervention of the third, and he now refusing, no bail bond could be entered for and in behalf of two of the executors appellants.

The parties were heard upon this objection, and after *délibéré*, His Honor citing 6 Nouveau Denizart, Vo. Desaveu, p. 296, and 4 L. C. Reports, p. 103, Clement *v.* Geer, and Pettis and Drummond and Loranger, delivered judgment as follows:

On the application before me and notice of Messrs. Stuart & Snowdon attorneys, of counsel for the said William Muir, George Barclay Muir and James Muir, joint parties and appellants in this cause, in their joint capacity and quality, as in the writ and proceedings therein mentioned, to put in security in appeal to Her Majesty in Her Privy Council in respect of the judgment rendered in the said cause by the Court of Queen's Bench, Appeal side, at Montreal, on the 9th day of September last, and also on the desaveu and objection taken and made by the said James Muir, one of the above named applicants, and by him fyled with documents in support thereof against the said application and proceeding, the said Messrs. Stuart & Snowdon were heard in support of the said application, and Mr. Perkins, attorney, of counsel for the said James Muir, was heard upon the said desaveu and objections by him so taken and

Muir et al., and Muir.

made, it is ordered that the same do stand over for decision upon the above to to-morrow, when the said respective Counsel and the sureties offered now present do attend before me.

19th October.

Messrs. Stuart & Snowdon and Mr. Perkins, the said respective counsel and the said sureties being present, it is ordered that inasmuch as said application was made by said Messrs. Stuart & Snowdon by and on behalf of the said William Muir, George Barclay Muir, and James Muir, jointly and as a joint application by them, and on their behalf, and inasmuch as the said James Muir, one of them, has by law a right to disavow the said application and proceeding, and to refuse to participate or to be a party thereto or therein, or to give or join in such security being given for and on his behalf, and has in fact disavowed and objected to all and every participation in the said application or proceeding, or to be a party thereto as one of the said applicants therefor, the said joint application is rejected.

Stuart & Snowdon, for Appellants.

Perkins & Ramsay, for Respondent.

(J. A. P.)

COURT OF REVIEW, 1870.

MONTREAL, 30TH NOVEMBER, 1870.

Coram BERTHELOT, J., MACKAY, J., AND BEAUDRY, J.

No. 807.

Fordyce vs. *Kearns*.

HELD:—Where a person makes a fire for the purpose of clearing his land, and the fire, in consequence of a high wind suddenly arising, communicates with his neighbour's property, that the person making the fire is liable for the damage thereby occasioned to his neighbour.

This case came up on a judgment of the Superior Court, District of Bedford, rendered 23rd of October, 1869, condemning Defendant to pay $20 damages and costs of the Superior Court.

MACKAY, J., said it had been argued in this case that a man had a perfect right to make fires for the purpose of clearing his land, and then, if by *force majeure* (such as a high wind suddenly arising) the fire communicated with his neighbour's property, that he was not liable. His Honor did not acquiesce in this view of the law, though some authorities had been cited in support of it. Hilliard on Torts says that express negligence must be proved. But *Toullier* is of a contrary opinion, and so is *Domat*, and both hold that though the fire may have been spread by wind, yet the person making it, or originating it, is liable. Vol. XI, No. 155, Toullier.

Judgment confirmed.

Q. C. & Buchanan, and J. J. C. Abbott, Q. C., for Plaintiff.

O'Halloran & Baker, for Defendant.

(J. K.)

COUR SUPERIEURE, 1870.

MONTREAL, 31 MARS 1870.

Coram BERTHELOT, J.

No. 180.

Desbarats & al. vs. *Lemoine & al.*

JUGE:—1. Que sur une défense au fond en droit fondée sur la raison que l'enrégistrement du transport qui fait la base de l'action, n'est pas allégué par les Demandeurs en leur déclaration; la cour se réserve d'adjuger sur icelle lorsque les parties seront entendues au mérite.

Les demandeurs réclamaient des défendeurs le montant d'une obligation par eux consentie en faveur de feu George Desbarats le 1 Février 1862, et transporté aux demandeurs le 16 décembre 1867. Les demandeurs n'ayant pas allégué dans leur déclaration que le transport comportait une hypothèque, n'avaient pas allégué son enrégistrement. Les défendeurs par leur défense au fond en droit ont répondu à cette demande pour entr'autres raisons les suivantes; "Parcequ'il "appert de l'acte d'obligation consenti par les défendeurs à feu George Desbarats "senior, le 1er de Février 1862, devant Huot, notaire, et dont copie est produite "par les demandeurs comme faisant partie de leur déclaration, que le montant de "la dite obligation avait été garanti et assuré par une hypothèque sur trois "immeubles décrits au dit acte d'obligation, et qu'il n'est pas allégué dans la dé-"claration des Demandeurs que le transport du 16 décembre 1867, ait jamais "été enrégistré au bureau d'enrégistrement où sont situés les dits immeubles ni "ailleurs, ni qu'aucun certificat d'enrégistrement de tel transport ait été signifié "aux défendeurs, ou à aucun d'eux."

PER CURIAM.—La cour, après avoir entendu les parties sur la défense en droit et en avoir délibéré, se réserve d'adjuger sur icelle lorsque les parties seront entendues au mérite.

Dorion, Dorion & Geoffrion, avocats des demandeurs.

Barnard & Pagnuelo, avocats des défendeurs.

(P. R. L.)

COUR SUPERIEURE, 1870.

MONTREAL, 30 NOVEMBRE, 1870.

Coram TORRANCE, J.

No. 1142.

Labelle & vir vs. *Labelle.*

JUGE:—Que le débiteur d'une pension alimentaire condamné seul à la payer, est bien fondé à actionner tout autre débiteur d'icelle pension, en déclaration de jugement commun, et le faire condamner à lui payer sa part de telle pension et des frais déjà encourus.

Les demandeurs ayant été poursuivis devant la Cour Supérieure à Montréal (No. 1142) Labelle vs. Labelle & vir, par leur mère et belle-mère pour une pension alimentaire de $5 par mois, intentèrent le 6 de juin 1870 une action contre le défendeur, No. 1142, et alléguèrent que le défendeur est un des enfants issus du mariage de la dite Marie Louise [illegible]nte et de feu Pierre Labelle, et qu'il est dans une position aussi avantageuse que celle des demandeurs, et que partant les demandeurs sont en droit de demander la mise en cause du défendeur pour

Labelle vs. Labelle.

[illegible] payer sa part de la dite pension, savoir $5 par mois et d'avance, et supporter sa part des frais dans la première ac[illegible] les frais de la présente action, et les demandeurs ont conclu à ce que le défendeur fut joint aux demandeurs dans la condamnation que la Cour prononcerait pour le paiement de la dite pension alimentaire, et à ce que le jugement prononçant la dite condamnation fut déclaré commun au dit défendeur, et à ce que le dit défendeur fut condamné à payer à la dite veuve Pierre Labelle, la somme de $5 par mois, payable le premier de chaque mois et d'avance, à commencer le 1er mai alors dernier, et sa part des frais de la première action, et les dépens de la présente action.

Le défendeur a rencontré cette action par une exception, se reconnaissant obligé à sa part de la pension et à sa part des frais sur la première demande comme sur une confession de jugement. Les demandeurs ayant répondu à cette exception et les parties ayant procédé à leur preuve; la Cour a rendu son jugement après audition des parties comme suit :

La Cour, après avoir entendu les parties par leurs avocats sur le mérite; considérant que les demandeurs ont fait preuve des allégués essentiels de leur déclaration, déclare le jugement rendu et prononcé par cette cour le 8 juin 1870 dans une cause où Marie Louise Lapointe est demanderesse contre Dame Martine Labelle & vir, défendeurs, commun au Défendeur en la présente instance, en conséquence condamne ce dernier à payer aux demandeurs les diverses sommes ci-après mentionnées, savoir, celle de $15.23 étant la moitié des frais encourus par la dite Marie Louise Lapointe pour l'obtention du dit jugement du 8 [illegible]in 1870, les dits frais taxés comme dans une action sur confession, celle de [illegible],85 étant la moitié des frais des Défendeurs Dame Martine Labelle & vir, sur dit jugement et celle de $2,50 moitié de celle de $5 que les demandeurs de la présente instance furent condamnés à payer à la dite Dame Lapointe dans et par le susdit jugement, pour pension alimentaire, et ce chaque mois à compter du premier de mai 1870. Et la cour condamne le dit défendeur aux dépens de la présente demande et action comme dans une cause contestée de la dernière classe de cette cour.

Doutre, Doutre & Doutre, avocats des demandeurs.
Dukamel & Rainville, avocats du défendeur.
(P. R. L.)

COUR SUPERIEURE, 1870.

MONTREAL, 30 NOVEMBRE, 1870.

Coram BERTHELOT, J.

No. 2440.

Gariépy vs. *Couvrette*.

JUGE :—Que sur motion, la cour accordera le congé-défaut.

Le demandeur n'ayant pas rapporté son action le 24 de novembre 1870, jour du rapport d'icelle; le défendeur ayant produit sa copie du Bref d'assignation avec sa comparution, fit motion, après avis donné, pour obtenir congé-défaut.

La Cour accorda cette motion et le jugement est comme suit : La Cour, ayant entendu le défendeur sur sa motion du 25 Novembre courant, qu'attendu

qu'une action a été intentée en cette cause sous le présent numéro rapportable le 24 du courant et n'a pas été rapportée, il soit donné acte au dit défendeur de la production par lui faite de la copie du Bref d'assignation de la dite action, que congé défaut lui en soit accordé, et ayant délibéré, accorde la dite motion, en conséquence accorde au dit défendeur son défaut de la dite action avec dépens contre les Demandeurs.

Bélanger & Desnoyers, avocats des Demandeurs.

Valois, avocat du défendeur.

(R. J.)

Gagnon vs. Couvrette.

CIRCUIT [illegible] 1871.

WATERLOO, 21st JANUARY, 1871.

Coram RAMSAY, A. J.

Reeves vs. *Archambault*.

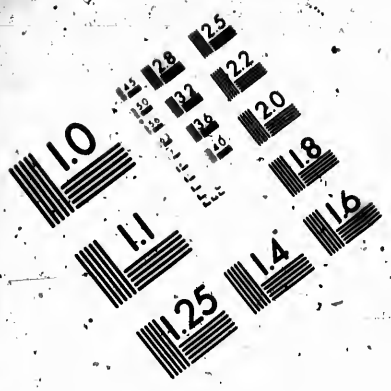
HELD:—That all writs of summons issued from the Circuit Court must be directed to the sheriff or a bailiff of the Superior Court (Arts. 48, 1065, 1067, C.C.P., 33 Vict., Cap. 17, Sect. 1.

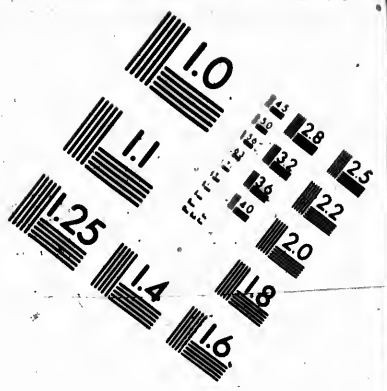
The plaintiff instituted an action in the Circuit Court for the county of Shefford against the defendant, who resides in the adjoining district of St. Francis, for the recovery of a balance due for house rent. The writ was served by a bailiff in that district, without any special address or direction being embodied therein. On the return of the action into Court the defendant appeared and fyled an *exception à la forme*, alleging that the service was irregular and null. First, because the writ was not addressed to the sheriff or a bailiff of the Superior Court for the district of St. Francis, and secondly, because the bailiff who served the said writ had no authority to make such service without a special direction.

At the argument plaintiff relied upon the form given in the appendix to the Code of Civil Procedure, and referred to article 1065, also to the general practice of the Courts.

Defendant's counsel cited articles, 48, 1065 and 1067, of the Code of Civil Procedure.

RAMSAY, A. J.—In this case an objection is made to the service. The return is made by a bailiff of the district of St. Francis, where defendant resides. The action is met by an *exception à la forme* in which defendant says that the writ could only be served by a bailiff in another district, if directed to him, and that this writ was not directed to anybody. Unimportant as this omission may appear to be, the Court must be guided by the letter of the law, which is express. Article 48 says:—"Saving the particular exceptions hereinafter mentioned, writs of summons are directed to any bailiff of the Superior Court, commanding him to summon the defendant to appear before the Court on the day and place therein mentioned." By Article 1065 this is extended to writs of summons, issuing out of the Circuit Court. Art. 1067 then further provides that "when the writ of summons is to be served in another district, it may be addressed to the sheriff or to a bailiff of such other district." The 33 Vict, c. 17, s. 1, consolidating all these provisions enacts:—"All writs, &c.,





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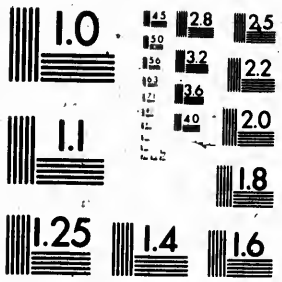

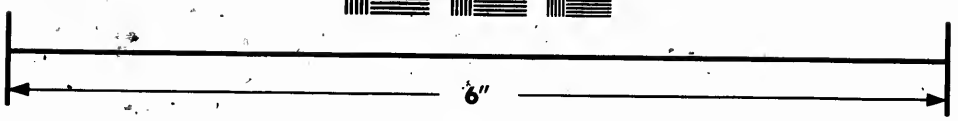

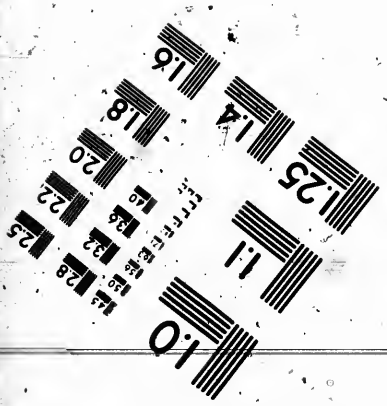

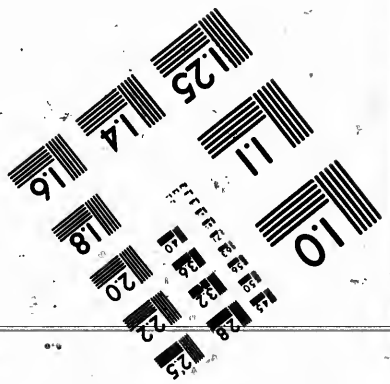

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Reeves vs. Archambault.

issuing either from the Superior or Circuit Court, may be addressed either to the sheriff or to any bailiff of the district in which such writ issues, and may be by them served or executed in such district, or in any other district, or to the sheriff, or to any bailiff of such other district in which such writ is to be served or executed." Now what is this direction to a bailiff or sheriff? Curious to say the form given as referring to Article 1065 gives no form of direction, nevertheless it cannot be maintained that the direction is merely the address of the envelope under which the writ is conveyed to the bailiff or sheriff, for Article 48 says that the direction shall *command him to summon the defendant*. It is therefore the order of the Court expressed by the Prothonotary or Clerk. If this interpretation be correct, the only question that remains is as to the effect of an omission to direct the writ properly. This question is decided by Article 51, which declares that "the formalities mentioned in Articles 46, 48, 49, and 50, are required on pain of nullity." It cannot be doubted that this nullity applies to the Amending Act already cited, (33 Vic.) The defendant must therefore succeed on his *exception à la forme* and the action be dismissed with costs.

Exception maintained.

Huntington, Leblanc, & Noyes, for Plaintiff.
Girard & Girard, for Defendant.
(J. P. N.)

COUR SUPERIEURE, 1870.

MONTREAL, 31 OCTOBRE, 1870.

Coram BERTHELOT, J.

No. 1479.

St. Denis vs. *Bélanger*.

JUGE—Que le rapport de l'huissier, qui constate qu'il a fait la signification entre onze heures et midi, est suffisant.

Le 7 Juin 1869, les avocats du Défendeur firent signifier une exception à la forme aux avocats du Demandeur.

L'huissier fit rapport qu'il avait signifié cette exception le 7 Juin 1869 entre onze heures et midi.

Le 22 septembre 1870, le Demandeur fit motion pour le rejet de cette exception, "pour n'avoir pas été signifiée aux avocats du Demandeur à une heure convena-"ble et légale," lesquels prétendirent que l'huissier aurait dû constater l'heure exacte à laquelle cette signification avait été faite et non pas dire entre telle et telle heure. C. P. C. article 78.

Le jugement de la Cour renvoie cette motion.

La Cour, après avoir entendu les parties par leurs avocats tant sur la motion du Demandeur produite le 22 septembre dernier que sur le mérite de l'exception à la forme plaidée par le dit Défendeur à l'action, a renvoyé la dite motion, et maintient l'exception péremptoire à la forme et renvoie l'action du Demandeur, le tout avec dépens.

Doutre, Doutre & Doutre, avocats du Demandeur.
T. & C. C. de Lorimier, avocats du Défendeur.
(P. B. L.)

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 10TH DECEMBER, 1870.

Coram DUVAL, C. J., CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

No. 29.

WALTER MACFARLANE,
(*Defendant en garantie in the Court below,*)
APPELLANT;

AND

MARTHA DEWEY,
(*Plaintiff en garantie in the Court below,*)
RESPONDENT.

COMPOUNDING FELONY.—CONSENT OBTAINED BY THREATS NULL.

HELD:—1st. A signature to a note having been obtained from an old woman by threats, that if she did not sign, her son would be arrested for stealing money, an action *en garantie* will lie against the person who used the threats and extorted the note, to protect the signer from a judgment obtained by a third innocent *bona fide* holder.

2nd. A son having acknowledged to have stolen $25 from M., the latter, threatening to have the son arrested, induced the mother and son to sign a note in his favor for $400:

HELD.—The note under the circumstances being signed by the mother, under the influence of fear for her son, that there was violence, and no consent or legal consideration, and the mother could not be held liable.

The judgment of the Court below, rendered by the Honorable Mr. Justice BERTHELOT, on 30th May, 1866, was as follows :—

La Cour, après avoir entendu les parties par leurs avocats au mérite sur la demande en garantie, avoir examiné la procédure et la preuve, vu les admissions faites et produites par le défendeur en garantie et avoir sur le tout pleinement délibéré ; Considérant qu'il est prouvé que la demanderesse en garantie a consenti et souscrit le billet du 11 Novembre, 1864, récité dans la déclaration, sans cause valable et légale, par elle eue et reçue du dit Walter Macfarlane, le défendeur en garantie, vû même qu'il n'a été consenti et souscrit par la dite demanderesse en garantie que par suite des menaces que le dit Macfarlane a faites devant elle qu'il ferait arrêter pour vol et félonie le nommé James Struthers, le fils de la dite demanderesse, si cette dernière ne consentait et souscrivait le dit billet en sa faveur, et que sous ces circonstances elle doit être relevée de l'obligation par elle ainsi consentie à cette occasion.

Vû que depuis l'introduction de cette action, la dite demanderesse en garantie a été condamnée par jugement de cette cour, en date du 26 Mars, 1866, au paiement du capital et intérêt et frais de protêt du dit billet du 11 Novembre, 1864, savoir ; la somme de £100 15 avec intérêt sur £100 depuis le 14 Novembre 1864, et sur quinze chelins depuis le 21 Mars, 1866, en faveur du nommé William Minchin, comme porteur du dit billet sur une action intentée par lui sous numéro 2263 contre la dite Martha Dewey et le dit James Struthers, conjointement et solidairement, et en outre, aux frais de la dite action se montant à $58.03.

La Cour vû tout ce que dessus, a condamné et condamne le dit défendeur en garantie à indemniser la dite demanderesse en garantie, tant en principal,

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intérêt, que frais du susdit jugement du 26 Mars, 1866, le tout avec dépens de de cette action distraits, &c.

The facts of the case will appear from the arguments of counsel.

Abbott, J. J. C., Q.C., for Appellant:—The action in which the Judgment now appealed from was rendered in the Court below, was based upon the pretension of Martha Dewey, Widow Struthers, the respondent, that Walter Macfarlane was her *garant* against any suit or action upon a promissory note made by her jointly with one James Struthers, her son, at St. Remi, the 11th November, 1864, by which note she and Struthers, her son, promised jointly and severally to pay £100 cy. to the order of Macfarlane, the appellant, within one year from that date for value received.

This note was endorsed by Macfarlane to William Minchin & Co., the plaintiffs in the main action in the Court below. Minchin & Co. sued the respondent and her son upon it: she then called in the appellant Macfarlane as her *garant*, claiming that he should hold her indemnified against Minchin's claim on the note, on the ground, as alleged in her Declaration *en garantie*, "That the note "was obtained and extorted from her by illegal means, to wit: by menaces and "threats that if she did not sign the same, the appellant would cause the said "Struthers, her son, to be arrested on a charge of having feloniously stolen "money, to wit: $20 and upwards, from him; and thus involve her in ruin and "disgrace; and that such note was obtained without any legal consideration, and "in fact for illegal consideration, to wit: the compounding of a felony."

The appellant and defendant *en garantie*, answered the demand *en garantie*, by alleging that the note was given for a valuable consideration, by Struthers and the respondent, the consideration being a like sum in which Struthers was indebted to the appellant for money belonging to him which Struthers had appropriated to his own use, and which [redacted] appellant insisted that Struthers then actually owed him.

The appellant further alleged by his plea that the respondent never was threatened in any way, nor were any menaces used either to her or to her son, to induce her to sign the note; but that she signed the note at the request of her son as surety for him, upon condition that he would sell and transfer to her all his share and interest, moveable and immoveable, in the estate of the late James Struthers, his father, and her deceased husband; together with all the rights he had as legatee of his father; and that in fulfilment of his promise, and in consideration of her having signed the note as surety, and at his request, the said Struthers by deed of sale executed at the Parish of St. Urbain Premier, on the 24th of November, 1864, before Lebrun and his colleague, notaries, transferred over to the respondent, accepting thereof, his share in the entire succession of his father, consisting of a one-third right therein; in which succession was declared to be comprised a farm in the seigniory of Beauharnois containing about 80 arpents, with a brick house, barn, stables and other buildings thereon erected. And the consideration of that transfer was declared to be the sum of £100 cy., which Struthers thereby acknowledged to have received from his mother, the respondent; but which in reality was the £100 for which she had become security for him by signing the note in question, jointly with him.

The appellant also filed a general answer denying the allegations of the respondent's action, and produced with his pleadings an authentic copy of the transfer made by Struthers to the respondent. Upon the issue thus raised, a judgment was rendered in the Superior Court at Montreal, by Mr. Justice Berthelot; who maintained the action *en garantie*, on the ground that the respondent signed the note in question without legal or valuable consideration, and did so in consequence of the threats which the appellant held out before her, that he would cause her son to be arrested for theft and felony unless she signed it.

And it is from that decision of the court below that this appeal is instituted.

The respondent and plaintiff *en garantie* examined on her behalf Norman Stewart and Isaac Struthers, the two parties who were witnesses to the note in question, and also the appellant himself. She also examined her daughter, Margaret Struthers, who resides in the house with her, and the nature of the transaction as established by their testimony, but chiefly by that of Stewart and Isaac Struthers, who being neighbors and friends of the family, may be regarded as independent and impartial witnesses, is as follows:—

It appears that the appellant is a pedlar; that he was in the habit of lodging in the house of the respondent in St. Remi; that shortly before the note was signed the appellant stayed over Sunday at the house of the respondent; who though not a recognized tavern or hotel keeper, was in the habit of lodging travellers passing that way for pay, and was habitually paid by Macfarlane for his board and lodging when he remained at her house. That during this Sunday, the appellant went to church, and on his return found that money had been taken out of his carpet bag, which he had left in the house. On the following Monday Norman Stuart came to Isaac Struthers, the witness, who was the brother-in-law of the respondent, and told him privately that appellant complained of losing money in Mrs. Struthers' house; and that he wished him, Stuart, to speak to Mrs. Struthers about it as a friend. That James Struthers, meaning the witness's nephew, was suspected of having taken it, and Stuart suggested that if he still had it, he and the witness, Isaac Struthers, might get it from him and there would be no more trouble. Upon that the two men agreed to meet in the evening at Mrs. Struthers' house, for the purpose of endeavoring to get the matter put right. At the time agreed upon, the witnesses Stuart and Isaac Struthers and the appellant met at Mrs. Struthers', the respondent's, house, where James Struthers the nephew was; and upon meeting there, in the presence of the whole family, the appellant asserted that James Struthers had taken the [illegible] out of his carpet bag; reminding him that he had left the church during ser[illegible] the previous day, and that if he did not give him back his money and settle the amount he would take the law of him, or something to that effect. Whereupon Macfarlane, the appellant, went out of the door as if to leave the place, James Struthers followed him, and they subsequently re-entered the house together. James Struthers after some further conversation with the appellant, went out again accompanied by his uncle, the witness. He went to a barrel, took some small amount of money out of it, and returned to the house; and then or soon afterwards, James Struthers acknowledged to have taken $25 and commenced

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writing a note for that amount; the respondent objecting to take so small a sum, insisting that he had taken at least £100, and that he would not take less than that sum. Then the two witnesses appear to have left the room; and they were subsequently called back into the room to serve as witnesses of the note sued upon in the Court below, which had been prepared during their absence. Before signing the note, however, the respondent came out to her brother-in-law, Isaac Struthers, and asked his advice as to whether she would sign it or not, having been asked to sign it by her son. The witness advised her not to sign the note, unless she had confidence in James, (meaning her son) that he would go on the following Monday and assign to her all his claim on his father's property. On this James promised to do so, and she then signed the note, the appellant telling her and the witnesses, that if her son did not keep his promise and transfer his property to her, he would acquit her of one-half of the note.

Stuart describes the conversation which induced the respondent to sign the note in question, at greater length than Isaac Struthers. He states that Macfarlane charged James Struthers in his presence with taking the money, and that Struthers finally acknowledged having done so to the extent of $25, which Macfarlane said was ridiculous, alleging that he had taken a great deal more. That after this acknowledgment Stuart and Isaac Struthers left the room, leaving Macfarlane and James behind, and that shortly afterwards James came out of the room and wanted his mother to sign the note in question, which at first she refused to do.—He then offered her a team of colts if she would do so; she objected, saying that they were not entirely his.—He then offered her his share of the property coming to him from his father. She hesitated for some time, said to Stuart that she was afraid he would go away before he secured her; but only as to the security she was to get from her son; and after he promised faithfully to stay and assign over the property to her, she consented, and signed the note.—And it does not appear by the testimony of either of these witnesses that Macfarlane urged the signature of the note by the mother; but only insisted that if he took the note in lieu of his money, he must have security from James Struthers, who appears to have had no means of his own beyond his share in his father's property.

Both of these witnesses agree in saying that they all understood that the note was given by James Struthers as *restitution of money* actually taken by him from Macfarlane, the appellant; and not by any means as a bribe or consideration for not prosecuting him. The appellant himself was examined, and he confirms the statement of the other two witnesses.—And he further describes the interview he had with the respondent, at which no other witnesses were present. It appears by his statement that the mother, having heard of his suspicions of her son, called upon him at another house where he was stopping after he left her house, and asked him to come down to her house and settle the matter; and that his going there with Norman Stuart and Isaac Struthers was at her express request. And he proves that it was James who applied to his mother to get her signature to the note, and describes in the same manner as Isaac Struthers, Norman Stuart and others do, the negotiations between her and her son as to the interest in his father's property, as a consideration for signing

the note.—Moreover he states that he entered into no agreement or promise that he would not prosecute James Struthers, if he got back his money; but always considered himself quite at liberty to inform against him. And James appears to have taken the same view of his position, as he left the country shortly after the restitution of the money.

The daughter, Margaret Struthers, in most respects confirms the evidence of the other witnesses; though naturally enough, she gives it a color a little more favorable to the respondent than they do. She confirms the statement of the appellant that her mother was in the habit of receiving and lodging people for pay, there being no inn in the neighbourhood where they lived; and describes the negotiations between her mother and her brother, as to the transfer of his share in her father's property, very much as it is described in the testimony of the other witnesses.—She certainly says that her mother signed the note from fright that her son would be arrested, and not in consideration of the transfer of his share of his father's property; but as she also states that her mother refused to sign the note until her brother agreed to transfer the property, the two assertions appear to be irreconcilable.

In a supplementary factum the appellant submitted:—

First, there was a valid obligation on the part of Struthers to repay the money he had taken, and that obligation was a sufficient cause or consideration for the note.

See testimony of Norman Stuart and Isaac Struthers proving that the note was given as representing the money taken, and not at all as a consideration for not prosecuting; also Macfarlane's deposition.

Second, the obligation of the mother is proved to have been incurred as a surety for her son and upon valuable consideration passing from him to her.

If the principal obligation is a valid one, as it has been shown to be, then the accessory obligation of the surety does not depend upon any consideration from the creditors to her, and it is proved that she signed at the request of her son and for value received from him. (Pothier, Obligations, No. 396.)

Third, there was no such constraint (violence) used in obtaining her signature to the note in question, as will render it void or voidable.

The influence upon the mind of the respondent by the fear of an accusation against her son did not constitute *violence* within the meaning of the law, *because the step which the appellant threatened to take was not illegal or unjust.*

"Lors même" (says Boileux, vol. 4, p. 357) "que la violence réunirait les trois caractères que nous venons d'énumérer," (that is to say, that it should be sufficient to influence a reasonable person, that it should be considerable, and that it should be immediate) "pour faire rescinder le contrat il faudrait qu'elle fût injuste, ou contraire aux bonnes mœurs. Or les voies de droit ne peuvent être considéré telles; par exemple la menace faite à une personne de porter contre elle une dénonciation à raison d'une créance ou d'un délit ne suffit pas pour faire restituer cette personne contre l'engagement qu'elle a contracté."

There is a long discussion of this question in 10 Duranton, p. 137 *et seq.* The case of Charret et Tourangin, reported in detail by Duranton, very fully developes the distinction in such a case. Charrett was accused of

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taking Duranton's money, and was threatened by Tourangin and his friends in a house into which they called him belonging to one of them. Charret gave his notes for $2,400, declaring in a separate paper that he did so in reparation of "differens vols, chez Felix Tourangin"; the paper being framed to enable them to convict him of theft if he did not pay his notes.

Charret brought an action to set aside the notes on the ground that they were obtained from him by violence and constraint. The Court, however, dismissed his action, holding that the constraint effected by threats of prosecution was not an illegal constraint, and therefore not a cause of nullity.

Thereupon the Minister of Justice prosecuted Charret for the theft, but he was acquitted.

Then Charret again proceeded by action to set aside the notes on the ground that he had received no consideration for them, and his action was maintained upon the ground that his acquittal established a chose jugée, the fact that no theft had been committed. And the pretention of Tourangin that this judgment conflicted with the first is controverted by the Court of Cassation on the conclusions of Mr. Merlin that there was no discrepancy between the two judgments. For, though the first held that the circumstances did not constitute *violence* or constraint in the eyes of the law, it did not hold that there was a valuable consideration, while the second, holding merely that there was no consideration, rested upon the verdict of acquittal of Charret.

2 Dictionnaire de Droit Civil, Vo. Violence. Il faut de plus (says Zachariae vol. 3, no. 615) que la crainte est la cause dans la menace d'une contrainte illégitime.

There was a valid obligation on the part of Struthers to repay the money he had taken, and that obligation was a sufficient cause or consideration for the note.

Larombière has discussed this question at some length, differing as to the principles which govern the case from other writers, but not in the conclusions he arrives at. His decision is that the obligation obtained by a threat of prosecution for a crime is a valid obligation to the extent to which it may justly be regarded as reparation, (see volume 1, pp. 72 and 73, Nos. 11 and 12) and he suggests that the appreciation of the amount of reparation should be liberal (see No. 12, latter part, citing the above authority from Duranton.) This decision of Larombière really depends more on the question of valuable consideration, than on that of constraint. He says the contract was good in so far as there was a consideration, but bad in so far as there was none, and whether there was violence or not, does not affect this decision. His conclusions therefore are the same as those of the other authors cited, and it may be questioned if his division of the subject, or his reasons, are as good as theirs.

Fourth, that the proposition of the respondent, that the consideration was unfounded and illegal, is unfounded. Because, the only ground upon which such illegality could be alleged is that the note was given by the plaintiff *en garantie* for the compounding of a felony. But it is essential to establish the charge of compounding felony that an actual agreement not to prosecute should be proved. 1 *Bishop*, No. 505.

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In Harding *vs.* Cooper, 1 Starkie 469, a bill was taken by the injured party, and the prosecution was subsequently abandoned, yet it was held that the bill was valid, an actual agreement not to prosecute not having been proved.

Hale says, 1 P. C. p. 618. "A. hath his goods stolen by B," &c. Ward *vs.* Lloyd, 6 Manning and Granger 785, Wallace *vs.* Hardnere, 1 Campbell 45, Harding *vs.* Cooper, 1 Starkie 467, Bishop's Criminal law, No. 505. An agreement not to prosecute cannot be implied, unless it must necessarily be implied from the circumstances, such as the giving up of the evidence of guilt, as in Williams *vs.* Bayley, 1 Law Reports, p. 220, cited by respondent. And this, and the consideration received by the mother from her son, constitute the principal distinguishing points between that case and the present. In that case the agreement was to give up the evidence of guilt, which necessarily implied an agreement not to prosecute. In this case there is neither surrender of evidence nor agreement, and in this case the note was signed after consultation with friends, after bargaining with respect to indemnity from her son, which indemnity he subsequently gave her.

Addison on Contracts, p. 91, 92, "Wherever the act which is the subject of the contract may, according to the circumstances, be lawful or unlawful, it will not be presumed that the contract was to do the illegal act."

This authority is cited as being exactly in accordance with our own law which must govern this case. Besides it is positively sworn by Norman Stuart and Isaac Struthers that the note was *not* given as an "inducement not to prosecute," but *was* given as representing the amount believed to have been taken from the bag. And Macfarlane himself swears to the amount as being about $427.

Fifth.—But if there was a compounding of felony (which is denied) the respondent was *in pari delicto*, and cannot succeed in her action to be relieved from the consequences of her illegal contract.

The principle is that if it be necessary for plaintiff in setting up and making out her case to rely upon the illegality of a transaction to which she was a party, then she can have no remedy from a Court of Justice.

Fivez and Nichols, 2 Manning and Granger, and Scott, p. 502.

1 *Hilliard* 177, 182, 2 *Hilliard* p. 142, *Broom's* Legal Maxims, p. 544—565.

Here the respondent must set up and rely upon the alleged illegal contract, and prove its illegality in order to claim indemnity from her alleged accomplice, as she does by her action *en garantie*, and this is also against the principle of law that there can be no contribution among wrong doers.

Morris, J. L., for respondent.—By her declaration in this cause, the plaintiff *en garantie* alleged: That William Minchin, of Montreal, had instituted an action, number 2263, against her and James Struthers, and the defendant *en garantie* to recover from them jointly and severally $403 with interest, being the amount of a promissory note bearing date at St. Remi, the 11th November, 1864, made by said James Struthers, and the plaintiff *en garantie*, payable one year after date to the order of defendant *en garantie* or bearer, and delivered to him and by him transferred to William Minchin.

That the signature of the plaintiff *en garantie* to the said note was obtained and extorted by illegal means, to wit, by menaces and threats that if she did not

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sign said note the defendant *en garantie* would at once cause the said James Struthers, her son, to be arrested on a charge of having feloniously stolen money, to wit, twenty dollars and upwards, from defendant *en garantie*, and thus involve the plaintiff *en garantie* in ruin and disgrace.

That said note was obtained without any legal consideration, and, in fact, for an illegal consideration, to wit, the compounding of a felony.

Walter Macfarlane, the defendant *en garantie*, pleaded:

That the note was given for a valuable consideration by the makers James Struthers and his mother, to wit, for a like sum in which Struthers was indebted to defendant Macfarlane, for money belonging to him which Struthers had appropriated to his own use and which he then actually owed him.

That plaintiff *en garantie* was never coerced in any way to sign said note, but she signed it as surety for her son James Struthers, at his request and upon his promising to transfer to her his interest in his late father's estate, and that he did do so by deed of date 14th November, 1864. That she therefore got full value for signing the note.

The general issue was also pleaded.

The circumstances under which the note was signed are clearly brought to light by the evidence of record, and are as follows:

The plaintiff *en garantie*, an old woman of sixty-six, and in a poor state of health, lived in a small farm house with her son James and her daughter. Being poor she sometimes allowed occasional travellers whom she knew to stop in her house for a short time, making no charge, but accepting what they gave her.

On Saturday, the 29th October, 1864, Macfarlane put up at her house and remained over night.

Before retiring to bed he placed a bag made out of a towel, and which he alleged to contain money, in his carpet bag, putting the latter under the washstand in his room.

At the same time he remarked that it was a very hard time to get money.

The next day, Sunday, he went to Church with the family.

On Monday morning, he took his bag and went away without saying anything. He returned to dinner and about one o'clock left for good, still not saying anything and apparently without paying anything for his accommodation. A few days after this, he seems to have returned to the house and said something about having lost money. The old mother hearing of it was thrown into a state of great excitement and followed him for a mile or more to the house where he stopped. She then asked him if he had lost money at her house and if he suspected any one of her family, being all the time in great distress and crying. Afterwards on the night of the date of the note, he made his appearance with two other men at her house. He appeared very much excited, accused James of having taken his money, said he had everything prepared to have him arrested, and opening the door said he could bring men in ten minutes. After a great deal of talking, James admitted that he had taken $25, and offered to give a note for that amount. Macfarlane, slapping his hand upon the table, said: "Now you have owned it, less than $400 won't settle it."

James did not want to give a note for that amount, but finally agreed to do so.

Macfarlane then wished the mother to become security, saying that if she did not he would have her son taken up and that he should stand his trial. This, for a good while, she refused to do, saying it was hard for her to throw her home away by signing the note. He also said to her daughter Maggie, "You had better advise the old woman to sign the note;" and when she refused said, "Would you rather see your brother sent to the penitentiary." All this was in the presence of the old woman, who was greatly agitated and nearly out of her mind. Then Macfarlane took the mother and James into a room *alone, the door being closed.* What took place there does not appear, but the result is significant. When the door was opened she consented to sign the note; Macfarlane saying, "If you will sign the note I will take half of it off, and if that won't do I will make it far less." The note was not read to her. When the note was about being signed, the daughter of the old woman suggested that James should transfer to her his share in the property, which he consented to do and subsequently did.

The respondent submits that the evidence clearly discloses the following facts:—

1st. That there was no legal consideration given for the note to the respondent. There is no proof that Macfarlane lost one sixpence beyond $25, which James Struthers admitted that he took.

2nd. There was only a partial consideration given to James Struthers, viz.: $25.00.

3rd. The note was signed by the respondent for an illegal consideration, namely, to save her son from arrest.

4th. It was signed through fear, and under the influence of threats; there was *défaut de liberté.*

5th. The transfer of the son's property was not the reason for respondent's signing the note. She consented to sign after great pressure and after she had been in the *room alone* with Macfarlane. She signed only through fright, and agreed to accept the transfer as unwillingly as she agreed to sign the note. Having been forced to sign the note she, at the suggestion of those around her, endeavored to protect herself as best she might by accepting the transfer. The alternative was the arrest of her son. *Vide* deposition of Margaret Struthers.

6th. That the appellant, Macfarlane, aware that a crime had been committed, converted that crime into a source of profit and benefit to himself. He traded on the knowledge of the theft and made capital of the power which he had of arresting the son, to obtain the security of the mother for a claim of which there is no proof except to the extent of twenty-five dollars, contrary to the settled rules and principles of law.

At the argument it was ingeniously contended that the respondent was an innkeeper, and therefore by law liable for the loss of her lodger's valuables, the obligation to make good which formed the consideration for the note. But, unfortunately for the pretensions of the appellant, his argument in that respect was contrary to his pleas, wherein it is distinctly set forth that the old woman signed, not for any liability of her own, but *as surety* for her son, and that the consideration for the note was the stolen money. The argument is also unwarranted by the evidence, which discloses that she was, in point of fact, neither innkeeper nor boarding-house keeper.

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It was also argued that if the consideration for the note was the compounding of a felony or the agreeing not to prosecute, the respondent was a party to it, and the law would not come to her assistance because she could not plead her own baseness. But it is quite clear that the respondent was an unwilling party, that, in fact, she acted through fear and that there was no real consent. She was not *in pari delicto* with the appellant.

The respondent refers particularly to the case of Williams and Bayley reported in 1 L. R. English and Irish Appeals, p. 200–222, which bears a remarkable resemblance to the present one, and is in principle identical with it.

The facts of the case are:—

"A son carried to bankers, of whom he, as well as his father, was a customer, certain promissory notes with his father's name upon them as endorser. These endorsements were forgeries. On one occasion, the father's attention was called to the fact that a promissory note of his son, with his (the father's) name on it, was lying at the bankers dishonored. He seemed to have communicated the fact to the son; who immediately redeemed it: but there was no direct evidence to shew whether the father did or did not really understand the nature of the transaction. The fact of the forgery was afterwards discovered; the son did not deny it; the bankers insisted (though without any direct threat of a prosecution) on a settlement, to which the father was to be a party; he consented, and executed an agreement to make an equitable mortgage of his property. The notes with the forged endorsements were then delivered up to him.

Held, that the agreement was invalid. A father appealed to, under such circumstances, to take upon himself a civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with a moral certainty of conviction, even though that is not put forward by any party as the motive for the agreement, is not a free and voluntary agent, and the agreement he makes under such circumstances is not enforceable in equity."

At a meeting of all the parties at the bankers, a conversation took place about a settlement, when it was stated, that it was "a serious matter" and "case of transportation for life." They also said, "If the bills are yours, we are all right; if they are not, we have only one course to pursue: we cannot be parties to compounding a felony." The father then signed an agreement mortgaging his property in consideration of the notes being given up to him.

The Lord Chancellor (Lord Cranworth) said, (amongst other things,) "the case in point of fact is this:—Here are several forged notes. The bankers, in the presence of the father and of the person who forged them, say to the father what amounts to this: 'Give us security to the amount of these notes and they shall all be delivered up to you; or do not give us security, and then we tell you we do not mean to compound a felony—in other words, we mean to prosecute.' Here was a pressure of this nature, we have the means of prosecuting and transporting your son. Do you choose to come to his help and take on yourself the amount of his debts, the amount of these forgeries? If you do we will not prosecute, if you do not, we will. That is the plain interpretation of what passed. Is that, or is it not, legal? In my opinion, I am bound to go the length of saying that I do not think it is legal. I do not think that a transaction of that sort would

have been legal even if, instead of being forced on the father, it had been proposed by him and adopted by the bankers."

Lord Westbury said:—"The question, therefore, my lords, is, whether a father appealed to under such circumstances, to take upon himself an amount of civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with the certainty of conviction, can be regarded as a free and voluntary agent? I have no hesitation in saying that no man is safe, or ought to be safe, who takes a security for the debt of a felon, from the father of the felon, under such circumstances. A contract to give security for the debt of another, which is a contract without consideration, is above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not—whether it is prudent to do it or not—is altogether taken away from a father who is brought into the situation of either refusing and leaving his son in a perilous condition, or of taking on himself the amount of that civil obligation. I have, therefore, my lords, in that view of the case, no difficulty in saying that, as far as my opinion is concerned, the security given for the debt of the son by the father, under such circumstances, was not the security of a man who acted with that freedom and power of deliberation that must undoubtedly be considered as necessary to validate a transaction of such a description.

"My lords, there remains the other aspect of the case, which is this: was the transaction, regarded independently of pressure, an illegal one, as being contrary to the settled rules and principles of law?

"This is not a case where the bankers are proceeding against the person liable to them on a contract independent of the forgery.

"Now, such being the nature of the transaction, I apprehend the law to be this—and, unquestionably, it is a law dictated by the soundest considerations of policy and morality: that you shall not make a trade of a felony.

"If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. It is impossible, therefore, if you look at this matter, wholly independently of the question of pressure, and confine your attention to the act of the bankers alone, not to come to the conclusion that a great *delictum* was committed when the transaction is viewed simply with reference to the course which they took.

"My lords, I regard this as a transaction which must necessarily, for purposes of public utility, be stamped with invalidity, because it is one which undoubtedly, in the first place, is a departure from what ought to be the principles of fair dealing between man and man, and it is also one which, if such transactions existed to any considerable extent, would be found productive of great injury and mischief to the community. I think, therefore, that the decree which has been made in this case, is a perfectly correct decree."

In the above English case the crime was forgery.

In the present case it was theft.

In the English case father and son were present at a meeting, where the father was given to understand that unless he gave security the son would be prosecuted.

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In the present case the mother and son were present, where the mother was given to understand that unless she gave security her son would be prosecuted.

In the English case the father had no consideration for the mortgage that he gave, except the receiving of notes that the bankers knew to be forged, in order that his son might be saved.

In the present case the respondent had no consideration for the note which she signed, except preventing her son from being arrested.

In the English case the bankers traded on the notes which they knew to be forged, and on the knowledge that they had of the crime, to obtain profit and advantage for themselves.

In the present case, Macfarlane, the appellant, traded on his knowledge of the theft, in the same way to obtain a profit and advantage for himself.

The pressure in the present case was much greater than that referred to in the English case—threats being more freely used, and the party a weak old woman, whose affection for her son was traded upon.

The respondent submits the following propositions of law:

1st. That want of consideration is fatal to a demand. Byles on Bills, chapter on consideration, p. 186, et seq.

2nd. Illegal consideration is so likewise.

Concealment of or compounding a felony. Story, Prom. Notes § 189.

1 Story, Equity Jurisprudence, p. 283 § 294.

2 Leading criminal cases, 158.

2 Bell's Com., p. 298, § 1.

3rd. There must be *pardelictum* to allow of the application of the maxim *ex turpa causa non oritur actio.*

Broom's legal maxims, pp. 569, 570.

Story, Contracts, § 491.

1 Equity Jurisprudence, § 296–300.

4. A consent obtained by threats and violence is null.

1 Code civil, p. 41.

4. Marcadé, pp. 349 and seq.

10 Duranton.

6 Toullier, p. 81.

1 Story, Equity Juris. § 239 and foot note p. 234.

1 Bell's Com. p. 295–6. N. 2.

Story, Prom. Notes, § 188.

Pothier, Obligations, Nos. 21, 25.

5th. Partial failure of consideration voids a note entirely.

Story—Prom. Notes, § 189, 190, pp. 212, 213.

7th. To make an *aubergiste* liable, the effects must have been specially placed in his charge. Pothier, Depôt, N. 79.

8th. He would not be liable for valuables without notice as to value. 2 Sourdat —Responsibilité, N. 949.

9th. That independently of the question of pressure, a party cannot trade upon his knowledge of a crime, converting it into a source of profit or advantage to himself.

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The respondent respectfully submits that the judgment of the Court below was right, and ought to be confirmed, and the appeal dismissed.

The following was submitted in answer to the appellant's supplementary factum :

Ritchie, T. W., Q. C., for respondent :—I. The first proposition of the Appellant is, That there was a valid obligation on the part of Struthers to repay "the money he had taken, and that obligation was a sufficient cause or consideration for the note."

There was, of course, an obligation on the part of the son to make restitution of any money he had taken. The amount he admitted to have taken was $25. There is no proof of anything beyond that. In so far as the respondent was concerned there was no consideration for the note. She owed no debt. Her fears were practised upon to induce her to sign the note. The witness, Margaret Struthers, proves clearly that such was the fact. She says (page 11 of Respondent's Factum,) in answer to the question whether it was not true that her mother was only induced to sign the note by her brother promising to transfer his share of the property to the mother, "That did not induce her to sign the "note at all. *It was only fright induced her to sign it.*"

The consideration of the note, even as between the appellant and Struthers, was illegal, except as to the $25 which the latter admitted to have stolen. Story says (*Prom. Notes* § 190.) "There is one peculiarity in cases of "illegality of consideration, in which it is distinguishable from the want of or "failure of consideration. In the latter, if there be a partial want or failure of "consideration, it avoids the note only *pro tanto; but, where the consideration "is illegal in part, there it avoids the note in toto.*"

II. In his second proposition, the appellant endeavours to maintain that if the principal obligation (that of the thief) is valid, the accessory obligation of the respondent is also valid.

There is an evident fallacy here. Suppose that instead of admitting the theft of $25, Struthers had admitted having stolen $400, and had given his note to the appellant for that amount. The appellant then turns to the respondent and says, "Your son has stolen $400 from me and has given me his note for "that amount. If you do not consent to become surety upon the note, I wi "prosecute him for the felony which he has admitted." As against the thief the note would be perfectly valid, being given in restitution of an amount admitted to have been stolen, but as regards the surety (the respondent) it would be null being obtained through the influence of menaces.

III. The third proposition of the appellant is in the following words :—

"There was no such constraint (violence) used in obtaining her signature to "the note in question, as will render it void or voidable.

"The influence upon the mind of the respondent by the fear of an accusation "against her son did not constitute violence within the meaning of the law, "*because the step which the Appellant threatened to take was not illegal or "unjust.*"

This proposition raises one of the most important questions at issue between the parties to this appeal.

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The pretention of the respondent is that such menaces were made use of by the appellant to induce her to sign the note in question, that she was not a free moral agent, and that her consent was extorted by a threat to prosecute her son for felony. Consequently that the note is null.

The appellant has cited in his supplementary factum a number of authorities bearing upon articles 1111, 1112, 1113, of the Code Napoleon. In order to see how far those authorities are applicable under our law, it may be well to place in juxta-position those articles, and the corresponding articles (Nos. 994, 995 and 996) of our Civil Code.

CODE NAPOLEON	CIVIL CODE OF L. C.
1111. La violence exercée contre celui qui a contracté l'obligation, est une cause de nullité, encore qu'elle ait été exercée par un tiers autre que celui au profit duquel la convention a été faite.	**994.** La violence ou la crainte est une cause de nullité, soit qu'elle soit exercée ou produite par la partie au profit de laquelle le contrat est fait, ou par toute autre personne.
1112. Il y a violence, lorsqu'elle est de nature à faire impression sur une personne raisonnable, et qu'elle peut lui imprimer la crainte d'exposer sa personne ou sa fortune à un mal considérable et présent. On a égard, en cette matière, à l'âge, au sexe et à la condition des personnes.	**995.** La crainte produite par violence ou autrement doit être une crainte raisonnable et présente d'un mal sérieux. On a égard, en cette matière, à l'âge, au sexe, au caractère, et à la condition des personnes.
1113. La violence est une cause de nullité du contrat, non-seulement lorsqu'elle a été exercée sur la partie contractante, mais encore lorsqu'elle l'a été sur son époux, ou sur ses descendants, ou ses ascendants.	**996.** La crainte que subit le contractant est une cause de nullité, soit que le mal appréhendé se rapporte à lui-même, ou à sa femme, ou à ses ascendants, ou à quelqu'un de ses proches, et dans quelques cas même à des étrangers, suivant les circonstances.

The difference between the modern French law and our own, and particularly between Art. 1112 C. N. and Art. 995 of our Code, is thus easily seen. The authors cited by the appellant are commenting upon the articles of the French Code which are essentially different from those of our Code. The only modern French author whose comments really apply, is *Marcadé*, whose suggestions have been adopted by our Codifiers. (Vol. 4, p. 350, No. 411.)

There is an admirable *resumé* of the law respecting the effect of fear produced by violence or menaces, in the 1st Vol. of DOMAT (Octavo Edition) Tit. XVIII, sec. 2, pages 388 and 389.

See also SOLON, vol. 1, No. 209, p. 125.

BOILEUX, (Vol. 4, p. 356)—"C'est la crainte qui vicie le consentement; "mais pour donner lieu à rescision, il faut qu'elle soit le résultat de la violence."

"La violence est physique ou morale. La violence physique s'exerce sur la "personne: elle vicie également le contrat:

"*La violence morale agit seulement sur la volonté;* elle détermine à consentir "un mal moindre pour en éviter un plus grand; *coacta voluntas voluntas est;* "mais le consentement n'est pas libre; il n'a pas les caractères nécessaires pour "obliger; il est arraché par la crainte."

All the French authors are agreed (rejecting the stern doctrine of the Roman law, that the violence must be of such a character as to make an impression in *homine constantissimo*) that the violence is to be regarded relatively to the age,

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sex and condition of the party concerned, so that a menace which would have no influence upon a strong man in full health, would be quite sufficient to invalidate a consent which had been obtained through its influence from an old man, a woman or a person in ill health. (POTHIER, Oblig. No. 25; 10 DURANTON, No. 140. DOMAT, loc. cit.; 4 MARCADÉ, No. 411.)

What more powerful influence could be brought to bear upon a feeble old woman, in broken health, than would result from the threat to have her son convicted of felony if she did not bind herself as surety for him?

The appellant says in his third proposition that "the step which the appellant "took was not illegal or unjust." This statement in the connection in which it is used, and in so far as the interests of the respondent are concerned, is entirely fallacious. If theft had been committed of the property of the appellant he had a right, and more than that, it was his duty, to prosecute criminally the guilty party. But he had no right to make use of a *threat* to do so, to extort a consent from a third party to become surety for the amount pretended to have been stolen—or rather for the amount that he was willing to compound the crime for—there being no proof that more than $25 had actually been stolen. The "legal constraint" referred to in Art. 998 C. C., and the term "*voies de droit*," made use of by Pothier, Oblig. No. 26, and by other authors, refer only to *civil remedies*, although harsh ones such as the *contrainte par corps*. No one but the appellant has ever imagined that a person had a right to make use of a *threat of riminal prosecution* as a means of securing a civil debt. In the case of Keir *vs.* Leeman *et al* (9 Adol. & Ellis N.S. p. 371) where third parties had agreed to become sureties to settle a prosecution for a simple misdemeanor, *the whole being done in Court with the assent of the judge*, it was held that the consideration was unlawful and that no action could be maintained upon the promise given. In expressing his opinion in the case of Williams *vs.* Bayley (1 Law Reports, Eng. and Irish Appeals, p. 212,) the Lord Chancellor said, "Here was a pressure of this nature. We have the means of prosecuting and "so transporting your son. Do you choose to come to his help and take on "yourself the amount of his debts—the amount of these forgeries? If you do "we will not prosecute: if you do not, we will. That is the plain interpretation, "of what passed. Is that, or is it not legal? In my opinion, I am bound to "go the length of saying that I do not think it is legal. I *do not think that a* "*transaction of that sort would have been legal even if, instead of being forced* "*on the father it had been proposed by him and adopted by the bankers*."

The case of Tourangin and Charret cited in the appellant's supplementary factum is really a very strong authority in favor of the respondent. The abstract of it given by DURANTON (Vol. 10, p. 137) is incomplete and in some respects incorrect. The case is fully reported in SIREY, Vol. 13, p. 262. The facts, as to the signing by Charret of the notes and the acknowledgment of theft, are thus stated:—

"Le 9 Juillet 1810, le sieur Charret souscrit au profit du sieur Tourangin, "pour 24,000 fr. de billets causés pour *prêt*."

"Et le même jour, déclaration que les billets ont pour véritable cause la "réparation civile des vols commis par lui, Charret, au préjudice du sieur "Tourangin."

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" De suite, et pour plus grande sûreté, le sieur Tourangin se fait donner une " obligation notariée, avec hypothèque sur les biens de Charret. L'obligation " était également causée pour *prêt*."

" *Tous ces actes avaient été consentis par Charret, sous l'influence plus ou* " *moins menaçante du sieur Tourangin*, et de cinq ou six amis, qui avaient " appelé Charret dans une maison à eux, pour faire ce qu'ils appelaient *justice* " *privée*."

On the 17th July, following Charret was prosecuted by the Minister of Justice, " for the thefts at Tourangin's house, and on the 3rd of August of the next year he was acquitted.

On the 31st August, 1810, Charret brought an ACTION CRIMINELLE against Tourangin before the " *Cour d'Assises en réparation de violence du 9 Juillet*," demanding the nullity of the *billets*. On the 3rd of May following, the Court, upon the verdict of the jury, rendered judgment acquitting Tourangin of the accusation of *violence*.

Tourangin sued Charret upon the notes, and the latter pleaded that they were null as having been given " *sans cause*," for the reasons before referred to. Judgment was in favor of Charret, and Tourangin was condemned to return the notes to Charret.

Tourangin appealed and the *Cour de Cassattion* confirmed the judgment of the Court below, giving amongst other reasons the following:—" *Que l'aveu que le sieur Charret avait fait de ces vols*, par un écrit du 9 juillet 1810, lui avait " été surpris *par des mauvaises voies : Que cet écrit n'avait pas été signé par* " *lui* AVEC UNE PLEINE ET ENTIERE LIBERTE D'ESPRIT : Que dès-lors il était " nul et ne pouvait lui être opposé ; IL EN RESULTAIT NECESSAIREMENT *que* " *l'obligation du 9 juillet se trouvait sans cause.*"

In the present case, the admission of a theft of $25 by Struthers was void, having been, no doubt, exorted from him by threats. It could never have led to his conviction.

IV. The fourth proposition of the appellant is, " That the proposition of the " respondent that the consideration was unfounded and illegal is unfounded. " Because the only ground upon which such illegality could be alleged is that " the note was given by the plaintiff *en garantie* for the compounding of a felony " But it is essential to establish the charge of compounding a felony that an " actual agreement not to prosecute should be proved."

It is not necessary for the respondent's case that she should establish the compounding of a felony on the part of the appellant. That Macfarlane was guilty of that offence is sufficiently clear. There was no *express* promise on his part not to prosecute, but there was one *necessarily implied* from his actions and words. He was charging Struthers with felony, and was strenuously pressing the claim with the view of securing a pecuniary advantage for himself. He said (see evidence of Margaret Struthers) that " he had everything fully prepared to have " him (Struthers) taken, and opening the door, said he could bring men in ten " minutes." At last the young man admitted having taken $25. " Now," " exclaimed Macfarlane, you have owned it, *less than* $400 WON'T SETTLE IT." He afterwards said to the respondent : " that *if she did not sign the note* they

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"would have Jim taken up, and that he should stand his trial." To the sister, who appears to have been of a resolute character, and who refused to advise her mother to sign the note, he said, "*Would you rather* see your brother "sent to the penitentiary?" The only reasonable inference from these different expressions is that Macfarlane tacitly undertook not to prosecute the respondent's son, if she consented to give him the security he demanded. Can there be the slightest doubt that if the appellant had said to the old woman, "When "I say less than $400 won't settle it, I don't mean that you shall infer any "promise on my part not to prosecute your son; I am free to do so if I choose," the note never would have been signed by the respondent? There was nothing to "settle" except the criminal charge—in so far as the interests or feelings of the old woman were concerned. She would lose nothing by a civil remedy being enforced against her son. It is clear that all the parties understood that Macfarlane meant to stifle the prosecution if his demands were complied with, and there was a distinct implied promise to do so. In the case of Williams *vs.* Bayley, Lord Westbury said, alluding to the bankers who had obtained security from the father, "were you not very well aware that when "you so traded with these bills, you would either prevent the possibility of a "prosecution, or render the possibility of a prosecution so remote, that it could "hardly be expected to succeed? That was the inevitable consequence." In that case the compounding of the felony, or "stifling the prosecution" was operated mainly, by the forged bills being given up. In the present case by the implied promise that the signing of the note by the mother would "settle" the criminal charge, the more so as Macfarlane did not hesitate to swear (towards the end of his examination-in-chief) that "he never said Struthers had stolen "his money."

V. The fifth and last proposition in the paper now under consideration is that, "If there was a compounding of felony (which is denied,) the respondent "was *in pari delicto*, and cannot succeed in her action to be relieved from "the consequences of her illegal contract."

This is a reiteration of one of the positions assumed by the appellant in his factum, and from its repetition it may be assumed that he attaches importance to it. Yet it is easy to show that there was no *par delictum* in the case. Either there was the compounding of a felony or there was not. Upon the former supposition there was only one party who could be guilty of the crime, and that was the appellant. He was the only one who "knew the felon, and took his "goods again, or other amends, upon an agreement not to prosecute." He was liable to be indicted for the offence. But what crime known to the law did the supposed felon commit in attempting to free himself from prosecution, or the innocent mother in binding herself to shield her son from the consequences of his crime? None whatever. Of the contracting parties, there was on the one side the appellant, guilty of misdemeanor, in compounding the felony, and on the other the respondent and her son, against whom (so far as the transaction in question is concerned) no offence known to the law could be charged.

But taking the position that what took place did not amount to the compounding of a felony, then the respondent would be precisely in the position that the

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father was in the case of Williams *vs.* Bayley—taking the views of the Lord Chancellor (p. 212,) that what was done by the bankers did "not amount to "compounding a felony." In that case the father obtained relief; in this the respondent is equally entitled to it.

See ADDISON on Contracts (pages 140 and 150,) for several cases establishing the principles, that even where there is *par delictum*, so long as the illegal contract remains executory and unperformed, the party bound may be relieved; and if the parties are not *in pari delico*, the most innocent of the two may recover back money paid under the illegal contract, although the unlawful act may have been fully performed.

The appellant, in his factum, and in the paper now under consideration, has referred to the testimony given by himself as if it made evidence in his favor. The law declares the reverse. However, his own story does not place him in a particularly favorable light. He says that he stated that if Struthers "did not "return my money, which I believe she had taken out of my carpet bag, *I would* "*take the law of him.*" He swears at first, positively, that he did not mean by using that expression that if he did not return the money, he would have him put in jail for taking it. Being pressed, he says that he had no objection to Struthers believing that to be his meaning. Finally, in reply to the question, "Did you not intend James Struthers to under- "stand that if he did not return your money, you would have him put in jail?" he answers, "Yes." First, the appellant *did not mean*, by using the language referred to that he would cause Struthers to be sent to jail; secondly *he had no objection* that Struthers should believe that to be his meaning; and lastly, he meant *that Struthers would understand* the appellant to mean what he did not mean at all! (p. 7, respondent's appendix). Then, again, at the end of the examination in chief the appellant swears that he "never said that he "(Struthers) had stolen my money!"

The conduct of the appellant (as described by the witness, M. Struthers—the only one who knew all the facts) was strange enough. The appellant arrived at the respondent's house on Saturday night, Oct. 29th, 1864, and remained until Monday morning. He had some money in his carpet-bag, but never said how much, noticing at the time, as he says, that almost all his money was gone. He said nothing. He returned to dinner, and then left for good, "still without "a word as to his loss." He only reappeared on Tuesday of the following week (evidence of M. Struthers) and went away once more without saying anything. In the evening of the same day, he for the first time made the charge of theft against the young man.

The only evidence that there was any consideration whatever for the note comes from the mouth of the appellant himself, the acknowledgment of Struthers that he had taken $25 being null, as having been obtained by improper means. The written confession signed by Charret in the case reported in SIREY, was declared by the Cour de Cassation to be void for the same reason.

The respondent confidently awaits a judgment from this Honorable Court, in accordance with the wise and equitable rules of our law, so clearly laid down by Domat: that the feeble and timid are entitled to protection against the

violence of the strong and the unscrupulous; that all menaces are illegal; and that perfect liberty must exist between contracting parties.

Such a judgment will confirm that of the Court below.

BADGLEY, J.—Macfarlane lost money out of his carpet bag; it was stolen by James Struthers, who acknowledged to having taken $25 of which a $5 bill was returned. Macfarlane declared that he had $600 in his bag in silver, tied up, and said that a large portion of it had been taken. So far as to the amount in his possession and the amount taken, he cannot be witness for himself in this cause, but it is proved that James Struthers admitted to have stolen $25, and this afforded an opportunity to Macfarlane to speculate upon it. It is proved that Macfarlane did not say how much was in the bag nor how much was taken, but upon James' offer to make the note for the $25 he said that nothing short of a £100 would settle it, and that it was not the only time that James had taken money from him, which James denied. These facts prove a speculation on the part of Macfarlane and exaggeration in the amount of the note. Fraud is proved by his own admission, when he said to the respondent, *Mrs. Struthers, if you will sign the note I will take half of it off, and if that won't do I will make it for less.* The exaggeration is plainly manifest; the note, however, was signed by James and his mother, the respondent, and made payable to Macfarlane or bearer, and was afterwards delivered by Macfarlane, without his indorsement thereon, to Minchin, the principal plaintiff in this cause, by whom the respondent and her son, the said James Struthers, and also the said Walter Macfarlane, were sued at law for the recovery of the sum on the face thereof, to wit, £100. James Struthers and Macfarlane made default, the respondent appeared, but did not plead, and on the 26th of March, 1866, judgment was rendered against her and her son James, jointly and severally for the amount of the said note, but not against Macfarlane. Now the action as set out was upon a note payable to bearer, and as such held by the said judgment plaintiff, and the action was against the defendant. On the 22nd of January, 1866, pending the action and before judgment, the respondent proceeded *en garantie* against Macfarlane to protect her against the suit for this same note, in which she averred that the note was without consideration, and had been extorted from her by threats and menaces, and her fears of the arrest of her son for felony for his theft upon Macfarlane, which would thereby involve the plaintiff *en garantie* in ruin and disgrace.

The said Macfarlane, defendant *en garantie*, denied the said averments, alleged that the said note was given by her for good consideration of a like sum due to him by James for money of Macfarlane's appropriated by James, that she was not so coerced to sign the note by menaces, but signed it as surety to Macfarlane for James' indebtedness to him, and received from James counter security, as in plea mentioned, by deed of real estate, the consideration of £100, therein set out, being the actual sum of money due by James.

Now it is plain from the evidence of record that James did commit a crime, that he stole $25 certainly from Macfarlane, that the latter threatened to have him arrested for felony forthwith, and that both Macfarlane and her brother in law urged her to become a party to the note by signing it as joint maker with her son James, and that under the apprehension and menace against

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her son, and from fear thereof, she joined in the note. Upon the whole, however, as matters stood, she does not appear to have been a free agent at the time or in the transaction, nor to have signed the note by her free and voluntary consent. There is no discrepancy or difference between the French authors and the English authorities as regards her position as a *third party* to the matter. Both laws, probably, would have borne hard upon James, at least something might have been urged against his objection, had it been made, that he was amenable to justice for his crime committed, and that his note was given to escape his due punishment, and at the same time to indemnify the person whom he had robbed. But nothing of this incrimination could have been urged against her; she was in no way concerned or inculpated in the robbery, and it was only under the pressure of her fears and apprehensions that the note was extorted from her, and, moreover, even as against James, the claim was a gross exaggeration.

Her pleas of menaces and want of consideration seem to be properly established, and her claim against Macfarlane is well founded, because the allegations of her pleas cast the entire onus of exculpation and good consideration upon him. If the party can shew that the note was obtained by fraud or duress, has been fraudulently obtained from intermediate holder, or lost or stolen unjustly, or in any way the subject of fraud or felony, this will throw the burden of proof on the holder, the claiming party. See 13 M. & W. 73, 16 Q.B.R. 244, 2 Roscoe 285, 6 Exch. R. 856. In this case Pollock, C.B., said it is now settled that if a bill be founded on illegality or fraud, or has been the subject of felony or fraud, upon that being proved, the holder is compelled to shew that he gave value for it, and, per Platt B., there is no hardness in such a rule for the plaintiff.

Here, the original holder must best know what consideration he gave for the bill, and besides he claims under the party who committed the fraud. So also of paper illegal on any ground which makes it null and void as between the original parties, it is equally void in the hands of subsequent parties. Upon this intervention Macfarlane as the bearer payee to the plaintiff in this suit is really the bearer and holder as regards her, as between themselves, and she has therefore substantiated her objection which he has not disproved.

There is a point in the case which might have involved an objection by Macfarlane. The action against her is direct by the bearer of the note made payable to bearer. She entered an appearance on the record, but allowed herself to be foreclosed and might be said to have acquiesced in the judgment thereupon entered up against her. It was competent for her to plead to the action the injustice done and extortion practiced upon her as to the note as she has pleaded her averments *en garantie*, and the authors hold that acquiescence by the injured party subsequently to the act of injury or extortion, removes the pressure practiced and fixes a liability for the extorted engagement. This objection has not been taken, and the judgment must go in her favor *en garantie*.

DUVAL, C. J., dissenting, said there could be no doubt that the young man acknowledged that he had stolen $25. Macfarlane pretended that more had been taken, but the young man always persisted in denying that he had taken more than $25. A question might arise whether the Court below ought to have given judgment for the whole amount, or whether the appellant ought not

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to have been called upon to state what was missing, and then limit the judgment to that amount. The respondent, however, ought not to complain of surprise, because she took advice from her brother-in-law, and took a guarantee from the son. It would not, therefore, be her loss, but the young man's. His Honor felt compelled to dissent from the judgment as about to be rendered.

CARON, J., also differed.

MONK, J., said he went a little further than Mr. Justice Badgley, and thought the case looked like compounding a felony; in fact it would be hard for a case to be more like it. The appellant threatened that if his proposal was not acceded to, he would resort to criminal proceedings. The old woman was terrified, and signed a note for $400.

The appellant said, moreover, that she need not pay the whole of this, that he would take half, or even less. It had been said that giving the note was restitution, but it was not, it was paying an amount that Macfarlane said he had lost, but it was not restitution.

DRUMMOND, J., believed the appellant stated a falsehood when he stated that he had lost $400. The money was in silver, and the weight of $400 in silver would have been between thirty and forty pounds. Now, no man could have such a weight taken out of his bag without his perceiving it, yet the appellant did not say a word about his loss when he took his departure on Monday morning. The loss was probably not more than $25, which the young man admitted he had taken. It was certainly a clear case of compounding a felony. Macfarlane admitted that he said he would have the young man arrested if the note was not signed. The facts of this case were stronger than in the English case cited, where the Court refused to maintain an action on the father's bond.

Judgment confirmed.

Abbott, J. J. C., Q. C., for Appellant.
Torrance & Morris, for Respondent.
Ritchie, Tho. W., Q. C., Counsel.
(J. L. M.)

COUR SUPERIEURE, 1870.

MONTREAL, 30 SEPTEMBRE, 1870.

Coram BEAUDRY, J.

No. 868.

Duhaut vs. *Lacombe et al., et Brunelle*, Demanderesse par reprise d'instance, et *Tranchemontagne et Ux.*, Opposants.

Juge—Que la permission de procéder *in forma pauperis* doit être révoquée, lorsque le créancier a transporté une certaine somme à prendre sur le montant de son jugement et sur d'autres réclamations.

Sur motion des opposants appuyée de pièces justificatives, pour faire révoquer la permission de procéder *in formâ pauperis*, vu la cession d'une somme de $3000 à prendre tant sur le jugement que sur un legs; la Cour a accordé cette motion et a motivé son jugement en ces termes:

Duhaut vs. Lacombe

"La Cour, considérant qu'il appert par les pièces produites par les opposants en cette cause, que le dit Louis Henri Isaac Jacques Duhaut, qui avait obtenu la permission de procéder en cette cause *in formâ pauperis*, par acte reçu devant L. O. Hétu, notaire, le 13 mai 1867, le dit L. H. I. J. Duhaut, a transporté à Eugène Urgèle Piché, écuier, avocat, solidairement avec Dame Agathe Dambourgès et Dame Eulalie Dambourgès, la somme de $3000, à prendre tant sur le jugement qu'il avait obtenu en cette cause que sur le legs fait aux dites Dames Dambourgès, dans et par le testament ou codicile olographe de feu François Boucher, écuier, en date du 12 Janvier 1861, et considérant que la dite Demanderesse par reprise d'instance la dite Eliza Brunelle, a aussi obtenu le 17 mai 1869, la permission de procéder *in formâ pauperis* et que vu le transport ci-dessus mentionné, elle n'a aucun intérêt à sauvegarder et que le privilège qui lui a été ainsi accordé ne sert qu'au cessionnaire du dit Louis H. I. J. Duhaut, et considérant que pour ces raisons il y a lieu de révoquer le privilège ainsi accordé à la dite Eliza Brunelle:

La Cour par les présents révoque et met au néant pour l'avenir, la susdite permission accordée à la dite Eliza Brunelle de procéder *in formâ pauperis*.

Piché, avocat de la Demanderesse par reprise d'instance.

Bernard & *Pagnuelo*, avocats des Opposants.

(P. B. L.)

COUR DU BANC DE LA REINE, 1870.

EN APPEL.

MONTREAL, 10 DECEMBRE, 1870.

Coram DUVAL, Juge en chef, CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

No 81.

LA CORPORATION DE LA PAROISSE DE ST. MARTIN,

(*Demanderesse en Cour Inférieure,*)

APPELANTE;

ET

LA COMPAGNIE DES CHEMINS DE PEAGE DE L'ISLE JESUS,

(*Défenderesse en Cour Inférieure,*)

INTIMEE.

JUGE:—Que la Cour de Circuit a juridiction conformément à la sous-section 5 de la section 49 du chapitre 21 des Statuts Refondu du Bas-Canada, savoir l'acte des Municipalités, sur une action pour obtenir l'enlèvement d'un empiètement; et que la demande de £100 de dommages résultant comme incident de l'empiètement ne vicie pas le reste de l'action.

L'appelante, par son action, s'est pourvue contre l'intimée et se plaignait de ce que cette dernière a érigé sur un de ses chemins de péage dans l'Isle Jésus *une barrière interrompant la communication entre les chemins publics du bord de l'eau et la descente à la rivière à l'endroit où se joignent les dits deux chemins, empêchant ainsi la circulation sur ces deux chemins.*

Dans son action, l'appelante prend les conclusions suivantes, "elle conclut à ce "que la demanderesse soit reconnue comme seule propriétaire et ayant seule sous "son contrôle le dit chemin du bord de l'eau jusqu'à l'endroit où il joint le dit

La Corporation de St. Martin et La Compagnie des chemins de peage de l'Isle Jésus.

" chemin de péage de la défenderesse et le dit chemin de la descente à la rivière " depuis l'endroit où le dit chemin joint le dit chemin de péage jusqu'à la dite " Rivière des Prairies.

" Que la défenderesse soit condamnée par cette Honorable Cour à enlever la " barrière érigée par elle et fermant le passage à l'endroit où les dits deux che- " mins se joignent, à enlever aussi la maison de péage construite par la Défende- " resse au même endroit, à démolir et faire enlever la dite barrière et la dite " maison de péage de manière à laisser à la demanderesse et aucune autre per- " sonne tant demeurant en la dite paroisse de St. Martin, qu'ailleurs, la circula- " tion et la communication libres entre et sur les deux chemins sous quinze jours " à compter de la signification du Jugement à intervenir en la présente cause : " et à ce que faute par la Défenderesse de ce faire dans les dits délais, la Deman- " deresse soit autorisée à faire démolir la dite barrière et la dite maison de péage " pour rétablir le passage et la communication libres sur les dits deux chemins " aux frais et dépens de la dite Défenderesse : soit condamnée à payer à la de- " manderesse cent livres courant de dommages et intérêts pour les troubles et rai- " sons susdites et les dépens distraits aux soussignés. "

L'appelante s'appuie sur la clause 49 de l'acte municipal du Bas-Canada, sous-sections 4 et 5, c'est le chapitre 24 des Statuts Refondus du Bas-Canada.

La Défenderesse Intimée a plaidé à cette action par une défense en droit et en outre deux exceptions.

L'appelante a répondu généralement aux défenses de l'Intimée et la procédure étant complétée, la cause a été inscrite sur le rôle pour Enquête et mérite.

Le jugement de la Cour de Circuit à Montréal rendu le 30 juin 1869 est motivé comme suit :

" La Cour, après avoir entendu les parties par leurs avocats tant sur la défense " en droit qu'au mérite de l'action et des exceptions, avoir examiné la procédure " et la preuve, et vu le désistement produit par la demanderesse, le dix Juin " courant, et sur le tout avoir mûrement délibéré ;

" Considérant que le désistement produit par la dite demanderesse, ne peut " avoir d'effet rétroactif jusqu'au jour de l'introduction de sa demande, par la- " quelle il est conclu pour un montant plus élevé que la juridiction de cette Cour " devant laquelle cette action ne pouvait être introduite.

" Vu la section trente du chapitre soixante et dix-sept de la vingt-cinquième " Victoria, étant l'acte d'Incorporation de la dite défenderesse, et qu'il ne paraît " pas que par ou à raison d'aucun des faits prouvés par la demanderesse, il résulte " que la défenderesse ait outrepassé les pouvoirs et l'autorité qui lui ont été con- " férés et attribués par la Section susdite et qu'il n'y avait lieu à former la pré- " sente demande contre elle ;

" La Cour, pour ces raisons, a renvoyé la demande avec dépens."

L'appelante, en appel disait qu'elle avait cru devoir se désister de cette partie de sa demande qui repose sur des dommages. Le 10 Juin 1869, elle a produit un désistement à cet effet. La Cour Inférieure a jugé que ce désistement était sans effet. Par ses conclusions l'Appelante demandait deux choses, savoir : 1o. Que l'intimé fut condamnée à enlever les embarras et empiétations dont elle se plaignait ; 2o. Que l'Intimée fut condamnée à lui payer £100 de dommages.

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L'appelante s'est désistée de cette dernière demande, et la Cour de Circuit restait toujours saisie de la première. Ce n'est pas le montant de la réclamation qui fait la juridiction de la Cour en semblable matière, mais bien la nature de la pour. suite, puisque l'Appelante pouvait demander la cessation de ces empiétements sans réclamer aucun dommage. Dans le cas d'un particulier qui porte telle action en Cour Supérieure, rien n'empêche qu'il ne demande que $100 de dommages s'il juge qu'il n'en a pas souffert d'avantage, et cependant personne ne songerait à nier la juridiction de la Cour. Ainsi comme c'est la nature toute particulière de la cause qui donne à la Cour sa juridiction, la Cour Inférieure pouvait, sans même avoir égard à la demande des dommages, connaître de l'action de l'appelante, et comme il a déjà dit ci-dessus, l'Honorable Juge qui a rendu ce jugement l'a bien compris, puisqu'il a en même temps prononcé sur le mérite de la cause."

MONK, J., dissented from the judgment about to be rendered. The action was brought before the Circuit Court, but connected with it was a demand for $400 damages. It was plain, therefore, that the court had no jurisdiction over the demand as presented. It was alleged that the defendant had not put in any declinatory exception. But this was unnecessary, for the court itself was bound to declare that it had no jurisdiction when such a demand came before it. The question, therefore, arose whether a person had a right of action for any amount whatever, say $10,000, in the Circuit Court, merely because he conjoined this demand with another cause of action which the law said should be brought in the Circuit Court. His Honor had not the slightest hesitation in saying that the judgment was right upon the evidence.

BADGLEY, J., said there was an obstruction on the high road, and this obstruction was placed there by the road Company of Isle Jesus. Now, in the suit to have this obstruction removed, the Corporation of St. Martin were bound by law to resort to the Circuit Court. They did come into the Circuit Court, for the purpose of having the obstruction removed, but in addition they asked damages and asked for an amount exceeding the jurisdiction of the Circuit Court. But this demand for damages was merely incidental to the principal ground of action which was properly brought before the Circuit Court. Under these circumstances, the court was justified in allowing the *désistement* from the claim for damages. His Honor held that the part which had been rightly asked might be granted, and that what had been improperly asked might be rejected.

Le jugement de la Cour d'appel est [illegible] comme suit:

La Cour, considérant que par la 24[illegible] cette municipalité du Bas-Canada, il est statué, que chaque fois que l'on empiétera sur un chemin, pont ou autre ouvrage public, la municipalité locale pourra intenter une action contre la personne qui aura ainsi empiété, pour la contraindre à se désister de son empiètement, et que cette action sera intentée devant la Cour de Circuit dans et pour le comté ou le district où sera située la municipalité locale, laquelle Cour de Circuit pourra connaître de toutes telles causes avec pouvoir, si l'empiètement est fondé, d'adjuger que la propriété sur laquelle on aura empiété soit restitué à la municipalité et de mettre à exécution tout tel jugement. Considérant que la demanderesse, par son action, a conclu non seulement à l'enlèvement de l'empiètement dont elle s'est plaint mais à des dommages qu'elle prétendait lui en résulter au

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montant de $400. Considérant que la Demanderesse a bien et dument prouvé cet empiètement causé par la construction de la part de la défenderesse d'une barrière et d'une maison de péage qui obstruent, empêchent et incommodent le passage des voitures sur une partie des chemins désignés en sa déclaration, lesquels se trouvent dans l'enclave de la municipalité locale, et sous son contrôle. Considérant qu'en assumant l'incompétence de la Cour de Circuit, devant laquelle la Demanderesse a intenté son action, à prendre connaissance d'une demande en dommages au-dessus de $200, résultant comme incident d'un empiètement de ce genre, la dite Cour de Circuit avait incontestablement jurisdiction sur cette partie de l'action par laquelle la Démanderesse se plaint du dit empiètement et en demande l'enlèvement, et que l'autre partie de son action par laquelle elle demande et conclut aux dommages (dont d'ailleurs elle s'est désistée dans le cours du litige) ne doit être considérée que comme une surabondance qui ne vicie pas le reste de l'action; considérant pour toutes ces raisons qu'il y a erreur dans le jugement rendu en cette cause par la dite Cour de Circuit le 30 juin 1869, renvoie les exceptions, maintient l'action de la Demanderesse telle que limitée par sa motion en désistement du 10 juin 1869.

Dissentientibus les Honorables juges CARON & MONK.

Jugement Infirmé.

Loranger & Loranger, avocats des appelants.

Cartier, Dominville et Rétournay, avocats de l'Intimée.

(P. R. L.)

SUPERIOR COURT, 1871.

IN CHAMBERS.

MONTREAL, 13TH JANUARY, 1871.

Coram MACKAY, J.

No. 2131.

Boyd vs. *Freer*.

HELD:—That an affidavit for *Capias ad Respondendum*, grounded on the departure of the Defendant, which does not allege that the departure of Defendant *will* deprive Plaintiff of his recourse, but is worded "whereby the said Plaintiff *may* be deprived of his remedy, &c." is bad and will be set aside.

The defendant in this case petitioned for discharge from arrest on various grounds, both on account of the insufficiency of the affidavit, and the falsity of its allegations in respect to defendant's intention to defraud. Evidence was taken, and the parties were heard before Mackay, J., both on the points of law and fact; but as the decision turned wholly on the former, the arguments as to the evidence are not given.

Crump, C. B., for defendant, argued that the affidavit was clearly not in accordance with the law. After alleging that defendant was immediately about to leave with intent to defraud, and giving various special reasons for plaintiff's belief, the affidavit proceeds to state, "That the said defendant hath been "repeatedly requested to pay up the balance of the said judgment and refuses

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"so to do, and has secreted his debts, moneys and effects, whereby without "the benefit of a Writ of Attachment *Capias ad Respondendum* against the "body of the said defendant, the said plaintiff *may* be deprived of his remedy "against the said defendant, lose his said debt, and sustain damage." Art. 798 of Code of Procedure gives the essential allegations required for such affidavit, and one of them is that such departure *will* deprive the plaintiff of his recourse. Plaintiff here only says that he *may* be, &c. This is not using the words of the article of the code nor an equivalent expression. *May* is a different word and differs widely in meaning from *will*. The one expression carries no further meaning than that the possible or accidental consequence of defendant's departure might be to deprive plaintiff of his remedy; whilst the other states the deponent's belief that the natural result of such departure will be to deprive the plaintiff of his remedy, the departure being itself made with that fraudulent intent. In the case of Clarke *vs.* Dewitt before Judge Mondelet in April 1868, an affidavit using the word "may" had been held to be insufficient. As to the form of affidavit No. 42 given in the Code of Procedure, in which the words "may be deprived of his remedy" are found, it is to be observed that this form is not prescribed for affidavits for *Capias*, but is in connection with articles 812 and 813 which regulate the issue of temporary warrants of arrest preliminary to *Capias*, by which, in the country parts, a person may be detained for a period not exceeding 48 hours under a warrant granted by a Commissioner of Superior Court. This form is wanting in the essential allegation of a *Capias* affidavit, viz., the intent to defraud, and the use of the word "may" in it cannot be regarded as overriding the requirements of Art. 798.

Benjamin, L. N., contra, contended that the use of the words "may be deprived of his remedy" was sanctioned by numerous cases and rulings of the judges, and also by the Legislature itself in the form of affidavit above-mentioned which is given for the entirely analogous case of arrest by warrant of a Commissioner, and is the interpretation put by the Legislature on the enacting part of the Code, viz., Art. 798. That it would be almost impossible for a man to swear positively and absolutely that he will be deprived of his remedy, because it might possibly happen that he would not be so, although defendant's departure was with that intent. Amongst other authorities he cited Lampson *vs.* Smith, 7 L. C. Reports, p. 425, where he contended it clearly appeared that the Court thought "*may* be deprived of his remedy" the proper expression.

MACKAY, J., in rendering judgment remarked that the requirements of the law in respect to affidavits for *Capias* such as the present one, are to be found in Art. 798, of Code of Civil Procedure; and that he should not enter into the discussion of cases decided under a different system of jurisprudence, and under the authority of former laws. The above article requires the plaintiff to swear that he has reason to believe and verily believes that the departure of the defendant *will* deprive plaintiff of his recourse. Has he done so in the present case? He says only "whereby he may be deprived." This is not what the law requires of him to swear in order to obtain the arrest of his debtor. It is vague and indefinite, and means scarcely more than "perhaps I may," or "it is possible I may"; and indicates no settled conviction or belief of deponent that he *will*

lose his recourse. It has been argued on behalf of the plaintiff that the hardship would be great to require a positive and absolute oath that he will be deprived of his recourse—an oath difficult for a conscientious person to take. But, on looking at the law, it will be seen that it makes no such requirement. What it does require, is that the creditor should swear that he has reason to believe, and doth verily believe that the departure of his debtor will deprive him of his recourse; and if he feels that he does not really so believe and cannot make such oath, he is not entitled to incarcerate his debtor. He should therefore give judgment in favor of petitioner on this ground without entering upon the other matters of the petition.

Judgment:—Considering that by the Code of Procedure, Art. 798, under which said *Capias* has issued in this cause, *capias* such as has issued at suit of plaintiff against defendant was, and is allowable only on an affidavit made in the terms of said article; and that the affidavit of plaintiff for a *capias* against the defendant was and is not in the terms of said article. Considering that plaintiff in his said affidavit does not swear to any belief by him that the departure of defendant (petitioner) referred to in said affidavit, will deprive the plaintiff of his recourse against the defendant. Considering finally, that the affidavit in virtue of which the *capias ad Respondendum* hath issued, was, and is insufficient to entitle plaintiff to such Writ, it is adjudged that the arrest of defendant made by, or under said Writ be set aside, and the defendant discharged from said arrest, and I do maintain the petition of the said William M. Freer to the extent aforesaid, but do not pass upon the said petition further as it is unnecessary.

Judgment granting petition.

L. N. Benjamin, for Plaintiff.
G. B. Cramp, for Defendant.
(G. B. C.)

CIRCUIT COURT, 1870.

VERCHERES, OCTOBER, 1870.

Coram TORRANCE, J.

No. 808.

Fraser vs. Duprès.

HELD:—That a donation of land by a father to his sons, with the obligation of paying a life rent and alimentary pension to the sisters of the donees, and also certain debts of the donors, does not give rise to *lods et ventes*.

This was an action to recover £3 9s. 8½ for *lods et ventes* on the No. 258 of the *cadastre* of the seigniory of Contrecœur, on a donation of farms by Joseph Duprès and wife to Charles, Jonas and George Duprès. The consideration consisted both in a life rent and alimentary pension and 300 livres, *a.c.* payable to each of the seven sisters of the donees, and also 3,000 livres to the creditors of the donors. At the conclusion of the deed, the donors acknowledge to have received from the said Jonas and George Duprès on account of what they were bound to pay by the deed, the sum of 600 livres, *a.c.*

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The plaintiff contended that *lods et ventes* were due, as money was payable to the creditors, and 600 livres were paid to the donors.

The defendants *è contra* cited Pothier, Fiefs; P. I., Chap. V, p. 153, and Drapeau *vs.* Campeau, 6 L. C. R. 86.

PER CURIAM.—The Court has carefully examined the deed in question, and sees nothing in it to take it out of the ordinary rule of a family arrangement which does not give rise to *lods et ventes*. The action must be dismissed.

Action dismissed.

Chagnon & Sicotte, for plaintiff.
Dorion, Dorion & Geoffrion, for defendants.
(J.K.)

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 9TH MARCH 1870.

Coram DUVAL, CH. J., CARON, J., DRUMMOND, J., BADGLEY, J.

No. 37.

CHARLES F. PAINCHAUD ET AL., APPELLANTS;

AND

EPHREM HUDON ET AL., RESPONDENTS.

HELD:—That where a party appealing to the Privy Council has given security for costs only, and has fyled a declaration that he has no objection to execution going out for the condemnation money, the Court will not allow the Record to be remitted to the Court below, in order to enforce such execution.

This was a motion to have the record remitted to the Superior Court, to enable the respondents to take out execution for the condemnation money awarded by the judgment of the Superior Court, confirmed by this Court; the appellants (who had been allowed to appeal to the Privy Council) having given security for costs only, and fyled a consent to execution going out at once for the condemnation money.

DUVAL, CH. J., (*dissentiens*) was of opinion that the record should be sent down, and would have no objection to grant a delay of one month for the transmission of the Transcript of Record to England.

BADGLEY, J., (for the majority of the Court): The only question is how to make the consent to execution operative. If the record be once sent down it cannot be got back, except by *certiorari*. Besides, when once the record is below, how could this Court know, when it comes back, that it is in the same condition as when sent down? It seems to us impossible to grant the motion, and it is therefore rejected.

Motion rejected.

E. Barnard, for Appellants.
R. & G. Laflamme, for Respondents.
(S.B.)

COUR DU BANC DE LA REINE, 1870.

EN APPEL.

MONTREAL, 7 SEPTEMBRE, 1870.

Coram DUVAL, J. C., CARON, J., DRUMMOND, J., BADGLEY, J., JOHNSON, J., *ad hoc.*

No. 78.

LOUIS JOSEPH DE TONNANCOUR & UX.,

(*Défendeurs en cour inférieure,*)

APPELANTS;

ET

JEAN SALVAS,

(*Demandeur en cour inférieure,*)

INTIMÉ.

JUGE:—Que les donations entrevifs sont sujettes à rapport, même sous l'empire de la législation de 1774 et 1801. (1).

Le 27 février 1855 les appelants ont consenti à Michel Fourquin, leur père, une obligation notariée, de £250 pour autant que le dit Michel Fourquin leur avait prêté; cette obligation payable à demande avec intérêt à 6 p. c.

Le 20 octobre 1859, le dit Michel Fourquin, sans considération, a fait remise aux appelants de leur obligation, et leur en a donné sur une copie produite en cette cause, un reçu sous seing privé dans les termes suivants :

" J'ai soussigné reconnai et confesse avoir reçu de Louis Joseph de Tonnan-
" cour et de Olive Fourquin, son épouse, la somme de deux cent cinquante louis
" avec toutes les intérêts échu et du jusqu'à ce jour dont je les quin quite et leur
" en donne quittance."

St. Michel Yamaska, le 20 octobre 1859.

Michel Fourquin."

Vers le 27 octobre 1861 le dit Michel Fourquin est décédé sans avoir fait de dispositions testamentaires, laissant pour ses héritiers huit enfants, savoir : Narcisse, Alfred, Joseph, Marie (mariée à Pierre Alexandre Lassalle) ; Josephte (mariée à Maxime Beaupré); Elizabeth, (mariée à Joseph Fourquin, fils de Jean) Catherine (mariée à Pierre Bergeron), et Marie Olive, l'appelante, mariée au dit Louis Joseph de Tonnancour.

Tous ces héritiers ont accepté la succession de leur père, mais les appelants refusant de faire rapport à la succession du montant de la dite obligation, le partage a été, à cause de cela seulement, retardé de plusieurs années, et ne paraissait pas pouvoir se faire autrement que par un procès, ce que voyant, Maxime Beaupré, un des dits héritiers, a acheté la part des appelants dans la succession du dit feu Michel Fourquin par transport en date du 18 janvier 1865. De suite les héritiers se sont mis à règler la succession et le 10 mars suivant ont signé devant F. X. Rivard et son confrère, notaires, un partage définitif de tous les biens de la

(1) Vide 2 L. C. Jurist, p. 141.

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succession à l'exception seulement du montant de la dite obligation que les héritiers ont spécialement réservé à l'article 22ème de ce partage, dans les termes suivants, savoir:

" Du partage ci-dessus, les parties ès dits noms et qualité déclarent être contentes et satisfaites, se transportent mutuellement tous les droits que chacune " d'elles pourrait avoir dans les lots qui leur sont assignés, par ces présentes, s'en " désaisissant les unes au profit des autres, pour par elles en jouir, faire et disposer comme de choses à elles appartenantes respectivement, suivant les parties " qui leur sont déterminées, se soumettant à la garantie de droit les unes envers " les autres suivant la loi et en conséquence du présent partage, elles se quittent " aussi mutuellement de tous reliquats de comptes, parts ou partie de sommes et " autres choses qui pourraient à l'avenir donner lieu à aucune contestation entre " elles, et de plus elles renoncent de ce jour et pour toujours à toutes réclamations " qu'elles peuvent ou pourront avoir les unes contre les autres au sujet de la succession du dit feu Michel Fourquin leur père et leur beau-père, sans néanmoins comprendre dans la présente renonciation le droit que peuvent avoir les " dites parties à l'exception du dit Maxime Beaupré, écuier, qui y a renoncé spécialement avant ce jour de faire rapporter aux dits Joseph Godefroy de Tonnancour et Olive Fourquin son épouse, une somme de deux cent-cinquante " louis dont ils ont refusé de faire rapport jusqu'à ce jour."

Ainsi de tous les biens composant la succession du dit feu Michel Fourquin il ne restait plus à régler que le montant de la dite obligation.

Si les appelants doivent en faire le rapport, chacun des héritiers a droit d'en réclamer d'eux un huitième.

L'intimé a porté son action pour un quart du montant dû en vertu de la dite obligation, tant en capital qu'intérêts; étant propriétaire par transports à lui consentis, du huitième de Marie Fourquin, épouse de Pierre Alexandre Lassalle, et du huitième d'Elizabeth Fourquin, épouse de Joseph Fourquin, fils de Jean.

Toute la question en cette cause se réduisit donc à décider si les appelants sont ou ne sont pas tenus de faire rapport du montant de la dite obligation dont leur père leur a fait don.

Le jugement de la Cour Supérieure, siégeant à Sorel, le 14 de Mars 1866, Loranger, J., est motivé comme suit:

La Cour après avoir entendu la plaidoirie contradictoire des avocats du demandeur et des défendeurs d'abord sur une motion des défendeurs, à l'effet de faire rejeter certaines parties du témoignage du Demandeur et ensuite sur le fond du procès mu entre eux: Pris connaissance des écritures des parties faites pour instruire leur cause, et examiné leurs pièces et productions respectives, dûment considéré la preuve et sur le tout avoir mûrement délibéré: a rejeté et rejette la dite motion vu l'admissibilité de la preuve du demandeur, justifiée par les réponses des défendeurs interrogés par le demandeur, et sur le fond considérant qu'il est évident que les défendeurs devaient faire rapport à la succession de feu Michel Fourquin de la somme de mille piastres, montant de l'obligation consentie avec intérêt le 27 Février 1855, devant Payan et collégue, Notaires, par les défendeurs au dit Michel Fourquin, qui le 20 octobre 1859, leur a fait de cette somme un don déguisé sous forme de quittance, considérant que les défendeurs n'ont jamais

rapporté cette somme et n'en ont point fait compte à leurs co-héritiers, bien qu'ils aient reçu leur part virile dans la succession égale à celle de chacun de leur co-héritiers tant par eux-mêmes que par leur cessionnaire Maxime Beaupré.

Considérant que cette somme n'a jamais été comprise dans le partage fait de la dite succession, auquel partage des réserves ont été faites pour la faire rapporter, et que les défendeurs, sont mal fondés en leurs exceptions, a rejeté et rejette les exceptions des défendeurs, et faisant droit à la demande, condamne les dits défendeurs à payer au demandeur, cessionnaire de Marie Fourquin par transport du 4 octobre 1865, reçu devant Payan, Notaire, la somme de $125, étant pour la part de la dite Marie Fourquin dans la dite somme principale de mille piastres, et une autre somme de $125 pour la part d'Elizabeth Fourquin cédée à la dite Marie Fourquin et légalement transportée au demandeur, avec intérêt sur cette somme de $250 à compter du 27 février 1855, date de l'obligation ci-haut désignée, avec dépens distraits &c.

Il sera néanmoins sursis à l'exécution du présent jugement jusqu'à ce que le demandeur ait donné à la satisfaction des défendeurs sinon à l'arbitrage du tribunal, bon et valable cautionnement que les dits défendeurs ne seront jamais inquiétés par les co-héritiers de la dite Marie Fourquin, au regard du montant porté en condamnation en principal et intérêts au cas où par aucun partage ultérieur le dit capital et les intérêts ou parties d'iceux seraient attribués à aucun autre des dits co-héritiers.

Ce jugement fut confirmé en révision le 31 octobre 1866. (SMITH, J., BERTHELOT, J., MONK, J.) Le jugement en révision est comme suit:

La Cour Supérieure siégeant à Montréal présentement en Cour de Révision, ayant entendu les parties par leurs avocats respectifs sur le jugement rendu le 14 mars 1866, dans la Cour Supérieure, siégeant dans et pour le District de Richelieu, ayant examiné le dossier et la procédure dans cette cause et ayant pleinement délibéré; considérant qu'il n'y a point d'erreur dans le susdit jugement, confirme par les présentes le dit jugement en tous points, avec dépens contre les dits défendeurs, etc.

Les appelants dans leur factum s'expriment ainsi:

The respondent's action presents the question of the validity of the donation. The Court below has pronounced judgment as if that were the only contestation raised by the appellants, who, by one of their pleas claim that the said Michel Fourquin had a right to give them the amount of the said obligation, and that they were not bound to make a return, *rapport*, of the same; they based their contestation, in that respect, upon the views expressed by the late Chief Justice of this Court in the case of Quintin vs. Girard [2 Jurist, p. 152.] "Le législateur de 1774 et 1801 en faisant disparaître les restrictions à la première, a évidemment voulu mettre ces deux facultés sur le même pied, et leur faire produire les mêmes effets. Il n'y a pas de raison de prétendre qu'ils ont pu vouloir qu'une donation fut à l'avenir plus favorable que l'autre, et qu'elle fut soumise à des *réserves* de droit, lorsque l'autre ne le serait pas. L'intention de la nouvelle loi est que l'on respecte la volonté de celui qui dispose de ses biens, que cette volonté s'exerce librement et sans entrave aucune." "Or cette volonté est toujours censé

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plus libre dans un acte entre vifs que dans un testament qui souvent est suggéré ou arraché à la faiblesse d'une personne mourante."

AUTORITES.—Sykes *vs.* Shaw, & al., 9 Jurist p. 153. 2 Toullier Oblgn. No. 309, 448.

Boileux, Com. Code Civil, Art. 868.

Pothier, Succ. ch. 4, Art. 2, § 3, et ch. 5, § 2. p. 226.

CARON, J.—Action par Salvas, comme cessionnaire de deux des héritiers Fourquin, pour obliger les défendeurs (DeTonnancour et son épouse qui, elle aussi est un des héritiers Fourquin), à lui payer le quart de £250 dont leur père commun, Fourquin, avait fait don, de son vivant, aux défendeurs, en leur donnant quittance d'une obligation de ce montant, sans qu'ils l'eussent payée.

Il faut voir les faits aux factums. Les faits sont clairs et prouvés; il en résulte que Fourquin père, est décédé sans testament, laissant huit enfants dont l'appelante est une.

DeTonnancour et cette Fourquin, son épouse, avaient consenti à leur père et beau-père une obligation de £250 payable avec intérêt; par reçu du 20 octobre 1859 (copie aux factums) le créancier Fourquin a donné aux appelants quittance de cette obligation et des intérêts.- Il est établi dans la cause que cette quittance était une donation déguisée, que rien n'a été payé, que c'était un pur don.

Les appelants ont prétendu dans leur défense avoir payé, mais le contraire est établi par eux-mêmes. Lors du partage, les appelants ont refusé de faire rapport de cette somme; pour en finir, le partage a été fait pour le reste de la succession, entre tous les héritiers, et les appelants eux-mêmes, représentés par le nommé Beaupré, mais avec réserve expresse, par chacun des dits héritiers, de leur recours contre les appelants pour les forcer à rapporter la dite somme. C'est à cet effet et en vertu de la dite réserve que la présente action est portée par l'intimé en ses qualités susdites.

Le Juge qui a entendu la cause en première instance a déclaré qu'il y avait lieu à rapport et condamné les défendeurs à payer 2 huitièmes de la dite somme de £250, la somme de $250 avec intérêt du 27 février 1855, date de l'obligation, et les dépens.

Le jugement soumis à la Cour de Révision a été confirmé en tous points par les Juges Smith, Berthelot et Monk.

Il me paraît que quant au fond ces jugements sont corrects; je les confirmerais: il n'y a pas de doute que le rapport est nécessaire. La quittance est une donation déguisée.

Mais je ne pense pas que le jugement soit correct quant aux intérêts; il me paraît que les intérêts ne devraient être accordés que depuis le décès du donateur. Voir le C. B. C., Art. 722, Code Napoléon, 856.

La date de l'obligation est du 27 février 1855. Le décès est du 27 octobre 1861: ce qui fait 6 ans 8 mois, qui à $15 par an font près de $100. Il me paraît que le jugement devrait être réformé sous ce rapport, et les défendeurs, appelants, condamnés au paiement de la dite somme de $250, mais avec intérêt seulement depuis le décès de Fourquin père, savoir depuis le 27 octobre 1861.

Je réformerais donc le jugement quant aux intérêts et j'accorderais à l'appelant ses frais en Appel, ceux de la Cour Inférieure restant contre lui. De Tonnancour et ex. et Salvas.

DUVAL, J. C., *dissentiens.*—Il n'y a pas eu de don fait par le père. Il n'y a qu'un simple reçu, ce qui n'est pas une preuve de la donation. L'appelante qui a été examinée dit que son père ne lui a jamais fait de donation et que cette somme lui vient de la succession de sa mère, que son père était tenu de payer.

Le jugement rendu par la Cour d'Appel est motivé comme suit :

La Cour considérant qu'il n'y a pas d'erreur dans la partie du jugement dont est appel dans laquelle il est déclaré que les défendeurs présents appelants sont tenus de faire rapport à la succession de feu Michel Fourquin de la somme de $1,000.

Mais considérant qu'il y a erreur dans la partie du dit jugement qui statue sur les intérêts auxquels les dits appelants sont condamnés, à compter du 27 février 1855, date de la dite obligation, tandis que les dits intérêts n'auraient dû être accordés qu'à compter du décès du dit Michel Fourquin arrivé le 27 octobre, 1861, et que partant sous ce rapport le dit jugement doit être modifié ; les appelants payant les frais en Cour Inférieure et ceux d'appel.

L'honorable Juge-en-Chef Duval et l'Honorable Juge Badgley *dissentientibus.*

Jugement modifié.

James Armstrong, avocat des appelants.
Germain, avocat de l'intimé.
(P.R.L.)

COUR SUPERIEURE, 1870.

MONTREAL, 30 DECEMBRE, 1870.

Coram MONDELET, J.

No. 1754.

Boucher & Vir vs. *Brault.*

Jugé :—Qu'à raison de l'état nuisible, dangereux même, des lieux loués, le locataire est non-seulement justifiable de laisser les lieux ; mais il a acquis le droit de faire résilier le bail, par exception, sur une demande pour loyer.

Les demandeurs réclamaient devant la Cour Supérieure à Montréal la somme de £60, pour un an de loyer à devenir échu le 1er Mai 1871, en vertu d'un bail notarié en date du 11 Avril 1870, vu l'enlèvement des effets du défendeur et la diminution de la garantie quant au loyer. L'action fut rapportée en Juillet, 1870.

Le défendeur plaida que l'état nuisible et dangereux des lieux l'avait obligé de les quitter au commencement de Juillet 1870, après avoir protesté les demandeurs le 25 Juin 1870, les requérant de réparer la maison sous vingt-quatre heures.

Le défendeur ayant prouvé les allégations de son exception, le jugement de la Cour renvoie l'action et il est motivé comme suit :

"La Cour après avoir entendu les demandeurs et le défendeur par leurs

Vide 4 L. C. Reports, p. 170, Boulanger vs. Deutre.

Dorion & Vir vs. Brault.

avocats respectifs sur le mérite tant de la demande principale que sur la demande incidente et aussi sur la motion des demandeurs en date du 22 Septembre dernier, à laquelle cette Cour a eu tel égard que de droit, avoir examiné la procédure, pièces produites et preuve et sur le tout avoir délibéré. "

" Considérant que le défendeur J. B. Brault a prouvé et établi que son exception péremptoire est bien fondée et que la demanderesse est sans fondement tant dans son action qu'à l'égard de la saisie-gagerie par droit de suite, qu'elle a pratiquée en cette cause.

" Considérant qu'à raison de l'état nuisible, dangereux même, des lieux loués par la demanderesse au défendeur Brault par bail reçu par Belle, notaire, à Montréal, le 11 avril 1870, durant le terme de l'occupation des dits lieux, lui, dit défendeur, était non seulement justifiable de laisser les lieux, mais qu'il a acquis le droit de faire résilier le dit bail, tant pour le passé que pour l'avenir.

Cette Cour déclare le dit bail du 11 Avril 1870 résilié tant pour le passé que pour l'avenir, met les parties dans l'état où elles étaient avant la passation du dit bail, déboute l'action de la demanderesse ainsi que sa demande incidente produite le 28 Novembre 1870, et met au néant la dite saisie-gagerie par droit de suite, le tout avec dépens. Action renvoyée.

Barnard & Pagnuelo, avocats des Demandeurs.

Jetté, Archambault & Christin, avocats du Défendeur.

(P. R. L.)

COURT OF REVIEW, 1870.

MONTREAL, 30TH NOVEMBER, 1870.

Coram MONDELET, J., MACKAY, J., TORRANCE, J.

No. 1707.

Beaudry vs. *Janes*.

Promesse de vente; LOSS OF THE SUBJECT—*Res perit domino.*

HELD:—1. Where the plaintiff by an agreement in writing transferred to the defendant a barge to use it and take possession of it at once, but subject to the express condition that such use and possession would give defendant no right of property in the barge until he should have completed delivery of 500 tons of coal to plaintiff, according as the latter would require it, and the barge was lost by *force majeure* without fault of the defendant before the coal was all delivered, though after the time mentioned in the agreement within which it was deliverable: that these circumstances did not take the case out of the ordinary rule *res perit domino*; that the loss of the barge fell on the plaintiff as owner, and the defendant was not bound to complete delivery of the coal.

2. That the statement in the declaration in the original demand, that the coal was worth $6 a ton could not avail to the defendant to support his incidental demand for the value of the coal delivered.

MONDELET, J. (dissenting). Le jugement, dont se plaint le défendeur Janes, a été rendu le 1er Juin, 1870, par la Cour Supérieure de Montréal,

Beaudry vs. Janes.

(BEAUDRY, J.) Ce jugement déboute l'exception du défendeur sur la demande principale, et condamne Janes à livrer au demandeur une certaine quantité de charbon, et à défaut de livrer ce charbon, payer au demandeur $436.30, valeur du charbon.

Le défendeur Janes, ayant fait une demande incidente, la Cour l'a déboutée. Voici ce dont il s'agit. Les parties, en 1867, firent ensemble un marché par lequel le défendeur, demandeur incident, s'obligea de livrer au demandeur 500 tonnes de charbon de la valeur de $2,000. Ce charbon devait être livré, partie en l'automne, 1867, c'est-à-dire, pendant l'année de navigation, finissant à cette époque là. Le demandeur payait ce charbon par une berge du nom de "Empress," qu'il donna en paiement, la vendant ou promettant la vendre au défendeur, qui en prit possession alors, et s'en servit dès lors, et depuis. Le défendeur avait délai, pour la livraison de *tout* le charbon, jusqu' à l'automne de 1868. Cependant il n'avait livré qu'une partie du charbon, au demandeur, à son besoin et à sa demande.

Il est de fait qu'en livrant la berge au défendeur, le demandeur avait stipulé qu'il n'y avait pas dépouille et qu'il ne donnerait au défendeur un titre à la propriété de cette berge, pour lui permettre d'en disposer, que lorsque celui-ci lui aurait livré tout le charbon. Le délai pour la livraison du charbon ayant pris fin, comme je l'ai observé plus haut, en l'automne 1868, il ne tenait plus au défendeur que d'exiger le titre, et c'était à lui à compléter la livraison du charbon. Au lieu de ce faire, le défendeur avait loué la berge à un tiers, et vers le seize Mai, 1869, elle périt. Lorsque le demandeur demanda au défendeur la balance du charbon non livré, il eut pour réponse, la singulière prétension du défendeur, que le demandeur était tenu de lui remettre le charbon déjà livré, ou de lui en payer la valeur, et c'est ce qu'il prétend obtenir par sa demande incidente.

La question est donc de savoir qui était propriétaire de la berge lorsqu'elle a péri. Le défendeur se fonde sur ce qu'alors, il n'avait pas de titre. Mais, ne peut-on pas lui répondre, que ne l'avez-vous exigé du demandeur, et pour vous mettre en règle et en droit de l'obtenir, pourquoi n'avez-vous pas livré la balance du charbon stipulé? Le demandeur vous avait livré la berge, vous en avez eu l'usage, vous avez livré une partie du charbon, vous étiez devenu non seulement possesseur de la berge, mais vous en étiez propriétaire, et s'il vous importait d'obtenir le titre, ce qui était votre affaire, vous devez vous imputer la faute à vous même de ne l'avoir pas fait. La berge a péri entre vos mains, la perte est pour vous. Votre compte et reçu qui est au dossier, reconnait avec votre déposition, la justesse de votre position à cette égard.

Que l'on envisage comme vente complète la transaction entre les parties, ou comme promesse de vente, il y a eu livraison, possession, usage, chez le défendeur, exécution de la convention, le défendeur est devenu propriétaire de la berge, et c'est à lui qu'on doit dire *res perit domino*.

Ces considérations tout en appuyant le jugement sur la demande principale, qui condamne le défendeur à payer, comme y appert, justifient, par conséquent, le débouté de la demande incidente. J'opine, sans hésitation pour la confirmation du jugement dont est appel.

Beaudry vs. Janes.

MACKAY, J.—On the 30th of August, 1867, Beaudry and Janes, by Notarial Deed, agreed as follows: Janes to deliver 500 tons of coals to Beaudry when, and as required, irrespective of the market price. Beaudry from time to time to give receipts for as many tons as delivered to him. The deed repeats:—"The delivery of the coal shall be as required by Mr. Beaudry for the use of "his steamers, say from 200 to 300 tons this fall (1867) and the balance "during the ensuing spring and summer, as may be required by Mr. Beaudry."

Beaudry agreed upon the delivery of the whole 500 tons to give Janes the barge "Empress," with her tackle and appurtenances, in payment of the coals. A bill of sale was to be given only after all the coals were delivered. The deed goes on to say:—"It is understood that said Janes may use the barge and take "possession of her at once, but always subject to the express condition that such "use and possession gives him no right whatever to the barge, which remains the "absolute property of the said Beaudry, so long as the said Janes shall not "have finally delivered the said full quantity of 500 tons of coal.

Janes took possession of the barge and was using it under this agreement up to the 16th May, 1869, when, owing to a storm in the Bay of St. Croix, the barge was wrecked and became a total loss. Up to that date Janes had delivered 412 tons of coals out of the 500 agreed upon. Beaudry, on the 28th June, serves a notarial protest upon Janes, tendering him the barge (then actually sunk in the river) and demanding the balance of the 500 tons of coals. Janes refuses to deliver the coals, and claims payment for the 412 tons already delivered. Beaudry then brings the present action to recover the price of the coals not delivered, valued at $412.30, claiming that he had delivered the barge, and that the loss of it must fall on him (Janes).

Janes pleaded that he was not the owner of the barge; that Beaudry was the owner, and by the agreement of 30th August, 1867, was to continue so until the full quantity of 500 tons of coals had been delivered; that he, Janes, was only in possession of the barge under the said agreement, that the barge was lost by no fault of his, consequently he could not be held responsible; and that instead of his being indebted to Beaudry in the $412.30 sought to be recovered, Beaudry was actually indebted to him in $2,063.75 for the 412 tons of coals delivered previous to the 16th May, 1869.

The parties went to proof, and the Judgment of the Superior Court dismissed defendant's pleas and condemned him to deliver the 87 tons balance of the 500 tons of coals, or else to pay the $412.30 demanded. It holds that the loss of the barge, seeing Janes' possession, must fall upon him. Janes has inscribed in Revision, and the Court here, that is, the majority of this Court, is of opinion that the judgment complained of must be reversed, and the plaintiff's action dismissed.

The Court finds that Beaudry was the owner of the barge when lost, and that it perished for him. *Res perit domino.*

It has been contended for Beaudry that Janes was owner of the barge, for he was possessor of it, with a *promesse de vente*; Art. 1478 of our Civil Code is relied upon, and the judgment *a quo* seems to be based upon this. But against this is the Art. 406, defining ownership. The case of Kerr and Livingston,

1 L. C. R. is referred to. The note to Art. 1478 shows that it was in the mind of the codifiers. But between Kerr and Livingston's case and the present there is all the difference in the world. *Kerr* gave a promise of sale, but with right to Livingston to use "as of his own proper freehold." *Kerr* also by his deed transferred to Livingston "all right of property which he, Kerr, can have in or to said lot of land." Are such expressions in Beaudry's deed to Janes? No, but contrariwise it is stipulated that Janes' possession is to operate no proprietorship for him, and that the barge is to be the property of, and to belong to Beaudry, so long as the full quantity of 500 tons of coals be undelivered.

The Court admits that promises of sale with delivery of possession may amount to sales, but all depends upon the wording of the convention of the parties. Beaudry's deed does not read as a sale, with promise of a deed in the future. The convention here was clear, and Beaudry having no intention to divest himself of the property of the barge stipulates, as it were, against Art. 1478, and both parties write down that Beaudry retains the property until after final delivery to him of the full 500 tons of coal.

"Il est déraisonable de soutenir que la propriété est transmise quand le "pacte intervenu entre les deux parties fait expressement dependre la translation du domaine de faits futurs."—No. 130, Troplong, Vente.

This is fatal to Beaudry. Janes had never been put into any default by Beaudry, who held on to his *domaine de propriété*; as late as June, after the loss of the vessel, Beaudry acts as owner of the barge. (See his Protest fyled.) Before the loss Beaudry had never offered the barge to Janes.

How can Beaudry say, under the circumstances proved, that Janes was owner of the barge at the time it was lost? From what time does he now date Janes' ownership? It may be convenient to say, from the contract; this is what is found by the judgment *à quo*.

Suppose Janes, early in 1868, had become bankrupt, having the "Empress" in possession, but having delivered only 50 tons of coal to Beaudry: could Janes' assignee, in the face of the special contract of 30th August, 1867, have retained the "Empress" as property of Janes, or assets of his estate?

Would Beaudry have allowed him, because of 1478, C. C.? I doubt it. The week before the loss, could Janes have had the barge declared his, while 87 tons of the coals were undelivered? Certainly not.

The judgment of this Court reverses that of the first of June, and dismisses Beaudry's action.

The following is the chief of the *considérans* of the judgment of the Court of Review.

"Considering that in May, 1869, the said barge, while in Janes' use, was "totally lost by *force majeure*, dangers of navigation, without fault of him, "Janes, and without plaintiff having previously put him into any default, and "that the loss fell, and must fall on the owner, the plaintiff, as the property of "said barge was not transferred by the agreement before mentioned, or at any "time, to the said Janes, and no translation of the *domaine* of it was, under "said agreement, or had been made by the plaintiff, or operated in any way,

Beaudry vs. Jones.

"and that the said 500 tons of coal had not been delivered before or at the time the said barge was so lost."

Judgment reversed.

Hon. MR. JUSTICE MONDELET, dissenting.

Jetté & Archambault, for the Plaintiff.

D. Girouard, for the Defendant.

(J. K.)

NOTE.—There was an incidental demand by Jones against Beaudry for $2,063 75 for the value of the 412 tons of coals that had been delivered, before the loss of the "Empress." The judgment of the 1st of June dismissed this incidental demand, holding the "Empress" lost for Jones. Jones inscribed for revision of this judgment also, and the Court of Revision would have reversed it; but, for want of proof on the incidental demand, of the value of the coals delivered, could not. So the dismissal was confirmed; though not for the reasons stated in the judgment of the 1st of June. The Court of Review held that resort could not be to the original plaintiff's declaration (where the coal was stated as worth $5 a ton) for proof on the incidental demand, of incidental plaintiff's allegation of value. (Mr. Justice Mondelet was for purely and simply confirming the judgment of the Superior Court.)

COUR DU BANC DE LA REINE,

EN APPEL.

MONTREAL, 7 SEPTEMBRE 1870.

Coram DUVAL, J. C., CARON, J., DRUMMOND, J., BADGLEY, J., et LORANGER, Juge suppléant.

No. 60.

OVIDE ANTOINE RICHER,

(*Défendeur en Cour Inférieure,*)

ET. APPELANT;

EDMOND VOYER, & AL.

(*Demandeurs en Cour Inférieure,*)

INTIMES.

JUGE—Qu'une donation de choses mobilières d'une valeur excédante $50, ne peut pas être prouvée par témoins.

Cette cause a déjà été rapportée en partie au 13 vol. du L. C. Jurist, p. 213.

La question principale jugée par la Cour d'Appel, est que la donation que l'appelant alléguait lui avoir été faite verbalement par sa grand'-mère madame Voyer, de la somme de $2000, déposée par elle à la Banque du Peuple, qui lui en avait donné un certificat de dépôt par elle endossé, et que l'appelant avait en sa possession depuis près de quatre ans avant le décès de madame Voyer, et au moyen duquel il retirait à la banque des intérêts sur ce dépôt; ne pouvait pas être prouvée par témoins.

La Cour Inférieure à Montréal (Monk, J.,) avait décidé, que ce dépôt avait été donné par madame Voyer à l'appelant comme don naturel *inter vivos*, et que les déclarations verbales et expresses et les reconnaissances de madame Voyer, accompagnées des présomptions et des indices qui concouraient à en établir la sincérité, le prouvaient.

Richer et Voyer et al.

Ce jugement, (31 Oct. 1868) est motivé comme suit :

The Court having heard the parties by their respective Counsel upon the merits of this cause, examined the proceedings, proof of record and having deliberated, considering that the certificate of deposit referred to in said Plaintiff's declaration was and is a negotiable instrument, and that the endorsement of the same by the late Dame Marie Anne St. Marie, was and is by law, a valid transfer and cession to all intents and purposes, of the sum of money specified in the said certificate of deposit in principal and interest by the said Dame Marie Anne St. Marie, to the defendant, and that the said indorsement cannot be viewed as a mere order or procuration in favor of the holder of the said certificate of deposit, to draw or collect the said sum of money from *La Banque du Peuple* as contended for by the said plaintiffs; considering that for a long period of time, and more particularly on the 7th day of June, 1867, when the said certificate of deposit was presented for payment by and paid to the Defendant by the said La Banque du Peuple, he, the said defendant, had been and was in legal possession of the same as the owner and holder thereof,

Considering that in law, the said indorsement and delivery of the said certificate of deposit must be taken *prima facie*, to have been made and given for value; and the rebuttal of such legal presumption lay on the said plaintiffs before the said defendant could be called upon to prove that he gave value for the same;

Considering that the said plaintiffs have failed to prove that the indorsement and delivery of the said certificate of deposit by said Dame Marie Anne St. Marie to the defendant, had been obtained by fraud or by duress, or that something of an illegal nature had been done by him with regard to the same;

Considering that the said Dame Marie Anne St. Marie received from him valuable consideration for the said indorsement and delivery, to wit, his services as her attorney, and also as the agent and *conseil* of her late husband Antoine Voyer for over twenty-five years;

Considering, further, that gift of moveable property accompanied by delivery may be made and accepted by verbal agreement, and that the indorsing and delivery of the said certificate of deposit even in the absence of valid consideration properly so called, constituted and was in law a gift or donation, *don manuel inter vivos*, of the sum of money therein specified, by the said Dame Marie Anne St. Marie to the defendant;

Considering that the said Plaintiffs have failed to rebut the said legal presumption of a *don manuel inter vivos* by the evidence of facts tending to prove fraud or suspicion of fraud, or some act of an illegal and fraudulent nature on the part of defendant;

Considering that the said indorsement was not necessary for any act or doing of the said defendant as the attorney of the said Dame Marie Anne St. Marie, the notarial power of attorney by her to him being sufficient to entitle and enable the said defendant as such attorney to receive the amount of the said certificate of deposit, both in principal and interest, upon the surrendering of the same, and without the said indorsement; and that consequently the said indorsement was made duly for the purpose of transferring the sum of money specified in the said certificate of deposit to the said defendant absolutely;

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Considering that the said Dame Marie Anne St. Marie hath disposed of the whole of her estate by particular legacies bearing substitution and prohibition of alienation and hypothecation, and has remained silent upon the said sum of money so deposited at the *Banque du Peuple*;

Considering the valuable services rendered by the defendant to the said Dame Marie Anne St. Marie, and to her said late husband, as their agent for over twenty-five years, and her reiterated promises to indemnify to said defendant for the same *au fur et à mesure que ses moyens et l'ordre de ses affaires le lui permettraient*;

Considering the donation *inter vivos* by the said Dame Marie Anne St. Marie to the defendant of the real estate situated at the corner of Craig and St. Lambert streets, in the city of Montreal, cannot be so taken and construed as to preclude the defendant from invoking other gifts;

Considering the formal and express verbal declaration and acknowledgement made by the said Dame Marie Anne St. Marie that she had made a gift or donation to the defendant of the sum of money specified in the certificate of deposit for the purpose of indemnifying him for his said services;

Considering finally, all the circumstances of this case, the Court doth maintain the said defendant's pleas and doth dismiss plaintiffs' action and demand, with costs.

Ce jugement fut infirmé en révision : vide 13 L. C. Jurist, p. 213.

L'appellant exposait ses prétentions sur le fait du don mutuel, en substance comme suit.

" J'ai souvent," dit M. le Professeur Bibaud, " entendu Madame Voyer dire " et déclarer qu'elle récompenserait le défendeur pour ses services, *à mesure que* " *ses moyens le lui permettraient.*" Etait-il donc extraordinaire que Madame Voyer, commandant une fortune d'une valeur de plus de soixante mille piastres, fit à son bien-aimé petit-fils un don des $2000 ainsi placées à la Banque à sa disposition?

Enfin, n'est-ce pas ici le lieu de reproduire ces observations de Rolland de Villargues encore une autre autorité souvent invoquée par les Demandeurs: " Un don manuel, même alors qu'il y eût tradition, peut ne pas résulter suffisam- " ment de la déclaration du prétendu donataire. Il peut être nécessaire que " *cette déclaration soit justifiée par des présomptions et des indices qui concou-* " *rent à en établir la sincérité.*"

Mais reste-t-il encore un doute dans l'esprit du juge? Eprouve-t-il encore quelque trouble sur des situations qui ne sont pas nettes? Nous ne lui disons pas seulement avec Troplong (No. 1048) de donner au possesseur le bénéfice de ce doute, et de se raffermir par l'observation des textes, en songeant que la prohibition de la preuve testimoniale et des présomptions humaines en cette matière, a pour but l'utilité publique, le bien et le soulagement des citoyens; mais nous lui recommandons tout particulièrement de lire le témoignage de M. le Professeur Bibaud. Là il trouvera de quoi rassurer sa conscience et dissiper ses doutes.

Quelque fortes et concordantes que pourraient donc être les circonstances contre le donataire, elles disparaissent en effet devant la force de la déclaration de la donatrice. Voici ce que dit M. Bibaud :

" J'ai eu occasion de lire la déclaration des Demandeurs par Messrs. Dorion. " Vers l'époque mentionnée dans la dite déclaration, mil huit cent soixante et " trois, et plusieurs fois subséquemment, j'ai été à portée d'entendre des con- " versations ou parties de conversations entre le Défendeur et la défunte Dame " Voyer, qui comportaient pleinement que la somme de deux mille dollars, " réclamée par les Demandeurs en cette instance, était à la disposition du Défen- " deur." Plus loin il ajoute: " J'ai fait ici allusion à des conversations ou " parties de conversations auxquelles j'avais été peu ou point partie; mais à l'époque " où le Défendeur a bâti sur la Côte St. Lambert, il y a deux ans ou deux ans et " demi, la dite feue Dame Voyer a fait devant moi une allusion formelle au don " des deux mille dollars plus haut mentionnées.

" J'entends que cet abandon ainsi fait à M. Richer, le Défendeur, était une " donation rémunératoire pour continuer à le récompenser de ses services et " comme son procureur et comme son conseil."

Plus loin encore, le témoin continue comme suit: " A propos des conversations " j'ai déjà été peu ou point partie, je veux dire que je laissais Madame Voyer " et le Défendeur parler de leurs affaires, me contentant d'écouter sans rien dire. " Comme je l'ai dit, dans ces conversations comme dans celle qu'elle a eu directe- " ment avec moi, Madame Voyer a souvent déclaré et dit qu'elle avait abandonné " le certificat de dépôt dont il est question en cette cause, ainsi que la somme " réclamée par cette action en faveur du Défendeur pour l'indemniser et le récom- " penser des services qu'il lui avait rendus tant comme procureur que comme son " conseil."

En transquestion à la question suivante: " Veuillez préciser et dire les expressions dont Madame Voyer s'est alors servi au sujet de la dite somme de deux mille piastres," le témoin répond: " Je crois avoir répondu suffisamment " déjà à la question qui m'est posée; mais je n'ai aucune objection de répéter " qu'elle s'est servi des expressions *certificat*, *don* et *abandon*, et qu'elle ne pré- " tendait plus aucune propriété sur le document entre les mains du Défendeur, " et autres expressions de la même portée."

On s'est objecté à l'enquête à l'admission de ce témoignage, objection qui a été réservée par la Cour. On a prétendu que cette preuve était illégale, comme tendant à prouver par témoins un don excédant $50. Mais c'est une méprise, don est en effet prouvé par l'endossement et la livraison du certificat. D'ailleurs, le don se fait aussi bien par convention verbale que par écrit, lorsqu'il y a livraison, comme le déclare notre Code et l'enseignent la doctrine des commentateurs et la jurisprudence des tribunaux. La preuve verbale est donc admissible, la preuve écrite n'étant en effet requise que des conventions qui doivent être écrites. La déposition de Mr. le Professeur Bibaud est donc parfaitement légale. Enfin ce témoignage ne peut être rejeté si on le considère comme portant sur les circonstances importantes ou atténuantes du don. Cette preuve a été admise dans la cause Colville et Flanagan, et il n'est pas même venu à la pensée des juges de révoquer en doute pour cause d'illégalité. C'est encore ce qu'a fait la Cour d'Appel dans la cause de Mahoney et McCready, et ce qui est d'ailleurs consacré par la pratique des tribunaux étrangers. Le Défendeur était même tenu d'offrir cette preuve pour justifier de la sincérité et de la véracité de sa déclara-

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tion. Grand nombre d'autorités cités plus haut s'appliquent parfaitement à cette question.

En Appel, la preuve verbale de l'allégué de l'appellant de ce don manuel *inter vivos*, a été déclarée illégale.

BADGLEY, J.—The case rests upon the agency of the appellant. The evidence showed that there was no agency, but simply a friendly service. The mere negotiability of the deposit receipt is not in question here. The money belonged to Richer's principal, Madame Voyer. It remained in her name till after her death, when it was drawn out of the Bank by Richer on the endorsed certificate which he had kept in his pocket for years. There is no proof that at the time Richer drew out the money, an agency account had been rendered. The endorsed receipt remained in his pocket for four years, and the interest was all appropriated by him. He says it was given to him by Madame Voyer, but he does not make any proof of that. Donations of this kind must be made positively. The presumption of law is against appellant. There was no fact that gave him any more right to this money after Madame Voyer's death than before. The donation cannot be proved by Mr. Bibaud's testimony. The judgment in revision must be confirmed.

DUVAL, C. J.—Said that if testimonial proof were admissible in the case, there would be a strong presumption in favour of Richer. But it was not admissible, and therefore the judgment condemning him to refund the $2,000 must be confirmed.

CARON, J., concurred.

Jugement de la Cour de Révision confirmé.

Girouard, avocat des Appelants.

Dorion, Dorion & Geoffrion, avocats des Intimés.

(P.R.L.)

COURT OF REVIEW, 1870.

MONTREAL, 30TH SEPTEMBER, 1870.

Coram MONDELET, J., MACKAY, J., and BEAUDRY, J.

No. 1033.

In re Bessette et al., Insolvents, and *La Banque du Peuple*, Claimants; and *Quevillon*, contesting claim of *La Banque du Peuple*.

HELD:—1. Where the endorser of a note became insolvent, and compounded with his creditors including the holder of said note, who, however, reserved his recourse against the other parties to the note, and the maker also became insolvent, that the endorser cannot rank on the note against the estate of the maker so long as the holder has not been paid in full.

2. Where a claimant in insolvency has received as holder of a note a composition on the amount of his claim from the endorser, in consideration of which he has released the endorser, reserving his recourse against the other parties to the note, that whatever the claimant has received from the endorser must be deducted from his claim against the maker's estate.

This was an appeal from a judgment rendered in the Superior Court by TORRANCE, J., a report of which will be found at p. 21 of Vol. 14, L.C. Jurist.

MONDELET J.—The question arising here is whether a creditor, who has been

paid his proportion on his claim against the estate of insolvents, and given a discharge, though with reserve, can claim, and be collocated on, or paid a greater sum than its rateable proportion, or dividend out of the assets of the estate of the insolvents, deduction being made from his claim of the sums of money already received by the claimant on account and in reduction of his claim.

The judgment of the assignee collocated the *Banque du Peuple*, the party claimant, to be paid in addition to its proportionate claim already received.

On this judgment being appealed from, his Honor Mr. Justice Torrance, by his judgment of the 30th November, 1869, reversed the judgment of the assignee, and ordered the contestant to be collocated for the sum of $342.38, on the assets in the place and stead of the claimant *La Banque du Peuple*, with costs in favour of said Charles Quevillon, as well of the contestation before the said assignee, as on the appeal from the said judgment of the said Assignee to a judge of the Superior Court.

There are, or have been, four systems of law referred to, namely: the old law of France, the present jurisprudence in that country, the Scotch law and the English law.

Now, under the law of France, unless altered by our Statute law, the *Banque du Peuple* cannot legally sustain its claim. The new or present jurisprudence in France is of no application to the present case. The Scotch law, whatever its wisdom may be, cannot be our rule. As to the English law, our own Statute law being silent on the subject, this ought to be our rule. His Honor, Mr. Justice Torrance appears to have adopted the English principle. Were it not for what will hereafter be explained, this judgment might be accepted as perfectly well founded.

On first consideration it appeared to me that the award to Quevillon could be sanctioned by this Court. But upon consideration I have come to a different conclusion. Quevillon is not in a position to contest the claim of *La Banque du Peuple*. But on the other hand it is in evidence that the bank asks for more than it is entitled to. The judgment which is prepared, and is the result of a protracted *délibéré* and frequent discussion, will clearly explain the principle on which it rests.

MACKAY, J.—After stating facts. The question now is whether the claim of the Banque du Peuple was legal, and whether the award of the assignee, refusing to collocate Quevillon at all, was legal. The judgment *a quo* refused to sanction the award of the assignee to the extent of the sum of $342.38, for which the Bank's claim had been settled by Quevillon, and reduced the claim of the Bank to $597.31. At the date that the Bank fyled its claim, it had received one instalment of Quevillon's composition, $85.59. It is perfectly certain that the Bank swore to a claim of $85.59 more than was really due to it. It claimed to be collocated for the whole. The assignee ruled against Quevillon altogether, and he appealed. The Court now holds that Quevillon is incompetent to come into competition with the Bank for any amount. The only effect of his contestation will be to draw the attention of the Court to the fact that the Bank claimed more than was due to it. It is certain that the Bank will not get paid in full. The form of proof required by our bankrupt law is that the creditor must swear

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to his actual debt. The Bank is wrong in this respect—that it swore to an amount as due, part of which it had received.

BEAUDRY, J., observed that he would have been disposed to maintain the assignee's dividend sheet; but seeing that the Bank had claimed more than was due, he concurred in the judgment, as now drawn.

The judgment is as follows:—

The Court, etc.....

"Considering that there is error in the said judgment of the said judge, to wit: in ordering that the claim of the Banque du Peuple be reduced by $342.38, and that the said Quevillon be collocated to the extent mentioned in the said judgment on the assets of the said Bessette & Frère's estate in the place or stead of the said La Banque du Peuple, and in so far as condemning the said Bank to pay the costs of said Quevillon; and this Court considering that by law the said Quevillon was properly not collocated for anything in the dividend sheet prepared by the assignee, (dividend sheet referred to in the pleadings in this cause);

Considering that the said Quevillon ought not to be collocated as ordered by the said judgment of 30th November, 1869, on the assets of said Bessette & Frère in the place and stead of the said La Banque du Peuple, the estate of said Bessette & Frère being *en déconfiture*, and its assets clearly insufficient to pay its liabilities, and to pay La Banque du Peuple its claim reduced even by the $85.59 hereinafter mentioned,

Considering that La Banque du Peuple had received, to wit, from him, Quevillon, $85.59 before it fyled its claim against Bessette & Frère, and that its claim when fyled was made and fyled for $85.59 more than was due to it, that the judgment now under revision might properly have ordered the reformation of the assignee's judgment of 4th October, 1869, by the reduction of the Banque du Peuple claim by said $85.59;

Doth reverse the said judgment of 30th November, 1869, with costs to La Banque du Peuple, against the said Quevillon, on the original contestation before the assignee; also on the appeal to the judge of the Superior Court, and on this revision, doth also reverse to the extent necessary to give effect to the present judgment the said assignee's judgment of 4th October, 1869, and it is ordered that the record be remitted to the assignee of the said Bessette & Frère, and that the dividend sheet be corrected by him, or a new dividend sheet be prepared by him, so that said Quevillon's collocation stand as at present, that is, that he be not collocated for anything, and that the Banque du Peuple may be collocated for dividend only as its original claim-amount reduced by the aforesaid $85.59; and said $85.59 deduction only of any legal costs or charge of the assignee, are ordered to be distributed or disposed of, as to law and justice appertain."

Judgment reversed.

R. Laflamme, Q.C., for Quevillon, contesting.
Dorion, Dorion & Geoffrion, for La Banque du Peuple.

(J.K.)

COURT OF REVIEW, 1870.

MONTREAL, 21 JUNE, 1870.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

NO. 145.

King vs. *Demers.*

FOREIGN JUDGMENTS—PRESCRIPTION.

HELD—Action will lie on a Foreign Judgment notwithstanding anything in the Ordonnance of 1629 to the contrary.

MACKAY, J.—On the 5th of April, 1858, the plaintiff obtained a judgment in Wisconsin against defendant upon a promissory note made in 1857 by defendant's firm of Demers Brothers.

Upon that judgment the plaintiff sues defendant here. He declares upon the note, the suit in Wisconsin, and the judgment, and alleges that since the 5th of April, 1858, defendant has left Wisconsin; he adds that under the law of Wisconsin interest runs on such judgments at six per cent, from date of them; he concludes for the judgment amount, interest, and costs.

The defendant pleads that the note and judgment are prescribed, that since 1857 Defendant has resided in Lower Canada, to the knowledge of Plaintiff; secondly that the suit and judgment in Wisconsin were irregular; that the note is prescribed; that King cannot sue as he does; that the foreign judgment, being irregular and illegal, cannot be enforced in Lower Canada.

By judgment of the Superior Court, 31 March, 1870, (Honorable Mr. Justice Mondelet) plaintiff's action was dismissed, the Court holding that such an action cannot be brought here, and "that defendant's plea, so far as the question of foreign judgment is concerned, is well founded."

King has inscribed for revision and claims that the judgment dismissing the action ought to be reversed. He says that actions on foreign judgments have often been maintained in Lower Canada, and refers to 16 Vict. Cap. 198 as declaring this.

For *Demers*, it has been argued that whereas, in Wilson *vs.* Demers, we dismissed the plaintiff's action and held the note sued upon prescribed, according to the *lex fori* of Lower Canada, we must in the present case, hold *King's* judgment to be prescribed; but are the two cases alike?—Against judgments, in Lower Canada, the only prescription is that of thirty years. So, ruling according to the *lex fori*, we *may* be bound to hold that King *has* action.

It has further been argued that if the matter, or subject, of plaintiff's judgment be prescribed the judgment itself ought to be held so, as in England it is, says *Demers'* counsel, referring to *Harris v Quine, Law Reports, Q.B.* 1869. We have examined that case. Quine pleaded in bar, in the Isle of Man, against an action, not on a specialty, instituted after three years. He succeeded. Such action, says the Isle of Man law, must be in three years, "and at no time afterwards." In England this was held to affect only the procedure. So it was held that the judgment in the Isle of Man dismissing Harris' action could not bar Harris suing in England before the expiry of six years from the cause of

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action, the statute of the Isle of Man not affecting the substance of the contract. It was *not* ruled in Harris v. Quine that if a judgment in the Isle of Man had been for a Plaintiff suing on a *promissory note*, that judgment, if sued upon afterwards in England, would be barred by six years, because of actions on promissory notes being barred there after six years. The defendant's case is not like Quine's, in Harris v. Quine.

What was ruled in Harris v. Quine had been previously ruled, in Massachusetts, in Bulger v. Roche, 11 Pickering. (See Story Confl. of laws § 582–6. note.)

Actions on foreign Judgments are held, says *Demers'* counsel, actions on simple contracts, and are sued upon as such, and are prescribed after six years, so it is, he says, in England, and so it must be held here. *We* hold that our own law must control; against judgments whatever, our own, or foreign, we enforce but one law of limitations.—We would require special things to be proved before ruling shorter prescription against foreign judgments than against our own. We have not, as in Georgia, a shorter prescription against foreign judgments than against our own. Of course were a foreign judgment extinguished, all the parties in the foreign country before and up to the extinguishment, new right could not be by removal of any of them to Lower Canada.

Are actions on foreign judgments prescriptible in England by six years?

The contrary is laid down in the works on Limitations, See *Wilkinson* on Limitations 15.

It seems that till 3 & 4 Wm. IV, no express limitations as to actions upon contracts made by deed, or against judgments, existed in England; but presumption of payment, or satisfaction, against them was allowed after twenty years, in practice. By the 3rd & 4th Wm. IV, prescription, but only of twenty years, is enacted against actions on bonds, or other specialties; under which judgments may be included.—*Smith*, on Contracts, 305.

All is debateable again here, says the counsel for Demers, and I have right to have it ruled that the note held by King is prescribed.

It might be so if the note had been prescribed when sued upon in Wisconsin, but the contrary of this appears.

By the Judgment under review the plaintiff's action has been dismissed; both parties agree that this was owing to the learned judge *a quo* holding that action was prescribed by the Ord. of 1629.

That ordonnance we may admit to be part of our law, as Felix holds it part of the law of France, *e. g.* in his No. 313, where he says that foreign judgments may be debated, &c. Arts. 2123, 2128, C. N., and 546 C. P. *and* the Ordonnance of 1629 are, together, the modern French law, he says, at No. 315.

Some articles of that ordonnance have been enforced here; others have not force. Itself has an article, No. 1, to the effect that desuetude may render inoperative even ordonnances.

Actions on foreign judgments have been and are allowed in Lower Canada. We may presume it from 16 Vic. c. 198, enacted five years before the note held by King was made. The ordonnance of 1629 is not against such actions.

In 1866 Hoppock sued Demers on a Wisconsin judgment, and Defendant did not plead that such a suit could not be. See 13 Jurist.

In the present case, Demers does not plead that a suit like it does not lie, but that the Judgment referred to, being irregular and illegal, cannot be enforced in Lower Canada. King vs. Demers.

We see good claim by plaintiff on a foreign judgment against defendant, *who has made no proofs*. Under the 16 Vic. we must give judgment for Plaintiff, upon what he has proved.

Interest will be allowed according to the law of Wisconsin, of which plaintiff has made the necessary allegation and proof. The judgment complained of is reversed, and the defendant condemned, as prayed.

One motive of the judgment in Revision is as follows: "Considering that under the circumstances proved, no law here prohibited, or prohibits, action such as ff's upon the foreign judgment referred to in his declaration."—The other motives are general.

Judgment for Plaintiff.

R. Laflamme, for Plaintiff.
D. Girouard, for Defendant.
(J. K.)

SUPERIOR COURT, 1870.

[IN INSOLVENCY.]

MONTREAL, 31st OCTOBER, 1870.

Coram MACKAY, J.

In re *Richard Davis*, Insolvent, and *Henry J. Clarke, Q. C.*, claimant, and *William M. Molson*, contesting.

In a contestation of a claim before an assignee, the assignee having first verbally fixed upon a convenient day for hearing and taking evidence, the contestant inscribed the matter with due notice, and all the parties interested, including the assignee, appeared on the day fixed, and shewed their acquiescence as to the regularity of the proceedings by allowing the assignee to give an award without objection.

HELD:—The proceedings were irregular, because under sec. 71 of Insolvent Act of 1869, the day for proceeding to take evidence should have been fixed by the assignee in writing, and the assent of the parties to the above mode of proceeding could not waive the irregularities.

Semble. In such cases it would be irregular for either party to inscribe the case.

This case came up on a petition to a Judge in appeal from an assignee's award.

The petitioner in appeal, a hypothecary creditor of the insolvent, alleged that Henry J. Clarke, Q.C., of Montreal, had fyled a claim for $35,000 against the estate of the insolvent.

That on 24th August, 1870, the petitioner had fyled a written contestation requiring said Clarke to prove his pretended claim, but had been duly foreclosed from answering the contestation, and failed to prove his claim. That the contestation was duly inscribed for proof and final hearing on the merits, and on the 21st of September, 1870, Mr. John Whyte, the assignee, rendered judgment, setting aside said claim without costs, and declaring that he reserved to Messrs.

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Mulholland & Baker, to whom he stated said claim had been transferred, "the right of fyling their claim under said transfer on or before Monday, the 26th inst."

That said Mulholland & Baker were not parties to said contestation and never appeared or intervened therein, the contestation being entirely between the petitioner and Clarke.

That under the contestation there was no proof made of any transfer of said claim by said Clarke to Mulholland & Baker.

That said assignee had no right to reserve to Mulholland & Baker, not in the cause, the right of fyling a claim or to adjudicate upon a pretended transfer of Clarke's claim to them, and the same being rightly dismissed for want of proof, said assignee had no right to give Mulholland & Baker rights as pretended transferees of Clarke, to fyle a claim.

That the petitioner having succeeded in his contestation ought to have been awarded costs. The prayer was that the judgment be reformed, and that part of it struck out which referred to said Clarke having transferred his claim to Mulholland & Baker, and which reserved to them the right of fyling a claim and which deprived the petitioner of his costs.

Abbott, J. J. C., Q.C., for Clarke, appeared and presented a petition to have the award declared null and set aside, his principal objections being that the assignee never fixed a day for proceeding to take evidence on the contestation, nor ever notified said Clarke of such a day being fixed. That the assignee did not proceed to take evidence on the said contestation on the 2nd day of September, the day for which it was inscribed, nor did he thereafter proceed from day to day to take such evidence or otherwise regularly order, but on the contrary nothing was done in the matter on said 2nd day of September, nor was the same continued for such evidence to any day certain. That the assignee never fixed the 21st of September for the hearing and taking evidence, nor was the said Clarke ever notified of the same.

The facts, as admitted and proved, are, that the case was first inscribed for *enquête* and hearing on merits on the 2nd day of September, the inscription being duly served upon Clarke and fyled with the assignee. By request of Mr. Abbott the matter was left open and nothing done until a new notice was served on Clarke, that the case would be proceeded with under the inscription on the 21st of September. This day was agreed upon with the assignee and the notice fyled with him and entered in his minutes.

On the said day Clarke appeared at the assignee's office, making no objection to the notice or the regularity of the proceedings, and declared he had assigned his claim to Messrs. Mulholland & Baker, but produced no evidence.

The assignee then, at the request of the petitioner, gave the judgment recited above.

The claimant Clarke relied upon sec. 71, Insolvent Act of 1869, which provides that "the assignee shall fix a day for proceeding to take evidence thereon, "and shall thereafter proceed therewith from day to day, unless he shall other-"wise order, until the making of his award in the premises."

Ritchie, Morris & Rose, for Molson, petitioner, contended that the assignee

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had fixed the day for proceeding. Although he had not signed a paper fixing a day, yet he had verbally fixed the day in question, and had shown this and his acquiescence by fyling the inscription and notice in the record and entering them in the minutes. He was also present on the day fixed, as was also Clarke, the claimant. All parties had agreed to the day and none had objected to it. Judgment had been rendered under the proceedings as regular, with the acquiescence and in the presence of all parties. The intention of the Act simply was that a day should be agreed upon with the assignee and that due notice thereof should be given. This had also been the invariable practice. The attorneys went to the assignee and asked him what day would suit his convenience, and upon ascertaining this, notified the other party. This was fixing a day. The act did not say that the assignee should sign a declaration fixing a day, but simply that he should fix a day.

The other point, that the assignee did not, after fixing a day for proceeding to take evidence, "proceed therewith from day to day," could not be seriously urged, as it had been admitted by Mr. Abbott, in presence of the Court, that the reason why contestant did not proceed on the day first named was that he had himself requested them to suspend proceedings.

The judgment set aside all the proceedings before the assignee from the 24th August, 1870, the date on which the contestation was fyled, and ordered that the record be remitted to the assignee.

Ritchie, Morris & Rose, for Molson, contestant.

J. J. C. Abbott, Q.C., for Clarke, claimant.

(J. L. M.)

COURT OF REVIEW, 1871.

MONTREAL, 28TH FEBRUARY, 1871.

Coram MONDELET, J., MACKAY., J., BEAUDRY, J.

No. 836.

Hart vs. *Rose.*

HELD.—1st. That a judgment upon the merits, which leaves a *défense en droit* undisposed of, is bad.

2nd. That a petitory action, not setting out the District in which the land claimed is situate, will be dismissed in the absence of evidence or an admission of the identity of the Township within which the land is alleged to lie, with the Township mentioned in the titles produced.

Semble, that proof *avant faire droit* on a *défense en droit* cannot, under the ordinance of 1535 be ordered by the Court.

MONDELET, J.—This was before the Superior Court of the District of Bedford, a petitory action whereby the Plaintiff, Reuben M. Hart, sought to recover from the defendant, alleged to be in possession thereof, the lot No. 13 in the first range of the Township of Ely. (The declaration does not state in what District.) The judgment appealed from, (JOHNSON, J.) maintaining plaintiff's action, is of the 19th May, 1870. There are no less than six pleas opposed to this action. By the first, the defendant claims a continued chain of titles from the Crown, by Letters Patent in 1802, down to himself. The second plea is

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about the same thing. 3rd. That the *auteur* of Moses Hart, Peter Torbox, never was owner or possessor of said lot. 4th Plea, 30 years' prescription. 5th Plea, ten years' prescription under good title. 6th. *Défense en droit.*

The defendant commences by being wrong in the order of his pleas, the *défense en droit* having been pleaded as a sixth plea, instead of as the first. More of that hereafter.

It would seem that the parties were sent to proof upon an *avant faire droit* which I shall presently have to speak of. No evidence was adduced; the whole case was made to rest on the titles respectively fyled by the parties. *Inde* all that followed, as we now have to show.

The plaintiff pretends that defendant has in no way proved him to be without title or right to the lot of land in question, nor that he, defendant, has a better or anterior title to that of plaintiff, and that with respect to plaintiff's title, the first is the title given by the sheriff of the District of Three Rivers in 1807, which title and right to the lot is followed down by a regular line and succession of other titles, to the plaintiff. On the other hand, the defendant rests his claim on Letters Patent from the Crown in 1802; and, like the plaintiff, urges a succession of other titles down to himself, as already mentioned. No testimonial evidence was adduced, the whole case resting on titles. Whether the lot of land in question, or the lot of land claimed by the parties, was or is in the District of Montreal, or whether the lot mentioned in the sheriff's title of 1807, is the identical Ely Township granted by the Letters Patent of 1802, remains in the dark: the parties have not thought of adducing evidence of that identity. We have been referred to maps and it has been suggested that the judges might by drawing a line on any map so used, and applying to the Township of Ely, ascertain its true position. Such a proceeding is out of the question, and at all events it is out of the record, and would by no means be conducive to any proof or demonstration. Thus we stand with plaintiff's declaration wherein it is not alleged in what District the Township of Ely was situated in 1807, which omission cannot be supplied by the Sheriff's title; and we have defendant's allegation and proof by Letters Patent that a Township of Ely, therein mentioned, was then (in 1802) in the District of Montreal! Where is the truth? Is it the same Township? or are there, or were there two? It is impossible to say. The action, therefore, in the absence of evidence of identity, should have been dismissed. The preceding observations bring me at once to two others, one with respect to the *défense en droit*, and the other the ordering of proof *avant faire droit*. What in this case is called a *défense en droit* (ranking sixth instead of first in order, five pleas *au fond* preceding it,) is a mixture of *moyens à la forme*, and *moyens en droit*. It should at once have been dismissed. One of the *moyens en droit* is the omission in the declaration as to which of the two districts the Township of Ely is or was situated in! That is no *grief en droit*, but a legitimate means of forcing plaintiff to amend (or see his action dismissed), it not being explicit in such a way that the defendant could safely plead to the action. It should have been, therefore, an *exception à la forme*. But the worst part of this is the order to go to proof *avant faire droit*. Such an order is against all reason. Proof! to what end, upon a *défense en droit*? Is

it not an elementary principle that upon a *défense en droit* the Court has no right to look at the exhibits? All it has to do is to ascertain whether the declaration shews a right of action; or, upon an answer in law, whether the plea demurred to shews a right of *exception péremptoire en droit* to the declaration. And by what process of reasoning can it be made out, that the Court will help itself, in deciding upon either the *défense en droit* or an answer *en droit*? Such a proceeding is not only bad, and absurd, but it is in direct violation of the law; the ordinances, and specially that of 1535, which is peremptory in decreeing that judges shall, at the outset, determine the *moyens de droit*. The *défense en droit* is either good or bad; if bad in itself, dismiss it at once; if good, maintain it and dismiss the action, unless the pleading is amended. It is perfectly evident that there never can be a case, not a single case, where such an *avant faire droit* should be ordered on a pleading in law, such as a *défense en droit* or an answer in law. One readily understands that upon *exceptions péremptoires en droit*, where law and facts are brought up simultaneously, it may be necessary for the Court juridically to know the facts; but every one knows, or should know, that on a demurrer, or *défense en droit*, or, by an answer in law, *réponse en droit*, all the allegations of either the declaration, or of a pleading, are hypothetically admitted. It is, therefore, a *contradictio in terminis* to order proof *avant faire droit*, apart from its being an open violation of the Ordinance. Nothing in procedure can be more clear or easy of apprehension and practice. Besides, it may be ruinous to parties; they may engage, sometimes, in a cumbrous, lengthy, expensive line of evidence; and forsooth, when the case is submitted on the merits, the Court has to dismiss the action. Why? Because there is in the action no right shewn. Can there be, *en procédure*, anything more glaringly contrary to law and reason? And what shews the proceeding in its true light, is the impossibility on the part of the Judge, at *enquête*, of preventing a multitude of irrelevant facts being proved, he having no further right or jurisdiction than to decide on the admissibility or inadmissibility of questions. But he has no power to interfere with the contestation, such as raised, and which the parties may blame themselves for not having caused to be shaped according to law. And in case the attempt has been made, then upon the Judge rests the responsibility of a protracted and often ruinous *enquête* being had. In the first case, the Judge is not to blame, and should not be blamed; ignorance, sheer ignorance, or malevolence, alone can lead any one to censure him. In the latter case, the Judge, and not the parties, should be visited with such censure, because it is his own act, his own error. The theory and practice upon such proceedings, the difference between the *défense en droit* and the *exception à la forme*, and the points which legally give rise to one or the other, are so plain, so self-evident, that they never should be confounded either by the Bar or by the Bench. The judgment appealed from has not only ordered proof *avant faire droit* upon the pleadings, including the *défense en droit*, but it has, on the final hearing, omitted to pass upon the *défense en droit*.

Upon the whole, it is in my opinion perfectly plain that the judgment maintaining the action is wrong, and that the action should have been dismissed. The judgment must, therefore, be reversed, and plaintiff's action dismissed, but without costs, both parties being wrong.

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MACKAY, J., concurred. In the state in which the record stood, there being no parol testimony, and no admissions, it was impossible that a judgment could be rendered in favor of the plaintiff.

The Judgment of the Court of Review is recorded as follows:—

The Court, now here sitting as a Court of Review, having heard the parties by their respective Counsel, upon the judgment rendered in the Superior Court of the District of Bedford, on the 19th day of May, 1870, having examined the record and proceedings had in this cause, and maturely deliberated:

Considering, that in the present case, not only has the Superior Court of the said District of Bedford ordered proof *avant faire droit*, instead of deciding on the *défense en droit* fyled by the defendant, but has omitted, altogether, by the judgment now appealed from, to pass, as should have been done, upon said *défense en droit*;

Considering further, that the *défense en droit* being irregularly and badly pleaded, after pleas to the merits, such as of record, and containing matters for an exception *à la forme*, mixed up with *moyens de droit*, should have been at once dismissed:

Considering that, on the merits, the plaintiff's action should have been dismissed, inasmuch as the said plaintiff has not proved the material allegations of his declaration:

Considering that there is error in the judgment appealed from, to wit, the said judgment of the 19th of May, 1870, this Court doth reverse, annul, and set aside the said judgment, and, proceeding to render the judgment which should have been rendered, doth dismiss the *défense en droit* in this cause fyled, and on the merits doth dismiss the plaintiff's action, without costs, inasmuch as both parties have partly caused the irregularities and illegal course taken in this cause, when they could have prevented it; and as to costs in this Court of Revision, each party to bear his own costs.

Judgment reversed.

Lay, for the Defendant, Appellant.
O'Halloran, Q.C., for the Plaintiff, Respondent.
(J. K.)

COURT OF REVIEW, 1870.

MONTREAL, 31ST JANUARY, 1870.

Coram MONDELET, J., MACKAY, J., TORRANCE, J.

No. 35.

Beard et al. vs. *Brown et al.* and E. Contra.

HELD:—That the payment of freight and the delivery of the cargo are concomitant acts, which neither party is bound to perform without the other being ready to perform the correlative act, and therefore, that the master of a vessel cannot insist on payment in full of his freight of a cargo of coals, before delivering any portion thereof.

This was an inscription in Review of a judgment rendered in the Superior Court at Montreal, on the 30th of June, 1869, by THE HON. MR. JUSTICE BERTHELOT.

The action was one in revendication of a cargo of coals which the defendant Brown refused to deliver to the plaintiffs without pre payment of his entire freight; the plaintiffs having offered to pay freight on the coals as landed and weighed. Brown, in consequence of the dispute, yarded the coals with the other defendant Shaw, in whose possession they were seized; the plaintiff depositing the freight in Court. Brown resisted the action, and brought a cross demand for damages.

The action was maintained with costs against Brown, and his incidental demand was dismissed with costs.

The following were the reasons assigned in the judgment of the Superior Court:—"The Court * * * Seeing the interlocutory judgment already rendered in this suit on the 4th of November last, and the deposit by the plaintiffs of the sum of $318.25 on the 4th of November last, as a balance of freight by them due to the defendant E. G. Brown, as per bill of lading of the 12th of October, 1868, executed at Newburg, as stated in the declaration, for the carrying of 155 tons of coal by the defendant from Newburg to the Port of Montreal in October last.

Seeing the security bond under which the plaintiffs have got possession of the quantity of coal seized and attached under and by the writ of saisie revendication issued in this cause.

Seeing that the bill of lading of the 12th of October, 1868, is *general* in its terms.

Seeing that the rights of plaintiff and defendant Edgar G. Brown, under the articles 2428 and 2453 of the Civil Code of Lower Canada, are concomitant.

Seeing that it is in evidence that the defendant E. G. Brown has wrongfully and illegally refused to deliver any part or portion of his freight without first having been paid by plaintiffs of the whole freight, which he had no right by law.

Considering that the lien and privilege of defendant Edgar G. Brown over the goods carried would not have been impaired or diminished should the plaintiffs have continued to have possession of the same on false or frivolous promises of payment.

Considering that the defendant Edgar G. Brown had no right by law to cause the said goods or coals carried by him to be advertised for sale, as he has done, after the offer and readiness of plaintiffs to pay his freight or any part or portion of the same so soon as he would have the delivery of said goods or coal or of any portion of the same.

Considering that for all these reasons the defendant and incidental plaintiff is wrong in his pretensions as set forth in his plea and his Incidental demand for damages."

MONDELET J.:—(For the Court in Review.) This is a case of *Saisie Revendication* of a certain quantity of coals, by plaintiffs, and an incidental demand for damages against them formed by defendant Edgar G. Brown. The other defendant Shaw has not contested, *s'en étant rapporté à justice.* The facts are the following:—

On the evening of the 24th of October, 1868, which fell on a Saturday, the

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defendant Brown arrived at the harbour of Montreal, in command of the barge "Orleans," on board of which were shipped 155 tons 14 cwt, of coal by Coming, Radcliffe and Sweet, of Newburg, consigned to the plaintiffs, the bill of lading being a general one, stating the usual conditions as to payment of freight.

It appears that the consignees paid on account of this freight $100 American currency, in advance.

About one o'clock P. M. on the 26th October, the barge "Orleans" was allotted a berth where she could discharge her cargo, thereupon the captain, Brown, proceeded to plaintiffs' office and informed them that he had arrived with the coal in question, and that he was ready to deliver it. The plaintiffs requested him to put it out, and that they would receive it, and pay him his freight. Captain Brown stated that he would not put out one ounce of it, till he had been paid his freight in full, and left the plaintiffs' office without waiting for a reply.

The same afternoon, Brown served upon plaintiffs a notarial protest or notification, informing them that he was ready to commence discharging and to deliver upon being paid the balance of the freight, failing which payment before the morrow, the 27th, at 11 o'clock, he would discharge the cargo on the wharf and sell it by public auction; the next day, however, he declared his readiness to discharge from his vessel as much coal as would by its freight compensate the $100 that had been advanced him, and accordingly discharged about 30 tons which were taken away during the day. But so soon as that quantity was discharged he refused to proceed further.

On the morning of the 28th, about 7 o'clock, plaintiffs wrote Brown a letter which was copied by the witness Alexander Brown, offering to be at the barge "Orleans" at 8 o'clock, with carts to take away the coal as fast as delivered, and to prevent further difficulty, proposing to Captain Brown three modes of securing to him the payment of his freight, namely, 1st, to pay the freight on the coal as they should receive it at the rate of 40 tons per day, according to the Statute; 2nd, or to pay the whole of the freight, if Captain Brown would put out the whole of the coal on the wharf, so that it could be seen and verified; or 3rdly, to pay the whole of the freight before the discharge of the coal on the wharf, if Captain Brown gave security that the whole would be forthcoming.

Captain Brown refused to accede to any of those proposals and insisted on his pretension that he should be paid the whole freight before he would put an ounce of the coal on the wharf.

On the 29th October, Captain Brown served a second notarial protest on plaintiffs, complaining of their refusal to pay the freight before the discharge of the coal, and on the same day he served a second protest notifying the plaintiffs that as they had not paid the balance of freight he would discharge the coal and place it in Shaw's yard, and would sell it on the 2nd of November to a sufficient extent to pay his freight, demurrage, legal and incidental expenses. And on the following day, the advertisement of the sale appeared in the *Montreal Herald*. Thereupon the plaintiffs seized the coal by *Saisie Revendication*, and

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bringing the amount of freight into Court prayed that the coal be declared to be theirs, and that it be ordered to be delivered over to them.

From the above statement, for the details of which I am indebted to the *Factum* prepared by the plaintiffs' counsel, it is at once apprehended that the contestation at issue between the parties is simply the following:—Was the Captain of the barge "Orleans" bound to deliver the cargo on the wharf, though not to plaintiffs, until the freight was paid? The judgment appealed from rendered by the Superior Court of the District of Montreal (BERTHELOT, J.) decided the affirmative of the proposition, and declaring the *Saisie Revendication* to be good and valid, ordered the coal to be delivered to the plaintiffs, and the defendant to pay the costs of the suit.

The principle of the judgment is that the rights of the plaintiff and the defendant are concomitant.

The consequence was, of course, that the defendant's pleas were dismissed, as well as his incidental demand with costs. The *Saisie Revendication* was declared good and valid with costs against defendant Brown, but without costs against defendant George Shaw. The deposit of the sum of $318.25 deposited by plaintiffs was ordered to be paid over to defendant Brown by the Prothonotary of said Superior Court.

This well motived judgment is in all respects strictly correct. Were there not innumerable English, French and American authorities, several judgments and a jurisprudence well established on the question before us, as having obtained in this country, reason and common sense, I do not say *equity*, but reason and common sense would readily suggest the true and only correct decision to be given in such a case as the present. The delivery and the payment must be concomitant. The captain must, of course, take the coal out of the hold of the barge, and place it in such a way on the wharf that it may be seen and verified, and in so doing he does not lose his lien. On the other hand the party who claims the coal as consigned to him has to be ready to pay. I do not see the slightest difficulty in this matter.

It is therefore my opinion that the judgment now under consideration should be confirmed, and it is confirmed accordingly.*

Judgment of Superior Court confirmed.

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

J. A. Perkins, Jun., for Brown.

(S. B.)

* [Rep. Note:—*Vide* Brewster et al. vs. Hooker et al.—1st. L. C. Jurist, pp. 90, *et seq.*]

COUR DE CIRCUIT, 1871.

MONTREAL, 3 MARS, 1871.

Coram BEAUDRY, J.

No. 2016.

Curley vs. *Hutton & Hutton*, mis en cause.

JUGE:—Qu'un défendeur saisi peut être nommé gardien de ses propres effets avec son consentement, et qu'il est contraignable par corps s'il ne les représente pas au jour de la vente.

Le 29 Août, 1870, une saisie-exécution est prise contre les biens meubles du défendeur. Du consentement de ce dernier l'huissier le nomme gardien de ses effets saisis. Au jour fixé pour la vente, le défendeur ne représenta pas les effets. L'huissier ayant fait son retour en conséquence, une règle fut prise pour faire déclarer le défendeur gardien en mépris de Cour et contraignable par corps avec l'alternative voulue en pareil cas, soit de représenter les effets ou d'en payer la valeur ou d'aller en prison.

Le défendeur plaida qu'il ne pouvait être contraignable par corps, en ne rapportant pas les effets, et allégua au soutien de sa prétention que sa nomination de gardien à ses propres effets était illégale; qu'il était incompétent pour servir de gardien à ses effets saisis et que l'huissier saisissant ne devait pas le nommer lui-même gardien de ses propres effets, même de son consentement. Il se fondait sur le § 6 de l'article 550 du Code de Procédure Civile. "Les shérifs ou huissiers ne peuvent prendre comme gardiens ou dépositaires, le saisi, sa femme et ses enfants à peine de tous dépens, dommages et intérêts; mais les frères et neveux du saisi peuvent être établis gardiens, s'ils y consentent." De là, le défendeur concluait à la nullité de la saisie.

J. B. Doutre, pour le demandeur répondit que l'art. cité par le défendeur défendait aux huissiers de nommer un défendeur gardien de ses effets; mais l'article ne déclarait pas la saisie nulle par suite de cette nomination.

La seule conséquence était de rendre l'huissier responsable des dommages qui en résulteraient; que c'était plutôt au demandeur, à se plaindre de cette nomination, puisque cela pouvait compromettre ses intérêts. Le demandeur consentant à ce que le défendeur sur sa demande, fut nommé gardien, cette nomination était légale et valable, à l'egard du défendeur.

Carré & Chauveau, Lois de la Procédure civile, tome IV. pp. 723 et 729, L'art. 598 du C. P. F. y est commenté. "Le saisi, son conjoint, ses parents, alliés et domestiques peuvent être établis gardiens de leur consentement et de celui du saisissant."

Pigeau, Procédure Civile, p. 626, vol. 1, où il est dit, "celui à qui il importe de refuser une personne pour gardien, l'établit ou l'accepte, l'établissement est valable; ainsi le saisissant peut accepter un enfant du saisi, même sa femme non contraignable par corps &c."

Idem, T. 2, p. 78. "Dans une saisie gagerie l'huissier peut forcer le saisi d'accepter la garde de ses effets et est responsable par corps de les représenter."

Règle déclarée absolue.

Doutre, Doutre, & Doutre, pour demandeur.

J. J. Curran, pour défendeur.

(J. B. D.)

COURT OF QUEEN'S BENCH, 1871.

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CROWN SIDE.

MONTREAL, 30TH MARCH, 1871.

Coram DRUMMOND, J.

Regina vs. *Amedée Fontaine* dit *Bienvenu*.

INDICTMENT FOR BIGAMY.

HELD:—1st. That it is incumbent upon the Crown under 4, 5 Victoria, ch. 27, sec. 22, (ch. 91, sec. 29, 30, C. S. C.) to prove that a person marrying a second time, whose husband or wife had been continually absent from such person for seven years then before, knew such person to be living within that time.

Semble 1st:—That the same rule would apply to 32, 33 Victoria, chapter 20, sec. 58, Criminal Act of 1869.

2nd. That the first wife cannot under any circumstances be witness for or against the prisoner.

3rd. That the jury will be directed to acquit the accused, the Crown failing to make such evidence of knowledge of the prisoner.

The prisoner was indicted for Bigamy as follows:

That Amedeé Fontaine dit Bienvenu, late of the City of Montreal in the District of Montreal, laborer, on the 29th day of October, in the year of our Lord 1857, at the City of Montreal, in the District of Montreal, did marry one Julie Lallier dite Marcheterre, spinster, and her the "said Julie Lallier dite "Marcheterre then and there had for his wife, and that the said Amedée "Fontaine dit Bienvenu, afterwards and whilst he was so married to the "said Julie Lallier dite Marcheterre as aforesaid, to wit, on the 21st day of "March, 1868, at the City of Montreal in the District of Montreal, feloniously "and unlawfully did marry and take to wife one Georgiana Burn, and to "her said Georgiana Burn was then and there married, the said Julie Lallier "dite Marcheterre, his former wife, being then alive, against &c., &c.

"And the Jurors &c., &c., that the said Amedée Fontaine dit Bienvenu afterwards, to wit, on the 9th day of January, in the year of our Lord 1871, at "the City and District of Montreal, within the jurisdiction of the said Court, "was apprehended for the felony aforesaid."

A true bill was returned. Said Julie Lallier dite Marcheterre was present in Court, and it was stated that she was a Crown witness, to which Counsel for the prisoner objected, citing 14 & 15 Vict. ch. 99, s. 3, and 16 & 17 Vict., ch. 83, sec. 3.

The Court held that she could not be allowed to testify either for or against the prisoner.

Upon the trial the Crown adduced evidence tending to prove the marriage of prisoner with Julie Lallier dite Marcheterre. The evidence of the Crown established:—

1st. That Julie Lallier dite Marcheterre had left Canada and resided in New York and at New Orleans from 1857 till February 1871, when she returned to Montreal.

2nd. That during such interval it had been reported and it was believed that she was drowned and was dead.

3rd. That the marriage of prisoner with Georgiana Burn took place at Chicago

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in August, 1867—but that Canon Fabre at Montreal in March, 1868, gave them the *bénédiction nuptiale*.

But the Crown witnesses wholly failed in any way to testify to any fact or facts which would establish that the prisoner knew or had reason or cause to know that Julie Lullier dite Marcheterre (from whom he had lived apart after 1857) was alive in 1867 or 1868, or at any period within the seven years previous to 1867.

John A. Perkins, Counsel for prisoner, claimed (before entering upon any defence) acquittal, and the direction of the Judge to the Jury to acquit upon two grounds.

1st. The indictment did not aver nor was it proven that prisoner was a British subject who had left Canada for the purpose of marrying in a foreign country. The second wife (Georgiana Burn) having admitted that she had been married in August, 1867, to the prisoner at Chicago, by the Rev. Mr. Kelley, the Court here had no jurisdiction. The celebration of marriage by the Rev. Canon Fabre went for nothing. The marriage, if ever it took place, was had at Chicago. They were and continued to be man and wife after August 1867. The crime, if any, was committed in a foreign state—and in the absence of evidence that prisoner was a British subject striving to evade our laws by a marriage in a foreign country, there was no case before our courts. Counsel cited decision Reg. v. McQuiggan, Q. B., 2 L. C. R. p. 340,—where it had been held "on an indict-"ment for bigamy committed in a foreign country, it is necessary that the "indictment should contain the allegations that the accused is a British "subject, that he is or was resident in the Province, and that he left the same "with intent to commit the offence," and referred to the argument of Mr. Kerr, Counsel for prisoner in that case, as relevant to the present case.

2nd. Because the Crown having proved the absence of Julie Lullier dite Marcheterre from the prisoner for over thirteen years, had not proved his knowledge that she was alive within the seven years prior to his marriage with Georgiana Burn. After stating facts proved in evidence, he argued that the prisoner was being tried under ch. 91, sec's. 29 and 30, Con. Stat. Canada, inasmuch as the alleged second marriage took place in Chicago in 1867 before the passing of the 32-33 Vict. ch. 20, in 1869. The two statutes, however, were worded alike upon the point being argued and similar to statutes of England upon the matter. Counsel cited the various material acts touching bigamy. They all contain the proviso or exception in favor of the accused as to knowledge of the existence of the former husband (or wife). In most of the United States the period of absence is fixed at five years, though in Massachusetts it is seven years, and in Ohio (law of 1831) three years, and in New York (1836) five years, where it is held that the legal penalty does not apply if one of the parties has been absent for a year or more at the time of the second marriage and is believed to be dead. The 1 James I, ch. 11, changed the period from seven to five years, enacting that the second marriage was void, but the party contracting was not within the penalties of the act. Cited Porter's case, Cro. Car. 461, 4 B. 163,164. It was incumbent upon the Crown to prove prisoner's knowledge, Reg. vs. Cullen, 9 C. & P. 681; Reg. vs. Jones, Carr. &

M. 614; Reg. vs. Briggs, Dears. & B. C. C. 98; Reg. vs. Heaton, F. & F. 819; Reg. vs. Turner, 9 Cox C. C. 145; and Reg. vs. Curgerwen, Law Rep. 1 C. C. R. 35 L. J. (M. C.) 58, adopting and fully sanctioning decision in R. vs. Heaton.

Regina vs. Fontaine dit Bienvenu.

T. W. Ritchie, Q. C., for the Crown, admitted the force of the last decision (R. vs. Curgerwen) but argued that it did not apply to this case. He maintained that this was a question for the Jury, and evidence upon the point at issue had been made; for in January, 1871, prisoner had attempted to find out where Julie Lallier dite Marcheterre resided.

The Court took time to consider its judgment.

DRUMMOND, J. It was not necessary to refer to the first point raised by the Counsel for the prisoner, inasmuch as the Court would decide the case upon the second objection made. After stating the evidence as given, his Honor ruled that the Crown had not shewn that the prisoner, at any time within the seven years prior to 1868, knew of the existence of Julie Lallier dite Marcheterre. After stating the law of England and criticising the various decisions upon the matter, he was disposed to adopt holdings in R. vs. Heaton, (which was a case very like this one), and R. vs. Curgerwen. Under our law it was incumbent upon the Crown to adduce sufficient evidence of knowledge to allow the case to go to the Jury. Not having done so, he should direct an immediate acquittal. His Honor stated his decision to the effect above written. Verdict, Not Guilty.

T. W. Ritchie, Q. C.,
E. U. Piché, Q. C., } For the Crown.

John A. Perkins,
E. C. Monk, } Counsel for prisoner.

(E. C. M.)

SUPERIOR COURT, 1871.

IN CHAMBERS.

MONTREAL, APRIL, 1871.

Coram MACKAY, J.

No. 644.

Henderson vs. *Loranger*.

HELD:—That under Chap. 10, Art. 997 *et seq.* C.C.P. and under Article 1013, and by our laws, a Petitioner issuing writ of *quo warranto* in term cannot proceed in vacation but must proceed during term.

The writ of *quo warranto* issued in term the 21st March, 1871, upon order of Court upon petition of Henderson, *Requérant*, against defendant, city councillor for St. Louis Ward, Montreal; and was returnable and returned in term the 27th March, 1871. Defendant urged pleadings in writing touching irregularities and illegalities of proceedings by *exception à la forme*.

Requérant, the 14th April, (in vacation) moved to amend bailiff's return, and to reject *exception à la forme*.

Henderson vs. Loranger.

Defendant by counsel urged that no proceedings could be taken in vacation, and opposed reception of papers presented by *requérant*.

After argument in chambers his Honour Judge Mackay ruled the objections as made in favour of defendant and refused to receive or fyle papers offered.

A. & W. Robertson, for *Requérant*.

John A. Perkins, for defendant.

Edward Carter, Q.C., counsel for defendant.

(J.A.P.)

SUPERIOR COURT, 1871.

MONTREAL, 18TH FEBRUARY, 1871.

Coram BEAUDRY, J.

No. 66.

Burn vs. *Fontaine* dit *Bienvenu*.

HELD:—That delay will be given to defendant to plead if it appear that he is under criminal charge which might be influenced by pleading within the required delays.

John A. Perkins, for the defendant.—The defendant, who is indicted for bigamy, prays for delay to plead till after 24th March, when the case and charge for bigamy will be tried, fearing that by now pleading his case would be prejudiced. This is proved by affidavits.

Joseph Doutre, Q. C., contra.

PER CURIAM.—Delay to plead is granted to 2nd April.

Doutre, Doutre & Doutre, for plaintiff.

Perkins & Monk, for defendant.

(J.A.P.)

SUPERIOR COURT, 1870.

MONTREAL, 30TH DECEMBER, 1870.

Coram TORRANCE, J.

[redacted] No. 2143.

Bonnell vs. *The Drummondville Bark Extract Manufacturing Company.*

The word "I" or "We" having been omitted in the beginning of an inscription for *enquête* and no consent in writing that the *enquête* be taken under the old system having been fyled, but the parties having proceeded with their *enquête*:—

HELD:—That the irregularities had been waived by the consent of the parties, as implied by their proceeding and examining witnesses under the inscription for *enquête*.

The above statement and holding, together with the remarks of the learned Judge, who rendered the judgment will sufficiently explain the points raised and decided.

TORRANCE, J.—This case is before the Court on a motion to set aside all the proceedings at *enquête*. The petitioners who made this motion impeached the inscription for *enquête* as entirely irregular. It was irregular in so far that the word "inscribe" was not preceded by the word "I" or "we." It was

also urged that there was no consent in writing that the *enquête* be taken under the old system. But both parties had gone on with the *enquête* by consent, and it is out of the question now to ask the Court to set aside all the proceedings. The object of an inscription is that the party be not surprised. The petitioners have gone on with their *enquête* and it seems a mere piece of *chicane* to raise such objections now.

Bonnell vs. Drummondville B. E. M. Co.

J. J. C. Abbott, Q. C., for plaintiff.
Doherty & Doherty, for petitioners.
(J. L. M.)

Motion rejected.

SUPERIOR COURT, 1871.

In Chambers.

MONTREAL, 8TH MARCH, 1871.

Coram BERTHELOT, J.

In the matter of McDonnell, an Insolvent: and Tyre, Assignee, and Kenney, Claimant.

HELD:—1. That no Judge in the Province of Quebec has a right to interfere with Insolvency matters originated in Ontario where the Insolvent has his domicile, even though the Assignee reside in the Province of Quebec, and the affairs of the estate be conducted in Montreal.
2. That the "Judge" having jurisdiction is the Judge of the domicile of the Insolvent.
3. That one Judge in insolvency matters has power to set aside and vacate an order made by another Judge in Chambers.

An order was obtained in Chambers, the 6th March, upon petition of claimant requiring the assignee to show cause why claimant should not be collocated.

J. A. Perkins, for assignee. The first objection is that the domicile of the insolvent was and is at Cornwall, where the assignee was named, and though the assignee be resident here, and the creditors upon dividend sheet will be paid to-day, the order was illegally obtained, as the only judge having jurisdiction is the judge of the County Court, Cornwall.

R. Laflamme, Q. C., contra.

Judgment maintaining objection and setting aside order, and dismissing petition with costs.

R. Laflamme, Q. C., for claimant.
Perkins & Monk, for James Tyre, assignee.
(J. A. P.)

COURT OF REVIEW, 1871.

MONTREAL, 22ND APRIL, 1871.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 1811.

Toland vs. Spencer.

HELD.—That a defendant, under bail, in a case of *Ca. ad res.*, and being the party inscribing in review, has a right to have his case heard as a privileged one.

MACKAY, J.—This is an application by the defendant, who is under bail in a case commenced by *Capias ad Respondendum*, to have the case heard as a privi-

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leged one. The Judges having taken time to consider are of opinion that the application must be granted. Although the defendant is at large on bail, he is nevertheless in the custody of his bail, who are his jailers, and have it in their power to surrender him at any moment. Under the circumstances,—he being the party inscribing,—we think he has a right to have his case heard as a privileged one, and it will be accordingly called at half-past one this afternoon.

Application granted.

Perkins & Monk, for plaintiff.
Bethune & Bethune, for defendant.
(S. B.)

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 9TH MARCH, 1870.

Coram DUVAL, CH. J., CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

Regina vs. Pelletier.

HELD:—1. That an indictment for perjury, based on an oath alleged to have been made before the "Judge of the General Sessions of the Peace in and for the said District" (of Montreal) instead of (as the fact was) before the "Judge of the Sessions of the Peace in and for the City of Montreal," (that being the proper title of the Judge), may be amended, after plea of not guilty.

2. That parties separately indicted for perjury alleged to have been committed at one and the same hearing can be witnesses for each other.

This was a Crown Reserved case.

The prisoner had been tried and convicted of perjury.

After pleading not guilty, the private prosecutor's Counsel moved to amend the indictment, as above explained, and his motion was granted.

The trial then proceeded, and the prisoner tendered as a witness on his behalf Cyrille Tellier, who had been convicted of perjury committed at the same hearing as that of the prisoner.

The presiding Judge (DRUMMOND) on objection being taken, refused to allow Tellier to testify, and the prisoner was found guilty by the Jury.

The Honorable Judge abstained from sentencing the prisoner, and reserved for the consideration of the Court sitting in appeal, the two points as to the amendment and the evidence.

DUVAL, CH. J.:—The allowing of the amendment was clearly correct, but we all think, after mature consideration, that the ruling with regard to the evidence was wrong. The prisoners were not indicted jointly, and the offence charged, being perjury, was not and could not be joint. The trial is therefore set aside and a new trial ordered.*

J. A. Chapleau, for private prosecutor.
Charles Ouimet, for prisoner.
W. H. Kerr, Counsel.
(S. B.)

* A similar judgment was rendered in the case of Tellier.

SUPERIOR COURT, 1871.

MONTREAL, 30TH MARCH, 1871.

Coram BEAUDRY, J.

No. 1536.

Fraser et al. vs. *Abbott et al.*

HELD: 1. That neither the cession of Canada, nor the introduction of enlarged power of bequest into Lower Canada by 41 Geo. III, abrogated the Declaration of December 1743.

2. That under Article 869 of the Civil Code, taken in connection with Chap. 72 of the Consolidated Statutes of Canada, a testator may will his property to fiduciary legatees, or trustees, to be by them applied to the establishment of a Public Library and Museum under the administration of a Corporation, to be formed for that purpose.

The pleadings and facts in this case are sufficiently disclosed in the remarks of the honorable judge in rendering judgment.

BEAUDRY, J.—Cette cause a été plaidée avec beaucoup de soin, de recherches et d'habileté de part et d'autre, et après un long argument a été soumise à la Cour.

L'action a pour objet de faire déclarer nulle une disposition contenue dans le testament de feu Hugh Fraser, reçu le 23 Avril, 187[illegible] (Griffin, Notaire.) Voici ce qu'on y lit.

15. "I give and bequeath to my old and confidential friend, the Hon. J. J. "C. Abbott, the sum of $4000, which I desire him to accept, as some compensa- "tion for the service which I anticipate he will render to me and to my memory, "under the conditions of this my will, in the performance of Executor and "Trustee, in carrying out with zeal and energy the design respecting which I "have consulted him, and which is embodied in the latter part of this my will, "believing that he will do justice to my memory, and to the trust I hereby con- "fide to him, by carrying out my intentions in the spirit in which they were con- "ceived.

16. "I give and bequeath to the Honorable Frederick Torrance, one of the "justices of H. M. Superior Court, the sum of $1,000, as some compensation for "the assistance which I hope he will consent to give my friend, the Hon. John "J. C. Abbott, in the carrying out of a design for the public benefit, in which I "am aware he takes a deep interest; and I trust that a certain preponderance "in the trust given to my friend, Mr. Abbott, in consideration of the long "friendship and confidence existing between us, will not prevent Judge Torrance "from giving him also cordial co-operation and support.

17. "I nominate and appoint the said Honorable John J. C. Abbott and "John Cowan my executors, for the purpose of carrying out the provisions of "my will, and I divest myself in their hands of my moveable estate and effects, "to the end that they may pay the foregoing legacies, raising the necessary funds "therefor in the most convenient manner, without any unnecessary sacrifice, and "immediately thereafter to transfer over the balance of my moveable estate to "the fund which, by the provisions of this my will, is vested in my trustees and "fiduciary legatees hereinafter named.

18. "I give, devise, and bequeath the whole of the rest and residue of my

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"estate, real and personal, moveable and immoveable, of every nature and kind "whatsoever, to the said Honorable John J. C. Abbott, and to the said Hon. "Frederick Torrance, hereby creating them my fiduciary legatees; and it is "my will and desire that they do hold the same in trust for the following "intents and purposes, namely: to establish at Montreal, in Canada, an Institu- "tion, to be called the 'Fraser Institute,' to be composed of a free public "library, museum, and gallery, to be open to all honest and respectable persons "whomsoever, of every rank in life, without distinction, without fee or reward of "any kind, but subject to such wholesome rules and regulations, &c. * * * And "it is my desire that three persons should be named by my said trustees to com- "pose with them the first Board of Governors of the Fraser Institute, which it "is my desire shall always be composed of five persons * * * I desire "that the residue of my estate and effects, after deduction of the expenses of "the management thereof, shall be forthwith conveyed over to the Corporation "to be thereby formed, to be called the Fraser Institute, for the purposes "herein declared. * * * And in the event of a vacancy occurring in the "said Trust, from any cause whatever, whereby the number of Trustees is re- "duced from time to time to one, it shall be the duty of the other, and he is "hereby authorized to name a trustee to fill the vacancy so occurring by a "notarial instrument to that effect. * * *

"And I hereby confer * * * upon my trustees hereinbefore mentioned "power to sell and realize such of my estate and effects as they shall deem "expedient, to acquire property whereon to construct buildings, and to construct "such buildings, and to proceed in all respects, with all diligence, in the carrying "out of my desires hereinbefore expressed, up to such time as the property and "estate hereby devised to them shall be conveyed over to the Fraser Institute.

"I desire that the term of office of my executors be continued beyond the "term limited by law, and until the duties hereby imposed upon them in the "payment of special legacies be completed."

L'action est portée par les héritiers du testateur contre MM. Abbott et Cowan comme exécuteurs, et contre MM. Abbott et Torrance comme universal fiduciary legatees et trustees,—en nullité des dispositions 17 et 18 en autant qu'elles contreviennent aux dispositions formelles de la loi, comme ayant pour objet la création d'une corporation sans autorisation préalable, statut, ou Lettres Patentes,—le legs fiduciaire n'étant fait que pour transmettre la succession à une corporation à créer et qui n'avait aucune existence.

Les demandeurs prétendent que les dispositions de ce testament quant à la fondation de cet Institut Fraser sont nulles.

1o. Parceque, aucune disposition testamentaire ne peut être faite pour la fondation ou création d'un corps, collége ou communauté à moins que des lettres patentes n'aient été préalablement obtenues du Souverain à cet effet; et que, en l'absence de telles lettres patentes les héritiers peuvent réclamer les biens légués pour telles fondations.

2o. Parce que ces dispositions sont nulles étant réellement faites en faveur d'un corps qui n'avait pas encore d'existence, qu'il n'y a personne pour recevoir ce legs qui est immédiat sans condition suspensive.

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Au soution de leur première proposition, les Demandeurs ont invoqué la déclaration de déc. 1743, faite pour les colonies et enregistrée à Québec, le 5 Octobre 1744, comme étant la seule loi en force ici, touchant les corporations et gens de main-morte, et qui, suivant eux, a été reconnue comme étant en force, dans les causes de Freligh et Seymour,—Dunière et La Fabrique de Varennes,—Gold Mining Co. et Desbarats,—et Millar et La Corporation Episcopale des Trois-Rivières.

Ils ont ajouté que cette déclaration n'a pas été mise au néant ou abrogée par la cession ; dans tous les cas elle n'aurait pu être remplacée que par le droit anglais tel qu'il existait alors, c'est-à-dire, par le statut Geo. II. qui aurait le même effet.

Sur le second point on a cité plusieurs autorités pour établir la prétention des demandeurs, et on a soutenu que les Trustees les Hons. Abbott et Torrance n'étaient pas fidéicommissaires, vu qu'au cas de caducité de la disposition quant à la création de l'institut Fraser, ils ne pourraient profiter du legs. Ricard, substit. No. 754 et 756, nous donne sur ce point les règles à suivre, soit pour reconnaître si le fidéicommissaire doit recueillir, suivant qu'il doit profiter ou non de la disposition, et celui ou le fidéicommis est fait pour éluder la loi. En thèse générale on peut donc admettre cette prétention des demandeurs, et toute la difficulté restera sur la question de savoir, si la disposition en faveur d'une institution de bibliothèque publique, telle que celle que le testateur ici avait en vue, tombe sous les prohibitions de la déclaration de 1743, et si cette déclaration elle-même est encore en force.

Les défendeurs de leur côté ont soutenu que la déclaration de 1743 a été virtuellement rappelée par l'effet du changement de Souverain, qu'elle était incompatible avec les prérogatives de la Couronne d'Angleterre, et que presque toutes ses dispositions sont contraires à l'ordre de chose qui existe aujourd'hui et ne peuvent être suivies et exécutées. Ils prétendent que le legs a été fait directement aux Hon. Abbott et Torrance qui en ont été saisis sous les conditions portées au testament ; que la disposition en faveur de personnes qui n'existent pas encore, mais en expectative, est valable. Toutes ces propositions sont invoquées sous les trois plaidoyers par eux produits, savoir : 1o. Une défense en droit, fondée sur l'absence, dans la déclaration, d'allégation, 1o. que le legs était fait pour des fins illégales, 2o. que le testateur n'avait pas droit de léguer et les défendeurs de recueillir, tel que voulu par le testament. Ces moyens de défense en droit sur laquelle du consentement des parties, il a été ordonné de procéder à la preuve, sont évidemment mal fondés et la défense doit être rejetée, la déclaration étant suffisante sans ces allégations. En vertu de la déclaration de 1743, invoquée par les demandeurs, il suffisait que la disposition fût faite en faveur d'un corps pour lequel des lettres patentes n'avaient pas été accordé, pour qu'elle fût considérée comme nulle.

Par leur second plaidoyer, qui est une exception fondée sur ce qu'ils ont fait des démarches et donné avis qu'ils demanderaient au pouvoir législatif, à sa prochaine session depuis le décès du testateur, un acte d'incorporation, les Défendeurs concluent au renvoi de l'action. Ce serait tout au plus là un moyen d'ex-

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ception dilatoire, car si le legs est nul, faute de lettres patentes préalables, ce n'est pas l'avis d'une demande d'acte d'incorporation, qui pourrait faire valider le legs et mettre au néant le droit acquis aux demandeurs. Cette exception doit donc aussi être déboutée. Il ne reste que le 3e plaidoyer, une défense au fond en fait, sur laquelle tout le mérite de l'action peut être discuté. Le titre des demandeurs et le testament et l'acceptation par les défendeurs du legs contesté sont prouvés, en sorte que les questions de droit seules sont à discuter.

La déclaration de déc. 1743 porte, art. II.

" Défendons de faire aucunes dispositions, par acte de dernière volonté pour " fonder un nouvel établissement de la qualité de ceux qui sont mentionnés dans " l'article précédent, (c'est-à-dire de maisons ou communautés religieuses, " hôpitaux, hospices, congrégations, confréries, colléges ou autres corps et com- " munautés ecclésiastiques ou laïques) ou au profit de personnes qui seraient " chargées de former le dit établissement, le tout à peine de nullité ; ce qui " sera observé quand même la disposition serait faite à la charge d'obtenir nos " lettres-patentes." Et l'article XXI ajoute : " Tout le contenu en la présente " déclaration sera observé à peine de nullité de tous contrats et autres actes qui " seraient faits sans avoir satisfait aux conditions et formalités y prescrites..... " Voulons en conséquence que les héritiers ou ayant cause de ceux à qui les dits " biens appartenaient, même leurs enfants ou héritiers présomptifs de leur vivant " (dans les cas de donations ou actes entrevifs) soient admis à y rentrer non- " obstant toute prescription et tous consentements exprès ou tacites qui pour- " raient leur être opposés," et par l'art. XXII : " A défaut par les héritiers de " procéder dans les 6 mois, les biens légués ou donnés doivent être réunis au " domaine."

Les demandeurs ne peuvent manquer de réussir si les dispositions de la déclaration sont encore en force, aussi les défendeurs se sont-ils efforcés de prouver leur abrogation :

1o. Par l'introduction du droit illimité de tester.

Ils ont invoqué l'acte de la 41e Geo. III ; mais cet acte n'a pas eu l'effet qu'allègue les défendeurs, car il est apporté une restriction à ce droit de tester : " Pourvu, y est-il dit, que le droit de tester tel que ci-dessus spécifié et déclaré " ne pourra être considéré et étendu de manière à donner pouvoir de léguer et " donner par testament ou ordonnance de dernière volonté, en faveur d'aucune " corporation ou autres gens de main-morte à moins que telle corporation ou " gens de main-morte n'aient la liberté d'accepter et recevoir suivant la loi." Cette disposition est reproduite dans l'article 831 du Code Civil. N'est-ce pas là maintenir les lois de main-morte qui existaient auparavant? Cette prétention est donc mal fondée.

2o. Par l'incompatibilité des dispositions de la déclaration avec la Prérogative Royale du Souverain Anglais.

Les défendeurs ont prétendu que les dispositions de la déclaration de 1743 auraient l'effet de restreindre la Prérogative Royale, en l'astreignant à des formalités qui n'existent pas en Angleterre, et qu'ainsi les dispositions ont été de fait abrogées lors de la cession, ne laissant ainsi quant aux biens de main-morte que les dispositions du droit anglais à cette époque.

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Quelle que puisse être la prépondérance de la prérogative, de la Couronne d'Angleterre, il est reconnu que dans les colonies cette prérogative royale peut être restreinte en tout ce qui ne tient pas aux principes et droits fondamentaux sur lesquels repose l'autorité souveraine, s'il existe dans la colonie des lois formelles, qui restreignent cette prérogative, (Chitty, Prerog. of the Crown, p. 25, 32) et qu'on doit à cet effet recourir à la charte de la colonie ou au traité par lequel cette colonie a été acquise. Pour le fond, la déclaration de 1743 est conforme à la loi commune qui existait en Angleterre, il n'y aurait donc que sur les formalités qu'il pourrait y avoir divergence, et en supposant même que la Prérogative Royale l'emportât, ce ne serait que sur la matière de forme. Cependant on ne peut [illegible] quoique par la Grande Charte (1 Stephen's Blackstone p. 436, 437, 4[illegible] loi qui pourrait affecter le Bas-Canada, puisque le Statut de Geo. II, n[illegible] pour l'Angleterre), il fut défendu, comme par notre déclaration de [illegible] des dons aux communautés religieuses directement ou par fidei commis, cette [illegible] ne s'étendait pas cependant à l'établissement d'écoles, ni aux dons faits pour le soutien des pauvres ou autres objets de charité. Notre déclaration de 1743 ne pouvait néanmoins pas sur ce point restreindre la prérogative royale, puisque l'exercice de cette prérogative n'était pas nécessaire pour rendre valides ces dispositions ; elle était seulement contraire à la loi commune d'Angleterre à cet égard. Au reste c'est là une matière de droit municipal qui ne touche aucunement aux principes et droits fondamentaux de la Couronne d'Angleterre, et conséquemment les dispositions de la déclaration ont été conservées en autant que le nouvel état de choses le permettait quant aux formalités à observer.

Ce second moyen des défendeurs doit donc être écarté.

3o. Par l'ensemble de nos lois actuelles qui forment pour le Bas-Canada un système particulier, en vertu duquel le legs en question est valide.

Ce système serait fondé, suivant les défendeurs, sur l'article 869 du Code Civil qui permet à un testateur d' " établir des légataires seulement fiduciaires ou " simples ministres pour des fins de bienfaisance ou autres fins permises et dans " les limites voulues par les lois ; le testateur peut aussi remettre les biens pour " les mêmes fins à ses exécuteurs testamentaires, ou y donner effet comme charge " imposée à ses héritiers et légataires ; " sur le pouvoir de tester en faveur d'une personne *cum capere poterit*, et sur le droit de la puissance publique qui, en vertu de son droit de visite, a le contrôle de tous les corps et corporations. Ainsi voilà trois points à examiner. Je commence par le dernier, le droit de visite du Gouvernement. Ce droit de visite, d'après le droit anglais, ne peut en effet être exercé que par la Couronne (Chitty, Prerog. p. 131), mais ce droit de visite ne peut faire disparaître ni anéantir celui que la déclaration de 1743, art. 21, accordait aux héritiers réels ou présomptifs, et qui est indépendant du droit de visite qui était une prérogative du Roi de France, comme il l'est du Souverain anglais. Les défendeurs ne peuvent donc invoquer ce moyen à l'encontre de l'action des demandeurs, qui ont une action de leur chef si la déclaration est encore en force et n'est pas implicitement abrogée par la législation introduite depuis quelques années.—L'article 869 du Code Civil permet d'établir des léga-

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taires fiduciaires ou simples ministres pour des fins de bienfaisance ou autres fins permises et dans les limites voulues par les lois : voyons si la disposition du testament de feu Hugh Fraser rentre sous cet article du Code. 1o. L'établissement de l'Institut Fraser est-il pour une fin permise par la loi ? On trouve la réponse à cette question dans le chapitre 72 des Statuts Refondus du Canada, qui permet d'établir des associations de bibliothèque, et des instituts d'artisans, sans qu'il soit nécessaire d'obtenir des Lettres Patentes. Il suffit pour cela que dix individus se réunissent avec un capital de $100 et déposent au bureau d'enrégistrement pour le comté, une déclaration indiquant le nom collectif de l'institution, son but, le montant des deniers ou valeurs souscrites ou possédées, les noms des premiers administrateurs et le mode de nomination de leurs successeurs et les autres particularités qu'ils croient nécessaires. Ils forment alors une corporation qui a droit de posséder des immeubles, pourvu que la valeur annuelle de tels immeubles n'excède pas $2000 dans les localités ayant 3000 habitants ou plus, et $1000 lorsque la population n'atteint pas ce chiffre. Comment avec cette loi prétendre que l'ordonnance de 1743 peut s'appliquer aux corporations à former telle que celle contemplée par Mr Fraser ? On peut en dire autant de toutes les autres corporations à fonds social, ou associations charitables philantropiques et de prévoyance dont l'établissement est permis par le chapitre 71 des Statuts du Canada, sans même exiger le dépôt de la déclaration requise par le chapitre 72. Tous ces établissements étant ainsi libres, la partie fondamentale de la déclaration de 1743 devient inapplicable, à leur égard du moins, et l'article 1 et le 21 en autant qu'ils s'y rattachent sont sans effet. Mais *quid* quant au 2ème article qui prohibe les dispositions testamentaires pour fonder tels établissements, avant l'octroi de lettres patentes ? On doit nécessairement dire que puisqu'il n'est plus besoin de lettres patentes, cet article ne s'applique pas davantage à l'établissement de semblable bibliothèque, *qui est une fin de bienfaisance permise* et *dans les limites de la loi*, suivant les termes de l'art. 869 du Code Civil, tant que les *Trustees* ou syndics ne dépassent pas les limites prescrites par le Statut quant à la valeur annuelle des immeubles qui pourront être acquis par eux. Cet article du Code Civil justifie la nomination de syndics faite par le testateur pour mettre à effet ses intentions de bienfaisance ; et sanctionne la doctrine ou règle *cum capere a poterit* invoquée par les défendeurs. De fait cet article 869 a introduit, s'il n'a pas maintenu, la jurisprudence anglaise, telle qu'on la trouve exposée par le juge Kerr, à la page 241 des Rapports de Stuart. Le testateur a voulu fonder une bibliothèque publique, tel était son objet, et non pas la création d'une corporation ; il a légué le résidu de ses biens aux Hon. Abbott et Torrance, qu'il a chargé d'établir cette bibliothèque, et pour cet objet les a autorisés à vendre ses biens et à racheter une propriété propice pour l'érection des bâtisses nécessaires et d'y faire construire ces édifices. Ces pouvoirs leur sont conférés personnellement. La formation de la corporation n'est pas requise pour ces préliminaires, mais peut suivre l'érection de la bibliothèque et musée, et ce n'est de fait qu'après cette construction et l'établissement de la bibliothèque que les légataires fiduciaires seront tenus de transmettre les biens à une corporation qui serait établie pour administrer et voir au maintien de cette œuvre, et lors même

que la création de cette corporation devien drait impossible, les deux légataires résiduaires auraient des pouvoirs suffisants pour perpétuer l'œuvre et empêcher qu'elle ne tombât. On ne peut dire ici que le legs étant fait à un être qui n'existe pas, est nul. On veut invoquer l'autorité de Furgole, vol. I, p. 44. "Il suffit, dit-il, que le légataire se trouve capable, lorsque l'échéance du legs arrive, sans examiner le temps du testament, ni celui de la mort du testateur." Ici l'échéance du legs en faveur de la corporation ne sera qu'après la construction des édifices, et ce n'est qu'alors que les demandeurs pourraient faire valoir cette objection. Ces considérations suffisent, il semble, pour faire repousser l'action des demandeurs et faire déclarer le testament valable quant aux défendeurs.

On peut encore ajouter que MM. Abbott et Torrance sont véritablement des fidéi-commissaires, car les legs qui leur sont faits, semblent attachés à l'établissement de cette bibliothèque. Ils y ont donc un intérêt et peuvent invoquer l'autorité de Ricard citée plus haut.

The judgment is recorded as follows:—

The Court, having heard the parties by their counsel respectively, as well upon the *défense en droit*, by the defendants pleaded to the plaintiffs' action, as on the merits, examined the record and proceedings and proof, and on the whole maturely deliberated:

Considering that the grounds in support of the *défense en droit*, or demurrer, of the defendants, are insufficient and unfounded in law, doth dismiss the said demurrer; and considering that the late Hugh Fraser, in his lifetime, of the city of Montreal, by his last will and testament, executed before Griffin, Notary, on the 23rd day of April, 1870, did ordain as follows:

17. "I nominate and appoint the said Hon. John J. C. Abbott and John Cowan my executors for the purpose of carrying out the provisions of my will, and I divest myself in their hands of my moveable estate and effects, to the end that they may pay the foregoing legacies, raising the necessary funds therefor in the most convenient manner without any unnecessary sacrifice, and immediately thereafter to transfer over the balance of my moveable estate to the fund which, by the provisions of this my will, is vested in my trustees and fiduciary legatees hereinafter named.

18. "I give, devise, and bequeath the whole of the rest and residue of my estate, real and personal, moveable and immoveable, of every nature and kind whatsoever, to the said Hon. J. J. C. Abbott, and to the said Hon. Frederick Torrance, hereby creating them my residuary fiduciary legatees; and it is my will and desire that they do hold the same in trust for the following intents and purposes, namely: to establish at Montreal, in Canada, an institution to be called the 'Fraser Institute,' to be composed of a free public library, museum, and gallery, to be open to all honest and respectable persons whomsoever, of every rank in life without distinction, without fee or reward of any kind, but subject to such wholesome rules and regulations as may be made by the governing body thereof from time to time, for the preservation of the books and other matters, and articles therein, and for that purpose to procure such charter or Act of Incorporation as my said trustees may deem appropriate to the

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purpose intended by me, namely: the diffusion of useful knowledge, by affording free access, to all desiring it, to books, to scientific objects and subjects, and to works of art; and to the procuring such books, subjects, and objects as far as the revenue of my estate will serve, after acquiring the requisite property and erecting appropriate buildings, and after paying expenses of management; making always the acquisition and maintenance of a library the leading object to be kept in view; and it is my desire that three persons should be named by my said trustees, to compose with them the first Board of Governors of the Fraser Institute, which it is my desire shall always be composed of five persons professing some form of the Protestant faith, with power to them to supply any vacancy caused by death or resignation, or by any crime or offence, the conviction whereof shall vacate the tenure of office of the offender. I desire that the residue of my estate and effects, after deduction of the expenses of the management thereof, shall be forthwith conveyed over to the Corporation, to be thereby formed, to be called the Fraser Institute, for the purposes herein declared. In order to prevent any difficulty arising in the conduct of the business of the trust hereby created, it is my will and desire that Mr. Abbott, as the Senior Trustee, shall have a second or decisive voice, in the event of any difference of opinion between him and his co-trustee. And in the event of a vacancy occurring in the said Trust from any cause whatever, whereby the number of Trustees is reduced from time to time to one, it shall be the duty of the other—and he is hereby authorized—to name a trustee to fill the vacancy so occurring by a notarial instrument to that effect, and, thereafter, the senior trustee shall always have a second or decisive casting vote in case of difference of opinion. And I hereby confer upon my trustees hereinbefore mentioned, power to sell and realize such of my estate and effects as they shall deem expedient, to acquire property whereon to construct buildings, and to construct such buildings, and to proceed in all respects with all diligence, in the carrying out of my desires hereinbefore expressed, up to such time as the property and estate hereby devised to them shall be conveyed over to the Fraser Institute."

Considering that the object of the aforesaid bequest, to wit, the establishment of a Public Library and Museum of Art, is legal, and does not require previous letters patent authorizing the same:

Considering that, under the said will, the said Hon. J. J. C. Abbott and Frederick Torrance became and were vested with the estate, so as aforesaid bequeathed to them, for the purpose in the said will mentioned, and are authorized to construct the buildings necessary for the same:

Considering that such bequest is valid under the provisions of Article 869 of the Civil Code, and that the said residuary fiduciary legatees may hold the said estate, and manage the same, so as to carry out the desires of the said testator, until a corporation be regularly formed to administer the said Public Library, after the erection of the necessary buildings; and that, until such time no contestation as to the right of such corporation to take the legacy and bequest can take place;

and that, therefore, the plaintiff's action cannot be maintained, doth dismiss the same with costs. Fraser et al. vs. Abbott et al.

Action dismissed.

Laflamme, Huntington, and Laflamme, for the Plaintiffs.
Barnard and Pagnuelo, for the Defendants.
A. Cross, Q.C., Counsel.
(J. K.)

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 10th SEPTEMBER, 1870.

Coram DUVAL, C. J., DRUMMOND, J., BADGLEY, J., MONK, J., JOHNSON, J., *ad hoc.*

No. 12.

THE QUEBEC BANK,

(*Plaintiffs in the Court below*,)

APPELLANTS;

AND

THOMAS STEERS, ET AL.,

(*Defendants in the Court below*),

RESPONDENTS.

HELD:—Where a trading partnership obtained advances from a Bank under an agreement that the proceeds of sale of hemlock bark extract manufactured by the partnership should be paid in to the Bank in repayment of the advances, and the partnership, while in a state of insolvency and largely indebted to the Bank, contrary to the agreement, applied the proceeds of 174 barrels of bark extract to the general purposes of the business without the knowledge or consent of the Bank; that such act (even in connection with evidence that the acts of the partnership as regarded the Bank, were from first to last akin to fraud,) did not amount to secretion with intent to defraud, sufficient to sustain an attachment before judgment.

The Judgment in Review will be found reported at 13 L. C. Jurist, p. 75.

The appellants stated their case in their factum, substantially, as follows:

This appeal is from a judgment of the Superior Court, MONDELET, J., in Chambers, rendered 20th October, 1868, at Montreal, quashing the attachment issued at the instance of the appellants; also from the judgment of the 27th February, 1869, of the Court of Review at Montreal, confirming said judgment; and from several rulings at *enquête* upon the examination of the witnesses, Philo D. Browne, William Rhind, and John Irvine; said rulings preventing the appellants from examining their witnesses as they had a right to, towards proving matters perfectly relevant to the issues, the burden of proving which had been put upon them by the pleadings. The appellants submit that even upon the merits in the present state of the record, the bank was entitled to judgment. But in any view of the case, the appellants are confident that this Court will set aside these rulings at *enquête*, and order the *enquête* to be re-opened, with liberty to the Bank to prove its case in the Superior Court fully.

Action was brought against Thomas Steers, jun., Thomas Steers, sen., Valentine Cooke, and Charles E. Seymour, traders carrying on business at Simpson,

Quebec Bank and Thomas Steers, et al.

near Drummondville, under the name of the Drummondville Bark Extract Manufacturing Company, and is founded upon a joint and several note for $10,000, signed by the four defendants, payable to the order of Thomas Steers, jun., Manager of the Company.

The action was accompanied by a writ of attachment, *saisie-arrêt*, before judgment, based upon affidavit of William Rhind, plaintiff's manager in Montreal, setting up: 1. The insolvency of defendants, and 2. The secretion of their estate with intent to defraud.

On the 4th Sept., 1868, defendants fyled a peremptory exception, answer to which was fyled by plaintiffs on the 8th Sept., 1868, and issue joined. But on the 10th Sept., defendants presented a petition under articles 819 and 854, C. C., praying that the attachment might be quashed, and the property seized, released, on the ground that the allegations of the affidavit were unfounded, and denying specifically both the insolvency of the Company and the members thereof, and the secretion with intent to defraud either by the Company or its members.

Issue was joined on the petition and an *enquête* ordered. Petitioners tried to prove they were not insolvent, but failed. At the *enquête* Mr. Justice Mondelet frequently maintained objections of petitioners against adduction of material evidence pertinent to the issues, especially as to the insolvency. Of these adverse rulings plaintiffs repeatedly complained. Plaintiffs' *enquête* was closed suddenly, though they had other witnesses—and one, Mr. Thomas Workman, was detained an hour longer than he expected. Of this, also, plaintiffs complained, urging the learned Judge to give time to get Mr. Workman from a meeting of the directors of the Molsons' Bank. Plaintiffs were not allowed to prove insolvency, nor facts subsequent to the attachment to shew the *intent* to defraud on the part of the defendants when the attachment was made. They were not allowed to inquire into the application of the money they had advanced. They were not allowed to inquire of P. D. Browne what consideration he had given for $1000 of stock standing in his name in the new Company. Before the argument on the merits, to which plaintiffs were hurried, on the 15th October, 1868, plaintiffs made two motions to have the rulings at *enquête* revised, and Steers, jun., and Cooke's depositions rejected. These were withdrawn by petitioners, but the motions were refused by the Judge. Plaintiffs made another motion, that the case be not heard on the merits of the petition to quash until parties were heard on motion to revise decisions at *enquête*, which was refused by Hon. Judge Mondelet.

An analysis of the evidence in the opinion of the Appellants establishes:—

That the defendants were seeking a charter of incorporation in December, 1867, and made the following representation to the plaintiffs:—"This being the season for procuring bark the Company wishes to open an account with a Bank, and to obtain a credit of $10,000 for that purpose. They offer as security the Company's note, endorsed by the Stockholders, whose names are Charles E. Seymour, 507 St. Paul street, Montreal, Robert Mitchell, brassfounder, Montreal, Valentine Cooke, merchant lumberman, Drummondville, Thomas Steers,

jun., Drummondville, patentee, and Thomas Steers, Melbourne; thus proposing to give the personal liability of the Stockholders, and the whole assets of the Company, as a guarantee.

"The manufacture of the article from the raw material is completed every 24 hours, the capacity of the factory being 20 barrels, of 40 gallons or 400 lbs each, extract per day of 24 hours, and the value at the factory 3c., (three cents) per lb. or $12 per barrel, and that amount will be advanced by a shipper for England to the Company, and as received, paid into the said Bank to the credit of the Company."

On these representations the plaintiffs advanced $10,000, for which defendants gave the note sued upon in this cause. It became due 6th May, 1868, and was protested for non-payment. Plaintiffs had many grounds of complaint against defendants, and lost confidence in the Manager. They had misrepresented the capacity of the works and the value of the extract. Rhind did not believe the capacity of the works over 10 barrels a day in place of 20, and it had often been stated to him that the extract would be sufficient in value to cover the amount of the note before its maturity. In July they were told specifically that the Bank would receive 300 barrels that month without further advance except freight, but the promise was not kept, though additional advances were allowed by the Bank, to enable them to manufacture the very stuff. The Bank made another advance of $1000, on the 30th May, and a third of $1000, on the 6th June, to save the works from stoppage. Rhind says the extract instead of being worth $12, was only worth $5, or little more than 1c. per lb., in place of 3c. as represented when the first loan was made.

As to the insolvency, notwithstanding the adverse rulings of the learned Judge, it was proved that petitioners owed plaintiffs $13,000. There was a claim of $20,000 and upwards in the name of Charles E. Seymour. There were besides at least four pending suits against Thomas Steers, jun., in whose name almost the whole of the Stock in the chartered Company stood. Seymour had made an assignment, and was largely indebted to the Bank, over and above his debts as a party to this suit.

Rhind swore that he believed all the defendants were insolvent; that he believed the debts of the Company, on the 20th July, were $35 000, corroborated by John Irvine, one well able to judge of the necessities of the Company, and never contradicted; and that the factory did not cost $20,000.

As to the secretion, it was proved that Steers, jun., the Manager of the Company, without the consent and knowledge of the Bank, transferred to D. Browne 174 barrels of extract for an advance. The plaintiffs contend that this was an act of secretion, and done with intent to defraud the Bank. The Company had pledged to the Bank their whole assets as security for the repayment of the $10,000 advance; and they had, in addition to this, agreed to deliver to the Bank all the extract as it was manufactured, and again and again acknowledged this obligation in their correspondence. It was the custom of the Company to ship the extract to the order of the Bank.

The facts then with respect to the secretive act are these:—The company, acting

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by its manager, disregarding its pledges and agreements with the Bank, and contrary to its usual custom of shipping to the order of the Bank, shipped the 174 barrels in question to the order of Steers, jun., and there without the knowledge or consent of the Bank, transferred them to [illegible]. The money obtained was not accounted for. It is true that Steers applied to the Bank for a further advance, declaring he had a bill of lading, but he never showed it to Rhind, and failing to obtain the advance, went away.

Further, the organization of the Company for which the charter was procured entirely under the control of Steers, jun., without any profession being made to acknowledge the claim of the Bank, the basis of which organization, as the learned Judge Torrance, when dissenting, pointed out, to withdraw from the pursuit of the Bank, who had only a claim against the defendants personally and individually, at least $20,000 of property, which the defendants were putting into the unincorporated Company." The land was held in trust by Hiram Seymour for the Company, and on that land alone the assets of the defendants, and Company, the money of the Plaintiffs, had been placed. That was a withdrawal of the property of the defendants from the pursuit of their creditors, and an actual or constructive secretion. Rhind further says, there was an attempt to change the copartnery. To this may be added the utter loss of confidence in Steers, jun., who had systematically deceived Rhind, and did as he pleased with the Company's assets. In two instances did Rhind allow Steers to obtain advances on extract though belonging to the Bank, once from Bonnell, $1400, and once from P. D. Browne, $1000; but it was well understood that it was only with the Bank's consent that this could be done.

But even restricted as they were in their proof appellants contend :—

1. That there was insolvency proved.

2. That there was secretion, both actual and constructive.

3. That the burden of disproving the allegations of the affidavit of Rhind upon which the attachment issued, lay upon defendants, and they did not disprove them.

4. That parties being insolvent, certain actions are liable to the imputation of fraud which might not be so construed if solvent, and consequently, that the actions of this Company in this case, coupled with their undoubted insolvency, constituted a fraudulent secretion.

Consequently plaintiffs contend that even as the record stands :—

1. The judgment ought to have sustained the attachment.

2. That at least they are entitled to have their *enquête* re-opened.

MEMORANDUM OF THE APPELLANTS' AUTHORITIES.

Onus probandi upon petitioners.

C. C. P. Art. 798. Capias for se[illegible] change from Con. Stat. L. C.; Cap. 87.

C. C. P. Art. 819. Party m[illegible] petition, *by "establishing," &c.*

C. C. P. Art. 834. *Sai. Ar[illegible]y "receiver."*

C. C. Art. 865. Same mode [illegible]pias.

7 Jurist, p. 227. Egert vs. L[illegible]

5 Jurist, p. 158 and 160. Dou[illegible]innis.

9 L. C. R., p. 368. Warren vs. Ma[illegible] (a appeal.)

Also: In review.—McCready vs. [illegible]

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Constructive secretion. Manner immaterial.

5 Jurist, p. 49. Langly vs. Chamberlain.
Judgment of Mr. Justice Monk, 31st December, 1863. Dumont vs. Goitre.
Molsons Bank vs. Leslie, No. 1504. Judgment of the 30th April, 1863.
McFarlane vs. Delesdernier, 7th December, 1860.
Raphael vs. McDonald, 3rd November, 1865.
Wilson vs. Beers, 30th May, 1865.
8 L. C. Rep., p. 152. Foster vs. Dorion.
Dubois vs. Ladd, 22nd February, 1862.

Intent to defraud may be proved by subsequent as well as by antecedent acts.

2 Russell on Crimes, p. 838.
1 Taylor, Evidence, p. 349—355. § 317.
Also: Langly vs. Chamberlain, quoted above; decided by Judge Badgley.

Greenleaf on Evidence, Vol. 2, § 15, p. 10, &c. Ed. 1853.
See also

Denisart as to *recéler*.
Pardessus, No. 1019. V. 5. That *Faillite* is ceasing to meet liabilities.
Dict. Contentieux. No. 61, *Faillite*.

BADGLEY, J.—The original defendants below established themselves into a trading copartnership at Drummondville, as the Bark Extract Manufacturing Company, with one Thomas Steers, Junior, as Managing Director. The Company had no active capital, but prevailed upon the Quebec Bank at Montreal to make large advances to them, to carry on their business upon the representations that the manufactured article should be of prime quality, that it should command a high market price, and that the manufacture should be so abundant in quantity as soon to pay off all the advances, which should be fully secured by placing in the possession and control of the Bank all the manufactured extract, the entire produce of the Company's works, and which was to be realized by the Bank to cover its advances. Under these representations the Company obtained from the institution an immediate credit of $10,000, which was afterwards extended by $2,000 more. Not long after the Company had commenced operations as a partnership, it was converted into a Limited Liability Joint Stock Company. Without entering into a minute detail of the Company's operations, it will suffice to say that the representations of the Company which induced the advances were altogether falsified, a very limited quantity of extract was manufactured and delivered, it was of so indifferent quality as not to command a third of the represented price, even for the small quantity disposed of, whilst the balance was unsaleable at any price and remained unsold. This is the substance of the evidence in this cause. Besides all the foregoing, quantities of the extract, such as it was, were brought to town and disposed of by the Company, and not placed in the possession of the Bank, some with, others without, the knowledge of the Bank, and finally, its chief financial manager and director here became insolvent, and the Company followed in the same course, being unable to meet its engagements, and amongst others the Bank advances which had fallen due and could not be paid by the Company. In this condition of things the Bank resorted to law proceedings, and were advised to issue an attachment before judgment against the Company upon the

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ground of their secreting and making away with their effects: the necessary affidavit was made by Mr. Rhind the cashier, who was the Bank officer through whom the arrangements with the Company were carried on, and who was best informed upon the transactions in question. The affidavit, if it may be so stated, is a condensed statement, but in sufficient detail of the principal of those transactions and of the circumstances originating or connected with them. Many, of course, are merely for reference whilst others indicate more or less nearly the secretion charged. The representations and their falsification in fact and effect are charged, the disposal by the Company of their produced extract surreptitiously and without the knowledge of the Bank, and finally the insolvency of the Company. In attachments involving the charge of secretion by the debtor, the facts must be sufficiently precise and substantiated in themselves to warrant the legal proceeding. They may be of such a nature as to indicate not an approach to a fraud when all are taken together, but even an actual fraud with an original intention to commit a fraud, and even in the opinion of mercantile men, who generally judge by the result of a transaction, a something which they would call by a harsher and more dishonest name than fraud. The ground of the attachment is the fact of the making away and secreting of his effects by a debtor to defraud his creditors, and must be supported by substantive averments sufficient to support not the moral or commercial conclusion but the legal conclusion to be deduced from the proved facts. In this case the facts in the affidavit have been put in issue and evidence had, upon the truth of the averments of the affidavit and their sufficiency to sustain the attachment. Now the falsity of the representations was established long before this proceeding, and is therefore unconnected with the subsequent fact of secretion: the insolvency of the Company in itself is not a constituent of the charge; it might constitute fraud and shew a fraudulent intent if connected with the act of secretion at some time, and not at all, unless the legal secretion is fully established, when the insolvency might be referred to as indicating the fraudulent object and purpose of making away with the goods, and thereby giving to the fact the character of secretion. This secretion rests upon the disposal by the Company of their goods, the extract, without the knowledge or consent of the Bank, and is limited to only one parcel, which was so disposed of. It is in evidence that the Company, to the knowledge of the Bank, were compelled to obtain advances *aliunde* upon their produce for means to carry on operations: they could not raise money in any other way, and the Bank did allow them to effect their purpose in two or three instances from third parties, after having itself refused to make the required advance. This parcel, which was to be sent past the Bank without its knowledge, was to be disposed of for the same purpose as the others, for obtaining the necessary means to carry on the Company's business, and the Bank having refused further advances and allowed the Company to raise funds from third parties upon their extract, it may naturally have been supposed that the same refusal would have been made as to this parcel, and therefore the Bank was not consulted. However suspicious under the actual agreement between the Bank and the Company, the surreptitious disposal of this parcel may be, and it is clear

that it had a suspicious character, yet it was not of a nature sufficiently positive in itself to constitute an actual or concerted secreting in fact, and was for the business purpose of the Company, although not immediately (but possibly prospectively) for the interest of the creditor in the Company's continuance of the manufacture. The conversion of the partnership into a limited Joint Stock Company is also brought forward in the affidavit, but it is proved that the change was assisted by the cashier himself. The damnatory facts in the affidavit which were sufficient *prima facie* to justify the issue of the attachment, have been more or less neutralized to such a degree by the evidence at Enquête as to remove support from the attachment. It is plain enough that the acts of the Company from first to last as regards the Bank, have been akin to fraud if not actually fraudulent, but Courts of Justice must be guided by evidence with respect to special proceedings, and in this case, that is not altogether sufficient to sustain the writ of attachment. In the course of the Enquête had in this case, several judicial rulings rejecting questions respecting the Insolvency of the Company, &c., &c., have been referred to the consideration of this Court. The object of the questions was to show the actual standing of the Company at the time when the alleged secreting was made, and the *quo animo* with which it was effected. This Court considers all those rulings, with one unimportant exception, to be erroneous and illegal, and that the questions should have been allowed to be put. Had they been so, and answered as favorably for the plaintiff as could have been desired, the evidence from them would have been only corroborative, and would not have availed to change the judicial fault of quashing the attachment, a Judgment which must be affirmed by this Court.

Judgment confirmed.

Welch & Bullock, for the Appellants.
A. Robertson, Q.C., Counsel.
B. Devlin, for the Respondent.
(J.K.)

SUPERIOR COURT, 1871.

SHERBROOKE, MAY 23RD, 1871.

Coram RAMSAY, J.

No. 754.

Worthen vs. Holt.

HELD:—1o. That a Defendant may apply by Petition in Term for the quashing of a writ of *Capias*, and such proceeding is more regular, under the C.C.P., than to apply by motion.

2o. That when the writ has issued on the order of a Prothonotary, acting in the absence of the Judge, on a claim for "unliquidated damages," a petition, concluding with a general prayer to quash the writ, and to discharge the Defendant, includes an application to revise the order of the Prothonotary.

3o. That, even when the amount of bail fixed is not excessive, the Court will quash the writ if it appear that, under the circumstances disclosed by the affidavit, it was indiscreet in the Prothonotary to allow the remedy afforded by *Capias*, and this without ordering any Enquête.

In this cause the affidavit made by the plaintiff contained the following allegations:—

That the defendant "is justly and truly indebted to deponent in the sum of fifty-five dollars currency, being for the use of a pair of oxen belonging to

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"deponent, and forcibly and unlawfully taken out of his possession by said "Holt about the fourth day of May instant, and detained and kept by him "until the 16th day of May instant, *and for damage* caused to deponent by "said Holt by such unlawful taking away of said oxen, which said damage con-"sisted of deponent's loss of time as a machinist, which occupation and engage-"ment he was obliged to give up in order to supply the loss occasioned by said "Holt's unlawful taking of said oxen as aforesaid, *and by damage* to his crops "and farming operations, to all a loss and damage of *at least* fifty-five dollars.

"That on the said fourth day of May, the said Holt, having with him a bailiff "of the Superior Court and a writ of *Revendication*, issued out of the Circuit "Court, in the name of said Holt against one Wilder Reed, commanding the "officer entrusted therewith to seize a pair of oxen therein described, in the pos-"session of said Reed, came to the domicile of deponent, being at a distance of "eight miles from the residence of said Reed and then and there demanded a "pair of oxen, which were then, and are now, the property of deponent, and "were then in his possession, and engaged in the charge of a farm labourer em-"ployed by deponent, he (said deponent) being then absent from home; that "said hired man refused permission to take said oxen, and thereupon said Holt "instructed said bailiff to seize them, and said oxen were seized and attached "by said bailiff, and removed and taken away from deponent's possession, and "detained and kept from him until the 16th day of May instant, and by such "unlawful seizure and detention deponent has been subjected to great loss and "damage—to wit, a damage of $55.

"That deponent is credibly informed, and verily, and in his conscience, "believes, that said Holt is now about immediately to abscond and leave the "Province of Quebec, and is going away to the United States of America, with "intent to defraud deponent and other creditors, and without the benefit of a "writ of *Capias ad Respondendum* to arrest and detain said Holt, he, said "deponent, will lose his said debt and sustain damage; and the grounds of his "said belief are that he has been informed by said Wilder Reed and one Tru-"man Maxfield, that said Holt has already sent away his family and effects, "and has been away once himself, and has only returned temporarily to arrange "some business matters, and is going away again immediately."

The following is the order given by the deputy prothonotary, acting in the absence of the Judge:—"I order a writ of *Capias ad Respondendum* to issue as "prayed for, and that said Cyrus Holt, upon being arrested under said writ, shall "be released upon giving good and sufficient bail to the amount of $200. Dated "May 17th, 1871."

The bailiff's return shews that the defendant was arrested about 6 o'clock on the morning of the 18th, at Ayer's Flat station, of the Masawippi Valley Railway, being then about to take his departure by the passenger train for the United States.

The writ was not returnable until the 10th day of June. The Superior Court Term commenced on the 22nd of May, presided over by the Hon. Mr. Justice Ramsay, owing to the illness of the resident Judge, the Hon. Edward Short.

On the 22nd the defendant presented a petition praying the immediate

return of the writ and the discharge of the defendant from imprisonment. The following are all the grounds urged in the petition for the quashing of the writ:—

1°. "That the affidavit on which the same issued is wholly insufficient, "because it does not disclose a debt above forty dollars due from defendant to "plaintiff, the only pretended debt being alleged unliquidated damages occa- "sioned from alleged illegal seizure of a pair of oxen, by which the plaintiff was "deprived of the use thereof 12 days, and which loss, if illegally occasioned by "defendant, would be less than half the sum of forty dollars.

2°. "Because the affidavit of plaintiff sets forth grounds of damage, as, for "instance, leaving his occupation as a machinist because deprived of the use of "these oxen, which are inconsequential and remote.

3°. "Because the affidavit only avers that defendant is about to leave the "Province of Québec, not Canada—to wit, that portion of the Dominion of "Canada lately called the Province of Canada.

4°. "Because the plaintiff fails to aver in said affidavit that defendant's "departure will deprive him of recourse against him.

5°. "Because plaintiff does not give any reason whatever for his believing "that defendant was, or is, about to leave the Province with intent to defraud "his creditors, except that he has sent his family away, has been away once, and "is about to go away again, which by no means renders necessary the inference "that defendant is about to leave the Province.

6°. "Because the plaintiff, in said affidavit, does not aver that defendant is "about to leave the Province, with intent to defraud his creditors in general, nor "does he aver that it is to defraud plaintiff in particular.

"Wherefore prays the Court will order the writ to be 'immediately returned,' "and that said writ, and the arrest made thereunder, be annulled, quashed, and "set aside, and the defendant be released from duress thereunder; the whole "with costs."

There are no special conclusions for the revising of the prothonotary's order, and no such grounds are urged in the petition. The petition had been served on the plaintiff's attorney, with notice that it would be presented on the 22nd; the plaintiff's attorney appeared on that day. The order was given for the return of the writ, and, on the 23rd, the writ being before the Court, the petition was taken up for argument when rules were called.

At the argument the defendant's counsel complained that the bail had been fixed at an excessive amount by the prothonotary, who ought not to have fixed the bail for a larger sum than the debt claimed, and 25 per cent. over to cover costs, such being the form of the bail bond given in the Statute.

The plaintiff's counsel argued that the proceeding should have been by motion, instead of petition, and that the fixing of the amount of bail was in the discretion of the Judge, or, in his absence, of the prothonotary, who was not obliged to follow the form, but who had the power to fix a fair and reasonable sum, which, in his judgment, would be sufficient to meet the probable costs without being unnecessarily oppressive. But that whether the bail was excessive in this

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case, or not, there was no application before the Court for a revision of the Prothonotary's order.

PER CURIAM.—This case comes up on a Petition to quash a Writ of *Capias* addressed to the Court in term. A preliminary objection is taken to the proceeding. It is maintained that the only mode of attacking the sufficiency of the affidavit in term, is by motion, and that it cannot be done by petition. In support of this pretension a case of Chapman v. Blennerhasset, 2 L.C.J., p. 71, has been cited. The short holding of the case supports the point urged by plaintiff; but, on looking at the remarks of the learned Judge, it would seem that the first holding is rather an inference of the reporter than the holding of the Judge. True it is, the order only goes to plaintiff "to answer that portion of the petition in which the defendant alleges that he had no intention of leaving with intent to defraud." But there may have been many reasons for this restriction of the order besides that suggested by the summary holding. It was pretended that the petition came too late, after plea filed, and that that was a waiver of merely technical objections. Or he may have considered the technical objections as unfounded in themselves, and the only answer required was to the merits. But, be this as it may, we have the express terms of the Code (Art. 819, C.C.P.) which permits defendant to establish by petition that "he is not liable to the imprisonment." These words are surely general enough to cover every ground of discharge, whether purely technical, as to the sufficiency of the affidavit, or to the merits. Besides, by looking at the first four Articles of Section III., that is, Articles 819, 820, 821, 822, no other proceeding than this summary petition is adverted to. If defendant, then, cannot have recourse to a petition to raise objections as to the insufficiency of the affidavit, he must invent a mode not even alluded to in the Code. But, in addition to this, in Article 821 we have it expressly admitted that the contestation as to the sufficiency of the allegations of the affidavit may be disposed of on a simple hearing of the parties; "but if the *contestation* is founded on the falsity of the allegations, issue must be joined upon the *petition* of the defendant." We thus see that, whatever the law may have been formerly, since the Code there can be no doubt that all defendant's means of establishing that he is not liable to imprisonment may be urged by a petition to the Court or Judge. I do not wish it to be understood that I consider these articles of the Code of Civil Procedure new law; they are not given as such; but the expressions differ most widely from those of the C. S. L. C., Cap. 87, Sec. 8. We must, therefore, go further. The defendant says that the *capias* was issued on a debt for unliquidated damages—that, therefore, it would only be issued on a Judge's order (Art. 801), or by the prothonotary (Art. 1339), but, if the order was given by the prothonotary, that it was subject to revision by a judge, upon application being made to that effect. This order defendant claims to have now revised on the grounds: 1st, that the bail ordered was excessive; 2nd, that the writ was ordered improvidently, and without the exercise of proper discretion on the part of the deputy prothonotary. This objection is met by plaintiff, who contends that there is no application to revise the judgment of the prothonotary. The petition might perhaps have been more full on this point, and there might have been special conclusions, but objection is taken to the action

of the deputy prothonotary, and there is a general prayer to be discharged founded on all these grounds. Again, the necessity for filing an exception, stating the grounds on which a revision of the prothonotary's judgment is sought, is confined to contentious cases (Art. 465.) In granting the order for the *capias* he was acting under Art. 1339.

The further objections taken by defendant are: (1) That it was said he was going to leave the "Province of Quebec," and not that portion of the Dominion of Canada heretofore called Canada; (2) That the affidavit does not say that plaintiff will lose his recourse against defendant; (3) That no reason is given for belief that defendant's going away is with intent to defraud; (4) That it is not said that defendant is about to leave with intent to defraud either the creditors in general, or plaintiff in particular.

The intent to defraud deponent is clearly stated in the affidavit, and it also appears that deponent and plaintiff are one and the same person. The intent to defraud is gathered from the departure from the jurisdiction. A number of reported cases really decide this, but the case of Quinn *vs.* Atcheson, 4 L. C. R. p. 378, is directly in point. The words of the Statute were—"*would deprive the plaintiff of his remedy against the defendant.*" It was held in Hasset *v.* Mulcahey, 6 L. C. R., p. 15, that "will lose his debt, or suffer damage," were a sufficient equivalent, and so even where "*may*" was used instead of "will." (Wilson *vs.* Ray, 4 L. C. R., p. 159.)

The question of the place defendant was about to leave is unimportant in this case, for it is said he was going to the United States. This is sufficient, and so it was held in a case of Debien *vs.* Marsart dit Lapierre, 14 L. C. R., p. 89.

There remain, therefore, only the first points to be considered, namely, whether the deputy prothonotary's exercise of the discretion conferred on him was wise, or whether it should be revised. I am not prepared to say that the bail was excessive, if the writ should issue. A *capias* is necessarily an expensive procedure, and it is possible that the amount for which security was ordered to be given was not even sufficient to protect plaintiff against loss, but the very bail required—the probable expense of the proceeding—should have made the officer pause before giving the order. It must be observed that unliquidated damages do not stand on the same footing as other debts, as regards the rights to *capias*, and that the plaintiff claiming damages has only a right to that remedy on shewing special cause. It seems to me that, under the whole circumstances of the case, no such cause was shewn, and that the deputy prothonotary's order must be revised, and the defendant discharged.

Hall & White, for Plaintiff.

Sanborn & Brooks, for Defendant.

(W. W.)

Writ quashed.

SUPERIOR COURT, 1871.

In Insolvency.

MONTREAL, 16TH MARCH, 1871.

Coram TORRANCE, J.

No. 902.

In the matter of JAMES MORISON, *Insolvent;* and TANCREDE SAUVAGEAU, *Assignee;* and DAME ANN SIMPSON, *Claimant;* and HENRY THOMAS, *et al.*, *Contestants.*

HELD:—That a stipulation in a marriage contract, whereby the wife surviving, is to receive in lieu of dower the interest on £1000 during the term of her life, the principal to go to the children, is a contract dependent on a contingency within the meaning of section 57 of the Insolvent Act of 1869; and in the event of the insolvency of the husband, the assignee will be ordered to make an award upon the value of the wife's claim, unless an estimate of the value is agreed to between her and the assignee.

PER CURIAM.—This is an appeal from the award of the assignee, Sauvageau, of date the 11th November, 1870, on the claim of Dame Ann Simpson, wife of the insolvent, under their marriage contract. This contract, of date 5th June, 1861, contains the following clause: "And the said James Morison, in further "consideration of the renunciation of dower by the said Ann Simpson, and of the "stipulation that there shall be no community between them, doth by these "presents settle on, give and grant to, the said Ann Simpson, his present "intended wife, the sum of one thousand pounds, currency, in such wise that "she, the said Ann Simpson, shall enjoy the interest and profits thereof, during "the term of her natural life, should she survive the said James Morison; and "at her death shall descend to and become the property of the child or children "which may be issue of said intended marriage, and in default of such issue "living, at her, the said Ann Simpson's death, the said sum of one thousand "pounds shall revert to, and be and become part and portion of the estate of "the said James Morison, and be disposed of as he may by last will or otherwise "direct."

Upon this clause of the marriage contract, the claimant made her claim, on the 4th April, 1870, and prayed that one of the Judges of Her Majesty's Superior Court, unless an estimate of the value of the said claim be agreed to between the claimant and the assignee, be pleased to order the said assignee to make an award upon the value of such contingent and conditional claim, and that thereupon the said assignee do make an award after the same investigation, and in the same manner as provided by law for the making of awards upon disputed claims and dividends; and finally that the said claimant be collocated for the said sum of £1000 cy., or such part thereof, or of the said interest on the said sum, or any part thereof, as will represent the value of the said conditional claim as to law and justice may appertain.

Henry Thomas, a creditor, contested the claim, and in support of his contestation, alleged that although the said claimant had renounced all dower, [illegible] liberality on the part of her husband was [illegible] to her in place of dower, and partici-

pated of its character. That it was a right conditional on her surviving him, a *gain de survie* which had no existence before the death of her husband. That it was a conditional charge upon his succession alone, and she had no right on his insolvent estate. That the capital belonged to the children only if they existed and survived her, and before they could do so they must renounce the succession of the insolvent. That the claimant could have no right whatever to the interest of this sum before her husband's death, and the said claimant must survive him before she becomes entitled to it. That therefore the claimant has nothing but a hope and no actual claim, and this claim cannot be maintained.

The assignee made an award rejecting the claim of Mrs. Morison.

This question does not come up for the first time. A similar question was discussed in the case of Musson, et al. *v.* Leslie et al. and Delisle *et vir*, opposants, and the Bank of Montreal, contesting.—10 L. C. Jur., 233, A.D. 1861.

If the circumstances were precisely similar, it would be my duty to follow the decision there given, which decided according to the maxim "jamais mari ne paye douaire," and rejected the claim of the wife. But the claim of Mrs. Morison was made in insolvency under the legislation of the Insolvency Act of 1869, and it is necessary to inquire whether the provisions of that act demand a different decision from the one pronounced in the Leslie case.

Section 57 enacts: "If any creditor of the insolvent claims upon a contract dependent on a condition or contingency which does not happen previous to the declaration of the first dividend, a dividend shall be reserved upon the amount of such conditional or contingent claim until the condition or contingency is determined; but if it be made to appear to the judge that such reserve will probably retain the estate open for an undue length of time, he may, unless an estimate of the value thereof be agreed to between the claimant and the assignee, order the assignee to make an award upon the value of such contingent or conditional claim, and thereupon the assignee shall make an award after the same investigation, and in the same manner, and subject to a similar appeal, as is hereinafter provided for the making of awards upon disputed claims and dividends, and for making appeals from such awards; and in every such case the value so established or agreed to shall be ranked upon as a debt payable absolutely."

There are decisions in England which throw light upon this question, whether under this section, the claimant has at present any right against the insolvent estate of her husband. There, at first, only debts due and payable at the date of the act of bankruptcy were originally provable, and therefore a debt payable on a contingency which had not happened at the date of the bankruptcy could not have been proved. The law was, however, altered in this respect by 6 Geo. IV. cap. 16; sec. 56; followed by 12 and 13 Vict. c. 106, s. 177, which are sections resembling much the section 57 of our own Act.

I would refer to exparte Marshall, 1 Mont. & Ayr. R., 128; South Stafford R. R. Co. *vs.* Burnside, 5 Exch. 138; where the judges refer to marriage settlements and claims arising after the death of insolvent, or on survivorship of the wife; Ex-parte Grundy, Mon. & McA., 293; 3 Russ., 423 n.; Exparte Tindal, Mon. & McA., 415; and text of Archbold's Bankruptcy, by Griffith & Holmes, Vol. 1, p. 573-5.

Morison and Sauvageau and Simpson.

In England I am justified in saying on those authorities, that the claim of Mrs. Morison would be admitted. Now, the words of our statute of 1869 are large and comprehensive. "If any creditor of the insolvent claims upon a *contract* "dependent upon a condition or contingency." I am of opinion to apply these words to the claim in question, and will give an order accordingly.

Award of assignee reversed, and order granted.

D. Girouard, for the assignee.
J. J. C. Abbott, Q. C., for the claimant.
Laflamme, Huntington & Laflamme, for Thomas et al., contesting.
(J. K.)

SUPERIOR COURT, 1871.

IN CHAMBERS.

MONTREAL, 27th APRIL, 1871.

Coram MACKAY, J.

No. 1043.

Hamilton vs. Kelly.

HELD:—That whilst the record is in appeal an application to obtain possession of the property by *saisie revendication* cannot be entertained.

This was a petition to a Judge in Chambers, by the plaintiff, asking to have the barge, which had been seized in the cause, under the writ of *saisie revendication* therein issued, delivered over to him, on giving security.

The defendant objected, on the ground that the record in the case was in Appeal, and that the Judge had consequently no jurisdiction in the premises.

The Judge, after taking time to consider, rejected the petition; rendering the following judgment in writing:—

"Having seen the above petition * * * admitting that an Appeal has been taken to the Court of Q. B., * * and that the Record has been transmitted to the Q. B., (Appeal side), for the purposes of said Appeal, I decline to pass on this petition, that is, I think myself incompetent to grant such petition as prayed."

Petition rejected.

Dorion, Dorion & Geoffrion, for plaintiff.
Bethune & Bethune, for defendant.
(S. B.)

COURT OF QUEEN'S BENCH, 1871.

MONTREAL, 10TH MARCH, 1871.

Coram DUVAL, CH. J., CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

No. 43.

DAVID TORRANCE, ET AL.,

(Defendants in Court below,)

APPELLANTS;

AND

THE BANK OF B. N. AMERICA,

(Plaintiffs in Court below,)

RESPONDENTS.

HELD:—That when a bank discounts for A. a draft by him on B., and accepts a check for the proceeds and delivers it to A., for transmission to B., to enable B. therewith to retire a draft for a similar amount, drawn by A. and accepted by B. for A's. accommodation, and about to fall due at the branch of the bank where B. resides, on the faith of A's. representation, assurance and undertaking (without authority, however, from B.) that B. will accept the new draft, and B. receives the check, and before using it has knowledge of the transaction as between A. and the bank, B. cannot legally use the check to retire his own acceptance on the old draft, without accepting the new one.

This was an appeal from the judgment of the Superior Court, at Montreal, reported at pages 325 *et seq.*, of the 12th Vol. of the *L. C. Jurist.*

Ritchie, Q.C., for the appellants:

Before making any comments upon the pretensions of the respondent, as set forth in the declaration, it may be well to advert to the relations between the parties on the 15th of July, 1867, as they appear by the record. Before that period Yarwood had ceased to act in any sense as the agent of Messrs. D. Torrance & Co. His purchases of grain upon commission for them were at an end, as he himself admits after referring to the account current (No. 43 of Record.) The appellants were simply contingent creditors of Yarwood, as having accepted accommodation drafts for him to the amount of $19,000. These facts are so found by the jury in answer to the second and third questions.

Keeping these facts in view let us see what the grounds are, as disclosed by the declaration, upon which the Bank of British North America asks for judgment against the appellants. It is not easy to ascertain, in reading the allegations of the respondent, upon what acts or defaults of the appellants, the Bank relies. The facts as understood by the Bank are narrated in detail, and the respondent affects to find in them sufficient ground for a favorable judgment.

The declaration of the respondent is more remarkable for what it *omits* to state than for its positive allegations. There is no averment of two most important points, which, if proved, would have been conclusive against the appellants. It is nowhere stated either that Yarwood drew the draft of the 15th July, 1867, with the authority or even the knowledge of the appellants, *nor that they accepted or promised to accept that draft.* There is then no undertaking, express or implied, alleged on the part of the appellants. Their liability must, therefore, be assumed by the respondent to rest upon facts other than the non-acceptance, by the appellants, of Yarwood's draft, drawn without their authority or knowledge.

The appellants, having made no motion for a new trial, inferentially admit that

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they are substantially satisfied with the findings of the jury. The answers of the jury are, indeed, incomplete and inaccurate in several respects. The first part of the answer to the third question is contrary to the evidence; the answer to the sixth question goes beyond the evidence, it having been positively stated by Mr. Menzies that nothing was said by Yarwood to him about the new draft being accepted; the finding upon the thirteenth question is unaccountable, both parties being agreed that the old draft was retired with the proceeds of the cheque. However the points upon which the jury erred are of minor importance. All the vital questions are correctly answered and the verdict is one as fair to both parties, as perhaps could reasonably be expected.

After the rendering of this verdict the appellants had two courses open to them one or both of which they might adopt, viz:

1. A motion for judgment in their favor *non obstante veredicto*; upon the ground that the allegations of the plaintiff are insufficient in law. (Code de P. Art. 433.)

2. A motion for judgment in favor of the appellants upon the findings of the jury:—upon the ground that the verdict is favorable to the appellants.

The appellants made both these motions.

Doubtless, the second motion might have been dispensed with, as it would have been competent for the appellants without it, to ask, in answer to the respondent's motion for judgment, the dismissal of the action. However, upon the motions made by the appellants and respondent respectively, the case came fairly upon its merits before the Court below.

The pretensions of the appellants are succinctly set forth in their plea. They were accommodation acceptors for Yarwood of a draft for $10,000, to mature on the 18th July, 1867. Yarwood had promised to pay this draft. On the 15th July he sent the appellants his accepted cheque to retire the draft, and with the proceeds of the cheque they did retire the draft as he had directed.

The cheque for $10,000 was not received by the appellants from the Bank of British North America. It was the fruit of a new and independent transaction between Yarwood and the Bank—*i. e.*, the discounting of his draft of the 15th July—to which the appellants were not parties. The proceeds of the draft were placed to the credit of Yarwood in his account with the Bank at London, C. W., and his cheque for $10,000, was charged to that account. It was accepted by the Bank upon the tacit understanding that it would go to retire the maturing draft—and it was so applied. The position of the appellants towards the Bank, in respect of the receipt of the cheque and its application, is not different from what it would have been had Yarwood remitted the proceeds of his transaction with the London Agency, in legal tender notes or in a draft upon another Bank. The appellants received the money, upon the cheque, for Yarwood, and applied it to the purpose he indicated. There was no condition attaching to the receipt of the cheque by the appellants except that it should be used to retire the maturing draft. Had there been any other condition, the Bank should have refused payment, until such condition had been complied with.

At the hearing of the case in the court below, the respondent, for the first

time defined the principles upon which it was contended that judgment ought to go against the appellants. Unfortunately for the Bank, the two propositions laid down by the respondent, instead of supporting, are directly contradictory of, the allegations of the declaration.

The first proposition of the respondent was that the money was paid by the Bank through error. This pretension requires no further notice than this; there is no averment or even hint to that effect in the declaration. On the contrary, a formal contract between the Bank and Yarwood is alleged whereby it was agreed (in the words of the declaration) "that the said check would be used to pay 'the said first mentioned draft, *to the discharge of himself* (Yarwood) *and the 'said defendants.*" There was no *error*, in a legal sense, on the part of the Bank. No doubt the London manager acted unwisely in discounting a draft drawn without the authority of the drawees and which they had not in any way promised to accept. Having done so, however, the Bank could not avoid paying its own acceptance of Yarwood's cheque, and it is idle to pretend that the payment was made through error.

The second proposition of the respondent, at the hearing in the Court below, and to which, apparently, more importance was attached than to the one above referred to, was: That in the transactions, at the London agency, between Yarwood and the Bank, there was formed the quasi contract *negotiorum gestorum;* Yarwood being the *gérant*, and the appellants the persons whose business had been transacted by him. Here again, the allegations of the declaration are destructive of the argument. In order that the quasi-contract, *negotiorum gestorum*, should be established between Yarwood and the appellants it was necessary that there should be a business of the latter, transacted without their order *à leur insçu* by Yarwood. So far from that being the case, some of the very first allegations in the declaration are, that "Yarwood, as between him and the defen- "dants, was in fact bound to provide for and pay said draft at maturity;" "that "with the view to provide the necessary funds *to enable him* to retire said draft "at its maturity," Yarwood made his draft of the 15th July, 1867; that he requested the Bank to discount the new draft and allow him to draw his cheque for the full amount of the draft "*in order that he might therewith pay* the said "first mentioned draft for $10,000." It is manifest, therefore, that, in this case, upon the respondent's own showing, the very first requisite of the quasi-contract *negotiorum gestorum* is wanting, viz.: a business of the appellants to be transacted by Yarwood. There having been no *affaire* of the Appellants to be transacted *à leur insçu*, nothing further is required to show the futility of this pretension of the Bank; but in order to constitute the quasi-contract in question it was also absolutely necessary that Yarwood should have acted with the express and formal intention of being reimbursed the amount paid by him in negotiating the renewal of the draft. It is established in evidence that the discount and commission on the new draft amounted to $132.22 which was charged by the Bank to Yarwood's account. It is manifest, however, that Yarwood never intended that this amount should be repaid to him, and he never could have made such a claim upon the appellants, for the simple reason (as set forth in the

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declaration) that their acceptance was an accommodation one, and that it was Yarwood's business and not their's to provide for it.

The case of the respondent would, of course, have been infinitely stronger could it have been alleged by the Bank, with any shadow of truth, that there had been even a verbal promise on the part of the appellants to accept the new draft. But even in that case there would be no liability on the part of the appellants, a verbal promise to accept a draft, not yet drawn, having no effect in law. This doctrine is well recognized in England, and was formally confirmed by the Exchequer of Pleas, in the case of the Bank of Ireland *vs.* Archer, reported in 11 Meeson & Welsby, 384. The facts in that case bear a striking resemblance to those in the present case. But in the case cited there was not only, on the part of the defendants, full knowledge of how the proceeds of the new draft had been obtained, one of the defendants having, previous to the discounting of the renewal Bill, requested that its proceeds should be remitted, but there was a formal, although verbal, promise to accept the new Draft. Notwithstanding these facts, the Bank of Ireland failed to obtain a judgment against the defendants.

The judgment of the Court below, the text of which is given above, seems to have proceeded upon a misapprehension of the pretensions of the respondent, as set out in the declaration. The Bank sues for a sum of money alleged to have been improperly received by the appellants, without any allegation that they undertook to accept Yarwood's draft; the judgment, making no reference to the receipt of this money, or to the cheque, is upon and for the amount of the new draft of Yarwood and the costs of protest. Such a judgment could only properly have been rendered upon allegation and proof that the appellants had promised to accept the new draft, and had subsequently refused to do so. There is no such allegation and no such proof. The respondent asks for one thing, the judgment awards another and different thing.

In whatever light the action of the respondent is viewed, it is, as the appellants respectfully maintain, wholly unfounded in law; and the judgment of the Court below ought consequently to be reversed.

Irvine, Sol. Genl., followed.

Bethune, Q.C., for the respondent:—

Before entering on the merits of the appeal, it was proper to admit that a clerical error had occurred in the written judgment of the Hon. Judge who pronounced the judgment of the Court below,—the unaccepted draft having been referred to instead of the money received on the check, which was really the subject matter of the suit, and not the draft;—but the error was so obviously a clerical one, that it was unnecessary to do more than admit it and suggest to the Court the propriety of rectifying it in the judgment to be pronounced by this Court.

On the merits he then submitted that the following facts were proved at the trial:—

Yarwood forwarded the accepted check to the appellants by letter, dated 15th July, 1867, in the following words:

"I have drawn on you to-day at 3 mos. for $10,000 and enclose cheque on "B. B. N. America for *same amount* to retire bill due on 18th instant."

And the London manager on the same day enclosed the new draft to the Montreal manager, in a letter worded as follows:—

"R. 449.—Torrance & Co., [redacted] Oct., $10,000. I have marked to be cashed at "par, at Montreal, a cheque of E. M. Yarwood for $10,000, in favor of D. Tor- "rance & Co., *against this bill*, and to retire my R. 349 due 18th inst."

Both letters arrived in Montreal on the night of the 16th July, 1867, and were received by the parties to whom they were addressed, on the morning of the 17th July, 1867, say between nine and ten o'clock.

The well-known custom of the Bank at the time was to forward all such drafts by the Bank messenger, shortly after receipt, to the parties who were to accept, and leave them with them until the following day.

The draft, presently in question, was accordingly taken by the messenger to appellants' office, (*distant about five minutes' walk from the Bank*), about 11 a.m., on the 17th of July, 1867, and left there for acceptance till the following day.

In the meantime the appellants telegraphed to Yarwood, as follows:—

"We decline accepting your draft made without authority, unless you can "furnish satisfactory explanation."

And on the same day (17th July, 1867) appellants wrote to Yarwood, acknowledging receipt of cheque, and announcing their intention to refuse acceptance of the draft.

Of all this, the appellants kept the respondent in ignorance, retaining the draft in their possession, and giving respondent no kind of intimation of their intention to refuse acceptance of the draft.

Not only did they do this, but they, in addition, *cashed* the cheque at the Bank, *at about one o'clock, p.m., of the 17th July*, 1867, instead of adopting the usual course of depositing the cheque in the Bank of Montreal, where they kept their account.

The *cashing* of so large a cheque being a most unusual circumstance, the teller of the Bank asked the clerk who presented it why the appellants did not deposit the cheque in their own bank, and he said in reply, "*we have some small amounts to pay out of it.*"

Yarwood also proved at the trial, that he wrote a letter to Mr. Cramp (one of the appellants) from Toronto, on the 16th July, 1867.

This letter the appellants were notified to produce, *but failed to do so*; and of all the correspondence between the parties, *it is the only letter not produced.*

Unfortunately, Yarwood never retained a copy of this letter, but from memory he stated its contents to be as follows:—

In examination-in-chief,—"I stated in that letter to the same effect as the "letter already [redacted]ed (the letter of 15th July, 1867), and I think it stated "*my regret at having been obliged to draw*, but that I had *no other means of* "*relieving the draft*, or words to that effect, I believe." And, in cross-examination,—"I merely remember as to the contents of that letter, that it was an

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"advice to Mr. Cramp, *telling him what I had done*, and I must have mentioned the check, I believe."

If that letter had been mailed on the 16th, it was proved at the trial, that in ordinary course it must have arrived at Montreal on the morning of the 17th July, 1867.

Yarwood stated his impression to be that it was so mailed, but he would not state positively that it was.

That Mr. Cramp had the letter, however, by the morning of the 18th July, 1867, is beyond doubt, as in his letter to Yarwood, dated Montreal, 18th July, 1867, he says, "*I am in receipt of your letter dated Toronto*, 16th inst."

As the production of this most important letter devolved on the appellants, its non-production by them clearly justified the Court and Jury in interpreting its presumed contents most strongly against the appellants.

The evidence at the trial then further established the following closing facts connected with this strange transaction:

On the morning of the 18th July, 1867, Mr. Cramp called at the Bank and intimated to the manager that he *believed* his firm would not be able to accept the draft. The manager thereupon immediately expressed his great surprise, and said that it was impossible for the firm to refuse acceptance of the draft, as the proceeds of it had been paid to them the previous day. Mr. Cramp replied, in effect, that Mr. Yarwood had no authority to draw, but that they had telegraphed to him, and that they hoped his answer would be such as would enable them to come under acceptance.

Shortly afterwards the manager called on Mr. Cramp, and handed him for perusal the letter of the London manager. Mr. Cramp read it, and then showed Yarwood's letter of the 15th July, 1867 (*but not that of the 16th of the same month*), saying, at the same time, that there was no advice *in that letter* (the one of the 15th) that the check represented the proceeds of the draft, to which the manager rejoined that it was impossible to separate the transactions.

After these interviews, and at about 3 o'clock p.m., on the 18th July, 1867, the appellants retired the old draft *through the intervention of a notary, and by legal tender notes.*

After commenting on the questions submitted to the Jury, and their answers, he then went on to say:—

The facts, as established by the pleadings, evidence and findings of the Jury, may be briefly summed up as follows:—

The draft of the 15th July, 1867, was discounted, and the check representing the proceeds thereof marked payable at par at Montreal, and delivered to Yarwood, by the Bank manager at London, on the faith of Yarwood's representation, assurance, and undertaking, that the appellants would accept the draft.

The appellants, on receipt of the check, fully understood the transaction, and immediately resolved in their own minds *not* to accept, and telegraphed and wrote to Yarwood accordingly.

The appellants, instead of immediately intimating to the Bank that they had no intention to accept the draft—which had been presented to and left with the

appellants' acceptance—*retained* the draft in their possession; and, knowing that the cheque represented the proceeds of the draft, and that the draft had been discounted upon the faith that they would accept it, and concealing from the Bank their pre-determination not to accept the draft, asked payment of the cheque from the Bank. And the Bank, presuming—as was natural under the circumstances—that the appellants would accept the draft, in ordinary course, on the following day, paid the cheque.

And on the following day, after being further fully informed by the Bank of all the facts and circumstances under which the draft had been discounted, and after being forbidden by the Bank to use the proceeds of the cheque to retire their own acceptance, then maturing, without accepting the draft in question, retired such acceptance with the proceeds of the said cheque.

From these facts the following propositions of law would seem naturally to flow:—

1. That Yarwood, when he undertook and assured the manager at London that the appellants would accept the draft, acted—though without authority—as the appellants' agent for that purpose, and that the appellants, by presenting the cheque and obtaining payment thereof, and so availing themselves of one part of the agreement entered into by him on their behalf, ratified Yarwood's act.

2. That the plan, arranged by Yarwood and the manager at London, for retiring the old draft, amounted to a proposal for an agreement between the Bank, the appellants, and Yarwood, which the appellants were at liberty to accept or reject when it came to their knowledge, but that the appellants having so acted, in presenting the cheque for payment, that a reasonable man would have concluded that they had accepted the proposal, and the Bank having, in fact, acted upon that conclusion and changed their position, the appellants cannot now be heard to say, that they did not accept the proposal, but must be held to have accepted it, and to have thereby bound themselves to accept the new draft.

3. That the Bank paid the cheque under a mistake of fact, and that without any laches on its part.

4. That the conduct of the appellants amounted to a constructive fraud, and the transaction ought, therefore, to be set aside, and the amount of the cheque repaid by the respondent; and, in support, would refer the Court to the following authorities:—Martin & al. vs. Morgan & al., 1 Brod. & Bing. p. 289; Kelly vs. Solari, 9 M. & W., p. 54; Townsend vs. Crowdy, 8 C. B., p. 477; Pickard vs. Sears & al., 6 Ad. & E., p. 469; Gregg vs. Wells, 10 Ad. & E, p. 90; and Notes to Marriot vs. Hampton, 2 Smith's Leading Cases.

On the whole the respondent confidently claims, at the hands of this Court, a confirmation of the judgment appealed from.

Abbott, Q.C., followed.

MONK, J., (*dissentiens*):—I have the misfortune to dissent from the judgment about to be rendered by the majority of the Court, but I have the satisfaction of knowing that I [illegible]y sustained in the view I take of this case by my honourable and learned colleague, on my right, (Judge Drummond). It is not my intention to go at any great length into the facts and law involved in the present

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appeal, and I shall abridge my remarks to such as is consistent with the examination of the case under consideration. I find myself at the outset in the face of a considerable difficulty arising from the fact that the judgment of the Court below gives what is not asked for. The declaration of the plaintiff asks a condemnation for $10,000 upon the accepted cheque for that amount. The action of the Bank against Messrs. David Torrance & Co., was based upon the grounds of fraud and *condictio indebiti*, or if not upon the latter, at least upon the ground of fraud, in this that the money had been obtained by the appellants by means of the cheque, under conditions that had not been fulfilled. The learned counsel who drew the declaration never intended to bring the action upon the draft; he felt that if the Bank had any action, it must be upon the *cheque*, and upon the ground that the appellants had obtained the money upon the cheque without fulfilling the condition upon which the cheque had been received. The honourable and learned judge in the Court below, in rendering judgment upon the verdict of the jury, changed the ground of action entirely and took up a view, one of his own, condemning the appellants upon a draft as to which there was no obligation alleged in the declaration or evidence that they had undertaken to accept it.

The judgment of the Court below was of a nature to compromise to some extent the character of a leading commercial firm in this city (the appellants,) and, in assuming the responsibility of dissenting in this case, I feel that the responsibility attaching to the confirming of such a judgment as that, in view of the issues and evidence, would be much greater. It is necessary to advert to the leading facts involved in order to explain my view of the case which I consider to be simple and admitting of no difficulty. The Bank of British North America, an institution well known and of the highest character, had and has a branch at London, in Upper Canada, at which it transacted a considerable business. In 1866 there was residing in or near that town a man of the name of Yarwood, as to whom not much appears by the record except that he carried on a somewhat extensive business—a fact of some importance as will be seen later. In that year Yarwood applied to Torrance & Co. for a credit to enable him to purchase grain—and also that they should buy grain with him on joint account. Neither of these propositions was accepted, but it was arranged that Yarwood should have a credit of $20,000 for the purpose of purchasing grain on commission for the appellants. That sum was quickly absorbed, and in fact during the summer and autumn of that year Yarwood bought grain for the appellants to the amount of about $45,000. The only circumstances of importance respecting these purchases were that they should have been made in the names of the appellants and insured for their benefit. In the spring of 1867, Torrance & Co., being desirous of shipping their wheat to England, ordered Yarwood to forward it for that purpose. They then learned for the first time that the wheat had been bought in the name of Yarwood and that he had pledged it for his own account to the Branch Bank of the respondent. The appellants may well have been surprised at this action of Yarwood who does not appear to have been a man of means or in very high credit. It is possible that the Bank may

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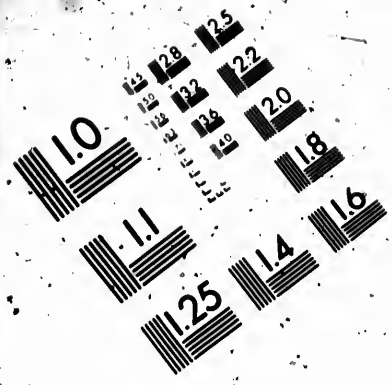
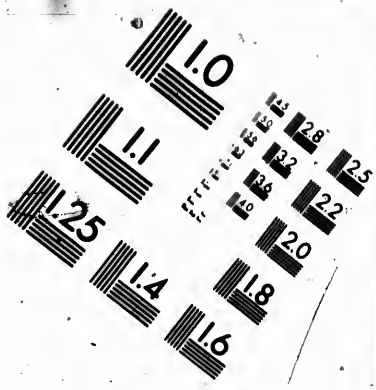
not have known that the wheat pledged by Yarwood for his own purposes was in reality the property of Torrance & Co., although it is not easy to conceive that the bank was ignorant of the fact. However, the appellants found themselves in such a position that they were obliged to accept two drafts of Yarwood amounting together to [illegible] to relieve their wheat. These acceptances were purely for [illegible] Yarwood. This is alleged in the declaration, and was so [illegible] jury. One of these acceptances—for $10,000—the only one in [illegible] appeal, was to mature on the 18th July, 1867. On the 12th [illegible], Torrance & Co. wrote to Yarwood, reminding him that the accept[illegible]ming due, and requesting him to provide for it. Thereupon, Yarwood [illegible]pared to his friend, the Manager of the Bank of London, C. W., and asked him if there would be any chance of renewing the draft falling due on the 18th at Montreal. The Manager answered "Yes," and asked him how he proposed to do it. Yarwood answered, by another draft and a cheque accepted, payable at Montreal at par. Yarwood returned with the draft and cheque. The former was discounted by the Bank Manager, and the proceeds were placed to the credit of Yarwood in the books of the Bank. His cheque for $10,000 was accepted, payable in Montreal at par, and returned to him by the Manager. It would appear that before the discounting of this draft Yarwood's account was overdrawn, and by the discount and commission being charged to him, the overdraft amounted to upwards of $400. The contract thus entered into was one entirely between Yarwood and the Branch Bank. It is alleged by the Bank that Torrance & Co. were aware when they received the cheque that Yarwood was bankrupt or about to become so. But if the appellants were aware of this the Bank must have known it too when the cheque was accepted. The cheque was sent to the appellants in Yarwood's letter of the 15th July, without any explanations. Torrance & Co. at once asked for explanations from Yarwood as to the new draft, first by telegraph, and on the same day by letter. The new draft was forwarded to the Bank at Montreal and was left, in the usual course of business, with the appellants for acceptance. The money was drawn upon the cheque and Torrance & Co., not receiving the explanations required from Yarwood, felt justified in refusing to accept the new draft. The Bank felt that the appellants acted unfairly in obtaining payment of the cheque and refusing to accept the draft. Upon the refusal of the appellants to pay the draft the present action followed. It may well be supposed that the learned counsel, who drew the declaration, felt great difficulty in the face of an action such as this. It could not be based upon the draft, for Torrance & Co. had never accepted it or undertaken to accept it. It could not be pure *condictio indebiti*, for the Bank was bound to pay its own acceptance. So the action was brought for the money obtained upon the cheque—the appellants being charged with fraud in receiving the money upon it, and applying it to the payment of the maturing draft without accepting the new draft. There is no allegation that Yarwood had any authority to draw upon Torrance & Co for the purpose of receiving the outstanding draft—nor that he acted as a *negotiorum gestor*—nor that the appellants promised to accept. In my view of this case, the new





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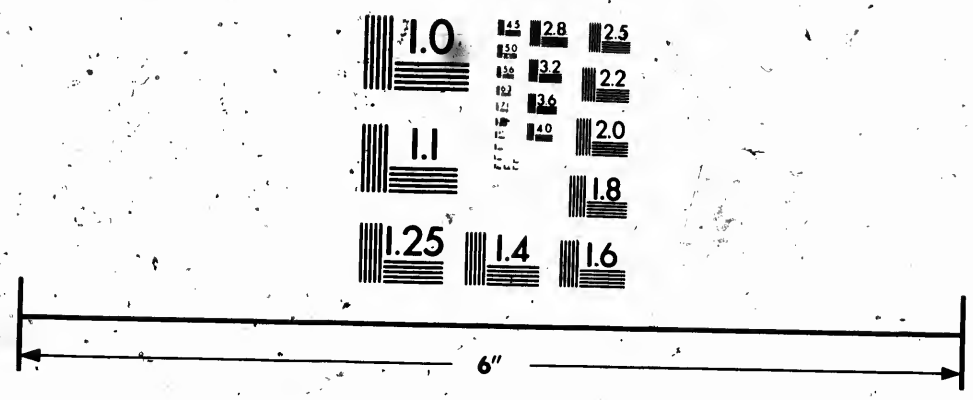

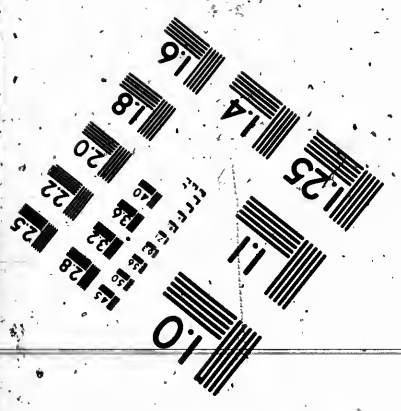

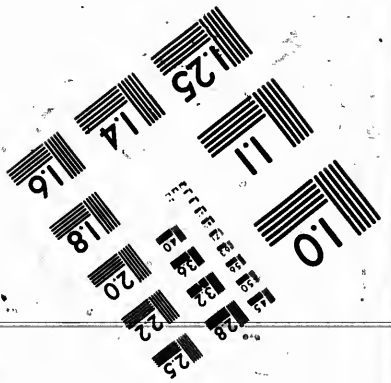

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draft is entirely out of the question. The declaration might have been met by a demurrer. The appellants having complied with the instructions received as to the application of the proceeds of the cheque, and there being no allegation that they had undertaken to accept the new draft, the action of the Bank against them has no foundation in law. However, the appellants instead of meeting the action of the Bank by a plea in law, pleaded in substance that the first draft was accepted solely for the accommodation of Yarwood, who was bound to provide for it; that the accepted cheque was sent to them by Yarwood for the purpose of taking up the maturing draft, and that they duly applied it to that purpose. I may remark here that this case does not, in my opinion, assume any different aspect from the fact of an accepted cheque having been sent to the appellants by Yarwood, from what it would have borne had he sent them the $10,000 in legal tender notes. They would have had to do the same in either case, *i.e.* retire the old draft with the funds provided by Yarwood. The Bank answered the plea specially, alleging that, although Yarwood was bound to pay the maturing draft, yet the appellants were pecuniarily interested in the transactions that gave rise to the draft, namely, the purchase of grain to be shipped to the appellants, and by them sold on commission, &c.

Upon these pleadings the parties went to a jury. The verdict was rendered upon a number of questions submitted. The answers to some of these questions it is not easy to interpret, and it is somewhat difficult to say whether the verdict is in favour of the plaintiffs or the defendants After the rendering of the verdict the appellants made two motions: 1. For judgment *non obstante veredicto*; and 2. For judgment on the verdict, and dismissing the action of the Bank. The respondent simply asked a judgment on the verdict.

Before commenting on the findings of the jury in answer to the most important of the questions submitted to them, it is necessary to consider what the business relations subsisting between Yarwood and Torrance & Co. were at the time the new draft was discounted at the London Branch. The second and third questions bear upon this point, and in answer to them the jury found that Yarwood was not then purchasing grain for the appellants, and that the maturing draft had been accepted purely for the accommodation of Yarwood, who was bound to provide for it. These findings of the jury dispose of the special answer of the Bank. The business connection between Yarwood and the appellants had entirely ceased when the former obtained the discount of the new draft. Yarwood was not acting as the agent of the appellants, nor as a *negotiorum gestor*. The fourth question refers simply to the making of the new draft, in order to provide funds for the old one. The next question is important; it is as follows:—

Did the said E. M. Yarwood request the plaintiff to discount said draft of the 12th of July, 1867, and allow him to draw a cheque for the full amount thereof, *in order that he might therewith retire the said first-mentioned draft*, and upon the representation and engagement by him that the defendants would accept such new draft; and did the plaintiff discount such new draft, and accept the said cheque, and certify it as being payable in cash in Montreal, on the faith of such representation, assurance and undertaking, and deliver it to the said E. M. Yarwood, for the purposes aforesaid?

The answer is "Yes." This question and answer bring us in the face of a material fact in the view of the respondent. There was no doubt that the answer is in accordance with the evidence. Yarwood did tacitly represent to the manager of the Branch Bank that the new draft would be accepted in due course, and, upon his assurance to that effect, it was discounted. But the inquiry remains: had he any authority to make such representation? None, whatever. The manager seems to have acted with extreme imprudence. He made no particular enquiry as to the probability of Torrance & Co's accepting, although he had the telegraph at his command. If the case is a hard one for the Bank, it has its own negligence to blame; and it is equally a hard one for the appellants to be held to continue Yarwood's liability, by being obliged to renew his draft. The next question is:

6.—Did the said E. M. Yarwood transmit said accepted cheque to the defendants, informing them in effect that the said cheque represented the proceeds of the said draft for ten thousand dollars, so drawn on the 15th of July, 1867, by him on defendants, and that said cheque had been obtained on the representation that said defendants would accept said draft of 15th July, 1867, and requesting defendants to accept said draft, and with the proceeds of said cheque retire said first-mentioned draft for ten thousand dollars to mature on the 18th of July, 1867, or did said E. M. Yarwood transmit said cheque to defendants without explaining how he had obtained it, and informing them only that it was to retire said first mentioned draft to become due on the 15th of July, 1867?

It must be conceded that this question is a very material one from the point of view of the respondent, and if the action has any grounds, a favourable answer to this question would be conclusive. The answer is very material, viz: "Yarwood remitted the cheque in his letter of the 15th of July, 1867, to cover the draft due the eighteenth instant, without explaining how he had obtained it."

Now, if this answer had been in the affirmative, and the cheque had been used as it was by the appellants to retire the maturing draft, I do not say that it would render the appellants liable. But the finding, instead of being in the affirmative, is that no explanation was given as to the circumstances connected with the obtaining of the cheque. The answer clearly did not hold the appellants liable for using the cheque without accepting the draft.

The next question of importance is the 11th. "When they so presented the said cheque for payment, did they know, or had they reason to believe, that it represented the proceeds of the draft of the 15th July, 1867, and that such draft was only discounted upon the faith that they would accept?" In the view of the plaintiff this question is a very important one; but it is not so in mine. The mere knowledge of how the cheque was obtained, seeing that the appellants had nothing to do with the transaction by which Yarwood became possessed of it, is not sufficient to affix any legal liability on Torrance & Co. If I could find any law in the allegations of the declaration, I should feel bound to say that an affirmative answer to this would draw the matter closer to the appellants than the answer to any other of the questions submitted to the jury. Now, what is

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the answer to this question? The jury find as follows: "We are *of opinion* that the defendants *had reason to believe* that the cheque was the proceeds of the draft of the 15th July, and that the said draft was discounted upon the faith that the defendants would accept it." The jury were not asked for their opinion as to what the appellants had or had not reason to believe. They were asked to find a fact from the evidence before them. I look upon this finding in so far as it may be considered favourable to the pretensions of the Bank, as absolutely worthless. It cannot benefit the respondent, and it cannot injure the appellants. It is an absolute nullity, as a piece of evidence.

The next question is:—"No. 12.—Did the said plaintiff, on the 18th day of July, 1867, notify the said defendants of all the facts and circumstances connected with the discounting of said last-mentioned draft, and the acceptance and transmission to them of said cheque, as alleged in said declaration, and did the plaintiff also forbid the said defendants to use the proceeds of said cheque without accepting said draft?"

To this the jury answered "Yes." In my view of the case this answer implies no fraud on the part of Torrance & Co. None is charged in direct terms by the question submitted, and certainly the jury have not found any. The idea of the Bank forbidding the appellants to use the cheque without accepting the new draft was preposterous. It was not competent to the Bank to do so, but it was a fact of no consequence, and one that could not alter the position of the appellants. It was the business of the Bank to refuse payment of the cheque unless it wished to take the risk of the new draft being accepted.

The next question submitted to the jury is the 13th, viz.:—"Did the defendants, after being so notified and forbidden, and with a full knowledge of all the facts and circumstances under which the said draft was disc[illegible], use the proceeds of the said cheque for ten thousand dollars, with intent to relieve themselves at the expense of the plaintiff from their liability on the said draft which so became due and payable on the 18th of July, 1867, and did they in fact retire and pay the said draft with the proceeds of said cheque?"

The answer was:—"The defendants drew the amount of the cheque, but how they applied the proceeds is not known, and retired the draft with legal tender notes through their notary."

I do not know what this finding means, as it is agreed upon all hands that Torrance & Co. retired the maturing draft with the proceeds of the cheque received from Yarwood.

The remaining questions, two in number, inquire as to the inability of Yarwood, on the 15th July, 1867, to pay the amount of the cheque, as to his subsequent insolvency, and as to whether Torrance & Co. know when they received the cheque, or had reason to suspect, that Yarwood was then either insolvent or shortly about to become so. The jury found that on the last mentioned date Yarwood was unable to pay the amount of the cheque, and thereafter became insolvent, but that there was no evidence to show that the defendant considered Yarwood an insolvent at the time they received the cheque.

Upon these findings of the jury, and upon the two motions of the appellants,

one for judgment notwithstanding the verdict, and the other for judgment in their favour on the verdict, and the motion of the respondent for judgment against the appellants, the case came up for decision before the honourable and learned Judge in the Court below. A judgment was asked for by the Bank upon the ground that the appellants had acted fraudulently in making use of the cheque without accepting the new draft. But there was no allegation or proof that Yarwood was authorized by Torrance & Co. to make the draft, nor that they undertook to accept it. Consequently there could be no fraud in their applying the cheque to the purpose for which it was sent to them. The charge of fraud fell to the ground, but the respondent endeavoured to make out there was "constructive fraud." I do not know what they meant by that. The Judge in the Court below, not adopting the ground of the fraud, real or constructive, or, indeed, any of the grounds set forth in the declaration, seems to have said to himself: "I will astonish them. I will give them what they don't expect—by "giving them what they have not asked for. Avoiding the ground of fraud, I "will render a judgment upon the draft." The learned counsel for the plaintiff had wisely abstained from declaring upon the draft, and it was the peculiarity of the judgment appealed from, that it is solely upon the draft, but without reciting that, either in the declaration or in the findings of the jury, there is anything to warrant the pretention that the appellants had undertaken to accept or pay the draft.

I confess that I should stultify myself should I consent to confirm such a judgment. This I have no hesitation in saying, supported as I am by my honourable and learned colleague, Judge Drummond. Take as an illustration, the case of a man who, travelling in England, should find himself short of money, and should draw on a friend in Canada for £100 stg., promising to send a cheque to meet it at maturity. Would it be pretended that the friend receiving the cheque and applying it to the payment of the outstanding acceptance, would be obliged to go on accepting simply because the Bank that had discounted the draft had failed to take the required assurance that the new draft would be accepted? I have no hesitation in saying that the action of the Bank is entirely unfounded in law. None of the facts proved or found by the jury warrant any imputation of fraud or of unfair dealing, or of anything in the slightest degree dishonourable on the part of Messrs. Torrance & Co. Greater vigilance should have been observed both at the Branch Bank, in London, and here. If the Bank loses money in connection with the transactions referred to in this case, it is entirely owing to its own neglect. I am of opinion that the judgment of the Court below ought to be reversed, and the action dismissed.

DRUMMOND, J., *dissentiens*:—I cannot add anything to what has been so well and so forcibly said by my learned brother, Monk. Had he not made so complete an exposition of the case, I should have taken precisely the same course in commenting upon the questions submitted to the jury, and their findings in answer to them. The great object of putting those questions to the jury was to obtain direct answers. I concur most fully in what has fallen from the learned Judge on my left, and think the judgment of the Court below ought to

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be reversed. Our system of submitting questions to juries in civil cases is a very good one if the answers are intelligent and consistent; because the line of demarcation between the provinces of the Court and Jury is kept distinct. If the questions are clearly put, and fully and correctly answered, the duty of the Judge becomes facile; if not, it is rendered difficult. In this case the questions are clear, being based upon the allegations in the declaration; but the answers of the jury are not always clear, and sometimes contradictory. My conviction is, that the Bank had no right of action against the appellants. There was nothing to fix any legal liability upon them. To confirm the judgment of the Court below would be, in my opinion, to establish a dangerous precedent. To refer to the illustration of Judge Monk, of a man in England drawing upon a friend here for £100, why might not the draft as well be for $10,000? In drawing upon the appellants before the maturity of the old draft, Yarwood acted without authority. He was himself bound to take it up. If any one was to blame it was the Manager of the Branch Bank at London, who acted with excessive imprudence. The only basis that the action has is contained in the 9th question, and in the answer thereto. These contain, in my opinion, no ground of action against the appellants. The answer to the 11th Question only gives the *opinion* of the jury. I fully coeur in the forcible commentary of the learned Judge on my left, upon the answer to this question. What would be thought in an action of assumpsit for goods sold and delivered to the amount of $10,000, if the clerk of the seller were to be brought up to state that he was of opinion that the defendant had reason to believe that the goods had been sold and delivered to him? Yet the answer of the jury to the 11th Question is of the same character as such evidence would be. I must enter my dissent from the judgment about to be rendered, fully concurring in the reasons so ably stated by Judge Monk.

BADGLEY, J.—The importance of this case makes it necessary to premise its leading facts to explain the precise nature of the action and demurrer submitted by this appeal, which has been much facilitated, by having placed before the Court here the written evidence fyled in the record by the parties, put into printed form as used at the trial in the Superior Court, with the oral evidence noted at the trial, also printed in conformity with the rule of this Court in such case.

In December, 1866, the appellants, merchants at Montreal, opened a cash credit for Yarwood at St. Thomas, in Ontario, to enable him to purchase grain on their account on commission. During the winter he had purchased to the amount of $40,000, but in his own name, and when in the spring he was directed by his principals to ship it to them here, a large quantity was found to have been pledged by him with the Bank of British North America at its Branch at London, Ontario, to cover his own liabilities to that institution. The principals here were obliged to come under acceptances for him to the Bank for a considerable amount to release the grain from the pledge upon it, and one of those acceptances was for $10,000, dated at London in Ontario, on the 15th May, 1867, payable to the Bank, and to mature on the 18th of July following. The appellants by the effect of their acceptance, came into possession of the pledged grain, much exceeding in value the amount of their acceptance.

On the 12th July, 1867, a few days before the maturity of the acceptance then held by the bank here to the perfect knowledge of the appellants, they wrote a letter to Yarwood, in which they call his attention to "our acceptance for $10,000 which was to fall due on the 18th instant, and request him to make timely remittance to meet it according to the understanding had when we agreed to borrow it on your account." To meet this object, Yarwood drew a renewal draft on the 15th of July at three months upon the appellants for a like sum of $10,000 as the maturing draft, which he procured to be discounted at the bank agency at London, upon his assurance to the manager there that it would be accepted by the appellants and applied to retire the maturing draft, at the same time drawing the full face of the discounted draft, by his check payable to the appellants, and which he got the manager to accept and make payable in cash at Montreal. By his letter of advice of the same date to the appellants Yarwood encloses to them the accepted check, and writes to them: "I have drawn on you to-day at three months for $10,000 and enclose check on Bank B. N. America for same amount to retire bill due on the 18th instant." This letter, with its enclosure, was duly received by the appellants on the morning of the 17th of July, and on the same day the bank here received from their London manager his letter of the 15th, advising the bank of the above transaction. "I enclose for collection R. 449, Torrance, 18th October, $10,000. I have marked to be cashed at par at Montreal, a check, E. M. Yarwood, for $10,000, in favour of Messrs. D. Torrance & Co., against this bill, and to retire R. 449, due 18th instant." At eleven in the morning of the 17th, the day of its receipt, the bank here left the renewal draft with the appellants, in the customary way, for 24 hours, if they required that time for their acceptance of it. It was delivered to Mr. Cramp, a principal partner in the appellants' firm, and with whom their transactions with Yarwood were chiefly conducted.

On the 16th of July, the day following that of the transmission of the check, Yarwood again addressed the appellants by letter from Toronto, through Mr. Cramp, in which he again notified them of his having drawn the renewal draft upon them as advised by his letter of the 15th, and of his object and reason for doing so, and also of his transmission to them of the accepted check to renew and retire the draft maturing on the 18th instant.

On the same day, the 17th on which the renewal draft was delivered to the appellants, they notify Yarwood by telegram to St. Thomas that they declined to accept his draft, and again by their letter of the same date to him at St. Thomas, they acknowledge their receipt of the check for $10,000 to retire the draft due to-morrow, and also his advice to them "that he had drawn upon them at three months through the Bank of British North America, for $10,000, which bill had appeared for acceptance," and they then reiterate the terms of their telegram, and say that his draft will be refused acceptance, *as the matter then stands*. Neither telegram nor letter was received by Yarwood until his return to St. Thomas on the 19th July from Toronto, whence he had written to them on the 16th, and which letter must have reached the appellants in due course by mail early on the 17th. Having decided on the 17th upon

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the course of refusing acceptance of the renewal at the very time when they communicated their decision to Yarwood, and were withholding from the Bank that renewal left with them as customary and which they had determined at the time not to accept, and well knowing that the check had been transmitted to and received by them to operate with the new draft the retirement and renewal of the draft falling due on the 18th, and needed not to be presented until that day, the appellants out of the usual business course in such matters, which was to deposit such paper with their own Bank, in this case the Bank of Montreal, for collection from the Bank where the paper was payable, themselves notwithstanding presented the check at about 1 P. M. of that day, the 17th, at the counter of the Bank here at Montreal, and received payment of the amount, but gave no intimation to the Bank of their already settled resolve to refuse acceptance of the renewal draft, the Bank manager here directing the check to be paid notwithstanding, in the full confidence of their acceptance of the renewal. Having thus secured the amount of the check, Mr. Cramp, on the following day, the 18th, and whilst the renewal was still in the hands of the appellants for acceptance, and before their payment of the draft due on that day, called at the bank here and stated to the manager *his belief that his firm would not be able to accept* Yarwood's draft for $10,000 which had been left with them the previous day, &c., whereupon the manager communicated to Mr. Cramp's the advice letter received from their London agent on the 17th, respecting the new draft and the check, and observed that it was impossible for Mr. Cramps' firm to refuse acceptance of the draft, the proceeds of which they had received the previous day, and he then and there forbade them using the proceeds of the check without accepting the draft. The interview did not result in anything, and afterwards, at 3 p. m. of the 18th, the appellants retired the due draft through their notary by legal tender notes for its full amount. On the same day the new draft was returned without acceptance, and was in due course protested for non-acceptance and afterwards for non-payment.

It is proper to add, in connection with the check, that it was made payable to the appellants and indorsed by them before its presentment for payment.

In continuance of the facts of the case, it is material to refer to two more letters, which were written previous to the institution of this action, and are set out in the printed evidence as stated above: the first is a letter from Mr. Cramp to Yarwood on the same 18th July, in which he writes: "I am in receipt of your letter, dated Toronto, 16th instant," and then proceeds to observe that Yarwood would have learnt that his bill for $10,000 had been refused, &c., that before asking any further assistance he should have declared his reasons and a full account of his affairs, and that the bill had been protested. Respecting his balance due to them, it was clear he was going to disappoint their expectations, but that their debt was a debt of honor, to be made up to them at any rate, and that the writer would give him liberal time, say a year, &c. The second is Yarwood's letter to the appellants from St. Thomas of the 19th July, in which he writes:

"I wrote you on the 15th instant, and now have your letter of the 12th and

your telegram of the 17th inst. I was away from home when the telegram arrived, and only got back last night.

"I wrote Mr. Cramp from Toronto. The check of $10,000 was drawn against proceeds of my draft on you at 3 months for same amount, and if you decline to accept my draft, then the check should not be used. I would not have made a draft on you, if my anticipations respecting grain had been realized."

This suit by the Bank (plaintiff below), the respondent, against the appellants (defendants below) followed after the protest for non payment of the renewal draft, and the respondent's declaration avers all the material facts above detailed, which it is not necessary to repeat here. It also avers that the appellants, knowing the circumstances under which the check was accepted, and the purpose of its transmission to them, and whilst determined not to accept the new draft, fraudulently demanded and received payment from the Bank of the amount of the check, without informing the Bank of their determination not to accept it; that, relying upon the integrity of the appellants and that they would accept the draft left with them for acceptance, but which they refused, the Bank paid the check, but forbade the appellants use of the proceeds thereof without accepting the new draft; the Bank notifying the appellants of the said facts and circumstances, of which the appellants were already aware, but that notwithstanding the premises and with full knowledge of the circumstances and of their having no right to use the proceeds of the check without accepting the new draft, and with the purpose of fraudulently procuring their own discharge from liability as acceptors of the old draft, they paid and retired the latter with the said proceeds of the check, still refusing their acceptance to the new draft which was in course subsequently protested for non-payment. It is also averred, that on the 15th July, Yarwood, to the knowledge of the appellants, was insolvent and unable to pay the draft to mature on the 18th; all which they knew, or had reason to know, when they received the proceeds of the check which they fraudulently appropriated for the purpose of saving themselves from loss at the expense of the bank. The right of the bank to recover from the appellants the $10,000 proceeds aforesaid, with interest, &c., and $5.20 costs of the protests, is then averred, and then follows the conclusion for condemnation against the appellants for the sum of $10,005.20 with interest and costs.

Two special pleas to the action were filed by the appellants, the first alleging that the retired draft was an accommodation acceptance by them for Yarwood, for which he was to provide according to agreement between them; the second alleging that they received the accepted check and its proceeds of $10,000 to take up the old draft, and received those proceeds for which they credited Yarwood, and by means of those proceeds took and paid the old draft according to their agreement with Yarwood. In addition to these special pleas, they pleaded also a general denegation of the allegations of the declaration. Special replications to the pleas were filed alleging that the defendants were pecuniarily interested in the transactions which gave rise to the making and accepting of the old draft, from which the appellants derived large profits in commissions and charges in selling the grain purchased by Yarwood, and finally the allegations of the declaration were reaffirmed.

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Upon these issues the cause was submitted for the decision of a jury who rendered their verdict upon the several articulations of fact judicially settled for their determination. It is not necessary to introduce the articulations here, as they are fully set out by the parties, and the findings of the jury upon them are sufficiently explanatory of them. The findings are: 1. That the plaintiff on the 15th July, '67, was the holder of the draft to mature on the 18th July. 2. That Yarwood at the time of making that draft was not engaged in purchasing grain for the defendants with money raised by them. 3. That the draft was accepted by the defendants as an accommodation to Yarwood with the understanding that he would retire it at maturity. 4. That to provide funds necessary to retire the draft Yarwood made the draft of the 15th July for $10,000 at London as stated in the declaration. 5. That he drew that draft and obtained discount thereof upon his representation and engagement, that defendants would accept it as stated in the declaration and received the said cheque payable in Montreal on such representation, for the purpose of retiring the old draft. 6. That Yarwood remitted the cheque to the defendants in his letter of the 15th of July to cover the draft due on the 18th July, without explaining how he had obtained it. 7. That the draft of the 15th July was presented to the defendants for acceptance on the 17th July, and left with them as customary until the 18th, when they refused to accept it. 8. That the draft was duly protested for non-acceptance and non-payment, and notice given, at the costs and expense as stated in the declaration. 9. That the said draft of the 15th July was presented for acceptance after the defendants had been made aware of the transaction, and they obtained amount of the said cheque from the plaintiff before refusing acceptance of the said draft. 10. That immediately on receipt of the cheque on the 17th July the defendants presented the same for payment, and received payment thereof from the plaintiff, and immediately placed the proceeds to Yarwood's credit. 11. That when the defendants so presented the cheque for payment the defendants had reason to believe that the cheque was the proceeds of the draft of the 15th July, and that said draft was discounted upon the faith that the defendants would accept it. 12. That plaintiff, on the 18th July, notified the defendants of all the facts and circumstances connected with the discounting of the draft and the acceptance and transmission of the cheque as alleged in the declaration, and did also forbid them to use the proceeds of the cheque without accepting the draft. 13. That the defendants, after being so notified and forbidden, and with full knowledge of the above facts and circumstances, drew the amount of the check, but how they applied it is not known, and retired the draft with legal tender notes through their Notary. 14. That on the 15th July Yarwood was wholly unable to pay the amount of the cheque and wholly insolvent. 15. That there was no evidence to shew that the defendants considered Yarwood insolvent at that time. These were the findings of the Jury.

The appellants' counsel by their factum in this Court, have put their case fairly before us, and they observe, that the appellants, having made no motion for a new trial, inferentially admit that they are substantially satisfied with the findings of the Jury, which they add, are, indeed, incomplete and inaccurate in several respects. "However, the points upon which the Jury erred are of minor

importance. All the vital questions are correctly answered and the verdict is one as fair to both parties, as perhaps could reasonably be expected."

The proceedings then upon the verdict were first a motion by the plaintiff in the usual manner for judgment in favor of the plaintiff upon the verdict, and secondly, the two following motions by the defendants.

1. That inasmuch as the allegations of the plaintiff are not sufficient in law to sustain his pretentions, notwithstanding the verdict of the Jury, judgment be rendered in favor of the defendants and the action of the plaintiff be dismissed with costs.

And 2. That on the verdict and findings of the jury, and on the pleadings and evidence of record, judgment be entered up in favor of the defendants, and that the action of the plaintiff be hence dismissed with costs.

The appellants state that they adopted both the courses open to them, and made both motions, although the second might have been dispensed with, as, in answer to the respondent's motion for judgment, they might have asked for the dismissal of the action; whilst they also admit that upon the respective motions of the parties the merits came fairly before the Court below. The Superior Court below rendered the judgment now appealed from, after argument upon those respective motions, and, rejecting the appellants' motions and granting that of the respondent, condemned the appellants in the amount demanded by the respondent with interest and costs, as demanded.

There being no motion for new trial nor for arrest of judgment, the contention turns principally upon the appellants' first motion for judgment in their favor *non obstante* the verdict, for the alleged reason that the allegations of the respondent are not sufficient in law to sustain their pretentions, notwithstanding the verdict of the jury, and is to be found in the 433rd article of our *Code de procedure*, which is, "whenever the verdict of a jury is upon matters of fact in "accordance with the allegations of one of the parties, the Court may, notwith- "standing such verdict, render judgment in favor of the other party, if the "allegations of the former party are not sufficient in law to sustain his pre- "tensions." Under this Code article, then, the motion *non obstante* demurs to the legal sufficiency of the allegations of the respondent to sustain the action, but necessarily admits the matters of fact found by the verdict and the allegations themselves to be accordant with each other; the simple legal question for solution being, do these allegations declare a legal right of action in this behalf for the respondent? According to practice in England, the judgment upon this motion is always upon the merits, and is never granted, except in a very clear case. 2 Tidd's Prac. 904-953; 1 Chitty, Plead. 695; Buller's N. P., 404.

Without a tedious repetition of the averments and allegations of the respondent, and which are detailed in the *factums* submitted to this Court by the parties, it would suffice in a general manner to declare their sufficiency in law, but particular allegations present themselves prominently in support of that legal conclusion, amongst which will be found that the appellants fraudulently appropriated to their own benefit the proceeds of the accepted cheque transmitted to them for the special purpose set out in the declaration, that they fraudulently misappropriated those proceeds from that purpose to their own advantage and

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to cause loss to the respondent, which, with other allegations of similar import, are plainly in themselves legally sufficient, and afford good legal grounds and cause of action against the appellants for their alleged fraudulent conversion to themselves of the amount in contestation. The legal sufficiency of these allegations in support of such action is established by numerous legal authorities, a few of which collected promiscuously follow, but all supporting the same point. In Moore & Barthrop, 2 Dow & Ry. 25, it was held that if a cheque is placed for a specific purpose, in the hands of a person who gives no value for it, he and other persons taking the same with knowledge of the facts must fulfil the promise; as where a bill has been received to get discounted, the party receiving cannot apply it to his own use in discharge of a debt due to himself—1 Stark R. 439; 3 Esp. 46; Chitty on Bills, and Byles, passim.—So, if a bill, &c., were accepted or made for a special or particular purpose, then no third person, aware of that object, can by obtaining the instrument or its proceeds apply the same to any other purpose—1 B. & Ad. R. 529; 1 Stark 439; 1 Bos. & Pul. 398; 8 Taunt. 21-100; 9 B. & Cr. 738. See also the following: 2 Starkie 340; 5 Wend. 366; 10 Johns. 231. So even a *bona fide* holder could not recover, if he took the paper with knowledge of the circumstances of the case—1 Moore 543—even if he did not have actual knowledge of the misappropriation, but knew such facts and circumstances as should have put him on inquiry, he could not recover. So the knowledge of defeating circumstances, &c., would show that there was some knowledge, or an intentional or careful avoidance of knowledge, which has the same effect as knowledge. So, if the drawer of a cheque procures it to be accepted upon false representations, the bank may reclaim the cheque or the money represented by it, unless it has been transferred or paid previously to one who has had no notice of the false or fraudulent act. 2 Parsons, 27. So if an accommodation is given for a particular purpose, and that is known to the holder of the paper at the time he takes it, a misappropriation of the paper would relieve the party giving the accommodation from all responsibility. *Idem*, p. 77. So, where peculiar circumstances of the case shew that the holder took the cheque with knowledge that its payment might be arrested by the acceptor on good grounds. 1 Parsons on Bills, &c. All these authorities are consistent with each other in principle, and all apply to the allegations as legally sufficient to support the action, and moreover are peculiarly applicable to the conduct of the appellants, who, knowing the purpose for which they held the cheque, presented it for payment, out of course, doubtless from their apprehension that if kept over for presentment to the next day, the 18th, when they would be forced to declare their refusal to accept the new draft, the bank might, on good and legal grounds, refuse to pay the cheque. In the face, then, of the respondent's allegations as to the origin of the cheque and the circumstances of the transaction, as well as the purpose of its transmission to and receipt by the appellants, and without multiplying authorities, it is plain that the legal sufficiency of the respondent's allegations has been fully established by authority of law and jurisprudence, and therefore the appellant's first motion, above stated, *non obstante veredicto*, for insufficiency in law of the allegations was properly rejected. By their second motion the appellants claim the judgment in their favor, on the verdict and findings of the jury, and on the pleadings and

evidence of record generally. The irregularity of this course of resting for judgment on the evidence of record generally is palpable, because where there is no motion for a new trial upon such evidence as a ground, the evidence must be sought in the findings of the jury, which in this case need not be repeated, but which, of themselves, have established matters of fact in accordance with the legally sufficient allegations of the respondent. Now even following the irregular course of proceeding adopted by the appellants in this respect, and considering the evidence simply in itself, it proves the circumstances of the original transaction between Yarwood and the Bank at London, that the intention and purpose of making and discounting the new draft and obtaining the cheque for the full draft amount accepted at London for cash at Montreal, and the transmission of the cheque by Yarwood to the appellants' order here, was that they should retire and renew the old draft by the proceeds of the cheque and by their acceptance of the renewal, both being parts of the same transaction and purpose; that the appellants had knowledge of all the foregoing, and being so cognizant, whilst withholding from the bank their already settled resolve declared by their telegram to Yarwood, to refuse their acceptance of the renewal then held by them for that purpose, they presented the cheque for prompt payment and received its proceeds for their own use, and that they appropriated, in bad faith, the proceeds of the cheque and wilfully avoided the obligation which their receipt of the cheque imposed upon them; the evidence of record establishing against them the matters in contention in the suit and confirming, if needs were, the findings of the jury. It is proper in connection with this matter of evidence and especially of the appellants' knowledge of the purpose of the cheque received by them, to observe that they were called upon at the trial to produce as evidence, Yarwood's letter from Toronto of the 16th to Mr. Cramp, which must have reached them in due course early on the 17th, and before their presentment of the cheque, their receipt of which is acknowledged in the appellants' letter to Yarwood, of the 18th; and in which Yarwood explains to and informs them of the purpose of the cheque, and the understanding on which he had obtained it, both cheque and renewal being parts of the same transaction and object. The appellants failed to produce the letter, the contents of which were, however, proved by Yarwood himself, and they thus came under the rule of law, where there has been a suppression of instruments which might have thrown light upon a suit, everything will be presumed against the party by whose agency such suppression has been practised, and every presumption will be made in favor of the *prima facie* right of the other party, (Kerr on Frauds 214 and cases cited there,) and therefore if the contents of a suppressed instrument are proved, the party will receive the same benefit as if the instrument were produced. *Idem.* Now under the circumstances, the result of the evidence is against the appellants, nor can they bring themselves within the distinction made by the authorities in the case of a third person, who, receiving a bill from another, has actually made further advances to him in money or goods to the credit of the bill, and where he has not done so and is merely a creditor on former account, in the latter case, he is to be considered merely an agent, and not a holder for value. (See De la Chaumette vs. Bank of England, 9 B. and C., p.

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208.) The evidence relied upon by the appellants in their second motion cannot avail them. But in that motion they also rest upon the pleadings in the cause, and urge in argument the two following alleged omissions out of the declaration, which it is not necessary to detail, as they form no point, but which they say if proved would have been conclusive against the respondents:—1st. That Yarwood drew the 15th of July draft with the authority or knowledge of the appellants; and 2nd. That the appellants accepted, or promised to accept, the draft, &c. From these alleged omissions they argue that there is no allegation of an undertaking with them, either express or implied. Now, the gist of the action is not whether Yarwood had or had not authority from the appellants to draw the renewal draft, or whether they had or had not promised to accept such draft either before or after it was drawn, but whether, Yarwood having drawn the draft and sent it to them with its proceeds in the cheque itself for the special purpose of replacing the maturing draft with the new one, they could by right of themselves, without accepting the renewal draft, wilfully appropriate those proceeds in discharge of their own debt to the Bank in contravention of the purpose of the sender, and with full knowledge of their wrongful act in that respect. These alleged omissions are entirely beside this action, and having no existence in fact could not have been alleged without palpable contradiction of the other allegations of the declaration. The appellants have cited the case of the Bank of Ireland against Archer 11, M. & W. p. 384, in connection with the second omission referred to by them, as to their non-promise to accept the new draft. Neither omission nor authority applies here. That case was upon an averment of actual acceptance of the bill by the Defendants, as set out in the first count of the declaration in that case, whereas in fact no acceptance whatever had been given, but only a verbal promise made previously to accept a bill to be drawn. The point held in that case was, "that a promise to accept a bill not yet drawn, does not amount to an acceptance of it, although the bill should afterwards be discounted for the drawer on the faith of such promise, and this ruling settled a long disputed point of commercial law as observed by Baron Parke who gave the judgment; he said the ruling did not apply to a promise to honor an existing bill; reason points out that in order to constitute an acceptance there ought to be a bill in existence which could be accepted, and to hold that the same would be an acceptance or not, according to the subsequent contingency of the holder of the bill having notice of it, would introduce a strange anarchy and confusion into the relations of the parties to the bill, the drawer being an exception as to some and not to other indorsers. A similar ruling to this English one prevails in the United States Courts, and Mr. Justice Story says in reference to such cases "a contrary opinion or ruling is at once unsound in policy and full of inconvenience," but the principles involved in such cases do not apply here. They were actions, upon promises to accept bills and notes, but not effected, whereas this action is substantially for the recovery of money sent to the appellants for a special purpose, and appropriated by them without performing the condition on which it was procured for them. Under all the foregoing circumstances the appellants' second motion could not be granted even if it was not irregular in its form, and was

properly rejected by the Court below. Both motions of the appellants having been properly rejected, those parties have no standing in the cause, and the judgment appealed from must be confirmed in its effect and final result for the reasons stated above; to judge otherwise would involve the legal inconsistency of compelling the Bank actually to advance without recourse its moneys to the appellants to enable them to pay off their indebtedness to the Bank from whom they obtain the money in wilful bad faith.

CARON, J.—Yarwood du Haut Canada, tire sur la Banque une traite pour $10,000, qui, acceptée par Torrance, est payée par la Banque.

À l'échéance de cette première traite, et pour la payer, le même Yarwood tire, de nouveau, sur la maison Torrance, et, sur la promesse faite à la succursale de cette Banque à Hamilton que cette nouvelle traite sera acceptée, il fait accepter, par le caissier de cette Branche, un chèque pour ce montant de $10,000.

Sur cette promesse, le chèque de Yarwood est accepté, et fait payable par la Banque à Montréal, et ce chèque avec la nouvelle traite [illegible] sur les Défendeurs leur est envoyé. Ils présentent de suite le chèque à la Banque, en reçoivent le montant et ensuite refusent d'accepter la Traite. Cet envoi par Yarwood du chèque et de la nouvelle traite était accompagné d'une lettre aux Défendeurs qui est produite 15 Juillet, 1867, et est suivie d'une autre du 16, qu'ils ont refusé de produire quoique requis de ce faire. Cette lettre aurait probablement démontré que le chèque ne devait être présenté à la Banque pour paiement, qu'en autant que la traite serait acceptée. Ce refus de produire la lettre et aussi l'empressement qu'ont mis les Défendeurs à se faire payer le chèque sont une présomption que les *Défendeurs savaient que le chèque ne devait être présenté à la Banque qu'en autant que la traite serait* acceptée.

C'est là toute la question.

Les Défendeurs lorsqu'ils requrent le montant du chèque, savaient-ils *ou non* que le chèque n'avait été fait payable à la Banque, par l'endossement du caissier, qu'à la condition expresse que les Défendeurs accepteraient la traite. S'ils le savaient, ils ont commis une fraude en se fesant payer le chèque et en refusant ensuite d'accepter la traite.

Or cette connaissance des Défendeurs parait établie par les 11e et 12e Reponses des Jurés, et aussi la 5e.

Voir les faits aux *factums*.

Si la maison Torrance ne voulait pas accepter la seconde traite, elle devait en informer la Banque, qui, dans ce cas, n'aurait pas payé le chèque, qui n'était payable qu'à cette condition que Yarwood doit avoir communiquée à Torrance.

C'est à Torrance que le montant du chèque a été payé—ils ont refusé d'attendre au lendemain. Les Défendeurs ne paraissent pas avoir agi convenablement. La Banque devait réussir dans son action, c'est ce qui a eu lieu. Les Défendeurs ont été condamnés. Ce jugement parait correct et doit être confirmé.

Les Défendeurs ont, après le verdict et sur ce verdict, fait une motion, l'une pour que jugement fût entré en leur faveur sur le verdict et l'action renvoyée *nonobstante veredicto*, vû que les allégués de la Demanderesse n'étaient pas suffisants en loi pour faire maintenir leur action, l'autre que sur le verdict du Jury,

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ses réponses aux questions à lui soumises, les plaidoyers et la preuve dans la cause, jugement soit entré en leur faveur et l'action renvoyée avec dépens. De la part de la Banque motion a été faite pour jugement conforme au verdict en sa faveur. Après audition sur ces diverses motions, jugement a été rendu le 31 Decembre 1868, par le Juge McKay, dont est appel, renvoyant les deux motions des Appelants, et les condamnant sur la motion de la Banque, à lui payer la somme qu'elle réclamait avec dépens.

Je crois ce jugement correct; il est fondé sur la connaissance suffisamment alléguée et prouvée qu'avaient les Défendeurs lorsqu'ils se faisaient payer, le 17 Juillet, le cheque que leur avait envoyé Yarwood avec la nouvelle traite, que cet envoi ne formait qu'une seule et même transaction et que le chèque n'était payable qu'en autant que cette traite serait acceptée. Cette connaissance, qui est le fait important dans la cause, ressort de l'ensemble des reponses des Jurés et surtout de celles aux 5, 11, et 12 questions, et aussi de la preuve dans la cause, qui établit une déviation aux usages du commerce en pareil cas, qui indique ou fait du moins présumer que les Défendeurs, en agissant ainsi, étaient eux mêmes sous l'impression que leur conduite n'était pas tout à fait correcte.

DUVAL, CH. J., also concurred, stating that he was quite satisfied that the Appellants knew perfectly well why the check was given to Yarwood at London, and if they did not choose to fulfil the condition on which it was given it was their duty not to use the check. As to the judgment being for the amount of the draft instead of the amount of the check, the Court considered that a mere clerical error which it would rectify in its own judgment.

The following was the judgment of the Court:—

The Court, etc., considering that the material allegations of the Respondents in their declaration in this cause fyled, mentioned, have been duly established, as also the sufficiency in law of the said allegations to maintain their action in this behalf;

Considering that, in the judgment rendered in this cause on the 31st day of December, 1868, by the Superior Court sitting at Montreal, whereby the said Appellants were adjudged and condemned to pay to the said Respondents the said sum of $10,005.25 cents, with the interest and costs by the said judgment adjudged, there is no error, doth confirm the said judgment; for the payment by the said Appellants to the said Respondents of the said condemnation money of $10,005.25 with the interest and costs aforesaid for the causes following, and not for the reasons in the said judgment set forth, namely: $10,000, part of the said condemnation money, as being the proceeds of the check dated at London in Ontario, the 15th day of July, 1867, drawn by E. M. Yarwood, and accepted by the Respondents at London aforesaid, and payable as cash at Montreal by the Respondents to the said Appellants or their order, which said check, endorsed by the Appellants, was paid to them by the Respondents at Montreal, on the 17th day of July, 1867, upon the faith that the Appellants would accept the renewal draft for $10,000 dated at London aforesaid, on the said 15th day of July, 1867, drawn upon them by the said E. M. Yarwood in favor of the said Respondents, at Montreal, and payable at three months to the said Respondents or order, and which said renewal draft at the time of the payment of the said check was in the

possession of the Appellants in the usual course for the purpose of their acceptance thereof; the whole as stated in the said declaration;

Considering that the said sum of $10,000, the contents of the said check, were the proceeds of the discount in full by the said Respondents, at London aforesaid, for the said E. M. Yarwood, of his said renewal draft upon the said Appellants, which said renewal draft and the said check were to be applied specially to the renewal and retirement of the said Appellants' acceptance for $10,000, held by the said Respondents at Montreal, to mature and be payable to them there by the said Appellants on the 18th day of July, 1867, and which said check was sent and transmitted to the said Appellants by the said E. M. Yarwood, for the special purpose of being so applied with the said renewal draft, for the renewal and retirement of the said acceptance of the Appellants to mature as aforesaid, the whole to the knowledge of the said Appellants, and as stated in the said Declaration;

Considering that the said Appellants, having knowledge of the said transaction between the said Respondents and the said E. M. Yarwood, at London, aforesaid, and of the sending and transmitting of the said check to the Appellants, for the special purpose aforesaid, and having in their possession the said renewal draft, for acceptance thereof, which they had resolved not to accept, knowingly avoided the special purpose for which the said check had been sent and transmitted to them, and converted and appropriated the said sum of $10,000, the proceeds of the said check, to their own benefit and advantage, the whole as stated in the said declaration;

Considering that the said Appellants, after their receipt of the proceeds of the said check as aforesaid, and to avoid the special purpose aforesaid, of renewing and retiring their said acceptance, refused to accept the said renewal draft upon them, the costs of the protesting whereof for non-acceptance and non-payment amount to the sum of $5.25, other part of the said condemnation money above-mentioned in the said judgment of the 31st December, 1867, which said judgment for the said sum of $10,005.25, with interest and costs therein mentioned for the above and foregoing reasons, is confirmed with costs of this Court, in favor of the Respondents against the Appellants."

(The Honorable Judges Drummond and Monk dissenting.)

Judgment of the Superior Court confirmed.

Ritchie, Morris & Rose, for Appellants.
Hon. Sol. Gen. Irvine, Counsel.
Strachan Bethune, Q.C., for Respondent
Hon. J. J. C. Abbott, Q. C., Counsel.
(S. B.)

COURT OF REVIEW, 1870.

MONTREAL, 31st MAY, 1870.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 328.

Hans dit Chaussée & ux. vs. *D'Odet dit d'Orsennens*, & *D'Odet dit d'Orsennens*, Oppt.

HELD:—That the sale of an immoveable, after the institution of a personal action to recover a debt for the payment of which the property is charged and affected, is null and void *quoad* the creditor plaintiff in the suit, who is entitled to seize and sell the property, notwithstanding such sale.

This was a hearing in review of a judgment rendered in the Superior Court,

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for the district of Joliette, by THE HON. MR. JUSTICE LORANGER, on the 19th of November, 1869, dismissing the opposant's opposition *à fin d'annuller*.

The points raised in the case are fully set forth in the arguments of Counsel.

Jetté, for Opposant:—Le jugement dont est appel, a été rendu le 19 Novembre, 1869, par la Cour Supérieure de Joliette, (L'Hon. T. J. J. Loranger, juge) Ce jugement déboute l'opposition de l'opposant.

Le 2 Juillet 1868, le Défendeur est poursuivi par les Demandeurs, pour certains arrérages de rente viagère; l'action est rapportée le 16 Juillet 1868. Le 17 Juillet 1868, le Défendeur vend la terre affectée au paiement de cette rente à l'opposant qui s'en met de suite en possession. Cet acte de vente est dûment enrégistré. Les Demandeurs ayant obtenu jugement font saisir cette terre *sur le Défendeur*, nonobstant la vente ci-dessus.

L'Opposant intervient alors, il allègue *son titre enrégistré avant la saisie, sa possession animo Domini*, et demande à être déclaré propriétaire de l'immeuble et que la saisie d'icelui, faite *sur le Défendeur*, soit déclarée nulle.

Les Demandeurs contestent cette opposition, prétendant que la vente ayant été faite après la poursuite, est nulle quant à eux, et que l'Opposant est mal fondé à l'invoquer contre eux, créanciers hypothécaires.

Telle est la contestation.

Les faits ci-dessus résultent de la procédure et des admissions écrites qui se trouvent au dossier.

Nous remarquerons d'abord qu'il n'est nullement question de fraude en la présente cause. La vente faite à l'opposant était inattaquable sous ce rapport; aussi les Demandeurs n'en ont-ils rien dit. Toute la question est donc de savoir si cette vente peut être valablement opposée aux Demandeurs, créanciers hypothécaires, ou si elle est nulle quant à eux. La Cour Supérieure l'a déclarée nulle.

Au premier abord, ce jugement paraît bien fondé, car il n'est personne au barreau, qui ne connaisse la section 1ère du chap. 47 des Statuts Ref. du B. C. qui déclare nulles les ventes d'immeubles affectés à des créances hypothécaires, lorsque ces ventes sont faites *après la poursuite*.

Mais nous soumettons humblement que *tel n'est plus notre droit*.

L'article 644 du Code de Procédure a virtuellement rappelé cette disposition du Statut, pour y substituer ce qui suit:

"Art. 644. A compter du moment *de la saisie*, le débiteur ne peut aliéner les "immeubles saisis, sous peine de nullité."

Et les Codificateurs citent au bas de cet article, cette section 1ère du chap. 47 des Statuts R. du B. C. que nous venons d'indiquer; ce qui prouve qu'en rédigeant leur article 644, ils avaient certainement ce statut sous les yeux, et *n'ont pas jugé à propos de le reproduire*. En effet on ne le trouve nulle part ailleurs.

De plus les Codificateurs citent le Code de Procédure français, articles 686 et 687, qui contiennent en effet les mêmes dispositions que notre article 644.

L'article 686 du Code de Procédure français, dit: "La partie saisie ne peut "*à compter du jour de la transcription de la saisie*, aliéner les immeubles saisis "à peine de nullité, et sans qu'il soit besoin de la faire prononcer."

Il est donc évident que les codificateurs n'ont pas voulu reproduire la section

première du chap. 47, des statuts R. B. C. qui est d'ailleurs une *législation d'exception*, et ont préféré revenir à ce qui était notre droit avant 1859, et à ce qui est encore le droit de la France aujourd'hui.

On nous dira peut-être ici: Mais l'article du Code et la disposition du statut ne sont pas incompatibles, et vous faites une application exagérée de l'article 644. Cet article n'est pas applicable au créancier hypothécaire saisissant, tandis que le statut s'applique précisément aux droits de ce dernier.

Il suffit de référer aux commentaires faits par les auteurs sur l'article 686 du Code de Procédure français, qui est exactement le même que notre article 644, pour voir que nous n'allons pas trop loin.

En effet, la jurisprudence est maintenant fixée en France, dans le sens que nous indiquons, et l'on y a maintes fois jugé *que la vente transcrite avant la saisie* (comme dans l'espèce actuelle) *est opposable au créancier hypothécaire saisissant*, aussi bien qu'au créancier chirographaire. Voir Carré et Chauveau, Procéd. Civile, question 2291 *bis* [vol. 5].

La question soulevée en cette cause est donc plus importante qu'elle ne parait au premier abord. Quant à nous, nous croyons que l'opposant était bien fondé, en présence de cet article 644 et de l'article 632 du Code de P. C. qui dit qu'on ne peut saisir les "immeubles, que sur la personne condamnée qui les possède "ou est réputée les posséder *animo domini*" à se plaindre de la saisie faite *sur le Défendeur* d'un immeuble que les Demandeurs admettent que lui l'opposant possédait alors ouvertement et *animo domini*.

Quant aux inconvénients pouvant résulter de ce changement de législation, nous n'avons pas à nous en préoccuper; d'ailleurs *Carré & Chauveau loco citato*, répondent à cet argument.

Tout en regrettant que cette cause ait été soumise par nos adversaires *sans discussion*, nous soumettons avec confiance les quelques remarques ci-dessus.

Dorion, for plaintiffs:—

Les Demandeurs ont porté une action contre le Défendeur, tiers détenteur d'un immeuble affecté au paiement d'arrérages de rente viagère, dont il s'était chargé par son acte d'acquisition.

L'action a été intentée le 2 Juillet 1868 et rapportée le 16 du même mois. Le lendemain du rapport de l'action le Défendeur vendit la propriété hypothéquée à l'opposant *son fils*. Les Demandeurs obtinrent jugement le 26 Octobre 1868, prirent une exécution contre les meubles du Défendeur, et, après un rapport de *nulla bona*, firent saisir l'immeuble en question. De là la présente opposition afin d'annuller par laquelle l'opposant demande à être déclarée propriétaire de l'immeuble saisi, et conclut en outre à la nullité de la saisie.

Les Demandeurs ont contesté cette opposition sur le principe que la vente à l'opposant n'était pas sérieuse, qu'elle avait été faite pour frauder les créanciers du Défendeur, et plus particulièrement parce qu'elle avait été faite après que des procédés eussent été adoptés pour recouvrer la dette au paiement de laquelle l'immeuble saisi était hypothéqué, et pour le recouvrement de laquelle telle saisie était faite.

La section 1ère chapitre 47, des Statuts Refondus du Bas-Canada, contient une disposition expresse à cet effet, déclarant *nulle* toute vente faite sous ces circons-

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tances:—"Toute vente ou aliénation d'un immeuble grevé d'hypothèque *après "qu'une poursuite aura été intentée pour le recouvrement de la créance au paie- "ment de laquelle le dit immeuble est affecté*, sera nulle à l'égard du créancier "qui aura intentée telle poursuite." Cette section est encore en force.

Il n'y a aucune disposition contraire ou incompatible, soit dans le Code civil, soit dans le Code de Procédure.

L'article 2074, du Code Civil, n'a pas eu l'effet d'en restreindre l'application aux actions hypothécaires seulement. Cet article parle de *l'effet de l'action hypothécaire* et, sous ce titre, il ne pouvait pas être question de l'effet d'une action personnelle pour le recouvrement d'une dette au paiement de laquelle un immeuble est affecté.

Quant à l'article 642 du Code de Procédure, il s'applique à un cas différent. Il suppose le cas où un immeuble est *saisi* que ce soit pour une dette *hypothécaire ou non*. C'est une extension et non une restriction du chapitre 47, des Statuts Refondus, qui ne s'appliquait qu'aux dettes hypothécaires et non aux dettes chirographaires.

Ici encore on trouve cette disposition sous un titre qui ne permettait pas de s'occuper de la question soulevée en cette cause; c'est sous le titre de "*saisie et exécution des immeubles.*" D'ailleurs en supposant que l'on mettrait de côté les dispositions du statut pour ne s'en rapporter qu'aux dispositions du Code Civil, les Demandeurs seraient encore bien fondés dans leur contestation, car quoique leur action ne fut pas précisément une action hypothécaire, elle était cependant portée contre *le tiers détenteur*, qui s'était obligé à la dette, et devait avoir plus d'effet que l'action hypothécaire elle-même, puisqu'elle combinait la responsabilité personnelle avec la responsabilité hypothécaire.

Les Demandeurs auraient bien pu prendre une action hypothécaire, mais comme le défendeur s'était obligé personnellement au paiement de la rente des Demandeurs, ils ont crû plus simple de prendre une action personnelle. Cela ne doit pas les priver d'aucuns de leurs droits. Le Jugement de la Cour de première instance qui a débouté l'opposition de l'opposant est donc bien fondé.

Il est bon de remarquer en outre, que cette opposition a été faite par le fils du Défendeur. Il est bien à présumer et on doit présumer qu'il connaissait la poursuite faite contre son père, et que la vente que ce dernier lui a consentie était évidemment faite dans le but de retarder les demandeurs dans le recouvrement de leur rente qui est leur seul moyen de subsistance. Aussi ils demandent avec confiance la confirmation du jugement dont la révision est demandé par l'opposant.

The Court of Review, considering that there was no error in the judgment complained of, unanimously confirmed it.

Judgment of S. C. confirmed.

Dorion, Dorion & Geoffrion, for Plffs.
Jetté & Archambault, for Oppt.

[S. B.]

COUR DU BANC DE LA REINE, 1870.

MONTREAL, 8 SEPTEMBRE, 1870.

Coram DUVAL, J. C., CARON, J., DRUMMOND, J., BADGLEY, J., ET MONK, J.

No. 30.

ADOLPHE MALHIOT,

(*Demandeur en Cour Inférieure,*)

ET

APPELANT;

DAME M. C. A. F. BRUNELLE ET VIR,

(*Défendeurs en Cour Inférieure,*)

INTIMES.

JUGE:—1o.—Que la femme séparée de biens peut s'obliger conjointement et solidairement avec son mari, et que son obligation sera jugé valable, s'il est prouvé qu'elle a profité de la transaction.

2.—Que pour se faire relever de son obligation, elle doit prouver que le créancier savait au moment du contrat, qu'elle ne s'obligeait que comme caution de son mari.

3o.—Que nonobstant toute déclaration contraire dans un acte authentique, il est loisible à la femme de faire la preuve testimoniale des faits propres à démontrer qu'elle n'est intervenue que comme caution de son mari.

4o.—Que dans l'espèce actuelle, nulle preuve n'a été faite que le créancier ait participé en aucune façon quelconque à la fraude que l'intimée allègue avoir été pratiquée à son égard, tandis qu'au contraire il est établie que le prêt a été fait à elle-même et qu'il a servi à payer ses dettes personnelles.

L'action reposait sur une obligation consentie en 1862 par Hilaire Mathieu et son épouse l'intimée en faveur de feu Auguste Juchereau Duchesnay.

Le mari s'était laissé condamner par défaut, mais son épouse avait répondu à l'action en se retranchant sur les dispositions contenues en la section 55 du ch. 37 des S. R. B. C., qui décrètent que la femme ne peut s'engager avec son mari en aucune autre manière que comme commune en biens, et que toute obligation qu'elle contracte en violation de cette disposition est nulle et sans effet. Elle plaidait qu'à l'époque où elle avait consenti l'obligation en question, elle était séparée de biens; que cette obligation avait été contractée par son mari et pour son profit, et que le créancier n'avait exigé son intervention dans l'acte que pour se procurer une caution.

Les termes de l'obligation, sont les suivants: "Furent présents Hilaire Mathieu et Dame Marie Félonise Brunelle, son épouse, duement séparée quant aux biens, qu'il autorise à l'effet des présentes, lesquels ont reconnu devoir bien légitimement à Auguste Juchereau Duchesnay, à ce présent et acceptant, la somme de $500 pour prêt de pareille somme qu'il a fait à Madame Mathieu pour employer pour ses besoins et affaires."

L'appelant, porteur d'un titre authentique contenant sur le fait essentiel de la cause, une déclaration aussi formelle, n'avait aucune preuve à faire, et il incombait à l'intimée de prouver la fausseté de cette déclaration.

Cette preuve impliquait nécessairement l'idée qu'une fraude avait été commise à son préjudice pour l'engager à faire cette admission qui, jusqu'à preuve du contraire, doit être présumée avoir été faite librement, et considérée par les parties comme le motif déterminant de l'obligation. L'intimée devait en outre

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pour se faire relever de cette fraude, établir la complicité de son créancier. Car si, pour obtenir son argent, elle avait surpris sa bonne foi au moyen de cette fausse déclaration, avec l'intention de le duper plus tard, elle ne pouvait pas espérer de se faire délier de l'obligation qu'elle avait contractée. On prête appui aux femmes qui ont été trompées et non pour leur donner les moyens de tromper, dit un auteur connu sur le Sénatus consulte Velléien. Et si une femme est intervenue pour quelqu'un dans le dessein de tromper, a su qu'elle ne s'obligeait pas, on lui refuse l'exception du sénatus consulte, ajoute le même auteur. L'intimée ne pouvait donc pas réussir sur son exception, à moins de prouver qu'elle avait été engagée à la connaissance de son créancier à contracter en fraude de la loi. Elle essaya d'en faire la preuve, mais sans succès.

L'appelant s'objecta à l'enquête à aucune preuve testimoniale à l'encontre des énonciations contenues en l'obligations authentique consentie par l'intimée, mais l'Honorable juge en Cour Inférieure maintint que telle preuve était admissible, attendu que les griefs de nullité invoqués par l'intimée reposaient sur la fraude qu'elle disait avoir été pratiquée à son égard. Cette décision, conforme à celle déjà rendue en Cour du Banc de la Reine, dans la cause Mercille et Fournier, fut maintenue par l'unanimité de la Cour en la présente cause.

Les parties instruisirent donc à l'enquête sur le mérite des exceptions de l'intimée: et de la preuve faite par cette dernière il résulte: Que l'obligation dont elle demande la nullité avait été consentie à M. Duchesnay par l'entremise de son agent M. Lamothe, qui fut aussi le notaire instrumentaire. Ce monsieur entendu comme témoin, dit que ce fut le mari qui fit la demande d'emprunt, mais que l'intimée se rendit elle-même à deux reprises différentes à son étude, la première fois pour s'entendre avec lui sur les conditions du prêt, et la seconde fois, lorsque l'acte fut préparé. Ce fut également le mari de l'intimée qui reçut l'argent par un chèque payable à son ordre sur une Banque de Montréal. Toute cette transaction était intervenu à St Hyacinthe à quinze lieues de l'endroit où le chèque était payable, et l'on comprend qu'il ait été remis au mari de l'intimée qui pouvait plus facilement qu'elle, le négocier. Il est également en preuve que le mari de l'intimée, notoirement insolvable, a acquitté des dettes pour un montant assez considérable chez différents marchands de St. Hyacinthe, et qu'il a fait ces payements durant les deux mois qui ont suivi l'obligation en question, et l'intimée prétend qu'il les a faits à même l'argent qu'il venait d'emprunter de M. Duchesnay. Tels sont en résumé les faits sur lesquels l'intimée s'appuie pour prouver que l'obligation a été consentie dans l'intérêt de son mari, et qu'elle n'a été partie à l'acte que comme caution.

L'intimé n'a prouvé aucun autre fait pour démontrer que l'appelant soupçonnât sa bonne foi, quand elle lui déclara avant de signer l'acte, que le *prêt était fait à elle même pour servir à ses besoins et affaires.*

De son côté l'appelant prouva que depuis près de dix ans, le mari de l'intimée était insolvable, n'avait fait aucunes affaires en son nom, et avait toujours vécu avec les revenus de sa femme. Qu'à l'époque de l'obligation en question il était le procureur de l'intimé dont il gérait les affaires à la connaissance du public, en vertu d'une procuration authentique. Quant aux prétendues dettes que Mathieu aurait acquittées avec les deniers empruntés de l'appelant, il fut

démontré qu'elles avaient été contractées en grande partie par l'intimée elle-même.

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En référant aux comptes payés par le mari et entrés en son nom dans les livres des différents marchands qui furent appelés comme témoins, il appert qu'ils consistent en effets d'épiceries ou de marchandises vendues à l'intimée elle-même à son mari et à leurs enfants, et qui ont été employées pour servir à la nourriture et entretien de la famille, de même qu'à l'exploitation d'une terre appartenant à l'intimée; et l'appelant prétendait que le mari étant insolvable, sa femme était aux termes de l'article 1317 du code civil, tenue de payer ces dettes. Parmi les sommes payées par le mari, se trouve la créance d'un Monsieur Buckley, au montant de $60 pour intérêts accrus sur une obligation que lui avait consentie l'intimée quelques années auparavant.

Tels sont en résumé les faits de la cause.

La Cour Inférieure renvoya l'action de l'appelant.

Le 6 septembre 1870 la Cour du Banc de la Reine infirma ce jugement, les Hons. Juges Caron et Badgley *dissentientes*.

BADGLEY, J. (*dissenting*). The female respondent is the wife *séparée de biens par contrat de mariage* of Mathieu, the male respondent, who during all their marriage has been a needy man, and encumbered more or less with debt. In February, 1852, when the debt in this case was contracted, being in his normal condition of impecuniosity, unable to meet and pressed to pay his engagements, he arranged with the notary Lamothe, the finance agent of Mr. Duchesney, to borrow from the latter $500, and the parties, Lamothe and he, then agreed that Mathieu should procure his wife to become a party to the notarial obligation, and as security for his loan that she should mortgage to the lender her sole remaining property. Lamothe drew up the obligation with the mortgage stipulation included in it, the description of the property having been furnished by Mathieu, and the executing notary, Lamothe, also inserted in the acte a declaration by the wife that the loan was made to her for her use, whilst it stipulated a joint and several obligation by both husband and wife, and a joint and several promise by both to pay back the loan with interest annually, as stipulated in the acte. When it was ready for execution, Mathieu brought his wife with him to Lamothe's office, where he signed the instrument, which she also signed without having it read or explained to her in any way by the notary. This was the only time she met or spoke with the notary on the subject. The loan was then paid to Mathieu by the notary, by a bank check which he delivered to Mathieu, who afterwards got it cashed at the bank and drew the money.

It is not shown that any part of this money was ever applied to her use; on the contrary, it is proved that, soon after its receipt, he paid off debts that were pressing him, Lamoureux a considerable amount, Raymond $185, Côté upwards of $50, Brais about $110, and, in the September following, with what remained, he established himself in business, this time, at La Présentation, where he fell into insolvency not long after. It is proved that the annual interests have been always paid by Mathieu alone, and acknowledged to have been received from him, and it is also proved that the wife was not indebted at the date of the obligation, nor needed to raise money for her own personal wants or for the necessities

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of her separate property. These are the facts of the case, and from them may be deduced, substantially, as matters of fact, that Mathieu was in debt and needed money badly, whilst she was free from debt and did not need to raise money for herself or her separate property; that the loan was negotiated by him alone, apart and without any intervention of his wife; that he knew the contents of the acts of which she was ignorant; that the loan money was received and employed for his use alone, and that she received no part of it or used any part of it for her separate purposes; that all the benefit of the loan was obtained by him, but that she neither derived nor had the least beneficiary advantage from it; and, finally, that the annual interest was always paid by or for him alone from his own means, and that she neither paid nor contributed to those payments out of her separate estate and property. It must be plain to any unprejudiced person that the loan was Mathieu's alone, and that his wife was only surety for her husband. Such is the marital power given to the husband over his wife, that the law, from the Roman law downwards, has deemed protection necessary from its improper exercise, and therefore freed the wife from every obligation resulting from any contract, joint or several, into which she enters with her husband, unless it is proved that its object was her separate advantage. The legislature of this country, acting under an imperative sense of social duty, adopted the principle of protection to married women against contracts entered into by them in the interest of their husbands, and enacted that wives should be protected against, in such cases, what was held to be the immoral influence of their husbands, and against their own acts, the result of that influence. The Registry Act of 1841, in this particular, was the declared text of the 1301st article of our Civil Code, which declares "a wife cannot bind herself, either with or for her husband, otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect." This is the declared existing law, and was in force at the date of this contract; it was, moreover, intended to be a law of public policy, and has always been so upheld by our jurisprudence for the repression of a social evil. The exception of the wife being commune as to property, not impairing her contract, is quite just, because the contract affects that property in which she can claim no share until the dissolution of the community, when only her renunciation to it relieves her absolutely for her common engagements. The exception does not apply to the wife separated as to property, who may contract under her husband's nominal authority, or that of justice, for her separate use and advantage, and to which he may be surety for her although she cannot become surety for him, the policy of the law being adverse to her acts in this respect, the law not presuming that her influence would be sufficient to impel or control her husband in his acts and contracts, whilst the law holds his influence to be paramount over his wife. The female respondent, a wife, though *séparée de biens*, in making this contract is within the precise words of the declaratory prohibitive law, and could not bind herself jointly and severally *with* her husband, and would, therefore, be relieved from her contract which the law renders absolutely void and of no effect, so her contract would also be void and of no effect if she contracted *for* her husband by her sole contract under his nominal authority. It is undeniable that a separated wife may con-

tract bindingly upon herself for her separate property and purposes, and it is alleged that the female respondent did so contract here, by becoming a party to the obligation which contained the declaration that the loan was for her advantage. It is established that she was ignorant and kept in ignorance of her alleged declaration, and that she in no way participated either in the creation of the loan or the receipt or use of the money by her husband. That the acte was neither read nor explained to her by the notary, which was in express violation of the law made for such case, and this fact is not denied by the notary, who is a witness for the plaintiff, the appellant. If there was a fraud arising from this declaration, it was practised upon, and not by, the wife. It is simply an absurdity to impute fraud to the wife for objecting against this unheard, unexplained and unknown declaration, which was manifestly introduced into the acte for the fraudulent purpose of shirking the prohibition of the law, and, if possible, of giving a legal form to the acte. She was plainly entitled to prove the fact, because it was *in fraudem legis*, and in itself sufficient in law to set aside the obligation as to her. Besides, the declaration alone cannot bind her, she must be proved to be the real beneficiary contractor, otherwise the declaration becomes a palpable evasion of the legal prohibition and of public policy in this matter, which would be outraged with impunity. The application of the loan is the test of the liability and must be proved affirmatively, and therefore by the lender, which he has omitted to do in this case; but the wife has made conclusive proof of the fact, notwithstanding, and has proved not alone the making of the loan by the husband Mathieu, but its payment to him and its entire absorption by him in his engagements, without any advantage to his wife. If the creditor be honest in enforcing his claim against her, he must be prepared to assume the onus of proving that she benefited by the consideration of her engagement. The prohibition of the law is so strong that those who treat with married women must see that their obligations turn to their advantage; the evidence of the circumstances of the receipt and application of the money are perfectly admissible as tending to shew an act *in fraudem legis*, and therefore the rule of law which prevents oral testimony *outre et contre le contenu d'un acte* is inapplicable, because, if the real nature of the transaction were prevented from being shewn, the laws made for the protection of married women would have no effect whatever. In every case these provisions of law would be evaded by giving to a prohibited contract the garb and semblance of one perfectly legal, and thus would be done indirectly what could not be done directly. 9 Touillier, No. 147. This applies to another circumstance, her binding herself *in solido* with her husband, which does not take her out of the protection of the law, because the law cannot be deceived out of its operation by changing the form of the instrument. In such cases the form of the instrument will be disregarded and the real nature of the transaction will be considered. A prohibitive law, similar to our own in this respect, prevails, in the State of Louisiana, which is governed, like this country, by French common law, and by a system of jurisprudence similar to our own; and, under that code of law, it has been held by repeated decisions of the Supreme Court of the State, "that it is incumbent on the party claiming to "enforce the contract of a married woman, to shew that the contract inured to

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"her separate advantage, and that the wife having a separate advantage in the "contract, being of the essence of her obligation, must be proved." These rulings are entirely applicable to this case; the contract has in its terms alleged the separate advantage for the wife, which the proof has utterly demolished and disproved. Independently of these circumstances and rulings, which are entirely in her favor, the female respondent claims the protection of the precise and unambiguous terms of our law: she has contracted *with* her husband, and the facts of the case shew that she has also contracted *for* him as security for his loan; she cannot in any way be his surety, and the form of the acte must be disregarded when being a mere surety she is made to appear in the light of a principal: her contention is not a question of sentimental or merely equitable fraud, but it is a legal objection against a plain attempt to violate the policy of the law made for the protection of married women, herself included.

DUVAL, J. C., pour la majorité de la Cour, maintint que la Déclaration contenue dans l'acte authentique signé par l'intimée, savoir que le *prêt avait été fait par elle-même*, n'avait point été contredite par la preuve, et que les alégués de l'Exception de l'intimée en ce qui concerne la participation de l'appelant à la fraude qu'elle dit avoir été commise à son préjudice, n'avait point été prouvés. Qu'au contraire tout démontrait que le créancier avait été de bonne foi. Que quelque fut l'usage qui aurait été fait de l'argent emprunté subséquemment à l'obligation, cela n'était d'aucune conséquence; que le fait essentiel sans lequel l'intimée ne pouvait pas se faire relever de son obligation, n'avait point été prouvé, savoir que M. Duchesnay ou son agent M. Lamothe, savaient au moment du contrat, que le prêt se faisait pour le mari et que l'intimée n'intervenait à l'acte que comme caution.

MONK, J., said that there was nothing in the law which prevented a wife from borrowing money. The mere circumstance of the husband being jointly and severally bound with the wife did not indicate that there was any illegality in the transaction. The wife cannot become security for her husband except as *commune en biens*, but the husband may be jointly and severally bound with the wife, where it is her debt. So that in point of fact the question came to be whether the money was advanced to the husband or to the wife. And on the evidence he was against the respondent.

The judgment is as follows:

La Cour après avoir entendu, etc.

Considérant que par l'acte d'obligation consenti par les intimés [illegible] d'Auguste Juchereau Duchesnay devant Lamothe et son confrère, notaires publics, en la Paroisse de Notre-Dame de St. Hyacinthe, le 27 jour de février, 1862, les dits intimés ont reconnu devoir au dit A. J. Duchesnay la somme de $500, argent courant, pour prêt de cette somme fait par le dit Auguste Juchereau Duchesnay à la dite intimée Marie Anne Félonise Brunelle pour employer à ses besoins et [illegible] laquelle somme les dits intimés promirent, par le dit acte, payer conjointement et solidairement au dit A. J. Duchesnay en cinq ans de la date du dit acte avec intérêt y stipulé à compter de la date du dit acte jusqu'à paiement;

Et vû que le montant de la dite obligation et des intérêts dûs en vertu d'icelle

a été dûment transporté à l'appelant, demandeur en Cour Supérieure, qui a droit d'action contre les dits intimés conjointement et solidairement pour le recouvrement du montant dû en principal et intérêt; et, en conséquence, que dans le jugement prononcé par la Cour Supérieure à St. Hyacinthe le 27 jour d'octobre, 1879, déboutant l'action du demandeur contre l'intimée Marie A. F. Brunelle, il y a erreur, cette Cour infirme et annule, etc. (*dissentientibus* les Honorables Juges Caron et Badgley.)

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Jugement infirmé.

Lafleur & Branger, pour l'appelant.

Dorion & Geoffrion, pour les intimés.

(M. C. L. et J. K.)

SUPERIOR COURT, 1871.

[IN CHAMBERS.]

MONTREAL, 12TH APRIL, 1871.

Coram MACKAY, J.

No. 493.

John Smith, Petitioner; vs. *James McShane*, Jr., and *The Mayor et al. of Montreal.*

HELD:—1. That a lease of a stall in the market of the Mayor, Aldermen and Citizens of the City of Montreal, is a contract within the meaning of the 29th and 30th Victoria, chap. 56, sec. 7.

2. That such contract, entered into by a City Councillor prior to new election, is not such a continuing contract as will disqualify him, when re-elected, from sitting under the new election, nor thereby to lose his seat in the said Council.

3. That, under the Act 29-30 Victoria, ch. 56, sec. 7, the words used being, "Any member "of the said Council who shall, directly or indirectly, become a party to, or secu- "rily for, any contract or agreement to which the Corporation of the said city is a "party, or shall derive any interest, profit or advantage from such Contract or "agreement, *shall thereby become disqualified* and lose his seat in the said Council," the Judge cannot oust from office a member re-elected, who had contracted with the Corporation while sitting as Councillor under a prior election.

4. The Mayor has not, nor has the City Clerk of Montreal, power or authority to cancel leases made by the Corporation, and such deeds of cancellation will be adjudged *ultra vires*.

5. Leases by Corporations, and releases, should be under the seal of the Corporation.

The case is stated in the judgment rendered, which passed fully upon arguments of counsel. We therefore only give authorities cited.

John A. Perkins, for petitioner. By-laws of the city as to the Mayor, p. 231; City Clerk, 232; Seal, 4: Markets and Market Committee, 44, 36, 326; Oath of Councillor, 26. Regina *vs.* Francis, E. L. & E. XII, 419. Kilner *vs.* Baxter, Q. B. Reports, 1866–7, p. 173. R. *vs.* York, 2 Gale & Davison (5 and 6 Vict. ch. 104), 2 Q. B. 847, 849, 850; 6 A. & E., 810. Grant on Corporations, 402. Homersham *vs.* The Wolverhampton W. Co., IV E. L. & E., 426. Angell & Ames, Corporations, p. 190, sec. 221, 222. Abbott on Corporations, p. 550, rec. 723, 599 (45, 46, 47); Grant, Corporation Leases, 140, 141; Stani-

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land *vs.* Hopkins, 9 M. & W., 178; Reg. *vs.* Paramore. 10 A. & E., p. 286; 1 Keen.; 2 Myl. & Cr., 406; and see Atty. Gen. *vs.* Corporation of Norwich, 1 Keen, 700. Simpson *vs.* Ready, 11 M & W., 344; 1 Ad. & E., p. 878; Reg. *vs.* Alderson; Leominster Case, Corbett *vs.* Daniels, p. 12 et seq.

F. Cassidy, Q.C., and T. W. Ritchie, Q.C., for defendant, cited Grant on Corporations, p. 205, 206, 207, 215; Dwarris, 646; 5 and 6 Wm. IV., ch. 56, sec. 78; 5 and 6 Victoria, ch. 104. Reg. *vs.* Hiorns, Ad. & Ellis, vol. 7, p. 960; 10 East, p. 210. The King *vs.* Hawkins, 1 Maule & Selwyn's Reports, p. 76; 7 Adolphus & Ellis, p. 360; 2nd Gale & Davison, the case of York, p. 105; 11 Meeson & Welsby's, p. 343. Simpson *vs.* Ready, 2nd Adolphus & Ellis, p. 847. Civil Code of Canada, art. 2086–2116, to show that there is no dower of McShane's property. 29–30 Vic. ch. 56, sec. 6 and 7.

(The judgment of the Court rests upon this last section of the Act.)

MACKAY, J. The defendant is holding the office of City Councillor in the Corporation of the Mayor, Aldermen and citizens of the City of Montreal. The plaintiff, claiming the office for himself, has taken a *quo warranto* against the defendant.

The city is incorporated by the 14 & 15 Vict., cap. 128, amended by late acts, particularly 29 & 30 Vict., cap. 56.

No person shall be capable of being elected a Councillor (says 14 & 15 Vict., cap. 128, sec. 8) unless he shall have resided, &c., &c., and unless he shall be seized and possessed, to his own use, of real or personal property, or both, within the city, after payment of all his debts, of the value of £500.

By the 29 & 30 Vict., cap. 56, this has been changed, so that now Councillors must be possessed of real estate in the city of the value of £500, after payment of their debts.

This real property, with residence, is the principal qualification. There are others by the 14 & 15 Vict. No person shall be capable of being elected Councillor who shall not be a natural born subject, &c., and of the age of twenty-one years, and persons attainted for treason or felony are ineligible for election; and by sec. 10, no person in holy orders, nor judge of any court, nor any person accountable for the city revenues, &c., shall be capable of being elected a councillor, or of being councillor.

It is further enacted by sec. 6 of 29 & 30 Vict., that no person shall be capable of being elected a councillor who may be indebted for taxes, &c., or is a party to, or interested in, any lawsuit, &c., wherein the Corporation is a party, plaintiff or defendant.

In the Acts of Incorporation there are clauses providing that the office of Councillor shall be forfeited, and any Councillor become disqualified in certain events. Thus, sec. 41 of 14 & 15 Vict. enacts that if any person holding the office of Councillor shall be declared bankrupt, or shall become insolvent, or shall take holy orders, or shall become a judge of any court, &c., or shall become accountable for the city revenue, &c., then, in every such case, such persons shall thereupon immediately become disqualified, and shall cease to hold office, &c.; and, by way of addition to this, sec. 7 of 29 and 30 Vict. orders that any Councillor who shall, directly or indirectly, become a party to or security for any con-

tract or agreement to which the Corporation of the City is a party, or *shall* derive any interest, profit, or advantage from *such* contract or agreement, *shall* thereby *become* disqualified, and lose his seat in the Council.

This is a wise enactment, meant to guard the corporators at large against rascalities by Councillors who, by contracting in their own names, or by leagning themselves with outsiders to whom the Council may have to give contracts, may make the Corporation pay more than right for works to be done; also it is meant to guard againt favoritism by Corporation officers, Mayor, and others, whereby Councillors tendering to do works for the Corporation, or to buy from them or contract otherwise with them, might be advantaged unduly, or their creatures or instruments (themselves keeping in the back ground) might be; also, it is meant to guard against oppressions of honest contractors, outsiders, by Councillors, envious of them, either in their own interest or in that of friends and relations of theirs.

It is well known that the most dishonorable and horrid frauds are committed in the United States and elsewhere every day by officers of large corporations, city corporations, and railway and trading ones. All trustees are bound to honesty; in our Corporation all the office-holders are put farther, they are put under oath of fidelity.

By the 14 & 15 Vict. the Mayor and Councillors, besides swearing to their property qualifications, are put under oath to "fulfil, faithfully, the duties of their respective offices."

This oath binds the taker of it to a religious observance of what is right towards his principals, the Corporation; he ought never to see them wronged, and be silent; he ought to tell them everything that might conduce to their interest; he ought always to see that the by-laws of the Corporation are not evaded.

The Corporation does its work through officers, and by means of Committees appointed for particular parts of the work, as the Finance Committee, the Market Committee, &c., &c.

There are by-laws in relation to many of the officers. By one, the Mayor is authorized to sign, seal, and execute, on behalf of the Council, all deeds, bonds, contracts, agreements, or assurances made and entered into, or directed to be, by the said Council. By another, it is ordered that the City Clerk shall keep the common seal, and affix it to all documents which from time to time may be made or issued by order of the Council, or signed by the Mayor.

By a by-law "concerning the Public Markets," it is ordered that the butchers' stalls shall be let annually, in the month of April, by public auction, for the term of a year from the 1st May following, and that the leases shall stipulate that the lessees shall, in no instance, directly or indirectly, sub-let the said stalls, or any part thereof, or otherwise dispose of any interest they may have in the same; that they shall not permit the said stalls, or any part thereof, to be occupied by any person or persons, whatsoever, other than themselves, without the special consent of the Market Committee. Such a by-law is a standing direction to the Market Committee, Councillors, and all concerned. The language of it is very strong. It is a by-law in favor of working butchers, and against drones, who

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might otherwise extort from them. On stalls reverting to the City, during the twelve months' term of any lease from default of rent paid, or other causes, they fall to be disposed of by the Market Committee (this by sec. 41 of the by-law referred to).

Having made these observations preliminary, I will now state the issues in this case.

The plaintiff Smith commenced the proceedings by a petition or information presented on the 14th of March last, praying that the defendant should be held to show by what right he was holding the office of Councillor, in the Corporation of Montreal, for the St. Ann's Ward; that he should be declared incapable of holding the office; that he should be ousted, and the petitioner put into the office, &c.

The petition commences by alleging the February last election for Mayor, Aldermen and Councillors; that the petitioner was a candidate for the office of Councillor for the St. Ann's Ward; that defendant also was; that petitioner was fully qualified to be elected, and also was a qualified voter; that the defendant was incapacitated from being elected, not having the requisite real property qualification, and because before and at time of his nomination, and during the election, he was, directly and indirectly, a party to and security for a contract and agreement to which the Corporation was and is party, and did and doth derive interest, profit and advantage from such contract and agreement, which was and is in force and existing, being a lease from the Corporation of certain stalls, and a certain stall or place in the public market, known as the St. Ann's market, to him the defendant, and to and for his profit, interest and advantage, and for the fufilment of which the defendant was and is bound and liable as security, said contract and lease passed before Devlin, Notary, in 1870.

The defendant not having the real property required, and being such party to and security for said contract or agreement, previous to the nomination and at the time of his election, was incapable of being elected a Councillor;

That petitioner received 376 votes at the election, and he was, of all who were capable of being elected, the candidate who received the largest number of legal votes, and was, therefore, duly elected Councillor, to wit, for said St. Ann's Ward;

Yet the Mayor, Alderman and citizens refuse to admit petitioner to said office, and have declared defendant entitled to it by the result of that election of February.

The petitioner further states against defendant, that he is unqualified to hold and retain the office of Councillor, as he has not the real property qualification required, and because he is a party to and security for a certain contract or agreement passed before Devlin, N. P., between the Corporation of Montreal and the defendant touching the lease of certain stalls or places, or a certain stall in St. Ann's market, from which contract or agreement, day by day, the defendant derives profit, &c., whereby he is now disqualified from holding said office of Councillor, &c. That petitioner is unable to state more precisely the nature of said contract or agreement, as he has been refused full information of the same, but he reserves to state more fully the same later.

The defendant by his plea or answer to the information denies its allegations of his [defendant's] want of proper qualifications for the office of Councillor, and denies that defendant usurps the office. It goes on to say that at the election for February, defendant was duly nominated and elected Councillor, having received 615 votes. Then it sets out the real property and other qualifications of defendant and his title deed, and negatives all disqualifications. Then it states that, true it is that on the 11th of June, 1870, defendant leased stall 38 in St. Ann's market, but that the Mayor and City Clerk who signed the lease had no authority to make it, and the pretended contract in this lease is null, by law, and never bound the Corporation nor the defendant; and the lease itself was annulled on 13th of March, 1871, by the same officers as made it; this by act before Devlin, N. P.; that the lease was broken as from the 11th of March, 1871, and only after the annulation of it was defendant sworn into office on that 13th of March.

That the lease, however, never did disqualify the defendant from being a candidate and being elected, or from holding office.

That as to stall 37, the defendant never had any interest in it. Then the plea denies that defendant has ever been, directly or indirectly, interested in any contract to which the Corporation of Montreal was or is party, or that defendant has ever derived any profit from any such pretended contract.

By his answer the informant denies that the title deed recited by defendant evidences sufficient real property qualification; then it says that, as to stall 38, the defendant cannot pretend want of authority in the officers of the Corporation to lease it to defendant, seeing that defendant has always possessed it and paid rent for it; that as to stall 37, defendant was always interested in it, and in the contract and lease of and about it, having taken it in the name of his infant son to hide that he himself [defendant] was party thereto, as in fact he is to this day, said infant having died in July, 1870, aged 9 months: that the defendant has derived profit from said lease of stall 37; that the cancellation of the lease for stall 38 was unauthorized by the Corporation, and made by William Workman when no longer Mayor of the city, and without bearing the seal of the Corporation, as was required, and it is null and void.

Here are the principal things proved at the enquête, apart from what was proved about the real property qualifications of plaintiff and defendant, which is of little interest, since I announced yesterday that both parties are found to have sufficient property qualification.

The defendant was Councillor for the city for the term that expired in March last. In April and May, and during the rest of 1870, and until March last defendant was also one of the Market Committee. In February, 1871, defendant was again elected Councillor for St. Ann's Ward.

The butchers' stalls of St. Ann's market were leased from May 1, 1870, to May, 1871.

The defendant took lease as from 1st May, 1870, of stall 38. Michael McShane and his minor son got leases of 11 and 12, and stall 37 was leased to A. J. McShane, defendant's baby.

Four stalls were gotten so for defendant and his infant son, and defendant's brother and his minor son.

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The defendant, as it seems to me, never meant to occupy 38, nor was it intended to do with A. J. McShane's stall 37 anything but sub-let it: and both 37 and 38 were sub-let from 1st May, 1870, and have been occupied only by the sub-tenants, Bayard in No. 37, and Fisher in 38.

A. J. McShane, in the lease to him, purports to sign the lease, and is styled butcher. As to the signature, A. J. McShane, to the lease, nobody can say who signed it. "A. J. McShane," however, appears to be (says the notary Devlin) in the same handwriting as the signiature "James McShane, jr.," to the lease to defendant.

Bayard and Fisher, who seem two honest working butchers, have paid, besides all Corporation rents, enormous sums to the defendant as rent; for instance, Bayard for 37 has paid $260, this pays, he says, to 1st May, 1871. Fisher for 38 has paid from May last several instalments of $20 a month; he was to pay, as he understood, $20 a month besides paying the Corporation. He has paid 5, 6, 7 such payments to defendant, he says. Defendant asks nothing more or less, signed no writings, but said he would make it all right. It was as stall rent Fisher paid to defendant.

It was the defendant, says Bayard, who fixed his (Bayard's) rent with him; that is for 37.

The defendant says he has received nothing from Bayard, except for Ellen Dunn, living in New York, sister of defendant's step-brother. The receipt that defendant gave Bayard reads so: "J. McShane for Ellen Dunn." "I do the business for my family," says the defendant.

James McShane, sen., father of the defendant, testified as follows:—I bought in stall No. 17 in the name of the defendant's son. *I thought a live child was better than a dead man.* Patrick, my son, died ten days previous, and the stall was taken for the interest of his wife, Ellen Dunn, whose father died a judge in Brooklyn. The defendant does the business for the family.

As to stall 38, defendant stood, under deed of lease, tenant of it till after his last election in February, and up to the 13th March, on which day the new Mayor and Councillors were to be sworn into office. A few hours before this ceremony, defendant and the late Mayor, then holding office merely till the new Mayor should have been sworn in, make an agreement to cancel the lease of stall 38, as from the 11th of March; the parties sign, and the City Clerk does. At the same time a new lease of that stall is executed by the Mayor and City Clerk to defendant's father, for the broken term up to May, 1871. *The father,* examined about it, *said at first that he signed the lease, himself, till defendant called him to acknowledge that it had been signed for him; that he had not* signed it *himself.* B. McShane signed it, as attorney for defendant's father.

At the argument I was pressed by plaintiff to find that the defendant had been making contracts, directly and indirectly, with the Corporation; that stalls 37 and 38 were both the defendant's; that the signature in the name of defendant's baby was, presumably, the defendant's; that defendant had taken the stall into his power and had gotten the rent he stipulated for it, and so was to be held to have been lessee of 37 indirectly, while of 38 he was lessee directly; that defendant had misused his office and violated his duty by trafficking in stalls and

helping his family and himself to them, contrarily to his duty and to the by-laws of the Corporation; that defendant had violated the by-laws of the Corporation by sub-letting 37 and 38; that defendant, interested in the contracts of lease of 37 and 38, was incapable of being elected at the February election, and now is incapable of holding the office of Councillor, for the leases are still continuing: that the pretended cancellation of lease of 38 was a mere nullity, a piece of favoritism by the late Mayor in favor of a Councillor, unauthorized (as the City Clerk has proved) by the Council or by any Committee; that it was null for want of seal, in addition to want of authorization.

The defendant has contended that plaintiff's conclusions of demand are contradictory; that leases existing by the Corporation in favor of defendant of dates long anterior to the nomination in February last could not be held to disqualify for election; that a lease at any time is not a "contract" within the meaning of the 29 & 30 Vict.; that the cancellation by the Mayor of the lease of stall 38 was legal, though without seal, and that if it was null for want of seal, then the original leases of 37 and 38 were null also, being not sealed.

I need not observe upon the arguments bearing upon the real property qualifications of the plaintiff and defendant; for, as I have said before, that part of the case has lost interest.

I have to pass upon the rest of what the parties have put in issue. Defendant protests that he never had any interest in stall 37.

The plaintiff persists that defendant was the real lessee and beneficiary under the lease of 37 to his baby son; that he was lessee of 38, and still is, and that these leases involve contracts disqualifying, not merely from being elected, but from holding office now.

Was defendant lessee of 37? Defendant's father says he bought the stall in the name of defendant's son. The Corporation was deceived in believing that it had a tenant, a real one, a butcher. Among relations we presume arrangements sometimes. Would defendant's father have used defendant's baby's name without any consent of defendant, is the argument of Mr. Smith. Who signed the lease to A. J. McShane? There is some presumption of defendant having done it.

O. J. Devlin's evidence leads to some presumptions, and we have defendant's ratification of what had been done by his reception of the rent from the sub-tenant, whose rent was fixed by defendant himself. As to the money that went to Helen Dunn, defendant got it firstly. Defendant ought to have denounced the whole matter to the Corporation, and not to have touched Bayard's money.

The speech of defendant, sworn to by Ferguson, goes to support the theory of defendant's having had 37, for he admitted having taken two stalls, but justified by saying that he took them for two deserving young men who had been a long time in his employment; that he made no money out of them, and let them have them for what they cost, or words to that effect. If defendant had two stalls, what ones could they have been but 37 and 38?

Ferguson has not been contradicted. There is enough proof to fasten on defendant indirect lesseeship of 37; and as to 37 and 38, both of them plain violation by defendant of material conditions of both leases proved. He ought

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not to have sub-let the stalls but surrendered them to the Corporation if not meaning to use them. That was his duty. What claim had Ellen Dunn on the Corporators of this City? Defendant was bound to do the best for the interest of the Corporation.

Defendant knowing of his father's use of his son's (defendant's son's) name, adopted the father's agency; and it had to be affirmed *for the whole* or repudiated. I find defendant to have had stalls 37 and 38. As to the late Mayor's cancellation of the lease of 38, and new lease to defendant's father, they were nullities, unauthorized, *and not under seal.*

It would have been better not to have gone into them. No exigency of the Corporation required it, and to the new Mayor and Councillors this business might have been left.

The Mayor and City Clerk, together, cannot give a release to any debtor of the Corporation for even five pounds. How then can they dissolve real property leases belonging to the Corporation. The City Clerk ought not to have signed this cancellation of lease, and new lease, knowing that they were unauthorized.

But I cannot yield to the argument, that if these last deeds be null the original leases are null; so that the defendant is to go free, though continuing in possession; for, "if a tenant go into possession under a lease void for not being executed under the corporate seal, even if made by proper officers, it will be held that, though the lease be void, the tenant is to be deemed tenant from year to year under the Corporation; his payment of rent from time to time to its officers is proof of tenancy under the Corporation, on which it may distrain for rent in arrear."—(Wood & Tate, ch. viii, Angell & Ames.)

In the case before us defendant took possession, he sub-let, and the rent to the Corporation, that defendant would have had to pay, had he himself been using the stalls, his tenants, the sub-tenants, pay for him, from time to time, to Kollmeyer, the Corporation collector. It is to be observed that the lease of 37 is not even nominally cancelled up to this time.

"We cannot look in favor of defendant to see whether the contract is binding so as to support an action at law against the Corporation."

"It would be monstrous to hold that the disqualification does not attach because the Corporation cannot be compelled to perform the contract," said Lord Campbell in Reg. *vs.* Francis; where defendant was urging that his contract with the Corporation was null, being unsealed.

I hold that defendant is still in possession of 37, by Bayard, who has paid him up to 1st of May.

I find the defendant's pleas allegation that he never had any interest in stall 37, disproved.

As to 38, I find defendant lessee of that also, and Fisher's six or seven payments to defendant were profits taken by defendant under a sub-lease, unduly, to the prejudice of the Corporation.

But are leases "contracts," within the meaning of the 29 & 30 Viet.? I have no doubt of it.

It is a rule that their common meanings are to be given to words. We see the Legislature every day, when the common meaning is not meant to be given to a word, ordering peculiar, qualified, technical meaning to be given to it.

This word "contract" used in sec. 7 of 29 & 30 Vict. is used in many of our Canadian Acts, and has been for years, for instance in the 24th chap. of the Consolidated Statutes of Lower Canada, sec. 31, sub-section three. Sub-section four orders, however, the common meaning *not* to be applied to the word—"the said word contract in this section "(it says) "shall not extend to any lease."

Then the Legislature, in the very Statute 29 & 30 Vict., uses the word again in another Act, qualifying it. For instance, in the Upper Canada Municipal Act, chap. 51.

Our City Incorporation Act uses the word "contract" without qualification, without limiting its meaning, as in the other Act of the same Legislature in the same session. Surely we may presume that the Legislature knew what it was about. Controversy has been as to the extent of the word, when used largely or without qualification, for twenty-five years, in England here. Yet the Legislature in our Montreal Act uses the word without qualification of it whatever. I therefore hold a lease from the Corporation to be a "contract" within the meaning of the word in the 29 & 30 Vict. So I would hold an agreement to rescind a lease of real property, if made in form by the Corporation to a Councillor, to be a "contract" within the meaning of the Act referred to.

According to the rule in such cases, if there were doubt about it, the most common and usual meaning would have to be given to the word.

But, says the defendant's counsel, even if the leases of 37 and 38 be held contracts, the Court must notice that these leases are of time, or date, long before the nomination day of the February last election, and, therefore, that they cannot be held to have operated (against defendant) disqualification for new election.

A contract that could not have been opposed to defendant at his nomination as disqualifying from election, could not, on his being elected, oblige defendant to vacate his office, said Mr. Cassidy.

This is the last question in the case: Is the argument of defendant's counsel upon it well founded? Of course I cannot disqualify anybody without law.

Is it said in our City Acts that a contractor towards or with the Corporation is disqualified from being elected? The only disqualifications are those of the 14th and 15th Vict., and Sec. VI of the 29th and 30th Vict. The defendant is not in any of the cases of them. In the Quebec City Incorporation Act there is disqualification from being elected from being interested in any contract. One law has been made for Quebec, but a different one for Montreal. There are only two disqualification clauses that can work against a councillor after his entry into office—one is the 14th and 15th Vict., and the other Sec. 7 of the 29th and 30th Vict.

Undue influence by means of contracts entered into after their assumption of office by Councillors is what the 29th and 30th Vict. legislates against. The case of Reg. *vs.* Francis, Q. B., May, 1852, cited by Mr. Perkins, I have looked at. It was upon the 5th and 6th Wm. IV., reading that nobody should be qualified to be elected Councillor *while having* any share or interest in any contract or employment with, by, or on behalf of, the Corporation. That is very

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different from our 29th and 30th Vict. law. It is different from our 14th and 15th Vict. too. Our clause disqualifying Councillors after their election, and while in office, reads in the future tense, "shall become" disqualified. It says, and the contract to disqualify must be one entered into while holding office. I interpret it as defendant's counsel do. The leases of 1870 I do not see to fall within its enactment so as to disqualify defendant from holding the office to which he has been recently elected; it might have been otherwise, perhaps, had defendant been continuing his councillorship (under his former election) say to March, 1872, instead of 1871, but this is a question that we have not to pass upon. In March, 1871, defendant ceased to be a Councillor under his former election. Since his present holding of office he has made no contract with the Corporation. The plaintiff himself asks me to hold the resiliation of lease of March 13 an utter nullity.

To conclude: the Requête of plaintiff cannot be maintained, seeing what I rule upon the last question; so it is dismissed, but without costs.

Petition dismissed.

Perkins & Monk, for the petitioner.
F. Cassidy, Q. C., for the defendant.
T. W. Ritchie, Q. C., counsel for defendant.
(J.A.P.)

CIRCUIT COURT, 1870.

MONTREAL, 30TH NOVEMBER, 1870.

Coram TORRANCE, J.

No. 34.

Belisle vs. *L'Union St. Jacques.*

HELD:—That by section 91 of the B. N. A. Act of 1867, the Parliament of Canada has exclusive legislative authority in all matters of insolvency, and an Act of the Legislature of the Province of Quebec changing the constitution of an incorporated Benefit Society, so as to force a widow to receive from the Society $200 once for all, instead of a life rent of 7s 6d. weekly, on the ground that the Society was insolvent, is unconstitutional and null, and may be declared so by the Courts having civil jurisdiction within the Province.

This was an action to recover $43.50 from a benevolent association, of which the plaintiff's deceased husband was a member, by the rules of which she alleged that she was entitled to a sum of $1.50 per week as long as she lived and remained a widow.

The defendant pleaded an Act of the Legislature of the Province of Quebec, of date the 1st February, 1870, chapter 58, by which the defendant was empowered to convert the claims of the plaintiff into a sum of $200, to be once paid to her.

Pagnuelo for the plaintiff affirmed that the Act in question was unconstitutional, null, and of no effect, inasmuch as the Legislature of Quebec had no power to legislate in matters of insolvency and bankruptcy; and that the Act in question violated vested rights, and cited:

2 Bell's Dict. *vo.* Insolvency.

1 Bell's Dict. *vo.* Bankruptcy.
Dallos Rép. *vo.* Faillite & Bankqueroute. Duvergier, p. 368.
Mailher de Chassat, Rétroactivité des lois.
2 Chabot, Qu. Trans. p. 88.

TORRANCE, J.—The plaintiff contends that the Legislature of Quebec had not authority to pass an Act like that under consideration, which would force the plaintiff to compound for her debt. It is necessary to examine the extent of the powers of the Local Legislature and also those of the Parliament of Canada. The Union Act 30 Vic., c. 3, s. 91 (known as the "British North America Act, 1867,") declares that (notwithstanding anything in this Act) the exclusive Legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say, *inter alia:*

"21. Bankruptcy and insolvency. 29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects assigned exclusively to the Legislatures of the Provinces."

On the other hand, it is right to look at the "Exclusive Powers of Provincial Legislatures."

92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say: *inter alia:*

"7. The establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions in and for the Province, other than marine hospitals.

11. The incorporation of companies with provincial objects.

16. Generally all matters of a merely local or private nature in the Province."

Let us now look at the Act of the Province of Quebec which is complained of. The preamble states;

"Whereas there exists in the City of Montreal a benefit and benevolent society, duly incorporated under the name of the "L'Union St. Jacques de Montreal," whereas the contributions levied on the members of such society are too limited, and the benefits, especially those granted to the widows of deceased members, are by far too high; and whereas, such disproportion between the contributions and the benefits has already reduced considerably the resources of the said society, remarkably encroached on its savings, and prevented the balancing of receipts and expenses, the latter having exceeded the former for more than three years; whereas the half of the widows of deceased members, that is two out of four, have understood such state of affairs, and come to the relief of the said society by agreeing to allow their weekly and life benefits to be lessened, and to exchange the same against the allowance of a sum to be once paid; and having not exceeded $200, except for such of them who had not already received as such an equal sum of $200; whereas it would be unjust and altogether injurious to the

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interests of the said society to continue to pay weekly and life benefits to the two widows having refused to comply with the terms offered to the other widows and by them accepted; and whereas the said two widows persisting in their refusal have already received in the way of ordinary benefits a sum exceeding that of $200; whereas it has been shown that the financial condition of the said association does not permit of its continuing to pay to the two widows aforesaid their previous pensions, which, even if it were disposed, it could not do, without entailing its own ruin; whereas the Act incorporating the said Society does not allow to decree that the terms accepted by the two widows aforesaid shall be binding for all the widows of its deceased members; and whereas it is expedient to remedy such unfavorable state of affairs, as prayed for by the petition of the said Society."

It is plain from this preamble that on the 1st February, 1870, a disproportion between contributions by, and benefits to, members had considerably reduced the resources of the Society and prevented the balancing of receipts and expenditure; and further, the financial condition of the association was such that it did not permit of its continuing to pay to the two widows their previous pensions, that "it could not do so without entailing its own ruin."

Is there insolvency here? The Coutume de Paris says, Art. 180: "Le cas "de la déconfiture est quand les biens du débiteur tant meubles qu'immeubles "ne suffisent aux créanciers."

Bell's Dict vo. Insolvency says: "When a person's debts exceed his estate he is said to be insolvent."

The Court may safely conclude that the affairs of the Society (defendants) were in a state of insolvency.

Such being the condition of the Society, the following enactment has been passed by the Quebec Legislature:

Sec. 1. The said Society, "The Union St. Jacques of Montreal," is hereby authorized to convert, in the ordinary manner and form of its proceedings, the benefits of the said two widows, to wit: Dame Elizabeth Brunet, widow of the late Albert Tessier, and Dame Julie Belisle, widow of the late Prospère Tourville, into the sum of $200, to be once paid to each and all of them."

Sec. 2. Provided that in case of refusal to accept, the $200 shall be kept in trust.

Sec. 3. Enacts that in the event of the Society becoming possessed of $10,000, the rights of these widows shall revive.

We now come to the important question whether these enactments were beyond the power of the Local Legislature. On the one hand the Provincial Legislature has exclusive legislative authority with regard to the incorporation of companies with Provincial objects, and generally all matters of a merely local or private nature in the Province. We may say that the incorporation of the society is to be made or amended by the Local Legislature.

On the other hand, the Dominion Legislature has exclusive legislative authority in matters of insolvency, and there is this most significant clause in section 92, defining the power of the Parliament of Canada. That Parliament has exclusive legislative authority over "Bankruptcy and Insolvency," and farther on it is said, "and any of the classes of subjects enumerated in this section (*e.g.* bank-

raptcy and insolvency) shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

In other words, the Imperial Act declares, first, what the Parliament of Canada alone can do, and then, to make its meaning plainer, declares what the Local Legislature shall not do.

The Court is of opinion that "The British North America Act, 1867," being the Imperial Act just now under consideration, has, in as plain language as words can make it, prohibited the Provincial Legislatures from making laws in matters of insolvency, directly or indirectly; and therefore the Provincial Legislature had no power to make a law by which the rights of the plaintiff to receive during her widowhood 7s. 6d. per week should, by reason of the insolvency of the Society, be compounded for a sum of £50 once paid, which is the meaning of section 1 of the "Act to relieve the Union St. Jacques of Montreal."

The judgment of the Court is, therefore, in favor of the plaintiff.

The Court having heard the parties, plaintiff and defendant, on the merits of this cause, having examined the procedure of record and duly deliberated:

Considering that by virtue of the constitution and by-laws of the society, defendant, in force at the date of the admission and death of the plaintiff's late husband, Prospère Tourville, the plaintiff had a right to claim and receive from the said society a weekly life rent of 7s. 6d. so long as she should remain a widow, and her conduct without reproach. Considering that such life-rent of 7s. 6d. per week has been unpaid from 1st February last to the 15th of August last, amounting to $43.50;

Considering that, as provided by section 91 of "the British North America Act, 1867," the exclusive legislative authority of the Parliament of Canada extends to all matters of insolvency, and "any matter coming within any of the classes of subjects enumerated in the said section 91 shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by them not assigned exclusively to the Legislatures of the Provinces;"

Considering, further, that the Legislature of the Province of Quebec had no power to make the Act numbered chapter 58 of the statutes of the Legislature of the Province of Quebec, passed in the Session held in the 33rd year of the reign of her present majesty Queen Victoria, by which Act the plaintiff, in view of the inability of the Society to meet its engagements, was compelled to compound her said claim of 7s. 6d. per week during her widowhood for the sum of $200 once paid;

Doth overrule the plea of the defendant, and adjudge and condemn the defendant to pay and satisfy to the plaintiff the said sum of $43.50 demanded by the present action, and interest thereon from the 25th August, 1870, until paid, and costs of suit, *distraits* in favor of Messrs. Barnard & Pagnuelo, attorneys of the plaintiff.

Judgment for plaintiff.

Barnard & Pagnuelo, for the plaintiff.

Dorion, Dorion & Geoffrion, for the defendants.

(J.K.)

COUR SUPERIEURE, 1871.

Coram SICOTTE, J.

ST. HYACINTHE, 12 JANVIER, 1871.

Lamoureux vs. *Péloquin, et Roy et al., Créanciers colloqués, et Dufort, Requérant.*

JUGE:—1o. Qu'on ne peut faire changer l'ordre des collocations dans un jugement de distribution, qu'en contestant le jugement de distribution lui-même dans les huit jours de l'affiche, ou après sur permission du tribunal, mais ayant homologation.

2o. Qu'on ne peut, par simple requête, en conformité à l'article 751 du Code de Procédure civile, demander qu'une collocation faite à un créancier par un jugement de distribution homologué, soit réduite, et qu'il y ait distribution supplémentaire de cette différence, en basant cette demande sur le fait que ce créancier a été colloqué pour plus que deux ans d'intérêt et la courante, et ce au préjudice du créancier postérieur.

3o. Que la requête permise par cet article du Code ne peut être prise, que quand on allègue et prouve qu'un créancier a été colloqué pour ce qui ne lui était pas dû, et pour ce qu'il avait déjà reçu précédemment.

Les faits de la cause sont ceux-ci :

Un immeuble appartenant au défendeur a été vendu par le Shérif. Adolphe Roy et al., créanciers hypothécaires mentionnés au certificat du Régistrateur, ont été colloqués pour la somme de $2499.65, balance des deniers prélevés, et ce en déduction du montant en principal et intérêts d'une obligation à eux consentie par le défendeur en date du 13 février 1863.

Le jugement de distribution fut homologué sans contestation.

Après homologation du jugement de distribution, E. B. Dufort, créancier du défendeur, mentionné au certificat du régistrateur, somma par *subpœna* Adolphe Roy de comparaître devant la Cour pour l'interroger sous serment à l'effet de savoir si son hypothèque pour laquelle il était ainsi colloqué, n'avait pas été déchargée en tout ou en partie, en conformité à l'article 741 du Code de Procédure.

Les réponses d'Adolphe Roy constataient qu'il avait reçu, antérieurement à l'affiche de ce jugement de distribution, diverses sommes d'argent en paiement de partie de son obligation, et que déduction faite de ces sommes d'argent, il lui restait dû le 15 septembre 1864, une balance en capital et intérêts jusqu'alors de $2115.58 sur laquelle il n'avait plus rien reçu depuis.

E. B. Dufort présenta alors une requête au tribunal sous l'opération des articles 751 et 741 du Code de Procédure civile, à l'effet de faire rendre par A. Roy la somme de $33.27, et de faire faire une distribution supplémentaire de cette somme, en se fondant dans sa requête sur ce que Adolphe Roy n'avait droit d'être colloqué que pour la balance de son hypothèque restée due le 15 septembre 1864, plus pour deux ans d'intérêt et la courante, mais pas au-delà de ces deux ans et la courante, faisant une somme totale de $2466.38, d'où A. Roy se trouvait avoir reçu une somme de $33.27 de plus que ce pour quoi il avait droit d'être colloqué.

A. Roy contesta cette requête, en prétendant qu'il lui était dû beaucoup plus que ce pourquoi il avait été colloqué; et qu'en effet les intérêts à lui dûs depuis le 15 septembre 1864, à venir au jour de la vente de l'immeuble, réunis à la balance restée dûe le 15 septembre 1864, formaient la somme de $3022.47, excédant conséquemment de beaucoup le montant de sa collocation. Et il prétendit

Lamoureux vs. Peloquin.

de plus que le procédé adopté par E. B. Dufort n'était pas le procédé qu'il devait employer ; que ce procédé indiqué dans l'article 751 du Code de Procédure n'avait trait qu'à faire rendre par un créancier les sommes d'argent qu'il avait déjà reçues et qui conséquemment ne lui était pas dûes, et nullement à changer l'ordre de collocations dans un jugement de distribution, que le seul procédé que pouvait prendre M. Dufort pour faire changer cet ordre de collocation, et faire réduire la collocation à la balance restée due le 16 septembre, 1864, plus à deux ans d'intérêts et la courante seulement, était de constater le jugement de distribution lui-même dans les 8 jours de l'affiche, et à ne pas le laisser homologuer sans contestation. Ci-suit le jugement :

La Cour, etc., etc., etc. Considérant que les dit créanciers Roy n'ayant pas été colloqués pour toute la dette, que leur devait le défendeur, et qu'en recevant la somme pour laquelle ils ont été colloqués, ils ne recevaient, après déduction faite des paiements qui leur ont été faits, que ce qui leur est dû par leur débiteur, à raison de leur créance hypothécaire ;

Considérant que si toutefois, les dits créanciers Roy n'ont de préférence pour les intérêts que pour deux années et ceux de l'année courante, ils ont et avaient droit de réclamer et de recevoir de leur débiteur tous les intérêts jusqu'à paiement entier de leur dette, et que s'ils ont été mis à l'ordre pour partie de leur dette, contrairement à leur rang à l'encontre de créanciers hypothécaires subséquents, la contestation, soit du rang ou dû mérite de cette collocation, doit et devait se faire suivant les règles ordinaires de procédure dans les instances ordinaires, et conformément à l'article 743 du Code de Procédure ;

Considérant que le jugement ordonnant la distribution ayant été homologué, les parties qui se prétendent lésées par ses dispositions, doivent se pourvoir contre tel jugement par les voies ordinaires, quand erreur est alléguée, et non par la voie exceptionnelle prévue par les articles 741 et 751, déclare le dit Dufort mal fondé dans sa requête et contestation, et l'en déboute avec dépens au profit des dits Roy.

Jugement renvoyant la requête avec dépens.

Chagnon & Sicotte, pour Roy.

Bourgeois & Bachand, pour Dufort.

(R.W.C.)

SUPERIOR COURT, 1871.

MONTREAL, 31st MAY, 1871.

Coram TORRANCE, J.

No. 667.

Davidson vs. *Cameron*.

HELD :—That an incidental plaintiff, residing beyond the limits of the Province of Quebec, will be held to give security for costs upon his incidental demand.

PER CURIAM. Counsel for plaintiff and incidental defendant has moved for security for costs upon the incidental demand, and cited McCallum *vs.* Delana, K. B. Q., 1812.

Davdison vs. Cameron.

The Court orders, under the Article 29, Civil Code, security for costs to be given by the incidental plaintiff upon his demand.

C. P. Davidson, attorney for plaintiff and incidental defendant.

Perkins & Monk, attorneys for defendant and incidental plaintiff.

(E.C.M.)

SUPERIOR COURT, 1871.

MONTREAL, 31st MAY, 1871.

Coram TORRANCE, J.

No. 212.

Miller vs. *Shaw et al.*

HELD:—1. That a writ of protection will be issued upon cause shewn, to protect a witness from arrest upon civil process.

2. That such protection will be for a time reasonable in coming, while giving evidence and returning.

3. That the period of protection will be decided by the Court.

John A. Perkins, for plaintiff, petitioned the Court (and fyled affidavits), shewing that John Miller, of England, now in New York, was the most important witness for plaintiff. He refused to attend this Court, fearing arrest by David Torrance & Co., who had lately recovered judgment against him for $7608. That he could not be examined under Commission Rogatoire for reasons stated. He, therefore, in this suit, prayed for writ of protection, or for such order as required. Witnesses, as well as the parties to a suit, are protected by Courts of justice and privileged from arrest on *civil* process during the necessary time consumed by them in going to the place where their attendance is required, in staying there for the purpose of such attendance, and returning thence. Lightfoot *vs.* Cameron, 2 W. Bl. 1113; Meekins *vs.* Smith, 1 H. Bl. 636; Randall *vs.* Gurney, 3 B. & A. 252; see also R. *vs.* Wigley, 7 C. & P. 4; see also 2 Revised Statutes of New York, 402, 403. It is not necessary that the witness should be served with subpœna. Arding *vs.* Flower, 8 T. R. 536; Walpole *vs.* Alexander 3 Doug. 46. A reasonable time is allowed to go and return, and the Courts are disposed to be liberal in making such allowance. The cases upon this point are collected in Strong *vs.* Dickenson, 1 M. and W. 493. Upon the application counsel also cited Brooks *vs.* Chesley, 4 Har. and McHen. 295; Norris *vs.* Beach, 2 John R. 294; Hurst's case 4 Dall. 487; Smyth *vs.* Banks, 4 Id. 329; Bours *vs.* Tuckerman, 7 John. R. 538; Seaver *vs.* Robinson, 3 Duer (N.Y.) 622; Selby *vs.* Hills, 8 Bing. 166. Counsel only pretended that protection was against arrest upon civil process, not upon criminal or quasi criminal process. The application was entirely a common law right, but the allowance of time discretiona \.

John L. Morris, for defendants, contended that cause shewn was insufficient. That there was no such proceeding by the laws of this Province. That to open the door to parties attending Canada to do their own business, under color of a writ of protection, would be dangerous. Such writs are granted in the United States and in England, but not here.

Miller vs. Shaw et al.

PER CURIAM. The application is a novel one, but adopted both in England and the United States. In Scotland it has alone been brought into disrepute by having been abused. The Court sees that the evidence sought for could not be as well taken under Commission Rogatoire as by evidence *vivâ voce*, and is therefore disposed to grant the order prayed for. The cause shewn is sufficient, and the authorities cited at the bar are applicable to the case. Greenleaf on Evidence, §§ 316–318, says: "This privilege is granted *in all cases*, where the attendance of the party or witness is given in any matter pending *before a lawful tribunal*, having jurisdiction of the cause." It extends to a witness coming from abroad without a subpœna. 1 Tidd's Pr. 196; Norris *vs.* Beach, 2 Johns 294. But it is discretionary to fix the allowance of time, and therefore judgment is given limiting the period of protection.

Perkins & Monk, for plaintiff.

Ritchie, Morris & Rose, for defendants.

(J.A.P.)

CIRCUIT COURT, 1871.

MONTREAL, 31st MAY, 1871.

Coram TORRANCE, J.

Nos. 1752, 1753, 1751.

Ramage vs. *Lenoir dit Rolland.*
Stole vs. *The same.*
Renix vs. *The same.*

HELD:—1. That the candidate is liable for services of carters engaged at his bidding to convey voters to the polls in a municipal election.
2. That a member of an Election Committee engaging the carters will be held responsible for their wages.
3. That such contracts can be enforced at law by suit.

The plaintiffs respectively claimed wages for services of themselves and vehicles for two days. The evidence adduced proved them to be voters, and the work done to have been carrying voters to and from polls at the municipal election for councillor for the St. Lawrence ward, city of Montreal, in March, 1871. The defeated candidate, Rolland, pleaded that he never engaged the carters or contracted, and that the work done was in any event illegal and *contre l'ordre publique*. Thomas Mullins, member of his committee (who engaged the carters), relied upon the fact that he was but agent, and incurred no personal responsibility.

B. T. de Montigny, pour le défendeur, a cité le 23e V. c. 17. s. 3. qu'il prétend s'appliquer aux élections municipales, vu qu'elle n'a aucun caractère special. Mais dans le cas où l'on prétendrait que cette loi ne s'appliquerait pas aux élection municipales, n'avons nous pas l'art. 989 du Code Civil qui dit que "le contrat sans considération ou fondé sur une considération illégale est sans effet.

"La considération est illégale, dit l'art 990, quand elle est prohibée par la loi ou contraire aux bonnes mœurs ou à l'ordre public."

Si donc la convention en question n'est pas prohibée par la loi, elle l'est cer-

Ramage vs. Lenoir dit Rolland.

tainement par l'ordre public, et contraire aux bonnes mœurs, et c'est ainsi que l'ont considéré les législateurs qui dans la loi concernant les élections, où ils disent "il est déclaré et ordonné que le louage ou la promesse de payer ou le paiement d'aucun cheval, attelage, voiture, etc., seront des actes illégaux"..... "ils ont exprimé, dans le préambule de cette loi, que ces menées étaient malhonnêtes et démoralisatrices."

Le contrat sur lequel on s'appuie serait-il prouvé, le savant avocat prétend qu'il est sans effet.

J. A. Perkins denied that the Act referred to aught but parliamentary elections. It has no bearing upon these cases which were municipal election engagements. Upon matters in issue he cited Lord Kenyon Rider *vs.* Moore and Francis *vs.* Cliff, 371: A committee are to be considered, both collectively and individually, as agents and candidates, answerable for every act done by any of them in relation to the election, notwithstanding proof given that many acts done by themselves without participation of others of them or knowledge of S. M. As to employment of chaises, *vide* Honeywood *vs.* Geary, 6 Esp. 119.

TORRANCE, J.—The law referring to parliamentary elections cannot be applied to the present cases. It is to be regretted that the Legislature has not thought proper to extend the provisions in question to municipal elections, but under the circumstances judgment must go for the plaintiffs.

Judgment for plaintiffs jointly and severally against both defendants.

Perkins & Monk, for plaintiff.

Trudel & de Montigny, for defendant Rolland.

T. C. & C. C. DeLorimier for defendant Mullins.

(J.A.P.)

SUPERIOR COURT, 1870.

MONTREAL, 30TH SEPTEMBER, 1870.

Coram BERTHELOT, J.

No. 1811.

Toland vs. *Spencer*.

HELD:—That a seafaring man who had been arrested by *capias ad respondendum*, and summoned (before the return of the action) to answer interrogatories *sur faits et articles*, may, on special application to a judge in chambers, based on the necessity of his immediate departure from the country, be permitted to answer such interrogatories before the day stated in the summons, and his answer so given will avail.

This was a motion by plaintiff to set aside an order granted by BEAUDRY, J., on the 15th of August, 1870, permitting the defendant to answer Interrogatories *sur faits et articles* and likewise the answers given. The defendant, a seafaring man, was under bail under a *capias ad respondendum*, and before the return of the action was summoned to answer interrogatories *sur faits et articles*. And, being immediately about to leave the country in his vessel, he made application, based on the necessity of his immediate departure, to be allowed to answer the interrogatories, before the day stated in the summons. The permission to

answer was granted, on the ground that the plaintiff's summons to answer the interrogatories was in itself premature, and *ex necessitate rei*.

The grounds of the plaintiff's motion were because the judge in chambers had no jurisdiction and because the answers could only be made in term and *vivâ voce* before a judge.

PER CURIAM :—I cannot see any just ground for setting aside the judge's order or the defendant's answers. The case was one of urgent necessity, and I think the judge had a perfect right to order as he did. The plaintiff himself, moreover, was prematûre in his own proceeding. The motion is therefore rejected.

Motion rejected.

Perkins & Monk, for plaintiff.
Bethune & Bethune, for defendant.
(S.B.)

SUPERIOR COURT, 1870.

MONTREAL, 30TH SEPTEMBER, 1870.

Coram BERTHELOT, J.

No. 1811.

Toland vs. *Spencer*.

HELD:—That an action of damages alleged to have been caused by the negligence of the defendant (a captain of a merchant ship) which resulted in the death by drowning of a pair of horses, hired by defendant from plaintiff (a carter), to assist in unloading the vessel, is not susceptible of trial by jury.

This was a motion to have the case tried by a special jury, and was resisted on the ground that the action was not susceptible of being so tried.

The action was brought by a carter to recover the value of a pair of horses, hired by a captain of a vessel to assist in the unloading, which the declaration alleged were drowned by the negligence of the defendant.

PER CURIAM:—I do not see that the offence charged is either *délit* or *quasi délit*, against moveable property; and, as the case is not a commercial one, I am of opinion that the plaintiff is not entitled to a trial by jury. The plaintiff will, therefore, take nothing by his motion.

Motion for jury trial rejected.

Perkins & Monk, for plaintiff.
Bethune & Bethune, for defendant.
(S.B.)

COUR SUPERIEURE, 1869.

En Revision.

MONTREAL, 30 DECEMBER, 1869.

Coram Mondelet, J., Berthelot, J., Mackay, J.

No. 330.

Lynch vs. *Duncan & Duncan*, Demandeur en faux, & *Lynch*, Défendeur en faux.

Juge :—Que le Protonotaire dans un district où le Juge qui y administre la justice est tenu par la loi de résider dans un autre district, peut accorder une requête, sans constater l'absence du juge. (1)

Le 4 juin, 1868, le Protonotaire de la Cour Supérieure, à Beauharnois, pour le District de Beauharnois, sur requête à lui présentée par le demandeur en faux, demandant le compulsoire de la minute attaquée de faux, donna l'ordre suivant: "Vu la requête ci-dessus, nous l'accordons et enjoignons au dit S. Brossoit, Notaire, dépositaire de la minute de l'acte de transport ci-dessus mentionné, de produire sans délai, à notre Greffe, à Beauharnois, la dite minute."

La procédure en faux fut ensuite conduite par le Demandeur en donnant les avis ordinaires du Procès Verbal de la minute, etc., et jugement final fut rendu le 17 novembre 1868 en faveur du Demandeur qui, sur motion du 3 novembre 1868, avait fait rejeter l'inscription en faux le 14 novembre 1868.

Ce jugement ayant été porté en revision par le Défendeur et Demandeur en faux qui prétendit que le Protonotaire n'avait pas le droit d'émaner un tel ordre, l'article 167 du Code de Procédure Civile ne donnant ce droit qu'à la Cour ou à un juge en vacance.

Mondelet, J. (différant.)—C'est le tribunal ou un juge en vacance qui seuls peuvent ordonner que le compulsoire ait lieu, à moins toutefois que le juge soit absent et que cette absence soit duement constatée et dans ce cas-là seul le Greffier peut agir. On ne peut, on ne doit pas présumer l'absence du Juge, on doit non-seulement présumer, mais tenir pour certain que le Juge était dans son district. Cela posé, le compulsoire ayant été ordonné par un fonctionnaire qui n'avait aucune juridiction, pour ce, il est nul et il va sans dire que le Défendeur n'était pas tenu de produire des moyens de faux. Il a été forclos illégalement; cette forclusion est nulle ainsi que tous les procédés qui l'ont suivie. C'est une question de juridiction à la décision de laquelle, comme dans toutes questions de ce genre est de *stricti juris*. Ce n'est pas l'occasion d'appliquer la maxime qui fait réputer bien faits, *bene recte acta* les procédés d'un officier public. La majorité de la Cour, tout en invoquant cette maxime, s'est fondée sur les dispositions du statut de 1864 qui oblige le Juge administrant la justice dans le District de Beauharnois, de résider à Bedford. 27 & 28 Vic., chap. 39, sec. 19, 1864.

Lynch vs. Duncan & Duncan.

Le jugement est comme suit :

La Cour Supérieure siégeant à Montréal présentement comme Cour de Révision, ayant entendu les parties par leurs avocats respectifs, tant sur le Jugement interlocutoire rendu dans et par la Cour Supérieure du District de Beauharnois, le quatorze de novembre, mil huit cent soixante et huit, accordant la motion du Défendeur en faux, que sur le Jugement final prononcé en cette cause le dix-septième jour du dit mois de novembre, mil huit cent soixante et huit, dans et par la dite Cour Supérieure du District de Beauharnois, ayant examiné le dossier et la procédure dans la dite cause et ayant délibéré ;

Considérant qu'il n'y a point d'erreur dans les susdits jugements, confirme par les présentes les dits deux jugements avec dépens contre le Défendeur. L'Honorable Juge Mondelet différant.

Jugement confirmé.

Perkins & Ramsay, avocats du Défendeur et Demandeur en faux.

Branchaud, avocat du Demandeur et Défendeur en faux.

(P. R. L.)

COUR DU BANC DU ROI, 1841.

MONTREAL, 19 JUIN, 1841.

Coram PYKE, J., ROLLAND, J., GALE, J.

No. 2317.

Ann Gregory vs. *Henry Dyer, es qual. & Ann Hughes & William Howland*, Tiers-Opposants.

JUGE.—Qu'une femme qui a épousé un homme déjà marié, durant la vie de la première femme n'est pas privée de ses avantages matrimoniaux, si elle l'a ainsi épousé, ignorant l'existence du premier mariage.

Dans l'action principale, c'est-à-dire de *Gregory vs. Dyer*, la demanderesse alléguait que le 16 juin 1817 elle avait épousé à Montréal feu Ellis Roland, sous le régime de la communauté, et qu'elle et son mari avaient acquis des biens considérables ; que son mari ayant été interdit pour démence, le 12 avril 1836, le défendeur Dyer avait été nommé son curateur ; que le dit Ellis Roland était décédé le 19 mars 1838 et que le dit curateur refusait de délivrer à la demanderesse la moitié des biens qui lui appartenait comme commune. La déclaration concluait à ce que le Defendeur rendit compte à la demanderesse de son administration et lui délivrât et remit la moitié des biens acquis par elle et son mari et dont le Défendeur était en possession comme ci-devant curateur à l'interdit.

Le défendeur fut condamné *ex parte* le 8 février 1839, conformément aux conclusions de la déclaration.

Ann Gregory vs. Henry Dyer.

Le 20 février 1840, Ann Hughes et William Rowland s'adressèrent séparément à la Cour, par requête et tierce-opposition, la première réclamant les biens laissés par Ellis Roland dans les termes suivants :

1o. Ann Hughes alléguait que le 4 août 1800 elle avait épousé le dit Ellis Roland ou Rowlands dans le payé de Galles, sans aucun contrat écrit ; qu'elle avait vécu plusieurs années avec lui et en avait eu quatre enfants, dont trois avaient survécu à leur père et vivaient encore.

Que vers le 20 Déc. 1807, le dit Ellis Rowlands l'avait abandonnée sans cause et était allé au-delà des mers, savoir à Montréal ; que la demanderesse Gregory avait épousé Ellis Rowlands, sachant qu'il était marié et que sa femme était encore vivante, qu'en conséquence le mariage contracté entre E. Rowlands et A. Gregory était nul et n'avait donné aucun droit à cette dernière, et que le jugement rendu en sa faveur devait être mis de côté ; que d'après la loi commune du pays de Galles (*Wales*) la requérante Hughes avait droit à l'usufruit d'un tiers des propriétés acquises par son mari et que par la loi du Bas-Canada elle avait droit à la moitié de tous les biens par lui acquis. En conséquence elle demandait qu'elle fut reçue tiers-opposante, pour empêcher l'exécution du jugement obtenu par la demanderesse ; que ce jugement fut mis de côté ; qu'il fut déclaré qu'elle avait droit à l'usufruit, sa vie durante, d'un tiers des biens laissés par Ellis Rowland ; qu'elle fut de plus déclarée commune avec ce dernier, et comme telle propriétaire de la moitié de tous les biens acquis par lui.

2o. William Rowlands après avoir allégué les mêmes faits que l'autre opposante, et notamment le mariage de Ann Hughes, sa mère, avec le défunt Ellis Rowlands, disait qu'il était né de ce mariage, le 7 juin 1801, et que lui et une sœur et une frère aussi nés du même mariage étaient les héritiers d'Ellis Rowlands, et il demandait qu'un tiers de la succession lui fut accordé.

La demanderesse répondit à ces deux oppositions, qu'elle ignorant l'existence du mariage d'Ellis Rowlands lorsqu'elle l'avait épousé, que tous les biens acquis par le défunt avaient été ainsi acquis par leur industrie et leur travail communs, et qu'en supposant qu'en vérité le défunt eut été marié ainsi que prétendu par les opposants, elle n'en avait pas moins droit à ce qu'elle avait obtenu.

Il fut prouvé que la demanderesse paraissait soupçonner ou avoir appris postérieurement à son mariage qu'Ellis Rowlands avait une femme vivante ; mais la preuve ne fit pas remonter cette reconnaissance à l'époque du mariage.

Les deux oppositions furent déboutées par le jugement du 19 Juin 1841. Le jugement n'est pas motivé.

Hugh Taylor, Avocat de la demanderesse.

Fisher & Smith, Avocats des opposants.

(J. D.)

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 10th SEPTEMBER, 1870.

Coram CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

No. 9.

ETHIER,

AND APPELLANT;

THOMAS, RESPONDENT.

HELD.—That when a promissory note is signed by procuration, proof of the due execution of such procuration must be made to entitle the Plaintiff to recover judgment in an *ex parte* suit on the note.

This was an appeal from a judgment rendered in favour of the Respondent by the Superior Court at Sorel, in an *ex parte* action brought against the Appellant, to recover the amount of a promissory note signed on his behalf by A. Germain, who claimed to act by procuration produced in the case, but not proved.

CARON, J., (*dissentiens*).—Action sur billet par l'Intimé porteur, contre le Défendeur appelant, feseur du dit billet en faveur de J. B. Labelle qui l'aurait endossé au Demandeur Thomas.

Le Défendeur ne sachant lire ni signer a donné au nommé Germain, procuration l'autorisant à faire et signer pour lui le billet en question. Cette procuration annexé au billet, devait être en brevêt ; elle est dans cette forme et comme telle devait être signée par un notaire et un témoin. Un témoin a bien signé la dite procuration et attesté par là que le défendeur avait fait sa marque sur le billet sur lequel est portée l'action ; mais le notaire a oublié de signer la procuration, laquelle a été produite en cour sans cette signature et avec celle du témoin seulement.

Le défendeur ainsi poursuivi a comparu, s'est objecté, par requête, à la forme de l'assignation, requête de laquelle, plus tard, il s'est désisté. Interpellé de plaider, il s'y est refusé. Après avoir signé l'inscription pour jugement faite par le demandeur et avoir fait défaut de s'y rendre, jugement a été rendu contre lui pour le montant du dit billet comme dans une cause par défaut ; C'est de ce jugement qu'est appel. A l'encontre de ce jugement l'appelant dit 1o. que le billet n'est signé ni du défendeur lui-même ni de personne dûment autorisée à le faire pour lui.

2o. Que l'endossement en faveur du demandeur n'est pas légalement établi.

3o. Que le jugement a été rendu sans preuve suffisante.

Quant au premier grief, il consiste dans le défaut de signature par le notaire de la procuration mentionnée plus haut. Cette omission de la part du notaire est-elle sous les circonstances, fatale, contre le défendeur? Si cet acte, dans l'état qu'il est produit, ne valait pas comme acte authentique, ne vaut-il pas comme acte sous seing privé (C. C. Art. 1221) ? Le tout pris ensemble, je serais assez disposé à le croire, et à regarder cet acte comme valable, s'il était prouvé, ou qu'il ne fut pas nécessaire de le faire.

Ethier and Thomas.

Or il n'a pas été prouvé, puisqu'il n'a été fait aucune preuve. Mais était-il nécessaire de le prouver ? L'Intimé prétend que non et le jugement le décide ainsi. L'Intimé se fondo sur les articles suivants de nos codes ; l'art. 145 du C. P. C. veut que toute dénégation d'un billet ou *autre écrit ou document* sous seing privé sur lequel est basée une demande, soit accompagnée d'une déclaration sous serment comme quoi le document n'est *pas vrai* ou que la signature de la *partie* ou celle de quelque autre personne sur le document, est contrefaite etc.

D'après cet art. le défendeur ayant comparu, (ce serait la même chose s'il n'eut pas comparu d'après l'art. 89 du C. P. C.) la demande portée contre lui et qui lui avait régulièrement été signifiée, comme il l'a reconnu en retirant sa requête à *la forme*, étant fondée sur un billet ou du moins sur un *autre écrit ou document* sous seing privé, il était de son devoir d'en nier la vérité sous serment et ne l'ayant pas fait, d'après l'art. 89, le demandeur se trouvait exempté de faire aucune preuve. Le défendeur étant donc tenu de nier la valeur et la vérité des documents produits contre lui, la procuration et le billet étaient admis sans qu'il fut nécessaire de les prouver.

La défense me fait l'effet d'une chicane, que je ne suis pas disposé à encourager. Si je puis le faire légalement les raisons ci-dessus données plus au long dans le factum de l'Intimé me font croire que le jugement doit être confirmé ; en cela, l'on est sûr que le défendeur n'aura que ce qu'il mérite et ne paiera que ce qu'il doit.

The majority of the Court maintained the appeal and dismissed the respondent's action *sauf à se pourvoir*, assigning the following reasons :—

The Court ***, considering that the procuration in the respondent's declaration mentioned, by virtue whereof the said promissory note sued upon in this cause was signed for the said appellant by A. Germain as attorney for that effect, for the said appellant, as averred and alleged in the said declaration, has not been proved, and the authority of the said A. Germain in that behalf for the said appellant has not been established in evidence, considering that the statutory presumptions of the validity of the signature to promissory notes does not extend to the procuration or power of attorney, by virtue whereof such attorney is authorized to sign promissory notes for the alleged makers thereof. And considering therefore that in the judgment rendered etc., etc, there is error, doth reverse etc., etc., reserving to the said respondent his recourse, *sauf à se pourvoir*, against the said respondent.—THE HON. MR. JUSTICE CARON *dissenting*.*

Judgment of S. C. reversed.

Barthe, Mousseau & Brassard, for appellant.

A. Germain, for respondent.

(S. B.)

* REPORTER'S NOTE.—BADGLEY, J., for the Court, referred to the case of Joseph & al. *vs.* Hutton, 9th L. C. Law Rep. p. 299.

COURT OF QUEEN'S BENCH, 1870.

MONTREAL, 10TH SEPTEMBER, 1870.

Coram DUVAL, CH. J., CARON, J., DRUMMOND, J., BADGLEY, J., BEAUDRY, J., *ad hoc.*

No. 95.

KAIGLE, APPELLANT;

AND

PIERCE, RESPONDENT.

HELD:—1. That the knowledge by a donee of the existence of a *hypothèque* on the property acquired, at the time of his acquisition, does not constitute him in bad faith, and he can therefore invoke the prescription of ten years.

2. That in the present case the payment made by the donee, in part extinction of the *hypothèque*, did not interrupt the prescription.

This was an appeal from a judgment rendered by the Circuit Court, for the District of Iberville, on the 11th day of June, 1867, condemning the appellant to pay to the respondent the sum of $101.40 cy., and interest and costs, which judgment was confirmed by the Superior Court, at Montreal, sitting as a Court of Review, on the 30th day of May, 1868. (THE HON. MR. JUSTICE MONDELET *dissenting.*)

The action in the Court below was brought by Pierce, as the *cessionnaire* of one Henry Sherry, under transfer executed 22nd May, 1865, to recover from the appellant $101.40, balance due under deed of sale from Henry Sherry to appellant of certain real estate, described in the deed executed 22nd April, 1864.

The appellant pleaded, in effect, that Henry Sherry guaranteed the property sold to be free and clear, *franc et quitte* of all mortgages; that there subsisted on the property at the time of the institution of the action, a *bailleur de fonds* claim of £90.9.1. currency, besides interest, remaining due and unpaid, under a deed of sale of the property in question, from Eustache Soupras to Samuel Sherry, father of said Henry Sherry, executed on the 16th of May, 1846, and registered on the 3rd of June, 1846; that said Henry Sherry acquired said property from said Samuel Sherry, his father, by donation executed on the 28th day of January, 1850; that said Henry Sherry paid $100 on account of said *bailleur de fonds* mortgage, on or about the 2nd of July, 1858, to N. D. D. Bessette, then acting as agent to the estate of said Soupras; that one Edward McDonald purchased and acquired said *bailleur de fonds* mortgage, on the 14th of July, 1865, and threatened appellant with an hypothecary action; that, in consequence, the defendant tendered to plaintiff his said claim and costs before the return of the action.

The tender was reiterated with plea, and the prayer of the plea was to the effect that the respondent be condemned to cause the said *bailleur de fonds* claim to be discharged, or to give good and sufficient security to the appellant that he will never be troubled by reason thereof.

Kaigle and Pierce.

The respondent replied to the effect that the mortgage complained of had long since been prescribed, and that no real cause of *trouble* existed.

In this pleading, the prescription is claimed on the ground that appellant and his *auteur* Henry Sherry had been "*en possession du dit immeuble sans trouble, "depuis plus de dix ans, savoir, quinze ans,*" before the execution of the deed of transfer to McDonald. And stress was laid on the fact that, in the deed of donation, the property was declared to be free and clear of all claims whatsoever.

At *Enquête*, it was proved that Henry Sherry paid Mr. Bossette (as agent for the Soupras estate) on the 2nd July, 1858, the sum of $100, on account of the *bailleur de fonds* claim in question, and that he (Sherry) had full knowledge of the existence of this claim when he acquired the property from his father. And Henry Sherry himself established the same facts, stating, however, that he received the money he so paid from his father, and that he paid it "like agent for" his father.

The following was the judgment of the Circuit Court, which was rendered by THE HON. MR. JUSTICE SICOTTE:

" La Cour, après avoir entendu les parties par leurs avocats, examiné la procédure et les papiers produits;

Considérant que les allégués de la défense comme les faits établis par les papiers produits constatent que le défendeur possède et possédait lors de l'action, tant par lui-même que par son auteur depuis plus de dix ans sans inquiétation, l'héritage dont le prix de vente est réclamée pour partie seulement;

Considérant que d'après la preuve et la loi le défendeur avait acquis longtemps avant l'action la prescription de l'hypothèque qu'il indique et qu'il ne peut être évincé;

Considérant que le défendeur ne justifie pas de justes raisons de crainte d'être troublé dans la possession de l'héritage qu'il a acquis ainsi que relaté dans les écritures et dont le prix est réclamé pour partie;

Considérant que le demandeur est bien fondé à réclamer comme il le fait, déclare le défendeur mal fondé dans ses défenses, et condamne le défendeur à payer au demandeur la somme de $101.40 avec intérêt du 25 janvier 1866, sur la somme de $100 et les dépens distraits."—

The appellant, feeling himself aggrieved by this judgment, inscribed the case for hearing before the Superior Court, at Montreal, sitting as a Court of Review.

The majority of that Court, composed of Justices BERTHELOT AND MONK (MR. JUSTICE MONDELET *dissenting*) confirmed the judgment of the Circuit Court, as follows;—

" La Cour Supérieure, siégeant à Montréal présentement en Cour de Révision, ayant entendu les parties par leurs avocats respectifs sur le jugement rendu le 11 de juin 1867 dans et par la Cour de Circuit pour le district d'Iberville, ayant examiné le dossier et la procédure dans cette cause et ayant pleinement délibéré.

Considérant qu'il n'y a point d'erreur dans le susdit jugement, confirme par les présentes le dit jugement en tous points avec dépens distraits à M. Laberge, avocat du demandeur.

L'Honorable Juge Mondelet ne concourre pas dans ce jugement."

Kaigle and Pierce.

In rendering the above judgment, BERTHELOT, J. simply remarked, that the *only* question at issue was as to whether the knowledge by Henry Sherry of the existence of the mortgage, at the time he acquired the property, prevented him from being considered a possessor in good faith, and on the authority of Duranton, the learned judge stated, that he was clearly of opinion it did not. On the counsel for the appellant asking whether or not the Court considered that the prescription had been interrupted, by part payment of the debt, the learned judge remarked, that that was none of Kaigle's business.

MONK, J., made no remark whatever.

MONDELET, J. (*dissenting*), after reciting facts, stated his opinion as follows:—

"The questions arising in this case are:—

1st. Admitting Henry Sherry knew that there was due by his *auteur* a balance on the purchase money of the immoveable property in question, was he thereby *constitué en mauvaise foi*, and debarred from the benefit of prescription?

2nd. Did the payment of $100, admitting it to be proved, interrupt the prescription, and was oral evidence of such payment legally admissible?

3rd. Does the defendant show that he has reasonable ground of apprehending a *trouble* and thereby justified in retaining in his hands the purchase money?

Upon the first question, I am of opinion that the knowledge Henry Sherry had of the existence of a balance due by his *auteur* on the purchase money of the immoveable property in question constituted him *en mauvaise foi* and debarred him from the benefit of prescription.

On the second question, I am of opinion, that the payment of $100 to the agent of the Souprus estate above mentioned had the effect of interrupting the prescription; and that the oral or testimonial evidence of the fact of a payment is not in the circumstances inadmissible, inasmuch as such payment is not proved to establish the discharge of an indebtedness, but solely to establish that an act was on such a day made by a party, which in law has the effect of interrupting prescription.

As to whether the defendant shews that he has reasonable grounds for apprehending a *trouble*, the fact that in the face of a clause and guarantee of *franc et quitte* there does exist a *hypothéque* produced by regular enregistration, a *bailleur de fonds* claim which is patent, and which plaintiff is bound to cause to disappear, before he can claim the balance due on the purchase money of the immoveable property so burthened, is a valid plea in the mouth of the defendant.

The defendant's plea, instead of being dismissed, should have been maintained; and the conclusions thereof, that the mortgage should be made to disappear, or good and sufficient security given as prayed, should have been the judgment of the Court below.—The dismissal of the action was an error, and the judgment appealed from should therefore be reversed."

Bethune, Q.C., for appellant, submitted that the opinion of MR. JUSTICE MONDELET was in all respects correct, and this for the following reasons:—

In the language of the 114th article of the custom of Paris, the possession of the party invoking the prescription must be *de bonne foi et sans inquiétation*.

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The knowledge by Henry Sherry of the existence of the mortgage, at the time he acquired the property, rendered him a possessor *de mauvaise foi.*—*Vide* 2 vol. grand Cout. p. 380, Nos. 6 et 7—Pothier, Pres. Nos. 126, 127, 128.—Troplong, Pres. No. 931. Dunod, Pres. p. 38—2nd Bourjon, Tit. 7 part 5, ch. 1 Sec 2. art. 6, p. 653.—1 Duplessis Liv. I. ch. 2. p. 490 Note (c)—Guyot, Rep. Vo. Pres. p. 315.—Housquet Pres. p. 349—8 Marcadé (2 Paul Pont, Hyp.) p. 1094, No. 1250.—2 Troplong, Hyp.—(Belgian Ed. in adv. Lib.) No. 880, 881 and 882 and notes.—9 Dalloz, Jur. du Roy, p. 423.

And the payment by him on the 2nd of July 1858 had the effect also of interrupting the prescription, even if he should be held to have been possessing in good faith, Dunod, Pres. p. 58.—"*Si le débiteur reconnait la dette par quelque acte que ce soit; s'il paie une partie du capital, etc.*" "*toutes les fois qu'il se fait quelque chose entre le créancier et le débiteur, le possesseur et le propriétaire, qui emporte un aveu exprès ou tacite de la dette, etc., ce sera une interruption civile conventionnelle, qui empêchera le cours de la prescription. Troplong,* Pres. No. 612. "*Indépendamment de la citation en justice, etc., il est un autre mode d'interruption civile etc., c'est la reconnaissance de la dette ou du droit rival par le débiteur ou le possesseur,*" No. 618. "*La reconnaissance peut être tacite. Nous signalons comme reconnaissance tacite, le paiement des intérêts etc.*—Pothier, oblgns. No. 692.—Art. 2227 of Code Civil of L. C.—"Prescription is interrupted civilly, by renouncing the benefit of a period elapsed, and by *any acknowledgment* which the *possessor* or the debtor *makes of the right of the person against whom the prescription runs.*"

As to the right of the appellant to prove the fact of the interruption by parol evidence.—*Vide* 4, An. Dec. Vo. Rentes Foncières—p. 245, No. 19.—Dunod, Pres. p. 171, 172. Troplong Pres. (Belgian Ed. in Lib.) Note 7 to p. 540.—Sirey—1813, 2 pt. p. 370.—Jour du P. 1814, p. 453.—Sirey, 1820,—pt. 1, p. 325.—Dalloz, 1832,—pt. 1, p. 330.—Civil Code of L. C., art. 1233, No. 6.

The respondent moreover, is the mere *cessionnaire* of Sherry and, therefore, possessed of no greater rights than Sherry. If Sherry were the plaintiff, clearly his *aveu* under oath, of having paid $100 on account, would be good evidence of the interruption. The respondent consequently, as his *cessionnaire* cannot legally object to proof by Sherry that the amount in question was actually paid by him.

On the whole, the appellant respectfully submits, that he established in a legal manner (in the words of the statute,—Cons. Stat. of L. C.; ch. 36, s. 31.) That he "has just cause to fear that he will be troubled by an hypothecary action," on the part of McDonald the present owner of the *bailleur de fonds* claim in question, and that he is therefore entitled to a reversal of both judgments, and to have judgment in terms of the conclusion of his plea.

Jetté, for respondent:—Trois questions se présentent en cette cause:

1o. La connaissance qu'avait Henry Sherry, qu'il était dû par son auteur une balance de prix de vente sur l'immeuble, à lui transmis, *à titre singulier* et avec clause de *franc et quitte*, le constituait-elle en mauvaise foi, et l'empêchait-elle de prescrire?

2o. Le paiement fait par Henry Sherry en 1858, *pour son père*, peut-il être considéré comme interruption de la prescription qui courait alors au profit du fils; et si oui, la preuve de ce paiement pouvait-elle être faite par témoins? 1 Kaigle and Pierce.

3o. L'appelant a-t-il fait voir une crainte de trouble suffisante pour le justifier de retenir le prix de l'immeuble entre ses mains?

PREMIÈRE QUESTION.—La connaissance qu'aurait pu avoir Henry Sherry qu'il était dû par son auteur, une balance de prix de vente, sur l'immeuble à lui transmis, *à titre singulier*, et avec clause de *franc et quitte*, le constituait-elle en *mauvaise foi* et l'empêchait-elle de prescrire?

Tous les auteurs qui ont discuté et approfondi cette question y répondent négativement.

La prescription invoquée par l'intimé à l'encontre de l'hypothèque que lui oppose l'appelant, pour se justifier de retenir le prix de vente de l'immeuble entre ses mains, est établie par les articles 113 et 114 de la Coutume de Paris. Cette prescription est à la fois *acquisitive* et *libérative;* et c'est sous ce double aspect qu'il importe de l'envisager pour en apprécier toute l'étendue. Elle est *acquisitive* quant à la propriété même de l'immeuble et *libérative* quant aux charges et hypothèques qui le grèvent. Or, ces deux prescriptions, *acquisitive* et *libérative*, ne sont pas regardées avec la même faveur en droit. Pour la prescription acquisitive on exige rigoureusement *le juste titre* et la *bonne foi;* pour la prescription *libérative* la négligence ou le silence du créancier pendant le temps fixé, suffisent.

Veut-on prescrire la propriété; il faut absolument la bonne foi, et la bonne foi la plus complète; il faut n'avoir aucun doute sur le droit de propriété de celui qui nous a vendu, car celui qui doute n'est pas de bonne foi; encore moins celui qui connaît le droit d'autrui à cette même propriété, cette connaissance l'empêche toujours de prescrire.

Mais il n'en est pas ainsi lorsqu'il s'agit de se libérer; la libération est toujours favorable, et on l'acquiert, même dans les cas de courtes prescriptions, malgré la connaissance la moins équivoque du droit d'autrui, c'est-à-dire de la créance contre laquelle on prescrit. Ainsi celui qui invoque la prescription d'un an, de cinq ans, de six ans contre une dette quelconque, connaissait certainement l'existence de cette dette, pendant tout le temps de la prescription, et néanmoins il prescrit indubitablement. "Régulièrement, dit Merlin, *Verbo* Prescription [Répertoire] page 437, pour se libérer par la voie de la prescription il ne faut point de bonne foi." Tels sont les principes qui ont toujours prévalu et aujourd'hui plus que jamais ces principes sont indéniables, car grâce à la faveur toujours croissante dont la prescription libérative a été l'objet dans toutes les législations, la loi a débarrassé cette prescription de toutes les entraves et les restrictions d'autrefois, et en la rendant *absolue* dans presque tous les cas, elle a prononcé l'extinction définitive de la dette comme punition de la négligence du créancier.

Il n'est cependant pas nécessaire d'invoquer les idées nouvelles pour justifier la réponse que nous donnons à la question ci-dessus. Nous trouvons cette réponse en toutes lettres dans un arrêt du 18 Mai 1684, rapporté au 2e volume du Journal du Palais, page 511.

Knight and Pierce.

Rousseau de Lacombe, *Verbo* Prescription, Sec. III, No. 1. De la prescription de 10 ou 20 ans, dit: "Il faut *juste titre* et *bonne foi*; Paris 113 et 114; *juste titre* s'entend d'un titre fait selon les lois, c'est-à-dire d'un contrat authentique fait dans les formes prescrites pour les contrats entre personnes habiles à contracter. Mais le contrat seul revêtu de toutes les formalités, ne suffirait pas à un acquéreur ou à un donataire, s'il n'était accompagné de *bonne foi*; il faut, pour pouvoir user de la prescription de 10 ou 20 ans, avoir cru que le vendeur ou donateur était propriétaire.

"Il est important d'observer que ce texte de droit (cité précédemment par l'auteur) ne parle que des choses vendues ou données à *non domino*, et de la *prescription de la propriété*; comme il paraît par ces termes, *cum crederet eum Dominum esse; il ne parle point des simples hypothèques* qui ne dépouillent pas un débiteur et n'empêchent pas qu'il ne soit maître et propriétaire; *c'est pourquoi pour empêcher un acquéreur, ou donataire de prescrire les hypothèques par* 10 *ou* 20 *ans, sa seule science ne suffit pas,* il faut une interruption formelle; *c'est ainsi qu'il faut entendre Paris,* 113 *et* 114.

Troplong, *Vente*, No. 660: "Après la renonciation expresse ou tacite, vient comme fin de non recevoir la prescription de l'action en résolution.

"Entre le vendeur et l'acquéreur ou ses héritiers, l'action en résolution ne se prescrit que par 30 ans, et ces trente ans ne courent que du jour où le prix a été exigible.

"Mais les sous-acquéreurs qui réunissent la bonne foi au titre, peuvent se prévaloir de la prescription de 10 et 20 ans.

"*La bonne foi existe quand même le tiers détenteur aurait su que le prix était dû*; car il a pu légitimement penser que le vendeur originaire serait payé par son acquéreur direct."

Durantou, Tome 16, *Vente* No. 364: "Le sous-acquéreur peut opposer la prescription de 10 ou 20 ans à l'action en résolution, s'il a juste titre; *et la connaissance qu'il aurait au temps de la vente, que son vendeur doit encore tout ou partie du prix, ne le constituerait pas en mauvaise foi, à l'effet de l'empêcher d'invoquer cette espèce de prescription*; car il a dû raisonnablement croire que son vendeur paierait son prix."

Grenier, *Hypothèques*, Tome 2, Nos. 514 et 515.

Delvincourt, Tome 3, Notes de la page 182; Note 3, page 385.

Vazeille, *Prescription*, No. 514.

Battur, *Privilèges et Hypothèques*, Tome 4, No. 772.

Bugnet, sur Pothier, *Prescription*, Tome 9, page 363, Note 2, fin du No. 127, du texte de Pothier.

Persil, *Régime Hypothécaire*, sur art. 2180, No. 32.

Enfin la jurisprudence française moderne a aussi affirmé le principe consacré par l'arrêt de 1684, et la Cour Royale de Nîmes a jugé, le 19 février 1839, dans une cause Peythier vs. Combe et Johanny: "que bien que l'acquéreur ait su, au moment de son acquisition, que son vendeur ne s'était pas libéré entre les mains du vendeur primitif, "*cette circonstance ne le constitue pas de mauvaise foi.*

Enfin le Code Civil du P. C. Art. 2251, a une disposition conforme aux principes énoncés ci-dessus.

Kaigle and Pierce.

Fort de ces autorités, l'intimé croit pouvoir conclure sur ce premier point, qu'Henry Sherry ayant possédé sans trouble, et avec juste titre et bonne foi, pendant plus de 14 ans, savoir depuis le 28 janvier 1850 jusqu'au 22 avril 1864, il avait, lorsqu'il a vendu à l'appelant, acquis la prescription contre toutes les hypothèques qui pouvaient grever l'immeuble à lui transmis.

DEUXIEME QUESTION.—Le paiement fait par Henry Sherry en 1858, *pour son père*, peut-il être considéré comme interruption de la prescription qui courait alors au bénéfice du fils; et si oui, la preuve de ce paiement pouvait-elle être faite par témoins?

La réponse à la première partie de cette question est tellement simple et concluante qu'il serait oiseux de s'arrêter à discuter longuement la dernière partie, savoir, si la preuve par témoins pouvait être permise dans l'espèce. Aussi ne le ferons-nous que parce que cette question a été soulevée par l'appelant en Cour de Révision et que c'est sur ce point qu'un des Honorables Juges (M. le juge Mondelet) a différé.

La dette contre laquelle Henry Sherry prescrivait, était celle de Samuel Sherry son père, et non pas la sienne. Pour qu'un paiement considéré comme fait interruptif de prescription put être opposé à Henry Sherry, il aurait fallu que ce paiement fut fait sur une dette dûe par lui, et non sur une dette dûe par un autre. Le paiement n'est une reconnaissance de la dette que de la part de celui qui doit; et ici Henry Sherry ne devait rien. Ce paiement pourrait être valablement opposé à Samuel Sherry, mais il ne peut pas l'être à Henry Sherry. Qu'est-ce qu'Henry Sherry peut avoir reconnu en faisant ce paiement? Une seule chose, il a reconnu que *son père devait* une balance de prix de vente; a-t-il reconnu devoir lui, cette balance de prix de vente? Assurément non, et l'appelant n'a pas encore osé le prétendre. Le contrat d'Henry Sherry porte la clause de *franc et quitte;* il est donc parfaitement libéré lui-même; le seul qui doive, c'est son père Samuel Sherry; le paiement de 1858 peut donc avoir eu pour effet d'interrompre la prescription qui courait alors au profit de Samuel Sherry sur son obligation personnelle de payer le prix de vente, mais non celle qui courait au profit d'Henry Sherry quant à la libération de l'immeuble par lui possédé. L'hypothèque créée par Samuel Sherry sur la terre d'Henry Sherry ne pourrait être dette de ce dernier que s'il y était obligé par son contrat d'acquisition; or, c'est le contraire; impossible donc de faire résulter de ce paiement une interruption de la prescription acquise à Henry Sherry.

Il semble inutile de rien ajouter; qu'importe maintenant qu'il ait été prouvé légalement ou non, qu'Henry Sherry a fait en 1858 un paiement de $100 avec l'argent de son père, pour le compte et sur la dette de ce dernier? L'hypothèque n'en est pas moins prescrite au profit d'Henry Sherry et du défendeur appelant.

Nous dirons cependant que la preuve de ce paiement de $100 ne pouvait être faite par témoins et qu'elle doit être rejetée.

Il suffit sur ce point de référer aux autorités suivantes:

Code Civil du B. C. Art. 1233.

Pothier, *Obligations* Nos. 694 et 695.

Troplong, *Prescription*, No. 622.

Toullier, Tom. 9, No. 97.

Kaigle and Pierce.

TROISIEME QUESTION.—La dernière question est une question de fait. L'Appelant a-t-il fait voir une crainte de trouble suffisante pour le justifier de retenir le prix de l'immeuble entre ses mains ?

Ainsi que nous l'avons établi ci-dessus, l'hypothèque que l'Appelant invoque pour se justifier de ne pas payer, est prescrite depuis longtemps. Néanmoins c'est cette hypothèque seule que craint l'Appelant. Il allègue que Macdonald est cessionnaire de cette créance et qu'il menace de le poursuivre.

Deux observations suffiront pour démontrer que ceci n'est pas sérieux.

1o. Le transport fait à Macdonald, *n'a jamais été signifié* à l'Appelant et bien que ce dernier eût été mis sur ses gardes sur ce point, par les réponses de l'Intimé, en Cour Inférieure, il n'a pas même tenté de prouver que cette signification avait été faite.

2o. Il se dit menacé de poursuite par Macdonald; où en est la preuve ? Il n'a pas même osé examiner Macdonald sur ce point, et pour cause Et d'ailleurs, comment Macdonald pourrait-il le menacer de le poursuivre avant même de faire signifier son transport ?

La seule question sérieuse dans la cause est donc la première et l'Intimé croit l'avoir résolue d'une manière satisfaisante. La Cour Supérieure d'Iberville lui a donné gain de cause et la Cour de Révision a confirmé ce Jugement.

L'Intimé a toute confiance que ce tribunal ne pourra qu'approuver ces décisions et renverra l'Appel avec dépens.

CARON, J. : — Il faut voir les faits au factum de l'Intimé, qui est très bien fait, et qui traite la question que soulève cette cause.

L'action est par l'intimé, cessionnaire de Henry Sherry, contre l'appelant pour balance du prix de vente d'un immeuble que lui a vendu le dit Henry Sherry, cédant de l'intimé.

L'action est personnelle contre l'appelant, comme aurait pu la porter Sherry lui-même, le cédant. (Il est pourtant dit au factum de l'intimé page I que l'action est personnelle et hypothécaire) Je ne la crois que personnelle portée contre l'acheteur lui-même. Le défendeur a plaidé que la terre qu'on lui a vendue est chargée d'une hypothèque, qu'il indique au montant de £170 pour laquelle il est menacé d'être poursuivi hypothécairement, par suite de quoi il n'est pas tenu de payer à moins que l'on fasse disparaître cette hypothèque ou donne caution.

Réponse de l'intimé demandeur, cette hypothèque est prescrite, n'existe plus et le défendeur ne court aucun risque d'être troublé.

Enquête de part et d'autre et questions soumises.

1o. Henry Sherry, qui est prétendu avoir prescrit hypothèque par possession de 14 ans avec titre (donation de son père) connaissait l'existence de la créance *Soupras*. Cette connaissance l'a-t-elle constitué en mauvaise foi, de manière à l'empêcher de prescrire ?

2o. Le paiement qu'il a fait à la succession *Soupras* a compte cette créance hypothécaire, a-t-il interrompu la prescription ?

3o. Le défendeur (appelant,) a-t-il raison de craindre le trouble qu'il allègue ?

La première question d'après les autorités citées par l'intimé, et autres doit

se décider en sa faveur; elles établissent que la connaissance qu'a le possesseur d'un immeuble de l'hypothèque dont il est chargé. ne l'empêche pas de prescrire pour s'en libérer, comme le dit en propres termes Troplong, cité à la page 3 du factum de l'Intimé comme suit:

"La bonne foi existe quand même le tiers détenteur aurait su que le prix "était dû, "car il peut légitimement penser que le vendeur originaire serait payé "par son acquéreur direct."

Cette doctrine est confirmée par les auteurs cités au factum, ce qui décide affirmativement la première question posée.

Il en est de même pour les mêmes raisons de la seconde, le paiement allégué est prouvé par le dit Henry Sherry seulement; or il dit positivement que c'est avec l'argent de son père et comme agent de son père qu'il a fait ce paiement à la succession *Soupras* sur le prix de la dite vente, ce qui devait le confirmer dans sa bonne foi et lui faire croire que la créance serait payée par son père, l'acheteur originaire et débiteur personnel.

Ce paiement n'a donc pas interrompu la prescription; si tel est le cas, l'hypothèque invoquée par le [illegible]eur était depuis longtemps éteinte et prescrite lorsqu'était portée la p[illegible]action. Le défendeur n'ayant aucune raison de craindre d'être troublé devait être condamné à payer la somme demandée, c'est ce qui a été fait par le jugement dont est appel, lequel doit être confirmé.

Il en serait autrement s'il s'agissait d'une prescription acquisitive sur laquelle nous ne sommes pas appelés à nous prononcer dans l'espèce.

Judgment of Superior Court confirmed.

L. G. MacDonald, for appellant.

Strachan Bethune, Q.C., counsel.

Jetté & Archambault, for respondent.

(S. B.)

SUPERIOR COURT, 1870.

MONTREAL, 30TH SEPTEMBER, 1870.

Coram BEAUDRY, J.

No. 939.

Hutchins et al., vs. *Cohen*, and *Cohen*, Plaintiff *en garantie*, vs. *Whyte*, Assignee, Defendant *en garantie*.

HELD:—That an Assignee under the Insolvent Act of 1864 cannot be sued *en garantie* in respect of a matter for which the Insolvent was liable to guarantee the plaintiffs *en garantie*.

This was a hearing on law. The defendant *en garantie*, who was assignee of one Franck under the Insolvent Act of 1864, was sued as such, to guarantee and hold harmless the plaintiff *en garantie* (the defendant in the original suit); the demand of the original plaintiff being one that Franck was bound in law, at the time of the assignee's appointment, to guarantee the defendant against.

The defendant *en garantie* fyled a demurrer to the action on the ground that no such action lies in law against an assignee under the Act, the only remedy being the fyling of a duly attested claim on Franck's estate.

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After hearing the parties, and taking time to consider, the Court maintained the demurrer and dismissed the action *en garantie*.

Action *en garantie* dismissed on demurrer.

Duhamel & Ruttville, for plaintiff *en garantie*.

Hon. J. J. C. Abbott, Q.C., for defendant *en garantie*.

(S. B.)

COURT OF REVIEW, 1870.

MONTREAL, 30TH NOVEMBER, 1870.

Coram BERTHELOT, J., TORRANCE, J., BEAUDRY, J.

No. 40.

Martin vs. *Thomas* dit *Tranchemontagne*.

HELD:—1. That an Insolvent under the Act has no legal interest to plead an assignment made by him under the Act, in bar of proceedings on compulsory liquidation.

2. That, in case of an assignment so made to an official assignee, non-resident in the county or place where the insolvent has his domicile, evidence must be adduced, by the party pleading such assignment, that there is no official assignee resident in such county, and this notwithstanding that the Sheriff, in his return to the writ of attachment, certifies, that there is not an official assignee so resident, and that, in consequence thereof, he has appointed a special guardian.

3. That a petition to stay proceedings fyled by an insolvent, after the expiration of five days from the demand of an assignment, on the ground that he has assigned to an official assignee, is too late.

This was a hearing in Review of a judgment rendered by THE HON. MR. JUSTICE LAFONTAINE, at Aylmer, in the district of Ottawa, on the 18th of June, 1870, maintaining the petition of the defendant to stay the proceedings of the plaintiff in compulsory liquidation, by writ of attachment, under the Insolvent Act of 1869, and quashing the attachment.

The insolvent resided at Bonsecours, in the district of Ottawa, where a demand of assignment was served on him by plaintiff, on the 21st December, 1869.

On the 29th December, 1869, the insolvent made an assignment in Notarial form, to Henry Howard, official assignee, residing at St. Andrews, in the district of Terrebonne.

On the same day, the plaintiff sued out proceedings in compulsory liquidation, by writ of attachment, at Aylmer.

The writ was served on the insolvent on the 30th December, 1869, and was returned on the 10th January, 1870. And, in his return, the Sheriff certified, that there was no official assignee resident within the district of Ottawa, and that, in consequence he had appointed a special guardian.

On the 12th January, 1870, the insolvent caused a petition to stay proceedings to be served on the plaintiff, which was fyled on the 13th of January, 1870. By this petition the insolvent pleaded the assignment to Howard, alleging that there was no official assignee resident in the county or place where the insolvent had his domicile, and that Howard was the nearest resident assignee.

To this petition, the plaintiff fyled a general answer on the 16th of February, 1870.

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No evidence of any kind was adduced in support of the petition, and the parties having been heard before the Judge, he rendered the following judgment, on the 18th of June, 1870:—

"Considering that, at the time of the execution of the present attachment, the defendant was an insolvent, and his estate and effects vested in the hands of an assignee, maintaining the conclusions of the said petition, it is considered and adjudged that the said attachment, and all the proceedings thereunder, be, and the same are hereby, set aside and quashed, and further the *demande* of the plaintiffs hereby dismissed. The whole with costs against the plaintiff," &c.

The following was the judgment of the Court of Review:—"La Cour * * * considérant que le dit Joseph Thomas dit Tranchemontagne était mal fondé en sa requête par lui présentée en cette cause, le 13 janvier, 1870, et qu'il n'a fait aucune preuve legale au soutien d'icelle, et qu'il était sans intérêt à présenter la dite requête, considérant de plus, que la cession ou le prétendu acte de cession invoqué par le dit défendeur en sa dite requête était tardif et sans effet, n'ayant pas été fait dans les cinq jours suivant le 21 décembre 1869, La Cour, pour ces raisons, a cassé, revisé et annulé le dit jugement du 18 juin 1870, et a renvoyé et rejeté la dite requête" etc., etc.

Judgment of Superior Court reversed.

Perkins & Monk, for the plaintiff.

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

(S.B.)

COURT OF QUEEN'S BENCH, 1871.

APPEAL SIDE.

MONTREAL, 9th MARCH, 1871.

Coram DUVAL, C. J., CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

No. 47.

JAMES MARTIN,
(*Defendant in Court below,*)
APPELLANT;

AND

ANDREW F. GAULT, ET AL.,
(*Plaintiffs in Court below,*)
RESPONDENTS.

HELD:—1. That payment of money secured by a guaranty is not to be presumed to have been made in discharge thereof.

2. That a guaranty to a certain sum given for a third person is uncertain and unliquidated until the deficiency due by the third person has been ascertained.

3. That the composition discharge under the insolvent act of 1864, affects the Insolvent only, but does not relieve outside parties, secondarily liable, not parties to the insolvent proceedings.

4. That the guaranty in question, signed by one partner in the name of the firm, was valid and binding.

5. That no proof being made as to the signature, and Defendant not having denied the same (under affidavit), it was held to be signed by him.

The judgment of the Superior Court was rendered at Montreal, the 30th April, 1870, by His Honor Mr. Justice Torrance, as follows:

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"The Court, &c., &c., &c., considering that the defendant, James Martin, "hath not, in the terms of the Code of Civil Procedure, Article 145, by affidavit, "denied that he or the defendants signed the letter of guarantee;

"Considering the several exceptions pleaded, not proved, &c., condemns the "Defendants jointly and severally, &c., to $325.95, &c., with costs.

D. Girouard, for appellant, contended that it was clear that the sum of $337.80 had been paid by P. Martin & Co. to Gault Brothers & Co., after the granting of the said letter of guarantee, and according to the principle of our Common Law, reproduced in our Code [Art. 1161], which declares that payments should be applied on the most burdensome debt, the letter of guarantee in question is satisfied and extinguished to the extent of the said sum of $387.80; that a debt, for which security has been given, comes within the scope of the said article is too clear to be called in question; it suffices to quote from Pothier, Obligations No. 57, Cor. 5.: "L'imputation se fait plutôt sur la dette pour laquelle "le débiteur avait donné des cautions que sur celles qu'il devait seul."

The appellant pleaded specially the payment and satisfaction of the said letter of guarantee, and it is astonishing that the Court below did not notice the said payment, and gave judgment for the respondents for the full amount claimed.

The appellant contends that he was discharged from all liabilities of the said firm of M. & J. Martin under the said deed of composition.

No comment is necessary to show that the appellant is discharged under the said deed of composition from the payment of the said letter of guarantee. It seems clear that, when the said respondents declared that "the said James "Martin shall be entirely exonerated and discharged from the claims of the "said parties of the first part, respectively, against the said late firm of M. & J. "Martin," they should be held to mean all claims and causes of indebtedness against the said firm.

Finally, the provisions of the Insolvent Act of 1864, by which the said deed of composition is governed, are conclusive in favor of the appellant. A deed of composition and discharge has the same effect as an ordinary discharge obtained under the said Act [sect. 9, par. 1.] The consent in writing to the discharge of an insolvent, "absolutely frees and discharges him from all liabilities what-"soever, existing against him and proveable against his estate, which are men-"tioned and set forth in the statement of his affairs annexed to the deed of "assignment, or which are shewn by any supplementary list of creditors fur-"nished by the Insolvent, previous to such discharge, and in time to permit the "creditors therein mentioned obtaining the same dividend as other creditors "upon his estate, or *which appear by any claim subsequently furnished to the "assignee.*"

As the appellant has remarked, the respondents subsequently fyled a claim for the said letter of guarantee, on the 8th January, 1869, that is, three days before the declaration of the first dividend, six months before the declaration of the second dividend, and one year before the declaration of the last dividend, and five months before the *retrocession* by the assignee to the insolvent, Michael Martin.

The appellant also respectfully submits that, as the granting of a letter of guarantee is not within the ordinary course of business of a partnership, he cannot be charged with the said letter of guarantee, unless the respondents fully establish that the same was given by himself, or with his knowledge, which they have failed to prove.

John A. Perkins, for respondents, argued:

Appellant did not deny the signature to letter of guarantee, as required by Article 145, Code de Procédure. It is therefore held to be his writing.

That M. & J. Martin were satisfied with the letter of guarantee is proven by the fact of their adding certain words thereto before signing the same.

No payments beyond credits given in accounts and statements are proven, and therefore the first plea of appellant is wholly unsupported by any evidence whatever.

The guarantee was promised by both Patrick Martin and Michael Martin long before it was given respondents.

Respondents have never compounded for or received aught on account of balance due on letter of guarantee.

In his proceedings in insolvency Michael Martin studiously avoided mentioning any claim that might arise against him under the guarantee: An insolvent debtor is only discharged from such debts as are made known by him or by the claimants. Were it otherwise, how would the number or amount required for composition be ever computed? The Act of 1864 is positive upon this point.

Never have respondents claimed in insolvency for amount now sued and received anything under any such claim.

The guarantee covers the amount due now, as disclosed by the evidence adduced and by the terms of guarantee itself.

The appellant is not a party to any proceedings in insolvency of Michael Martin. He is not bound thereby and has not been discharged of this debt now claimed.

By Appellants' Exhibit No. 2 the creditors (among other respondents) only compounded for and discharged Michael Martin of such claims as were made known at the time and included in schedule attached to such deed. In this schedule we find the debt of Gault Brothers & Co. fixed at $3308.69. The amount now claimed is not included therein.

DRUMMOND, J., dissenting, was of opinion that the guaranty for a particular purchase to the extent of $400 was discharged by the payment of over $400 on that purchase by P. Martin & Co. The guaranty was not a continuing one and for $400 only. He would reverse judgment appealed from and dismiss suit of respondents.

BADGLEY, J., giving the judgment of the Court:—In May, 1867, the firm of P. Martin & Co., of St. Placide, composed of Patrick Martin and J. Bte. Decary, opened a credit with Messrs. Gault Brothers & Co., of Montreal, and purchased from them goods to the amount of $710.94, payable at the usual terms of credit and for $400, of which they were to give the sellers the guaranty of M. & J. Martin of Beauharnois, composed of Michael and James Martin.

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The guarantee dated the 27th of September following, four months after the purchase, was given to Gault Brothers about the time of its date and was in the following terms: "Beauharnois, 27 September, 1867. Sirs, we hereby agree to "guarantee payment of Messrs. P. Martin & Co's. purchase from now to the "extent of $400 for goods purchased by them last spring, yours, &c., M. & J. "Martin."

At the date of the guarantee Messrs. M. & J. Martin were in business connections to a considerable amount with Gault Brothers and their guarantee was at once accepted by the latter.

In the month of January, 1868, the firm of M. & J. Martin was dissolved by the retirement of James, the appellant, and the business was continued by Michael Martin in his own name until the following 23rd of June, 1868, when he became insolvent, and by the operation of the Insolvent Act he assigned for $21805, including in his schedule of liabilities his creditors, Gault Bros., for $3223.67, as due by notes, and for which they filed their claim in due course in insolvency which was afterwards duly allowed, less $600, for which the claimants retained mortgage security, but the liability upon the guaranty above mentioned was not included in the schedule of creditors. On the 18th of July, 1868, Michael, the insolvent, offered a composition of 6/3 in the £ to the creditors for himself, *as an individual and as late co-partner of the firm of M. & J. Martin*, which was duly accepted, and, in consequence, the usual deed of insolvent composition was executed between himself and his creditors, and the composition was in due course paid to and received by them, whereupon he was discharged from his schedule liabilities, and his estate subsequently returned into his possession.

At the date of the composition discharge the guaranty above mentioned was only an indirect liability against Michael & James Martin for P. Martin & Co., who were still doing business, and who only followed Michael's example of going into insolvency some time after, namely, on the 16th of November, 1868, but with a worthless estate and without offer of composition. When P. Martin & Co. became insolvent the balance in account current due by them to Gault Bros., after crediting payments on account and debiting and crediting interest in the usual mercantile manner, was $325.95 which at once fixed the amount covered by the guaranty, and for which this action has been instituted by Gault Bros., the respondents, against Michael Martin and James Martin, jointly and severally, as an undischarged liability of their late firm; both were brothers of Patrick Martin, the leading partner of the insolvent firm of P. Martin & Co., and doubtless interested in their brother's prospects and advantage.

Several pleas have been filed against the action, the principal of which need only be noticed here. The first of these is, in effect, a plea of payment by the application of the payments made to Gault Bros. by P. Martin & Co., previous to their insolvency, on account of their debt, and which payments, amounting to more than $400, it is pleaded discharged the guaranty by the mere effect of the payments made. Now this involves the defining of a guaranty which Fell says "is a promise to answer for the payment of some debt, &c., in case of the failure of another person who is in the first instance liable to such payment." The gua-

ranty is a collateral to the main engagement and as tersely observed in 2 Pardessus, p. 523, "le cautionnement d'un crédit diffère de celui d'un simple emprunt," and the difference in its legal effect is shewn in 3 Delvincourt 252 and Savary Parêve 74; it is not a merely legal suretyship. Pitman, Principal and Surety, p. 92, says: "A guarantee being a contract of indemnity to make good the default of the party for whom the guarantee is given, is, therefore, not an absolute debt but an engagement to pay what shall be found due from the principal, [necessarily within the amount limited by the guarantee] and, until that fact of what shall be found due is known, it is in the nature of a claim for unliquidated damages." 4 Esp. N. P. Cases 207. Now the engagement of guaranty may as here be confined to a particular dealing or transaction or it may extend to a series of dealings. If a single dealing or transaction only is contemplated, the guarantee is extinguished when or as soon as the contemplated dealing or transaction *has been completed or satisfaction made by the principal*, and at p. 41 Pitman says "again the liability of the guarantor is co-existent with that of the principal upon the particular transaction in regard to which such liability is assumed;" thus extending to the non-satisfaction of the whole purchase within the limit of the guaranty. It has been proved that the purchase remained unsatisfied to the extent of $325.95 the balance of the particular dealing for which the guarantee was given, and that balance so fixed constitutes the liquidated debt due by the guarantors. Assuming the above to be established and conclusive, the question of the appropriation of payment, as pleaded here in payment of the guaranty, is explained in Plomer vs. Long, 1 Starkie N. P. Cases, p. 101, being an action on a bond in which there was a surety. It was contended that the payments made by the principal subsequent to its execution, ought to be appropriated to the bond in favor of the surety; *sed per* Lord Ellenborough, C. J., "the plea is payment, and the question is whether the payment was made *animo solvendi*. The general rule is that, where nothing is directed as to the application, the person who receives may apply it. In a Court of law this cannot be considered a payment in discharge of the bond, without some circumstances to show that it was so intended." Here the payments were not made or applied to discharge the guaranty, and the respondent's clerk proves that the payments were agreed by the principal, P. Martin & Co., that they should not affect the guaranty for the remaining balances after each payment.

The point of the application of payments in this case will be found in Fell and also in Delvincourt and Savary, above referred to, and does not require to be discussed here. Again, where the guarantee is general it is *in omnem causam*, as shown by Delvincourt loc. cit. If the guarantors desired to escape from the interest chargeable on the principal's purchase, they ought to have taken their precautions to protect themselves against it, which they have not done. As to the partnership signature to the guaranty, it is sufficient to bind the partnership if uncontradicted. The presumption of liability, according to our law, favors the liability of the partnership. It was for the appellant to establish the fact that he, as a partner of the firm, was relieved. He has not done so, and it stands good against him.

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The next plea to be noticed is the averment of the effect of the insolvent's discharge, under the deed of composition by Michael, as also discharging James, the appellant. It is necessary to observe that this appeal has been instituted by James only, the judgments appealed from, so far as Michael is concerned, stand in full force by the effect of his acquiescence, and the only question raised by this plea is whether the deed of composition between Michael and his creditors, his payment of his composition to his creditors, and the consequent discharge in insolvency upon the deed, relieved and discharged James from this claim, James not being a party to Michael's proceedings in insolvency and without privity to his deed of composition and discharge. It is proper to state that the liability of Michael and James was several as well as joint, and as no insolvent proceedings were had by James, and he in no way participated in the composition or its payment to the creditors, he necessarily remains within the exceptive provision of the 4 sub. sec. of sec. 9, of the Insolvent Law of 1864: "The "discharge of an insolvent shall not operate any discharge in the liability of any "person or company secondarily liable for the debts of the insolvent, either as "drawer, indorser, guarantor, &c., nor of any partner or other person liable jointly "and severally with the insolvent for any debt; nor shall it affect any mortgage, "lien, or collateral security held by any creditor as security for any debt thereby "discharged." These are the words of the Statute under which James remains liable as the undischarged debtor upon this liability, and, therefore, Michael's composition discharge is quite inoperative for the benefit of the appellant.

It only remains to add, as a matter of procedure, that, if the principal be insolvent, as the firm of P. Martin & Co. was, when the debt in which the guaranty is given becomes due, no demand need be made on the principal in order to bind the guarantor, upon the presumption that in such case no injury could be done to the guarantor by want of notice. Under these circumstances the appeal must be dismissed.

Judgment confirmed, the Hon. Mr. Justice Drummond *dissentiente*.

D. Girouard, for appellant.

John A. Perkins, for respondents.

(J.A.P.)

CIRCUIT COURT, 1871.

COWANSVILLE, 3rd MARCH, 1871.

Coram RAMSAY, A. J.

Webster vs. *Philbrick, and Wilkie*, opposant, and plaintiff contesting.

HELD:—That the plaintiff, residing out of the Province, cannot be compelled to give security for costs, nor can his attorney *ad litem* be compelled to produce his power of attorney, on an issue raised by the plaintiff contesting the opposant's opposition.

PER CURIAM: This is a motion on the part of opposant to compel the plaintiff contesting the opposition to give security for costs and to file a power of attorney to his attorney *ad litem*. This is really the matter of two motions. As to the security for costs, art. 29, C.C., provides that "Every person, not resident in Lower Canada, who brings or institutes any action, suit or proceeding in its Courts is bound to give to the opposite party, whether a subject of Her Majesty or not,

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security for the costs which may be incurred in consequence of such proceeding." This article is taken from the 41 Geo. III, c. 7, sec. 2, which provides that, in all actions, oppositions, and suits prosecuted before the Courts of civil jurisdiction in this Province, by any person or persons residing without the Province, whether such person or persons be subjects of Her Majesty or not, the defendant, or others concerned, may demand and obtain good and sufficient security, at the discretion of the said Court, for payment of their costs, in case the *plaintiffs* or *prosecutors* should fail in such their said actions, oppositions or other suits; and all proceedings shall be stayed and suspended until such security shall have been offered and received." The interpretation of this section gave rise to some question (see Mayer et al. *vs.* Scott and Benning, et al., 4 L. C. J., p. 46, Brigham *vs.* McDonald et al., and Devlin, 10 L. C. R. p. 452, Scott et al. *vs.* Austin and Young et al., 5 L. C. J., p. 53). In the C. S. L. C., cap. 83, sec. 68, the wording was slightly altered. I only notice the slight difference in the wording of the statute of the 41 Geo. III, and that of the statute proclaimed in the 24th of the Queen, to show that, with the jurisprudence before them, and paying the minutest attention to the phraseology of the law, the persons to whom the consolidation of the statutes was confided maintained the old wording in all essentials. It may be safely stated that, before and after the consolidation, the jurisprudence was uniform, with the exception of the case of Mahoney et al. *vs.* Tomkins, and Geddes et al., 9 L. C. R., p. 72, which seems to have been decided under some misapprehension as to the previous jurisprudence. But on the most careful examination I can give to the reported cases, they seem to me, with this exception, to indicate the principle that the absentee plaintiff should be held to give security for costs, and not the absentee defendant. This too is in conformity with the old law of France: "L'étranger doit donner la caution *judicatum solvi*; au reste cette caution n'est due par l'étranger, que lorsqu'il est demandeur parcequ'il comparait en jugement ce n'est que parcequ'il est forcé," arrêt du 13 Février 1581. Pothier, Tr. des personnes, p. 577, The case of Mahoney et al. *vs.* Tomkins and Geddes is further overruled in the case of Brigham *vs.* McDonnell et al. and Devlin, already cited, and in the case of Morrill *vs.* McDonald et al. and Ross et al., (1851) 6 L. C. J., p. 40. I may further add that the cases cited in support of Mahoney et al. *vs.* Tomkins and Geddes do not appear to me to be incompatible with a ruling different from that which obtained in that case. In Benning *vs.* The Rubber Co. and Young et al., the contestation was not of an opposition but of a collocation of a judgment of the Court, and therefore it was that Mr. Justice Mondelet held that as opposants those contesting the collocations were within the 41 Geo. III (2 L. C. J., p. 287). The other case cited in support of the ruling in Mahoney et al. *vs.* Tomkins and Geddes was the case of Church *vs.* Bostwick and Wheeler. It is not reported; but it is only necessary to say that the contestation there was the declaration of a *tiers-saisi*, and that therefore it is similar to the case of Mayer et al. *vs.* Scott and Benning et al., 4 L. C. J., p. 146, and is not a case in point. But, on the other hand, how can the case of Mahoney et al. *vs.* Tomkins and Geddes be reconciled with Scott et al. *vs.* Austin, and Young et al., 5 L. C. J., p. 53, which condemned a non-resident intervening party to give security? Who is the *intervenant* in the present case?

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Clearly the opposant. If both intervenant and plaintiff have to give security for costs, and the plaintiff contesting is to be held to be plaintiff on the contestation, then both opposant and contesting party must give security, which is absurd. I need not combat the pretension that the origin of the proceeding is the execution, for no one has ever pretended that the plaintiff executing his judgment shall give security, although it is a new *instance*.

I have entered thus at length into an examination of these cases on account of the case of Baltzar et al. *vs.* Growing and Hutchinson et al., which, rejecting the ruling in Morrill *vs.* McDonald et al. and Ross et al., and of Brigham *vs.* McDonnell et al. and Devlin, confirms the ruling in Mahoney et al. *vs.* Tomkins, and Geddes et al. This decision seems to have been to some extent influenced by the terms of the C.C., art. 29, which it becomes therefore important to examine. The act respecting the codification of the laws of Lower Canada, relative to civil matters and procedure, cap. 2, C. S. L. C., provides that "the said Codes shall be framed in the French and English languages, and the two texts, when printed, shall stand side by side." Notwithstanding this declaration of equality of "the two texts," it is evident that one text must necessarily be the original; and, as a fact, article 29 of C. C. was drafted in French. In addition to this, the last article of the C. C. (2615) declares that "if in any article in this code, founded on the laws existing at the time of its promulgation there be a difference between the English and French texts, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded." Now, on looking at the article 29, it will be seen that it purports to be old law, that is, the law of the 41 Geo. III., which is in its turn, an adoption of the law as explained by Pothier. On referring to the French version of art. 29, it will be seen that there is a difference in the two texts. The English text says, "who brings or institutes any action, suit or proceeding in its courts," etc.; the French version says, "qui y porte, intente, ou poursuit une *action*, instance ou procès," etc. The translation of *procès* by the word *proceeding*, is glaringly inexact. A contestation of an opposition is a proceeding but it certainly is not a *procès*. The French text being the original, and above all the most consistent with the law existing at the time of the promulgation of the code, I must be bound by it. But really the difference of opinion seems to be as to which is plaintiff—the opposant or the contesting party. On this point I cannot understand there being a doubt. A fair test is to ask: "Who has the right to begin and to reply?" Evidently the opposant. He is therefore plaintiff and cannot have security from the plaintiff contesting the opposition. While on art. 29, it may be a matter of curiosity to know that the words in the original draft were "partie attaquée ou poursuivie," but that the precaution of using this circumlocution became unnecessary from the careful wording of what precedes. As contestant is not plaintiff, he is not obliged to produce any power of attorney. The motion is, therefore, dismissed with costs.

Motion for security of costs, etc., rejected.

Ernest Racicot, for opposant.

O'Halloran & Mitchell, for plaintiff contesting.

(S. B.)

SUPERIOR COURT, 1870.

MONTREAL, 30TH NOVEMBER, 1870.

Coram BERTHELOT, J.

No. 2252.

Terrill vs. *Haldane* et al.

HELD.—1.—That the *service*, by the defendants of a *notice* of motion (not really fyled or presented to the Court) does not interrupt *peremption*.

2.—That a motion for *peremption d'instance* really made by two out of three members of a legal firm (the attorneys of record [illegible] without any substitution of attorneys previously allowed by the Court, and [illegible] that the remaining member of the firm is either dead or has ceased to practise.

3.—That a requisition by plaintiff for process to examine defendants *sur faits et articles*, fyled on the same day that service is made of the motion for *peremption*, will not interrupt the *peremption*.

4.—(Overruling Howard & al. *vs.* Childs & al. 9 L. C. Jur., p. 22) that the death of two of the defendants does *not* interrupt the *peremption*.

This was a motion for *péremption d'instance*, by two of the defendants.

The motion was made on the 25th October, 1870, having been previously served with the notice thereof, on the 22nd of the month, and was signed and presented in Court by "Dorion & Dorion" as attorneys of the applicants.

Messrs. Dorion, Dorion & *Sénécal* were the attorneys of these defendants on the face of the record. And no substitution of attorneys had been asked or allowed. And no evidence was adduced that Mr. Sénécal was either dead or had ceased to practise.

On the 21st October, 1870, the plaintiff was served, on behalf of the same defendants, with a notice of motion which was never fyled or presented in Court.

The plaintiff fyled in the case, on the 22nd October, 1870, a requisition for process to examine the defendants *sur faits et articles*.

The plaintiff objected, in writing, to the granting of the motion, on several grounds, and, amongst others, because the *péremption* was interrupted, by reason of the service of the notice of motion, on the 21st October, and by the fyling of the requisition on the 22nd of that month,—also because Messrs. Dorion & Dorion were not the attorneys of record for the defendants, who were in reality represented by Messrs. Dorion, Dorion & *Sénécal*, and because two of the defendants were dead.

The Court overruled all the objections and granted the motion, the judge referring to Day *vs.* Décousse & al., 12 L. C. Jur. p. 265, and remarking that he was satisfied now that the judgment which he had rendered in Howard *vs.* Childs & al., (9 L. C. Jur., p. 22) was incorrect, and that, notwithstanding the death of some of the defendants, the others had a right to demand and obtain the benefit of the *péremption d'instance*.

Motion for *péremption d'instance* granted.

H. W. Austin, for plaintiff.
T. W. Ritchie, Q.C., Counsel.
Dorion & Dorion, for defendants.

(S. B.)

SUPERIOR COURT.

In Review.

MONTREAL, 31st JANUARY, 1871.

Coram Mondelet, J., Torrance, J., Beaudry, J.

No 334.

Childerhouse vs. *Bryson*, et al.

Held:—That the writ and declaration in the Circuit Court constitute the *exploit de citation* and that the conclusions in the writ to this effect "that the plaintiff prays judgment accordingly," supply the omission of such conclusions in the declaration annexed to said writ.*

This action was brought in the Circuit Court, for the District of Ottawa, on a promissory note, for $130.

Annexed to the writ of summons was a declaration which contained the usual allegations of an action and promissory note, but the usual conclusions were omitted.

The defendant having fyled a *défense en droit*, without reasons assigned, and the parties having been heard, the defendant urged the omission of conclusions to the declaration.

Upon this ground, the Court (Lafontaine J.) dismissed the action with costs.

In the Court of Review, in Montreal, the plaintiff contended that by the 15th rule of practice of the Circuit Court, the reasons of the *défense en droit* ought to have been assigned—that the writ and declaration taken together contain sufficient conclusions. The plaintiff referred to Stuart's Reports, p. 107, and further stated that, according to the rules and orders of the Court of King's Bench, for the District of Quebec, the writ of summons contained no statement of the demand or plaint, and no prayer for redress. This form of writ continued in use until the passing of the Judicature Act of 1849, 12 Vict. ch. 38, when a new provision was made respecting writs in the Circuit Court, produced in Section 170, Con. Stat. for L. C., form L. contained in the Schedule to that Act and Art. 50, C. C. P., No. 35, Appendix C. C. P. This writ contains a prayer for judgment.

It will be observed that the law only requires that the causes of action be set forth in the writ or in the declaration annexed to it.

The law does not require the declaration to contain conclusions, the only conclusions in the writ are sufficient when the causes of action are stated in it "and the plaintiff prays judgment accordingly." The declaration being annexed to the writ, which forms part of the process and takes the place of the statement which would otherwise require to be inserted in the body of the writ, the conclusions taken only in the writ, as follows, "and the plaintiff prays judgment accordingly," ought to be sufficient. That the objection ought to have been raised by an *exception a la forme*, C. C. P. Art. 119.

* C. C. P. Arts. 50, 1065. Appendix, Form No. 35.

The defendant cited Stuart's Reports, Paquet & Gaspard, p. 108, and Forbes & Atkinson.

Pigeau, Proc. Civile pp. 399, 400, C. C. P., Art. 17.

Ord. 1667, Tit. 35, Art. 34.

The judgment of the Court of Review, reversed the judgment of the said Circuit, as follows:—

The Court now here sitting as a Court of Review, considering that the *défense en droit*, pleaded by defendant, is informal, contain no special reasons, and should have been rejected; Considering that the said *défense en droit* has not been adjudicated upon; Considering that the writ and declaration constitute the *exploit de citation*, and inasmuch as there are conclusions in the said writ, and reference therein is made to the declaration thereto annexed, thereby connecting them; Considering that there is error in the judgment, rendered on the 20th December, 1869, by the Circuit Court of the District of Ottawa, this Court doth reverse and annul said judgment; and it is ordered and adjudged that the said *défense en droit* be, and the same is, dismissed, and on the merits that defendants be, and they are hereby, condemned jointly and severally to pay and satisfy to the plaintiff for the causes mentioned in his, said plaintiff's declaration, the sum of $130, with interest from 1st September, 1866, and costs, save and except the costs of the articulation of facts, which is informal.

Judgment for plaintiff.

Fleming, Church & Kenney, attorneys for plaintiff.

Perkins & Monk, attorneys for defendant.

(P. R. L.)

CIRCUIT COURT, 1871.

MONTREAL, 1st AUGUST, 1871.

Coram BEAUDRY, J.

No. 1456.

Dwyer vs. *Barlow.*

HELD.—That an action to annul or rescind a lease of moveable property, will not be brought in a summary manner under the provisions of the Article 887, and seq., of the Code of Civil Procedure, which apply only to cases of real estate.

The plaintiff by his action brought before the Circuit Court at Montreal in July, 1871, alleged a notarial lease, dated the 23rd June, 1871, made by the plaintiff to the defendant of a spotted horse for the space of four months at a rent of $2 per week, and claimed the rescision of the lease on non-payment of eight dollars for four weeks rent due.

The defendant pleaded to this action as follows: "That each, all and every "the matters and things set forth and described in the action and demande of "plaintiff are false, untrue and denied.

"That the contract in question was and is a sale, and defendant paid plaintiff "$9 on account which is more than the sum now claimed, and this action to "rescind and dispossess cannot be maintained, and defendant prays for its dis-"missal with costs."

Kinmond vs. Beaudry.

The parties went to proof on the 28th July, 1871.

PER CURIAM.—This Court sitting under the provisions of the Article 887, and seq., of the Code of Civil Procedure has no jurisdiction over a case respecting leases of moveable property.

The action is therefore dismissed with costs, saving to plaintiff his recourse before the proper tribunal.

Action dismissed.

Quinn, attorney for plaintiff.
Perkins, Monk & Foran, attorneys for defendant.
(P. R. L.)

SUPERIOR COURT, 1871.

IN REVIEW.

MONTREAL, 30TH MARCH, 1871.

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

No. 2281.

Kinmond vs. *Beaudry.*

HELD:—That when an article contracted for has been delivered, but not in proper order for the purpose required, the purchaser is well founded in protesting and requiring the same to be put in proper order, and in his offer to give back or allow the contractor to take it away.

The judgment in this cause was rendered by the Superior Court at Montreal, on the 31st October, 1870, (Beaudry, J.) and explains sufficiently the question at issue between the parties. It is *motivé* as follows:—

"The court having heard the parties by their counsel respectively, examined the "proceedings and proof of record, and on the whole maturely deliberated; con- "sidering that the said defendant has established in evidence that the blower for "the recovery of the price whereof the present action has been instituted, was "intended to procure burning of hard coal in the furnace of the steamer "'Beaver,' and that the said blower was insufficient to procure the burning of "said hard coal, and was altogether useless to the said defendant, who by nota- "rial protest required the said plaintiff to put the said blower in proper order for "the required purpose as aforesaid, or to remove and take away the said blower, "doth grant acte to the said defendant of his offer to give back or allow the "plaintiff the said blower and appurtenances, and doth dismiss the said plaintiff's "action with costs."

This judgment was confirmed in review.

Kerr, attorney for plaintiff.
Jetté & Archambault, attorneys for defendant.
(P. R. L.)

SUPERIOR COURT, 1871.

In Review.

MONTREAL, 29th APRIL, 1871.

Coram MONDELET, J., MACKAY, J., TORRANCE J.

No. 408.

Wicksteed vs. *The Corporation of the Township of North Ham et al.*

HELD:—That the provisions of the Civil Code prohibiting agents and others from becoming buyers of the property, which they are charged with the sale of, apply to subordinates.*

This action instituted before the Superior Court for the District of St. Francis, was brought to annul a sale for municipal taxes and rates, made at the instance of the defendants, the Corporation of the Township of North Ham, in February, 1868.

The plaintiff in his declaration alleged that in the month of November, 1867, the lot was sent up by the secretary-treasurer of North Ham to the secretary of the County of Wolfe, to be sold for arrears of taxes, and was in due course advertised by the county-secretary to be sold on the 3rd February, 1868. That the whole lot was sold by him without competition and for the amount of the taxes $45.25, being one-fifth or twenty per cent. of the whole value of the lot, to the secretary-treasurer of the Township of North Ham, and as well upon the informalities of the local council, as upon the illegal adjudication to the secretary-treasurer of the said municipality, being the officer by and through whom all the proceedings taken in bringing the land to sale were had.

The action was contested only by the corporation of North Ham, the corporation of the County of Wolfe having made default, and the secretary-treasurer *adjudicataire*, having appeared, but not pleaded to the action.

The judgment of the Superior Court at Sherbrooke, (SHORT, J.) is as follows:—

The Court * * * * Considering that the plaintiff was proprietor of the lot number 23 in the fifth range of the Township of North Ham, on the 3rd February, 1868, and that on that day the said lot of land was exposed for sale by the secretary-treasurer of the Municipal Council of the County of Wolfe and sold to the defendant, Octave Gaudet, the secretary-treasurer of the Municipal Council of said Township of North Ham, for the municipal rates and taxes assessed and laid on said land by the said corporation of the township of North Ham;

Considering further that the said Octave Gaudet, who was at the time of the said sale of the said land for taxes, and had been at the time the said rates and taxes were assessed and laid, the secretary-treasurer of the said Municipal Council of North Ham, could not legally become the *adjudicataire* of the said land at the said tax sale * * * * doth adjudge and declare the said sale to be and to have been illegal, null and void; with costs against the said defendants.

* C.C., Art. 1484.

Bathgate vs. Delisle.

the corporation of the Township of North Ham and Octave Gaudet * * * and the said defendant the Corporation of the County of Wolfe, is hereby put out of court without costs.

This cause having been inscribed for review before three judges in Montreal, the defendant in his factum contended that the secretary-treasurer of a local municipality could buy at a county sale, the sale being conducted by the secretary-treasurer of the county, and when a report has been made of lands in arrears for taxes by the local secretary, his functions with regard to the sale ceased, and he has a right to bid at a public sale like any other individual.

There is nothing in the law disqualifying persons in a situation similar to that of said secretary-treasurer from purchasing in every case of judicial sales. Even tutors and curators may purchase property of those over whom they are appointed in cases of sale by judicial authority—(C. C., Art. 1484.)

The only incapacity declared by law in judicial sales relates to sheriffs and other officers entrusted with the sale.—(C. C., Art. 676.)

After hearing the parties in review, the Court confirmed the judgment.

MONDELET, J.—The Court sees no reason to disturb the judgment below which set aside a sale to the secretary-treasurer. The Code prohibits an agent from becoming a purchaser, and subordinates stand in the same position.

MACKAY, J.—The action is to have the sale set aside, and the adjudication to Gaudet declared illegal. There are various irregularities in the proceedings. The road was to be thirty-six feet wide, but when the report came to be homologated, it was reduced to twenty-six feet. A front road cannot be less than thirty-six feet wide. C. S. L. C., chap. 24, sec. 40, sub-sec. 10: "No front road shall be less than thirty-six feet, French measure, in width, between the lines of the fences on each side thereof." The judge *a quo* found that the formalities required have not been observed. I can see many reasons for saying that the proceedings are irregular, and that the sale is null. The judge *a quo* went on to say that Gaudet as secretary-treasurer was incompetent to buy. This is also correct. The Code has not distinguished between chief agents and subordinates.

Judgment confirmed.

Borlase, attorney for plaintiff.

Sanborn & Brooks, attorney for defendants.

(P. R. L.)

SUPERIOR COURT, 1870.

MONTREAL, 30TH NOVEMBER, 1870.

Coram BERTHELOT, J.

No. 37.

Bathgate vs. *Delisle.*

HELD:—That in an action against a public officer for a *saisie revendication* of goods seized, *prouve avant faire droit* will be ordered upon a demurrer alleging the omission of one month's notice.*

The plaintiff brought his *demande en saisie revendication* of goods seized at the Custom House at Montreal and summoned the defendant, as Collector of

* *Vid* 10 L. C. Jurist, p. 207, C. C. P. Art. 22.

Customs at the Port of Montreal, to answer the action. The plaintiff claimed no damages from the defendant, but prayed by the conclusions of his declaration, that he be declared the proprietor of said goods so seized, with costs against the defendant.

The defendant met this action by a demurrer stating that he was sued as Collector of Customs by the said action for an act or thing done in the exercise of his office, and there is no allegation in the declaration that a notice, in writing, according to law, of the said action, was delivered to the said defendant by the plaintiff or their attorneys before said action was taken out.

The parties having been heard upon the demurrer, *preuve avant faire droit* was ordered.

Abbott, attorney for plaintiff.

Pominville, attorney for defendant.

(P.R.L.)

SUPERIOR COURT, 1871.

MONTREAL, 29TH APRIL, 1871.

Coram TORRANCE, J.

No. 507.

Ex Parte Lalonde, petitioner for a Writ of Certiorari.

et

Tremblay et al., J.P. et Belanger, prosecuting.

HELD:—That although the right of *certiorari* has been taken away, under the agricultural act, still there are cases in which the courts will allow it.*

The petitioner applied for a Writ of *Certiorari* from the judgment rendered by the Justices of the Peace at their Special Sessions at the parish of St. Anne du Bout de l'Ile, in the county of Jacques Cartier, under the Agricultural Act, on the 9th December, 1870. That the writ was granted against said judgment which is as follows:—"D'après les témoins entendus, nous condamnons "M. Joseph Lalondo, défendeur en cette cause, à un dollar d'amende et les frais et "dépens payables d'ici à huit jours et faute de paiement à quinze jours à la "prison commune du district de Montréal."—The parties were heard before the Superior Court at Montreal.

PER CURIAM.—This case comes up on the merits on a writ of *certiorari*. Under the Agricultural Act the right of *certiorari* is taken away, but still there are cases in which the Courts will allow the *certiorari* to issue and pronounce judgment accordingly. This is certainly a case in which the writ of *certiorari* may issue. The conviction makes no mention of the reason for which the condemnation went against the defendant. The rule *nisi* must be declared absolute.

The judgment is as follows:—La Cour ayant entendu les parties par leurs avocats sur la règle *nisi* du requérant pour *certiorari* pour casser la conviction

* 24 Vic., ch. 30, sec. 15.

Grange et al. vs. McDonald and McDonald.

rendue contre lui * * * * et aussi la motion du dit Justinien Bélanger pour casser le dit Bref de *certiorari*, ayant examiné les pièces et la procédure du dossier; considérant que la dite conviction ne fait pas voir pour quelle cause le dit requérant a été condamné, déclare absolue la dite règle nisi en cette cause, et met au néant la dite conviction et renvoie la motion du dit Justinien Bélanger, le tout avec dépens.

Conviction quashed.

Duhamel and Rainville, attorneys for petitioner.

Bélanger, Desnoyers and Ouimet, attorneys for prosecutor.

(P.R.L.)

SUPERIOR COURT, 1871.

IN REVIEW.

MONTREAL, 30th JUNE, 1871.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 105.

Grange et al. vs. *MaDonald and McDonald*, opposant.

HELD—1st. That the fact of partial payments having been made on account of the judgment does not justify the conclusions of an opposition by the debtor, in demanding the total nullity of the seizure.

2nd. That in such a case, there is error in dismissing the said opposition *in toto*.

3rd. That the exact amount due on the judgment must be determined—each party paying his costs on said opposition.*

The judgment of the Court of Review on the above points is motivé as follows:—

The Court in Review * * * * Considering that the opposant has not proved the extinction of the debt for which the writ of *fieri facias* issued in this cause, but only two partial payments;

Considering, nevertheless, that the conclusions of said opposition were, and are, unfounded, in demanding the total nullity of the said seizure;

Considering, however, that there is error in the said judgment dismissing the said opposition *in toto*, doth reverse said judgment * * * * Declares that the seizure or execution referred to, could, and can only be enforced, and shall be for £63 15s. * * * * with costs of the writ of execution, and of the seizure under it, and the Court rejects the rest of the opposition, and it is ordered that each party bear his own costs in the Court below; but as to costs of this Court of Review it is ordered that the opposant do pay the same to opposant, plaintiff in Revision.

Doutre, Doutre & Doutre, avocats des demandeurs.

Bondy, attorney for opposant.

(R.R.L.)

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* *Vide*, Ramsay's Index, p. 124.—Vo. execution, No. 8.

SUPERIOR COURT.

In Review.

MONTREAL, 30TH JANUARY, 1871.

Coram MONDELET, J., MACKAY, J., BEAUDRY, J.

No. 114.

Guérin vs. *Mathe.*

HELD:—1. That, in matters of simple contract, in which there is no written agreement, a variance between the allegations and proof is not fatal, and it is sufficient that the real substance of the matter at issue be considered.*

2. That no costs of articulation of facts, or of answers thereto, will be granted when they are general.

The plaintiff sued the defendant at Ste. Scholastique, in the District of Terrebonne, for $150, the price of a horse sold under verbal contract of sale, payable $50 cash, and the balance in May, 1870. The action was instituted in May, 1870.

The defendant pleaded that he had bought the horse on trial, *à l'essai.*

The real issue in the case was whether the horse was taken on trial or not. The defendant, examined as a witness, stated that the agreement was verbal between them, and afterwards that they related their agreement to one witness, whose deposition was given, and went to prove the sale of the horse for $150. The plaintiff contended that there was a *commencement de preuve par écrit* by the answers of the defendant, and that the proof of the sale by the witness was legal.

The judgment rendered by the Superior Court for the District of Terrebonne (Berthelot, J.), is *motivé* as follows:

"La cour, après avoir entendu les parties par leurs avocats, avoir examiné la "procédure et entendu la preuve faite, et sur le tout, avoir délibéré;

"Considérant que le défendeur n'a pas prouvé les allégués de son plaidoyer, "l'en a renvoyé, et considérant de plus qu'il est en preuve que le demandeur a "vendu au défendeur le 12 avril dernier, un cheval étalon, pour le prix et somme "de $150 courant, dont le défendeur a eu la livraison, et l'ayant eu en sa posses- "sion pendant plusieurs jours, après, lesquels il l'a remis sans droit ni raison "dans l'écurie du demandeur et nonobstant les défenses de ce dernier, a con- "damné le défendeur à faire reprendre et charger le dit cheval chez le dit deman- "deur qui sera tenu de lui laisser prendre; et en outre la cour condamne le dit "défendeur à payer au dit demandeur la somme de $150 pour le prix convenu du "dit cheval, le tout avec intérêt de ce jour et les frais. Et la cour, attendu que "le dit demandeur s'est servi journellement du dit cheval, l'a renvoyé de son "recours pour les soins et la pension du dit cheval."

The defendant carried this judgment to review, and the judgment was reformed.

MONDELET, J.—The plaintiff sued defendant, in the district of Terrebonne, for $150, the price of a horse. His Honour held that the plaintiff had not proved

* Best, on Evidence.

Guérin vs. Mathe.

the contract of sale alleged by him, and on this ground he would dissent from the judgment to be rendered. Even if he could see that there was a contract of sale he would only give plaintiff the sum of $50, because the bargain appeared to have been for $50 cash, and the balance in May, 1870. Now the present action was instituted in April, 1870, and was premature as to the amount payable in May. On the first point, however, viz., the absence of a contract of sale, his Honour would dismiss the action altogether.

MACKAY, J., said the majority of the Court were of opinion that, in accordance with the jurisprudence of this country, the judgment of the Court below should be reformed, and that judgment should go for the amount due at the time the action was instituted. In matters of simple contract the strictness of proof referred to by the learned President of the Court was seldom required. It had formerly been the custom in England to exact proof conformable to the matters alleged in the declaration, but of late, in matters of simple contract, in which there was no written agreement, the rigor of the ancient rules was much relaxed, and although formerly a variance between the allegations and proof would be fatal it was now deemed sufficient that the real substance of the matter at issue should be considered. He cited English authorities to show that, though the English Courts formerly went to the extent of the learned President of the Court, still the best writers were now of opinion that the principle had been carried too far, whereby causes were often lost by small discrepancies. In this case defendant said he bought the horse for a month on trial. In the opinion of the Court the sale of the horse for $150 was proved, but the sale on trial was not proved. When a difference arose between plaintiff and defendant, they, both being illiterate persons, stated their case to a third person, and this man proved that the sale was made for $150,—namely, $50 in cash, and the remainder in May. The essence of the contract was proved. The real issue in the case was whether the horse was taken on trial or not. There was no proof of the horse being taken on trial, and the judgment of the Court below would, therefore, be reformed, and the amount reduced to $50, the sum that was due when the suit was instituted, reserving to plaintiff his recourse for $100—the balance that was not due at the time the action was instituted.

The judgment in review is as follows:

"The Court here, sitting as a Court of Review, * * * * considering "that there is error in the said judgment of the 10th May, 1870, to wit, in "granting beyond what ought to have been to plaintiff, and in condemning the "defendant in the whole $150;

"Considering that the veritable issue between the parties in this cause was as "to whether defendant had bought from plaintiff the horse (étalon) referred to in "plaintiff's declaration, or whether the horse was delivered *à l'essai* and taken "*à l'essai*;

"Considering that plaintiff has proved a sale and delivery to defendant of the "horse, but the defendant has wholly failed to prove that said sale and delivery "were *à l'essai*;

"Doth condemn the defendant with costs, as in an action of so much, but

"without costs of *articulation de faits*, or of answers to defendant's so-called "*articulation de faits*, all the articulations in this cause being too general and, "therefore, irregular."

The Honorable Gédéon Ouimet and The Honorable John H. Gray.

Champagne, attorney for plaintiff.

Prévost & Rochon, attorneys for defendant.

(P.R.L.)

SUPERIOR COURT, 1871.

IN REVIEW,

MONTREAL, 30TH JANUARY, 1871.

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

No. 1803.

The Honorable Gédéon Ouimet, Attorney-General *Pro Regina*, and the *Honorable John H. Gray*, defendant.

HELD:—That in proceedings affecting corporations or public offices, Book 2nd., title 2nd., chap. 10, Code of Civil Procedure, Arts. 1062 and 1066, the defendants may set up against the information, an *exception déclinatoire*, and at the same time, pleas to the merits of the petition.

To the petition of the Attorney-General *Pro Regina*, proceeding under Article 1016 of the Code of Civil Procedure, the defendant fyled at one and the same time:—

1. An exception déclinatoire.
2. An exception or plea to the merits.
3. A défense au fond en fait.

The petitioner fyled nothing in answer to these pleadings or any of them.

The defendant inscribed the case for proof upon the *exception déclinatoire*. The petitioner moved to reject the inscription upon the ground that the defendant, having fyled pleas to the merits, had waived and abandoned the declinatory exception.

On the 21st November, 1870, the Judge in Chambers (Beaudry, J.) rendered the following judgment:—"Having heard the parties by their counsel, "upon the motion of the petitioner of the 18th instant, that, inasmuch as the "defendant hath fyled pleas to the merits, the inscription by him fyled for the "adduction of evidence on the *exception déclinatoire* be set aside, and this "cause struck from the rôle *des enquêtes*, with costs; having examined the pro-"ceedings and deliberated, I do order and adjudge that said petitioner take "nothing by his said motion, and I do fix the 26th instant, at ten of the clock, "in the forenoon, for the enquête in this cause."

This judgment was carried to the Court of Review.

MONDELET, J.—We are called upon to decide whether the defendant by his pleading to the merits, conjointly with an *exception déclinatoire*, expressly declaring therein that he so pleads to the merits, has renounced the benefit of such *exception déclinatoire*, and, whether the inscription is right, he having inscribed the cause for *enquête*. The Honourable Mr. Justice Beaudry ruled out the motion of the Attorney-General to reject the inscription for

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enquête. This decision is perfectly correct. This was not an occasion for passing remarks on the practice of filing conjointly pleas which are contradictory to one another. The Court could only deal with the only point that arose: Has the defendant waived the *exception déclinatoire* by pleading under special reserve to the merits? The answer is at hand—*de facto*, he most certainly has not. By inference he cannot be assumed, much less held, to have done, what, in express words, he emphatically declares he does not do. The judgment rendered by Mr. Justice Beaudry was in all respects correct, and should be confirmed.

MACKAY, J., concurred. There was no waiver on the part of the defendant. The defendant could inscribe on the exception.

The Court of Review confirmed the judgment as follows:—

"The Court, now sitting as a Court of Review, considering that there is no error in the said judgment, doth in all things confirm the said judgment with costs against said petitioner."

Motion rejected.

The Attorney-General, pro Regina, by *Ritchie, Q.C.*
Dorion, Dorion & Geoffrion, for Defendant.
(P. R. L.)

CIRCUIT COURT, 1871.

MONTREAL, 30TH MARCH, 1871.

Coram MACKAY, J.

No. 123.

Delisle vs. *Sauvageau*.

HELD:—1. That under the facts in the present case, no contract of lease existed between plaintiff and defendant *ex quadrile*.

2. That the money asked in this case, by the name of rent, is not due, and that plaintiff's recourse is for money as damages, or for what else plaintiff may be advised as to law and justice under the facts [illegible] certain.

PER CURIAM:—This was an action against defendant as assignee in respect of the occupation of a house belonging to the plaintiff in the east end of Notre Dame street. In April, 1868, the plaintiff leased the house for three years from 1st May, 1868, to one Turgeon. The lease was terminable at the end of each year on giving notice. Turgeon, in the first year of the lease, became unfortunate in business, and gave notice to terminate the lease. When the 1st May, 1869, came round, the plaintiff naturally sought to get possession of his property; but, though he pressed to get possession, he was kept out by the assignee of Turgeon till the 9th May. Then two young men drove up to his house and offered him the keys of the premises. The plaintiff resolved to go and see what condition the premises were in before taking the keys. The exact day on which he got possession did not appear, but it was about the eighteenth May. The premises were then found to be in bad order. Of course, a landlord's chance of renting his premises is almost gone for the year if they remain unlet on the 18th May.

* C.C. Art. 1627.

The plaintiff was not able to get another tenant for 1869. He therefore now claimed that he was entitled to rent from the defendant *ès qualité*, according to the terms of the original lease, and he sued for a quarter's rent, due 1st August, 1869. The defendant pleaded that there had been no tacit reconduction; that he, defendant, was not the tenant of the premises during the second year; that plaintiff himself had possession of the property during the second year; that plaintiff having refused the keys on the 8th May, defendant had done all that was necessary, and that plaintiff must suffer the consequences. For tacit reconduction, of course, the tenant must be holding over with the consent of the owner. But there was no such thing here as holding over with the consent of the owner, for plaintiff was trying all the time to drive the defendant out. Tacit reconduction, therefore, could not be thought of. On the pretension that eight days was the legal time, his Honor said he was against the defendant. He could not see that there was any such term as eight days for tenants going out of a house. His Honor referred to the Code, and to the Consolidated Statutes, which made it very plain that the occupation of tenants expires on the 1st of May. The case of the plaintiff was a peculiarly hard one. He lost his year's rent through the fault of the defendant; but, then, the question came up whether the Court could give judgment on the particular state of things which the plaintiff declared upon. It could not be held that there was tacit reconduction. The action for rent must, therefore, be dismissed with costs, reserving to the plaintiff his recourse for damages.

The judgment of the Court is *motivé* as follows:—

The Court, considering the lease alleged of plaintiff's store and property described in plaintiff's declaration, proved, to wit, lease to Turgeon, and that Turgeon and defendant occupied said store and property to the first of May, 1869, at which date said lease, it was agreed, should terminate; considering that defendant *ès qualité*, and persons under him, for whom he is responsible, kept possession (contrarily to plaintiff's will or consent) of said store and property unduly after the said 1st May, 1869, and that, notwithstanding reiterated demands by plaintiff for possession, to wit, on the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th of May, 1869, plaintiff was refused possession of said store and premises;

Considering the retention from plaintiff of said store and premises by defendant and those under him aforesaid, on the 4th, 5th, 6th, 7th and 8th May, 1869, illegal, and calculated to damage plaintiff by making him lose the chance of finding a tenant for the term from the 1st May, 1869, up to the 1st May, 1870;

Considering, however, that no contract of lease exists or has existed since the 1st May, 1869, between plaintiff and defendant *ès qualité* for aforesaid store and property, and that the relation of landlord and tenant does not exist between plaintiff and defendant, and did not on said 4th, 5th, 6th, 7th, and 8th May, 1869, consent between the parties for a lease being clearly absent, and that, under the circumstances, the money asked by the name of rent by plaintiff from defendant is not due to plaintiff, and that defendant's plea is therefore well-founded to extent of having this so declared, doth dismiss plaintiff's action with costs, saving to plaintiff any other recourse against defendant *ès qualité* for money

The Hon. G. Ouimet, and The Corporation of the County of Compton.

as damages, or for what else plaintiff may be advised as to law and justice and under the facts may appertain.

Action dismissed.

Cartier, Pominville & Bétournay, Attorneys for Plaintiff.

Witherspoon, Attorney for Defendant.

(P. R. L.)

SUPERIOR COURT, 1871.

In Review.

MONTREAL, 30TH JANUARY, 1871.

Coram MONDELET, J., MACKAY, J., BEAUDRY, J.

No. 685.

The Honorable Gédéon Ouimet, Her Majesty's Attorney General for the Province of Quebec, *pro Regina*,

Petitioner;

AND

The Corporation of the County of Compton,

Respondents.

HELD:—That no right of revision exists in favour of the Crown when the right of appeal is denied by law.

The respondent, having moved for the discharge of the inscription for review, for the reasons mentioned in the following judgment, the inscription was set aside, and the judgment is *motivé*.

PER CURIAM:—It was contended that a right of review existed in this case in favour of the Crown, though the right of appeal is denied by our law. It was contended that the Crown could not be deprived of any of its privileges. Defendants urged that the question was one of jurisdiction, and not of authority or prerogative, and that, the jurisdiction being taken away by law, the appeal could not be entertained. The Court found they had no jurisdiction, and the motion to discharge the inscription would therefore be granted.

The judgment is as follows:—

The Court, now here sitting as a Court of Review, having heard the parties by their counsel, upon the motion of the respondents of the 22nd December last past, that, inasmuch as no deposit hath been made with the inscription for review by petitioner, and inasmuch as the information and prosecution in this cause of the Attorney General was laid and fyled under the 10th chapter of the second title of the 2nd Book of the Code of Civil Procedure, and relates solely to municipal corporations and offices, and inasmuch as this cause is not appealable, and is, by the 5th section of the said 10th chapter of said Code, expressly excepted from the right of appeal, and is, therefore, not susceptible of revision by this Court, that the inscription for hearing in review in this cause, fyled on the 10th December last, be set aside and discharged; having examined the record in said

cause and duly deliberated, doth grant said motion, and, in consequence, doth set aside and discharge the said inscription for review with costs against said petitioner.*

Métrisé dit Sanfaçon vs. Brière et Guilbault.

Inscription discharged.

The Attorney General, by *Barlow*, attorney.
Sanborn & Brooks, attorneys for respondents.
(P. R. L.)

COUR SUPERIEURE, 1871.

MONTREAL, 29 AVRIL, 1871.

Coram BEAUDRY, J.

No. 2467.

Métrisé dit Sanfaçon vs. Brière & Guilbault, T. S.

JUGE:—Que d'après l'article 821 du Code de Procédure Civile, la contestation de la saisie-arrêt avant jugement doit se faire avec la contestation au mérite et non sur requête, lorsque la dette n'est pas encore due ni échue. (1)

La demanderesse, sur son affidavit alléguant recel, fit émaner une saisie-arrêt simple et aussi en main tierce, contre les biens du défendeur, laquelle fut rapportée en Cour Supérieure le 28 novembre 1870, pour le recouvrement de $300, montant d'un billet fait par le défendeur le 28 avril 1870, et payable en avril 1871, à la demanderesse.

Le 7 décembre 1870, le défendeur présenta une requête en chambre, contestant cette saisie-arrêt.

La demanderesse y répondit en fait.

Les parties ayant été à l'enquête et ayant examiné leurs témoins, furent entendues au mérite de cette requête.

Le jugement de la Cour renvoie la requête ainsi que tous les procédés sur icelle, et il est motivé comme suit :

" La Cour, après avoir entendu les parties par leurs avocats, examiné la procédure, pièces produites et preuve et sur le tout mûrement délibéré ; Considérant " que la créance pour laquelle la saisie-arrêt émané en cette cause, n'était pas " encore due ni échue, et que d'après l'article 821 du Code de Procédure, la " contestation de l'arrêt devait se faire avec la contestation au mérite et non sur " requête, ainsi qu'il a été fait en cette cause, met au néant toute la procédure " qui a eu lieu en cette cause à compter de et y compris la dite requête, sauf " aux parties à procéder de nouveau ainsi que de droit, le tout sans frais."

Requête renvoyée.

Bourgoin & Lacoste, avocats de la demanderesse.
L. L. Corbeil, avocat du défendeur et requérant.
(P. R. L.)

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* *Vide* 3 Revue de Leg. p. 371.

(1) C. P. C. Arts. 821 & 854.

COUR SUPERIEURE, 1871.

MONTREAL, 30 MAI, 1871.

Coram BEAUDRY, J.

No. 805.

Blackburn vs. Decelles & al.

JUGE:—Que la preuve orale à l'effet de prouver des documents sous la marque d'une croix, est légale.

Le Demandeur réclamait des défendeurs en vertu de quatre billets en date du 19 juin 1868, souscrits par le défendeur Decelles et payable à son propre ordre, et par lui endossés et ensuite endossés par le défendeur Faubert sous croix devant témoins, en faveur du demandeur et protesté pour non paiement.

Le 18 avril 1871, le défendeur Lambert qui avait contesté cette action, fit la motion suivante : "motion de la part du défendeur, Gabriel Faubert, que la déposition du témoin French soit rejetée du dossier et considérée comme nulle et de nul effet, comme tendant à prouver par témoins un arrangement ou convention d'au-delà de cinquante piastres."

Lors de l'audition au mérite et sur cette motion, les avocats du défendeur Faubert soumirent à la décision de la Cour les propositions suivantes :—

1o. L'écrit sous croix produit par le demandeur ne peut pas être prouvé par témoins.

2o. Il ne peut, dans tous les cas, l'être par un seul témoin.

3o. L'action n'aurait pas dû être basée sur les billets et le demandeur ne pouvait poursuivre que pour le déficit qui aurait pu exister après règlement entre le demandeur et le défendeur Decelles.

Sur la première proposition, il suffit de référer à la discussion qui a eu lieu dans la cause de Neveu vs. DeBleury, 12 Déc. des Trib. du B. C. p. 117, pour se convaincre qu'il n'existe aucune loi ou jurisprudence pour justifier la prétention qu'un écrit quelconque peut être fait sous croix.

Qu'on l'ait toléré à raison de billets promissoires pour des petits montants, cela est admis. Dans la cause citée ci-dessus où il s'agissait d'un reçu pour une somme légère, le reçu était attesté par trois témoins, et encore le juge en chef actuel a différé d'avec la majorité de la Cour, et ses raisons paraissent beaucoup plus fortes que celles des autres.

L'Hon. juge Aylwin admet que dans le district de Québec, le juge Panet avait déjà fait cesser l'habitude de donner des jugements sur des billets sous croix.

Cette partie de la 34e Geo. III, c. 2, sur laquelle la Cour s'est appuyée dans la cause de Neveu & Bleury est depuis longtemps rappelée. Le Code n'a aucune disposition à ce sujet.

Mais l'avocat du défendeur prétend que c'est une affaire commerciale et qu'il faut se servir de la preuve testimoniale. Si c'est le cas il n'avait pas besoin d'écrit.

Or, peut-on prétendre sérieusement que lorsqu'il s'agit d'une convention pour une somme d'au-delà de $4000, convention par laquelle un individu s'expose à perdre tout recours contre son débiteur par le fait d'un tiers, cette convention pourra être prouvée par un témoin quelconque ? Ceci ne serait [illegible] par aucune autorité.

L'action du demandeur contre Faubert doit donc être renvoyée.

Le demandeur soumit ses propositions de droit comme suit :

A promissory note signed by a cross in presence of one witness is good.

Collins & Bradshaw, 10 L. C. R. p. 366.

Anderson & Park, 6 L. C. R. p. 102, 479.

An endorsement by cross before witness is valid.

Noad *vs.* Chateauvert & al., 1 Rev. de Leg. 229. The payment of money in a *non commercial* case may be proved by witnesses who witnessed a receipt signed by the party who received the money, with a cross, in their presence. Neveu père & al. *vs.* DeBleury, 3 L. C. J. p. 87. And in the same case it was subsequently held that the payment of a sum of money may be proved by the attesting witness to a receipt signed with a mark made by the party receiving the money.

Queen's Bench 6 L. C. J. p. 151, also 12 L. C. R. p. 117.

A cross or a mark may be a commencement de preuve par écrit.—*Ib. Ib.*

In this case (which is a commercial case) the transaction took place, not in this province but at New Edinburgh, province of Ontario.

Taylor Ev. p. 368, § 377.

Preuve orale admise lorsque l'écrit ou mémorandum n'a pas été signé.

C. C. 1233.

La preuve testimoniale est admise de tout fait relatif à des matières commerciales.

C. C. 1234.

Dans aucun cas, la preuve testimoniale ne peut être admise pour contredire ou changer les termes d'un écrit valablement fait.

Le jugement de la Cour est motivé comme suit :

La Cour, après avoir entendu le demandeur et le défendeur, Gabriel Faubert, par leurs avocats et sur le mérite ainsi que sur la requête sommaire du dit Gabriel Faubert demandant le rejet du témoignage du témoin Albert French, le défendeur Jean-Baptiste Decelles n'ayant pas plaidé à cette action, examiné la procédure, pièces produites et preuve et sur le tout mûrement délibéré ; considérant que la preuve orale produite en cette cause à l'effet de prouver les documents sous la marque d'une croix produits en cette cause par le demandeur, est légale, déboute la dite requête sommaire du dit défendeur ; et adjugeant sur le mérite de la cause, considérant que le dit Gabriel Faubert est mal fondé dans la première de ces exceptions et que le dit demandeur a agi envers le dit Jean Baptiste Decelles avec la connaissance, l'approbation et l'autorisation du dit Gabriel Faubert, la rejette et considérant que sur sa seconde exception, le dit défendeur n'a prouvé de paiement qu'au montant de $1020 ; condamne les dits défendeurs à payer au demandeur la somme de $4132.79, balance restant due sur les quatre billets en date du 19 juin 1868, faits par le dit Jean-Bte. Decelles payables à son propre ordre et endossés par lui-même et par le dit Gabriel Faubert en y apposant sa marque sous croix en présence de témoins, &c., &c., &c.

Perkins & Ramsay, avocats du demandeur.

Dorion, Dorion & Geoffrion, avocats du défendeur Faubert.

(P. R. L.)

COUR SUPERIEURE, 1871.

EN REVISION.

MONTREAL, 30 MARS, 1871.

Coram BERTHELOT, J., MACKAY, J., TORRANCE, J.

No. 2577.

Delisle vs. *Lécuyer et al.*

JUGE :—Que le maître ou capitaine du navire n'a aucun lien ou privilège sur le navire pour ses gages. (1)

Le demandeur fit saisir-arrêter un bateau à vapeur appartenant aux défendeurs et dont il était le capitaine, et ce par privilége ou lien pour salaire et autres dépenses par lui faits pour le compte des défendeurs. Action rapportée le 19 décembre 1870.

Le 13 février 1871, les défendeurs présentèrent une requête devant un juge en chambre pour le rejet de cette saisie sur plusieurs informalités y alléguées, et en outre sur ce que le demandeur n'avait aucun lien ni privilége. Cette requête fut rejetée, (Mondelet, J.), et le jugement fut motivé comme suit : " Ayant vu " et examiné la requête faite et présentée par les défendeurs et requérants le 13 " février courant, suppliant pour les causes et raisons y mentionnées à l'annu- " lation du bref de saisie-arrêt émané en cette cause le 29 novembre dernier, " ayant entendu les parties sur icelle dite requête et délibéré, considérant que " les moyens de forme invoqués en la dite requête sont mal fondés, ils sont ren- " voyés ; considérant que le demandeur a un lien de droit, tel qu'il l'allègue " et qu'attendu cela, la prétention du contraire est mal fondée, la dite requête " est renvoyée avec dépens. ".

Cette décision fut portée en Revision devant la Cour Supérieure à Montréal. Les défendeurs prétendirent :

1o. Que le demandeur devait produire un affidavit contenant ce qui est exigé par les arts. 834 et 835 du Code de Procédure Civile ; 8 L. C. J. p. 337.

2o. Que telle saisie-arrêt simple peut être contestée en tout temps avant jugement par une requête, C. P. C. Arts. 819, 820 et 854. Vol. 2, L. C. J. p. 71.

3o. Que dans la saisie d'un bateau à vapeur il faut donner et mentionner dans le procès verbal de saisie, le tonnage et jaugeage à peine de nullité, C. P. C. art. 560 ; Statut Ref. du Canada, chap. 41, sec. 13.

4o. Qu'un capitaine naviguant dans les eaux de l'intérieur n'a pas de privilége ou lien sur le bateau pour salaire, C. C. Art. 2383.

La Cour de Revision a maintenu la Requête et elle a renvoyé la saisie-arrêt, et le jugement est motivé comme suit : " The Court, considering that there is error " in the said judgment, to wit in rejecting the Requête of defendants filed on " 13th February last to quash the *saisie-arrêt* in this cause issued at suit of " plaintiff, doth reverse the same.....Considering that plaintiff had no right

(1) Vide 1 L. C. Reports—p. 145.
7 L. C. Jurist—p. 119.

13 L. C. Reports—p. 226.

" to take or issue said writ of *saisie-arrêt*, and that it has issued without any affi- Conlan vs. Clarke.
" davit to warrant it, and that the allegations of said requête were and are suffi-
" cient to entitle the *Requérants* to their conclusions, doth maintain said *requête*
" of defendants and doth set aside and quash said *saisie-arrêt* with costs.

O. Augé, avocat du demandeur.

Jetté, Archambault & Christin, avocats des défendeurs.

(P. R. L.)

COUR SUPERIEURE, 1871.

[En Revision.]

MONTREAL, 30 JUIN, 1871.

Coram Mondelet, J., Mackay, J., Beaudry, J.

No. 1849.

Conlan vs. *Clarke*.

Jugé:—Que durant l'existence de la communauté, la femme est obligée d'habiter avec son mari et est mal fondée à réclamer de lui une pension alimentaire à moins qu'il ne refuse de la recevoir. (1)

La demanderesse poursuivit le défendeur son époux pour une pension ; elle prétendait que le défendeur l'avait abandonnée et en conséquence elle réclamait des aliments.

Le défendeur, avant l'institution de l'action, avait proteste la demanderesse l'informant qu'il avait un logis convenable pour la recevoir et la priant de vivre avec lui, et il a conclu à ce qu'elle fut déclarée mal fondée en sa poursuite.

La preuve constate que le défendeur a fait l'offre en question, mais que la demanderesse a refusé, prétendant qu'elle ne pouvait être tenue de demeurer dans l'endroit offert par son époux, savoir, dans la maison de la fille même des parties, et laquelle est mariée.

Le jugement de la Cour Supérieure à Montréal [Torrance, J.] maintint l'action de la demanderesse, et ce jugement est comme suit :

" The Court..... considering that Plaintiff hath proved that Defendant hath
" failed to maintain her as his wife, considering that Defendant hath failed to
" prove the allegations of his plea, doth overrule the same and doth adjudge and
" condemn defendant to pay and satisfy to the said Plaintiff the sum of $128
" as an alimentary allowance at the rate of $16 per month from the 27th Oc-
" tober 1869, to the 27 June 1870, with costs."

Ce jugement ayant été porté en Révision, fut infirmé pour les motifs énoncés contenus au jugement de la Cour siégeant en Révision comme suit :

" The Court..... considering that in law and in fact, the Plaintiff, the wife
" of the Defendant, hath shewn no right of action against her said husband, as
" pretended for the causes mentioned and set forth in her declaration, Consi-
" dering that during the existence of the *communauté*, the wife is bound to live
" with her husband, unless there be legal causes for separation from bed and

(1) Art. 175 C. C.

Cross vs. Judah.

"board. Considering that the wife, during the existence of the *communauté*, "cannot claim a *pension alimentaire* or provision from her husband unless he "refuses to receive her. Considering that the Plaintiff's action does not meet "any of the above mentioned cases. Considering that there is error in the judg- "ment appealed from—this Court doth reverse the same ..... without costs." Judge Mondelet dissents from that part of the judgment with respect to the costs; he being of opinion that the action should be dismissed with costs.

Action dismissed.

Doherty & Doherty, avocats de la demanderesse.
Leblanc, Cassidy & Lacoste, avocats du défendeur.
(P. R. L.)

COUR SUPERIEURE, 1871.

En Revision.

MONTREAL, 30 JANVIER, 1871.

Coram Berthelot, J., Mackay, J., Beaudry, J.

No. 216.

Cross vs. *Judah.*

Juge:—Que pour exercer l'action possessoire dans la jouissance d'une servitude, le demandeur est tenu de faire apparaître du titre de cette servitude. (1)

Mackay, J. The action brought by Plaintiff is *en complainte*, alleging that he possesses in common with Defendant a right of passage between their respective contiguous properties, leading from Little St. James street to Fortification Lane; that he is troubled in his possession by defendant, who claims the exclusive use of the passage. Plaintiff declares that he was in possession, in common with the Defendant, by title of proprietor for a year and a day, as shown in plan annexed to deed of purchase of the property sued by him. Defendant pleaded that neither Plaintiff nor his *auteurs* had any right of enjoyment of the passage, except by sufferance of Defendant, which sufferance had ceased before the present action was instituted. As Plaintiff's claim involves a right of servitude, he should have set forth in his declaration the creation of the servitude by the person over whose land it was claimed, but no title creating the servitude was produced. A deed was produced after the parties had been at *Enquête* a considerable time; but the defendant never pleaded to it, and might have objected to its production. Moreover, this deed was never registered. The right of Plaintiff to the servitude, even under the deed produced, was doubtful, and where the title creating a servitude is doubtful, the doubt is given in favour of the land subject to the servitude, and in reduction of the servitude. The deed was never registered, and the defendant appears never to have known of it. His Honor cited authorities to show that a person troubled in his servitude *discontinuée* must produce his title. This was also the doctrine of our Code. The

(1) C. C. Art. 549.

servitude in this cause was created in 1819 by Mrs. Prior, though the deed establishing it was not produced until considerable evidence was taken. Judgment reformed and action dismissed.

Saunders vs. Déom.

Le jugement de la Cour de Révision est motivé comme suit :

La Cour Supérieure, siégeant à Montréal présentement comme Cour de Révision, considérant qu'il y a erreur dans le susdit jugement du 28 juin 1870, cette Cour l'a révisé et réformé, et procédant à rendre celui qui aurait dû être rendu par la dite Cour Supérieure ; considérant que le demandeur, de même que ses auteurs, ne pouvaient réclamer sur le terrain mentionné en la déclaration en cette cause, qu'un droit de servitude et non un droit de propriété dans le fonds et que pour exercer l'action possessoire dans la jouissance de cette servitude il était tenu de faire apparaître du titre de cette servitude, titre qu'il n'a produit qu'à l'enquête et qui ne justifie pas les allégués de sa demande. La Cour, pour ces raisons, adjuge que les parties soient mises hors de Cour, sauf à se pourvoir autrement qu'il pourra appartenir ; avec les frais de la Cour Supérieure contre le demandeur sur le jugement susdit du 28 juin dernier, chaque partie payant ses frais en Cour de Révision.

Action renvoyée.

Lunn, avocat du demandeur.
Wurtele, avocat du défendeur.
(P. B. L.)

COUR SUPERIEURE, 1871.

En Revision.

MONTREAL, 30 JUIN, 1871.

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

No. 847.

Saunders vs. *Déom.*

JUGE.—Que la preuve testimoniale, d'un avis verbal de la continuation du bail, est valable dans les circonstances de la présente cause.

Par le bail consenti par le demandeur au défendeur le 24 février 1868, ce dernier avait le droit de continuer le bail pour trois ans à compter du 1er mai 1871, à certaines conditions, en donnant au demandeur un avis par écrit, trois mois avant l'expiration du bail, savoir, avant le 1er mai 1871.

Le demandeur poursuivit en expulsion le défendeur sur le principe que le bail était expiré le 1er mai 1871.

Le défendeur plaida qu'il avait fait toutes les améliorations qu'il était tenu de faire par le bail pour lui donner le droit de continuer le bail pour encore trois années, et " qu'avis a été donné par lui défendeur au demandeur et à sa famille " vers la fin de janvier ou à peu près vers ce temps là."

Saunders vs. Déom.

Les parties ayant été à la preuve, il fut constaté qu'un avis *verbal* avait été donné par le défendeur à la fin de janvier 1871 à la femme du demandeur qui était absent, et que le demandeur à son retour l'avait accepté et avait reconnu devant témoins l'avoir reçu verbalement, et que le défendeur continuerait à être son locataire pour trois années de plus.

Le jugement de la Cour Supérieure rendu à Montréal le 30 mai 1871, (Beaudry, J.) a renvoyé l'action, et il est motivé comme suit :

" La Cour....considérant que le défendeur a prouvé les allégations de son " exception et a droit à la continuation de son bail qui a été acceptée par le " demandeur, déboute l'action du dit demandeur avec dépens."

Cette cause ayant été inscrite en révision, le demandeur prétendit dans son factum que le défendeur n'ayant pas donné au demandeur un avis par écrit, n'avait pas le droit à la continuation du bail,—que le demandeur n'avait pas accepté un avis verbal.—que quoiqu'il puisse paraître étrange de prime abord, que le demandeur tienne tant à l'avis par écrit, néanmoins, un écrit était indispensable pour sa garantie, car sous un autre point de vue, si le défendeur eut abandonné la maison au 1er mai 1871, dans quelle position le demandeur ne se serait-il pas trouvé ? Qu'avait-il pardevers lui pour forcer le défendeur à rester ? N'ayant pas d'écrit, il n'avait pas de preuve légale.

Le défendeur prétendit dans son factum, que la preuve du défendeur était légale. Qu'il avait prouvé un avis verbal, et son acceptation par le demandeur qui l'avait reconnu devant témoins, et qu'à l'enquête le défendeur ne s'est pas opposé à cette preuve, et n'en a pas demandé le rejet lors de l'audition, que d'ailleurs les aveux du demandeur sous serment justifient cette preuve.

Le défendeur cita :—

Pothier, Oblgns., No. 614.
7 Toullier, No. 321 &c.
9 L. C. J., p. 319.
14 L. C. J., p. 305.
5 Marcadé et Pont, 6 Ed: Art. 1318.
Parg. 4 page 19, Art. 1325.
Parg. 1 & 2, pp. 44 & 45.
Sur l'Art. 1341, p. 105.
Sur l'Art. 1583.
1 Pigeau, Proc. Civile, p. 57.
Bonnier, preuves, Nos. 418, 604.

La Cour de Révision a confirmé le jugement avec dépens.

L'Honorable Juge Mondelet *dissentiens.*

Jugement confirmé.

Belle, avocat du demandeur.
Mousseau & David, avocats du défendeur.
(P. R. L.)

COUR SUPERIEURE, 1871.

En Revision.

MONTREAL, 30 JUIN 1871.

Coram Mondelet, J., Mackay, J., Beaudry, J.

No. 2371.

Beaudry vs. Desjardins et divers opposants, et *J. A. Desjardins*, créancier *colloqué*, & *Henry Thomas* et al., contestants.

Jugé:—Que la parenté entre le médecin réclamant la valeur de ses services professionnels donnés durant la dernière maladie et le défunt n'est pas un motif légal pour donner lieu à une réduction de sa créance, et nonobstant que des médecins plus rapprochés de la résidence du défunt auraient pu le soigner.

2. Que l'insolvabilité du défunt n'est point non plus un motif légal pour opérer une réduction de la créance du médecin.

3. Que l'enrégistrement d'un bordereau des frais de dernière maladie sur l'immeuble alors sous saisie, dans le délai fixé par la loi, est valable.

L'opposant Desjardins réclamait sur les deniers provenant de la vente des biens immeubles du défendeur, son oncle, décédé, la somme de $278, montant des frais de dernière maladie et la valeur des soins donnés par lui comme médecin, ainsi qu'il appert au bordereau des dits frais enrégistrés dans le Bureau d'Enrégistrement du Comté de Vaudreuil, le 12 mai 1858.

L'opposant fut colloqué pour tout le montant de la collocation.

Henry Thomas et al., contestèrent cette collocation sur le principe qu'à l'époque de l'enrégistrement de ce borderau, la propriété vendue était sous saisie, et l'a toujours été depuis (1) et était sous la main de la justice et que le montant en était exagéré et exorbitant.

L'opposant a examiné plusieurs témoins, et les contestants ont prétendu prouver par les transquestions posées aux témoins de l'opposant que l'opposant était le gendre et le neveu du défunt, qu'il résidait à une distance de 15 à 20 lieues du domicile du défunt, et que ses visites étaient au taux de $30 par visite. Ils citèrent 1 Troplong, Com. des Com., Ed. Belge, No. 135, et Note Nos. 132 et 137.

Guyot, Rép. Vo. frais funéraires, Nouv. Den. Vo. frais funéraires.

L'opposant répondit que les contestants n'avait fait aucune preuve, qu'un parent a besoin de soins médicaux tout autant qu'un étranger; que s'il y avait des médecins plus rapprochés de la résidence du défunt, l'on doit supposer que les médecins, au lieu de faire une visite par mois, tel que porté au compte du dit opposant, auraient fait une visite par semaine, ce qui aurait compensé amplement la différence du prix.

L'opposant cita: C. C. Art. 2003. Les termes de l'article ne contiennent pas la distinction faite dans l'article 2002 au sujet " de ce qui est de convenance " à l'état et à la fortune du défunt."

Le jugement de la Cour Supérieure à Montréal (Torrance, J.) rendu le 30

(1) C. C. Art. 2091.

Beaudry vs. Desjardins.

décembre 1870, a réduit la collocation de l'opposant à la somme de $50, et est motivé comme suit:—

"The Court...Considering the relationship existing between the opposant Jean "A. Desjardins and the deceased, and that the deceased could have had the ser- "vices of physicians resident at or near the place of his residence.

"Considering also his state of insolvency at the time of his death, doth main- "tain the contestation of said opposition with costs, and doth reduce the collo- "cation in favour of said opposant, for expenses of the last illness, to the sum "of $50; and doth order that the Prothonotary of this Court do prepare a new "report of distribution allowing the opposant $50 for the expenses of the last "illness and distributing the balance of the sum of $205 according to the right "of the parties."

La Cour de Révision à Montréal a renversé le jugement et a accordé à l'opposant le montant entier de sa réclamation pour les frais de la dernière maladie, et le jugement est motivé comme suit:

The Court now here sitting as a Court of Review, having heard the parties by their respective Counsel upon the judgment rendered in the Superior Court in and for the District of Montreal on the 30th December, 1870, having examined the record and procedure had in this cause and maturely deliberated;

Considering that there is error in the judgment, to wit: in reducing as it did the collocation made in favour of Jean A. Desjardins and in maintaining said Henry Thomas and al.'s contestation, doth, revising said judgment, reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises;

Considering that the opposant Jean A. Desjardins is entitled upon the proofs of record to have and maintain the collocation made in his favour, as *per* the report of collocation fyled on the 18th March, 1870, and posted that day; and that his proofs of record support said collocation and have not been controverted by any counter proofs; Doth maintain said collocation and reject the contestation thereof, and of said opposant J. A. Desjardin's opposition, with costs.

Barthe, avocat du dit opposant.

Laflamme, Huntington & Laflamme, avocats des contestants.

(P.R.L.)

COUR SUPERIEURE, 1871.

En Révision.

MONTREAL, 28 FEVRIER, 1871.

Coram Mondelet, J., Berthelot, J., Mackay, J.

No. 252.

Lacombe, vs. *Ste. Marie, et al.*

Juge:—Que lorsque plusieurs parties plaidantes ont contesté séparément en première instance et qu'elles manifestent leur désir de le faire en révision, la partie qui demande la révision est tenue de faire autant de dépôts qu'il y a de contestations.

Les défendeurs ayant fait chacun une motion pour faire rejeter l'inscription en Cour de Révision vu l'insuffisance du dépôt, le jugement de la Cour a adopté cette motion et est motivé comme suit:

La Cour Supérieure siégeant à Montréal présentement comme Cour de Révi-

sion, ayant entendu le demandeur et chacun des défendeurs par leurs avocats respectifs, sur les motions respectivement faites par chacun des dits défendeurs, le 21 février courant, ayant examiné la procédure et délibéré; Considérant que les défendeurs ayant plaidé et contesté l'action du demandeur séparément en première instance, et que leur intention de contester séparément la demande de révision est manifestée par la motion faite par chacun d'eux respectivement, et que dans ce cas, chacun des dits défendeurs a droit à la garantie d'un dépôt séparé pour répondre de ses frais en révision, accorde les dites motions, sans dépens et en conséquence ordonne au demandeur de déposer au Greffe de cette Cour une nouvelle somme de $40 d'ici au 15 mars prochain à défaut de quoi, la dite cause sera rayée du Rôle de Révision, et la demande de révision renvoyée avec dépens.

Rodier vs. Hébert.

L'Honorable Juge Mondelet différant sur les dépens qu'il est d'avis d'accorder aux défendeurs suivant que requis par leurs dites motions.

Cartier, Pominville & Bétournay, avocats du demandeur.

Doutre & Doutre, avocats des défendeurs.

(R.M.L.)

COUR SUPERIEURE, 1871.

MONTREAL, 29 AVRIL 1871.

Coram BEAUDRY, J.

No. 94.

Rodier vs. *Hébert*.

JUGE:—1o. Que la demande pour une somme au-dessous de $100, accompagnée de conclusions demandant que le défendeur (qui n'est tenu au paiement de la créance qu'hypothécairement) soit condamné à payer la dette, si mieux il n'aime délaisser, etc., est une demande de la compétence de la Cour de Circuit et non pas de la Cour Supérieure. (1.)

2o. Que ce n'est pas une action hypothécaire réglée par l'article 2061, C. C. et par conséquent appelable. (2)

Le demandeur réclamait la somme de $84.50 du défendeur, comme détenteur d'un immeuble hypothéqué au paiement de cette somme, devant la Cour Supérieure par son action rapportée le 30 janvier 1871; et il concluait à ce que le défendeur fut condamné à lui payer cette somme, si mieux il n'aimait délaisser l'immeuble. (3)

Le défendeur a rencontré cette demande par une exception déclinatoire alléguant que la Cour de Circuit connait en premier ressort et privativement à la Cour Supérieure de toute demande pour une somme ou une valeur moindre que $100; et qu'il appert par les allégués de la déclaration et les conclusions prises, que la somme réclamée du défendeur est moindre que $100; savoir: $84.50.

Le demandeur ayant répondu en droit à cette exception et les parties ayant

(1) Vide 14 L. C. Jurist, p. 58.
(2) C. P. C. art. 1142. No. 4.
(3) *Sed Vide* Arts. 2061, 2016, C. C.

Fournier vs. Lavoie.

été entendues, la Cour a maintenu cette exception et a motivé son jugement comme suit:

"La Cour..... Considérant que l'objet des conclusions de la demande du " demandeur est le recouvrement de la somme de $84.50 avec intérêt sur cette " somme à compter du jour de l'assignation, et que le délaissement de l'immeu- " ble désigné en la déclaration n'est mentionnée dans les conclusions que comme " moyen de se soustraire au paiement de la somme réclamée, et que l'action telle " que formulée n'est pas l'action hypothécaire telle que réglée par l'article 2061, " du Code Civil." "Considérant que telle demande est de la juridiction de la " Cour de Circuit, maintient le déclinatoire plaidé par le dit défendeur, renvoie " le demandeur à se pourvoir devant la Cour de Circuit et le condamne aux " dépens."

Action renvoyée.

Trudel & Demontigny, avocats du demandeur.
Cartier, Pominville & Bétournay, avocats du défendeur.

COUR SUPERIEURE, 1871.

En Revision.

MONTREAL, 30 JUIN, 1871.

MONDELET, J., TORRANCE, J., BEAUDRY, J.

No. 259.

Fournier vs. *Lavoie*.

JUGE:—1o. Qu'une demande pour la valeur d'une certaine quantité de bois coupé, sur un terrain dont les parties se contestent la possession et le titre, est de la nature d'une action pétitoire.
2o. Que sans un bornage, la Cour ne peut décider sur les droits des parties.
3o. Que ce bornage ne peut être ordonné, vu que les parties ne l'ont pas demandé. (1)

Le jugement de la Cour en Révision est motivé et explique suffisamment toutes les questions soulevées et décidées:

La Cour Supérieure siégeant en Révision, considérant que le demandeur se plaint que le défendeur a coupé et enlevé du bois sur un terrain que le dit demandeur allègue avoir été sa propriété et en sa possession depuis nombre d'années avant la voie de fait en question, et conclut à ce que le défendeur soit condamné à lui payer pour cette voie de fait, la somme de $400.

Considérant que cette demande est de la nature d'une action pétitoire et que le défendeur, en plaidant que le bois avait été coupé sur un terrain qui était sa propriété et non sur celle du demandeur, a nié le titre du demandeur au bois dont le demandeur réclame le prix et soulève ainsi la question du pétitoire.

Considérant qu'il appert que le terrain en question est sur la limite qui divise les héritages des parties et qu'il n'apparait pas que ces deux héritages aient jamais été bornés suivant la loi, de manière à les définir, et que sans ce bornage,

(1) 10 L. C. Jurist, p. 139.

Kingsley et ux. vs. Nixon & Sutherland et al.

la Cour ne peut adjuger sur le droit de propriété, soit de l'héritage ou du bois coupé —et considérant que la contestation liée entre les parties ne permet pas de contraindre les parties à procéder à un bornage qu'elles n'ont pas demandé et qu'il y a eu conséquence, erreur dans le jugement rendu en cette cause, le 19 novembre 1871, dans le district d'Iberville enjoignant [illegible] bornage, met au néant le dit jugement, déboute l'action du [illegible] présent, sans frais.

Le juge Mondelet est d'avis que le jugement dont [illegible] infirmé, attendu que dans l'espèce actuelle, il n'y avait pas [illegible] bornage, lequel, au reste, n'était demandé ni par le demandeur ni [illegible] leur.

Mais il diffère du jugement rendu par la majorité de la [illegible] maintenant l'action du demandeur, attendu qu'à l'avis de la Cour, n'y ayant pas eu de bornage, il ne peut être adjugé sur la propriété du terrain où a été coupé le bois; le juge Mondelet est d'avis que le demandeur a droit à un jugement pour $75, valeur prouvée du bois qu'a coupé le défendeur sur la terre du demandeur.

Jugement renversé.

E. G. Paradis, avocat du demandeur.
D. Lagrave, avocat du défendeur.
(C. R. I.)

COUR SUPERIEURE, 1869.

MONTREAL, 19 MAI, 1869.

Coram BEAUDRY, J.

No. 1075.

Kingsley et ux. vs. *Nixon*, & *Sutherland* et al., Intervenants.

Jugé:—Que la nature d'une intervention qui tend à dépouiller l'une des parties de la propriété et de la possession de l'héritage par lui loué, rend toute la cause évocable. (1)

Les demandeurs réclamèrent devant la Cour de Circuit pour le district de Montréal, des arrérages de loyer au montant de £8., avec saisie gagerie.

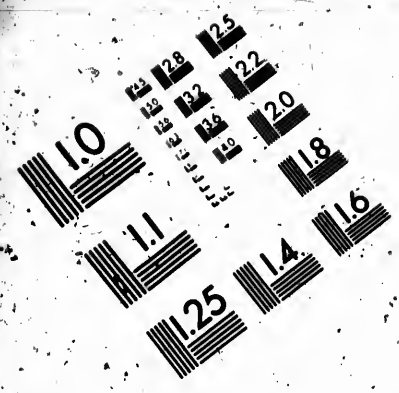
L'action fut rapportée le 12 février 1869.

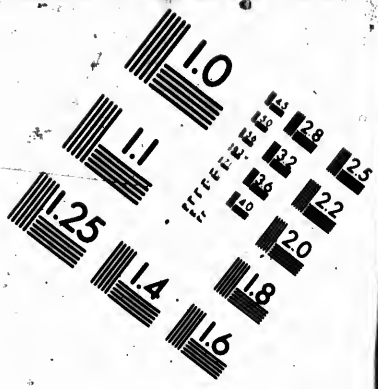
Le 20 février 1869, James Sutherland et consors intervinrent en la cause et par leurs conclusions, les intervenants demandaient à être déclarés propriétaires et en possession de l'immeuble loué par les demandeurs au défendeur, et à ce que tous les loyers leur en fussent payés par le défendeur.

Le 16 mars 1869, les demandeurs produisirent une déclaration d'évocation, attendu que les intervenants demandaient à être déclarés propriétaires de l'immeuble loué par les demandeurs à la défenderesse et à percevoir les loyers échus et à échoir et que leur demande se rapportait à des héritages et à des droits futurs, et tendait à infirmer les droits des demandeurs à l'avenir, et se réservèrent de demander caution pour leurs frais contre certains intervenants qui étaient absents.

Les parties ayant été entendues sur la validité de cette évocation le 17 avril 1869, la Cour Supérieure, (Beaudry, J.,) maintint la dite évocation.

(1) C. P. C. Art. 1058.





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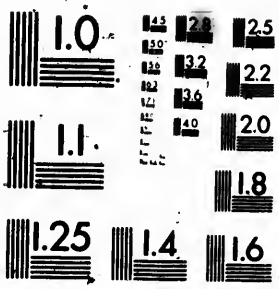

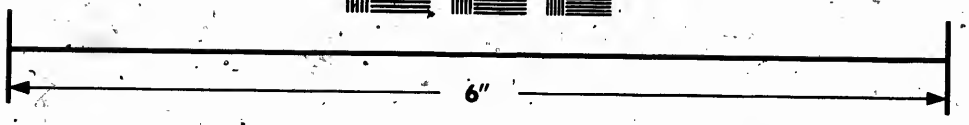

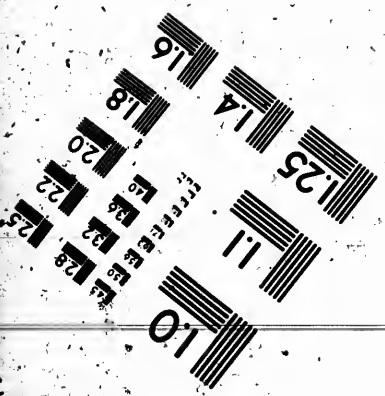

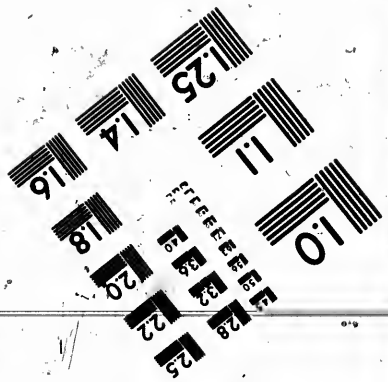

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Boucher vs. Le Maire, etc. de Montréal.

Les intervenants ayant été plus tard déboutés de leur intervention, le jugement final fut rendu par la Cour Supérieure, (Torrance, J.,) le 30 novembre 1870, comme suit : La Cour condamne la défenderesse à payer aux demandeurs la somme de £8. pour un mois de loyer et les dépens comme dans une action pour ce montant dans la Cour de Circuit.

Barnard & Pagnuelo, avocats des demandeurs.

D. Browne, avocat de la demanderesse.

J. & W. A. Bates, avocats des intervenants.

(P. R. L.)

COUR SUPERIEURE, 1871.

MONTREAL, 30 MAI, 1871.

Coram BEAUDRY, J.

No. 2637.

Boucher vs. *Le maire, les echevins et les citoyens de la Cité de Montreal.*

JUGE :—Que l'inondation d'une maison causée par le débordement des eaux provenant de pluies torrentielles qui ne peuvent s'écouler par l'égoût public, rend les défendeurs responsables des dommages.

Le 23 décembre 1870, le demandeur poursuivit les défendeurs pour $500 de dommages par suite de l'inondation du soubassement de sa maison dans le cours des mois de juin, juillet et août 1869 ; et par suite de l'incurie et de la négligence des défendeurs, en laissant obstruer l'égoût de la rue.

Les défendeurs plaidèrent que vers l'époque à laquelle le demandeur prétend qu'a eu lieu l'inondation de partie de sa maison, il est tombé des pluies torrentielles qui ont produit une inondation dans plusieurs parties de la ville et qui se sont introduites dans un grand nombre de caves et bas de maisons ; ces inondations étaient causées en partie parceque les canaux des rues, dans les districts submergés n'étaient pas d'une capacité suffisante pour laisser écouler les eaux qui tombaient en si grand abondance, d'où il est résulté que ces dites eaux ont refluë par les canaux privés et se sont introduites dans les maisons.

Que les défendeurs ont fait construire le canal dans la dite rue comme ailleurs d'une dimension suffisante pour faire écouler les eaux dans des circonstances ordinaires, mais ils ne pouvaient prévoir et ils n'étaient tenus de prévoir qu'il surviendrait des inondations comme celles qui ont résulté des orages qui se sont abattues sur la ville à la dite époque et qui constituaient une véritable force majeure.

Les parties ayant procédé à leur preuve respective furent entendues au mérite de la cause.

Les défendeurs citèrent les autorités suivantes :

C. C. Art. 1053.

11 Toullier, p. 149, No. 119.

Rolland de Villargues, Vo. dommages, No. 7.

2 Sourdat, Resp. No. 1059.

Abbott, Laws of Corp. p. 532 No. 506 et seq., No. 510.

Boucher vs. Le maire, etc. de Montréal.

PER CURIAM.—The plaintiff alleges that, being proprietor of certain premises on St. Charles Borromée street in this city, he let the basement and lower portion of the same to one named Viau, for $144 rent and taxes per annum; that during the months of June, July and August, 1869, the drain in said street was much obstructed, and failed to carry off the water, which flowed into said premises, to such a degree that Viau instituted an action against plaintiff for the resiliation of his lease; which lease was rescinded by the Court, to the loss and damage of plaintiff, in consequence of the above, and by reason of being unable to obtain a tenant during the remainder of the year, of six hundred dollars; all of which the plaintiff alleges was caused by the negligence and fault of defendants, from whom he now seeks to recover the said sum as damages. The defendants plead that the loss was caused by heavy rains, which created an inundation, and not by their fault or negligence. The Court, however, considers that, although it is not proved that the resiliation of Viau's lease was in consequence of the inundation, yet the defendants were guilty of want of care and diligence in the month of August; and assesses the damages due to plaintiff therefor at $40, for which amount judgment goes in favor of plaintiff with costs.

Le jugement de la Cour Supérieure est motivé comme suit :

La Cour, etc.; considérant qu'il est en preuve que le 16 août 1869, les défendeurs ont été avertis que le canal ou égoût de la rue St. Charles Borromée, en la cité de Montréal, près de la propriété du demandeur était obstrué et que les défendeurs ne se sont mis en mesure de le réparer que le 19 du même mois. Considérant que le dit jour 19 août 1869, à la suite d'un nouvel orage, la maison du dit demandeur a été pour la seconde fois inondée par le refluement de l'eau qui ne pouvait s'écouler par le dit égoût ou canal public et que les défendeurs sont responsables des dommages causés par suite de cette dernière inondation dans le soubassement de la maison du demandeur, lesquels dommages ne peuvent être évalués à plus de $40. Considérant qu'il résulte de la preuve faite que le bail que le demandeur avait fait de la dite maison au nommé Chs. C. Viau, n'a pas été résolu à raison de l'inondation d'icelle, mais aussi pour d'autres cause, indépendantes du fait ou de la négligence des défendeurs et que les défendeurs ne sont pas responsables des dommages et frais résultant de la dite résolution, condamne les défendeurs à payer au dit demandeur la somme de $40, avec intérêt de ce jour et les dépens, la Cour déboutant le demandeur du surplus de sa demande.

Jugement pour le demandeur.

Doutre, Doutre & Doutre, avocats du demandeur.

R. Roy, avocat des défendeurs.

(P. B. L.)

Beaudry vs. Desjardins.

COUR SUPERIEURE, 1871.

EN REVISION.

MONTREAL, 13 MAI, 1871.

No. 1751.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

Boucher et vir, vs. *Brault et al.*

JUGE :—Qu'il y a erreur dans le jugement rendu en cette cause et que la demanderesse est bien fondée dans sa saisie par droit de suite et quant à la mise en cause des autres défendeurs. (1)

Le jugement rendu par la Cour Supérieure le 30 décembre 1870 a été renversé en cour de Révision, et il est motivé comme suit :

La Cour, considérant qu'il y a erreur dans le dit jugement, a revisé le dit jugement et l'a renversé. Considérant que la demanderesse a prouvé ses allégations contre le défendeur Brault. Considérant que le défendeur Brault a fait enlever et transporter tous les meubles et effets garnissant la dite maison au numéro 190 et au numéro 188 de la rue St. Laurent dans la ville de Montréal, occupé le premier par le dit Brault, le second par Ovide Perrault mis en cause, et appartenant tous deux à Catherine Würtele, mise en cause. Considérant que le dit défendeur, sans raison valable et sans y être autorisé en justice, a abandonné les lieux susdits et que le dit défendeur n'a pas prouvé les allégations de son plaidoyer, déclare la saisie par droit de suite émanée en cette cause bonne et valable, et laissant à la dite demanderesse à se pourvoir pour son loyer et à procéder sur sa demande incidente ainsi que de droit, ce dont les défendeurs Ovide Perreault et Catherine Wurtele seront tenus de prendre connaissance ; avec [illegible] frais de la Cour Supérieure, etc., etc., etc.

Pagnuelo, avocat de la demanderesse.

Jetté, Archambault & Christin, avocats du défendeur Brault.

(P. R. L.)

COUR SUPERIEURE, 1871.

EN REVISION.

MONTREAL, 30 JUIN, 1871.

Coram MONDELET, J., MACKAY, J., BEAUDRY, J.

No. 2371.

Beaudry vs. *Desjardins et Dame E. Desjardins et vir*, opposants, *et Henry Thomas et al.*, contestants.

JUGE :—1o. Que les frais funéraires privilégiés comprennent seulement ce qui est de convenance à l'état et à la fortune du défunt. (2).

2o. Que l'enregistrement d'un bordereau de ces frais sur l'immeuble alors sous saisie dans le délai fixé par la loi ; est valable. (3)

Le jugement rendu par la Cour Supérieure à Montréal le 30 décembre 1870 n'a accordé à l'opposante que la somme de $50.00 sur celle de $156. 75

(1) Vide L. C. Jurist, Vol. 15, p. 117.

(2) C. C. Art. 2002-2009.

(3) Arts. 2090, 2091 C. C.—Troplong, Priv. et Hyp. No. 650.

qu'elle alléguait avoir déboursée pour les frais funéraires de son père, le défendeur, et l'a condamnée aux dépens de la contestation de son opposition faite par Henry Thomas et consors.

Le montant total de son opposition avait été contesté ; et ce montant par elle encouru pour les obsèques de son père était constaté, par un bordereau enrégistré, le 12 mai 1868. Les contestants alléguaient que la propriété était sous saisie lors de cet enregistrement ; que le montant de frais funéraires était exagéré et exorbitant, et que le défendeur était au jour de son décès insolvable. A l'enquête, le curé de la paroisse a prouvé le coût des services de première, deuxième et troisième classe, et qu'il y avait sept classes de services.

Les contestants prétendaient que le montant de $60 suffisait pour les frais d'un service de troisième classes, qui aurait convenu parfaitement dans les circonstances où se trouvait le défendeur.

L'opposante prétendait que le privilége des frais funéraires pouvait affecter un immeuble sous saisie ; si l'on considère que les articles 2090 et 2091 du Code Civil qui prononce la nullité de l'hypothèque consentie par le débiteur dans les 30 jours qui précèdent sa faillite ou postérieurement à la saisie, contiennent une exception en faveur des créances, dûment enrégistrées mentionnées dans le chapitre suivant, au nombre desquelle créances ainsi exceptées se trouvent celles des frais funéraires et de dernière maladie.

Troplong, Priv. et hyp. No. 650 ; au lieu du No. 850 cité erronément au bas de l'art. 2090.

Le jugement de la Cour Supérieure (Torrance, J.,) est motivé comme suit : " The Court, considering that the position and means of the deceased F. X. " Desjardins did not justify the expenditure by the opposant of the sum of " $156.75 for which he was collocated, being the disbursements made by the " opposant in giving her deceased father a funeral service of the first class. "

" Considering the insolvency of the deceased Desjardins at the time of his " death, doth maintain the said contestation with costs and doth reduce the col- " location in favor of said opposant for said funeral expenses, and doth order that " the prothonotary of this court do prepare a new report of distribution allowing " to the said opposant the sum of fifty dollars for said funeral expenses. "

En revision ce jugement fut réformé, quant aux frais ; il est motivé comme suit :

The Court now here sitting as a Court of Review.....considering that there is no error in the said judgment, except in so far as by it, the said Eliza Desjardins has been condemned to pay the costs of said contestation of the opposition and collocation, doth revise said judgment, reform the same and proceeding to render the judgment that ought to have been rendered in the premises, doth confirm the said judgment of the 30 December 1870, save only in so far as regards costs. As to costs, the said Eliza Desjardins is declared to be entitled to be collocated and is ordered to be collocated for costs of introduction and fyling of her opposition as of an opposition for $50, and costs of revision are hereby awarded against said Henry Thomas et al., in favor of said Eliza Desjardins.

Bondy, avocat de l'opposante.

Laflamme, Huntington & Laflamme, avocats des contestants.

(P. R. L.)

COURT OF REVIEW, 1871.

MONTREAL, 30th SEPTEMBER, 1871.

Coram BERTHELOT, J., MACKAY, J., BEAUDRY, J.

No. 252.

Lacombe vs. *Ste. Marie & al.*

HELD:—That Justices of the Peace are liable in damages for illegal and malicious commitment, made without previous examination of witnesses before them in the presence of the accused.

This was an action to recover the sum of $5,000 damages from defendants, justices of the peace, for having maliciously and illegally caused plaintiff to be arrested. The pleadings and facts appear in the remarks of the honourable Judge who pronounced the judgment of the Court of Review.

MACKAY, J. The plaintiff is a merchant at Laprairie, and defendants justices of the peace there. Plaintiff sues them for damages, $5,000, for having arrested him, and afterwards committed him to jail, on the 11th of November, 1865, without cause, maliciously, upon proceedings informal, and illegal, upon a charge of perjury, made by one Bourassa, against plaintiff.

It appears that on the 3rd of March, 1865, a house, or store, of Bourassa's, at Laprairie, was burned; an inquiry into the cause of the fire had been made by the Coroner, and plaintiff had been examined as a witness upon the enquiry. A true bill, for arson, was afterwards found by the Grand Jury against Bourassa, and plaintiff was a witness before the Grand Jury. Bourassa was acquitted by the Petty Jury.

Bourassa, irritated against plaintiff, charged him on the 11th of November, 1865, with perjury, committed at the inquiry before the Coroner; Bourassa's information, written by Medéric Lanctot or by Laurier, his partner, out of the presence of any magistrate, is sworn to before Ste. Marie; and upon this and two other depositions in like form, the two defendants order the arrest of plaintiff; and his production before them at the house of Medéric Lanctot's father Hypolite. It was dark night at the time, a Saturday night.

Upon the plaintiff's being taken before the justices, it would have been proper for them to take the examinations of any witnesses in support of the charge against plaintiff, and of course they ought to have called for the affidavit or deposition before the Coroner, in or upon which the perjury was charged to have been committed.

But no examination of witnesses whatever was; nor exhibition of any deposition before the Coroner! Yet, the defendants commit the plaintiff Lacombe to jail, till he should be discharged in course of law, and he is carried off that night in charge of *Coaillier*, a Montreal officer, who had been procured to go up to Laprairie, in advance, for the purpose. The plaintiff was carried from Laprairie to St. Lamberts in a carter's vehicle, and from St. Lamberts is ferried across to Montreal in a canoe, arriving at Montreal Jail, at about 11 o'clock at night.

It was Medéric Lanctot with his partner Laurier who prepared all the papers, apart from the signatures to them. After having taken (before the arrest) the depositions: "Je me suis rendu, (says Lanctot), avec les témoins et le nommé "Elzéar Bourassa chez mon père, Hypolite Lanctot;" then Bourassa went for the defendants.

One of the witnesses, *Des Rivières*, was *quasi* inveigled into making his deposition; for, says he: "Je ne savais pas que c'était pour faire arrêter M. "Lacombe. Si j'avais su que c'était pour faire arrêter M. Lacombe, je ne sais "pas si j'aurais consenti à faire ma déposition;" and he did not make it before the two defendants, so the one whom he did *not* make it before is liable, *semble*, for false unwarranted arrest as well as for the after commitent. DesRivières says his deposition was written in Bourassa's shop by Medéric Lanctot; yet the law says the justices must take the examinations, and that the swearing must be before they are written or taken. The depositions written by Lanctot were spent at and from the time of the arrest of plaintiff upon them. Now examinations had to be, after the arrest, before any commitment to jail, such as here was, could be, lawfully.

The following appears from the defendants' own depositions before the Court: Moquin says: Bourassa asked him to go to Hyp. Lanctot's. He signed the commitment. Plaintiff was brought before us (he says) by *Coaillier*; plaintiff answered nothing to the accusation: "et nous l'avons envoyé en prison, et je suis "parti immédiatement; je n'ai été là qu'un instant." No witness was examined in his, Moquin's, presence: "mais j'ai pris communication des affidavits et de la "plainte produite."

Ste. Marie says: Bourassa spoke to me "la veille ou l'avant veille de cela." He does not remember of any procès-verbal of proceedings made after the arrest, nor can he say who acted as *greffier* to the justices. Examined on *faits et articles*, he says: the depositions were ready when he arrived at Hypolite Lanctot's.

He says the proceedings lasted an hour; and Moquin with him, he believes, all the time! *Moquin* says he was only an instant there and Coaillier says, from the arrest till the departure only half an hour!

Nothing further was done by Bourassa. There had been no perjury, most probably, but some ends were gained. Sunday at Laprairie passed with plaintiff in jail in Montreal; his family in distress; plaintiff's character assailed, and, of course, the talk at the church door.

As to Bourassa, never further did he budge, but plaintiff was left to work his way out of jail and his discharge from the accusation against him at his own expense, and by his own activity.

He firstly got admitted to bail upon a Habeas Corpus, and afterwards was discharged in the Criminal Court for want of prosecution.

Plaintiff's declaration alleges the facts pretty nearly as proved, and charges that defendants conspired with Bourassa to oppress plaintiff, aiding Bourassa in a vengeance against plaintiff; charges the defendants with maliciously, illegally, and informally arresting the plaintiff, and afterwards committing him to jail, refusing bail; the declaration alleges that the arrest was without warrant;

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this may be, but Coaillier swears that he had a warrant, but that he cannot find it now. For the purposes of the case and of this judgment we will allow that there did exist a warrant.

The defendants sever in their defences, and plead separately what may be called a general denial and the general issue.

The judgment *à quo* has dismissed plaintiff's action, the Court finding the defendants not chargeable, and in no respect liable towards the plaintiff, whose case is said not to have a shadow of foundation; and so the factum of defendants in Review repeats, saying that judges can never be molested for their judgments. It would be intolerable, certainly, if, as a general rule, judges could be. But magistrates are judges only in a qualified way; their acts are judicial sometimes, and merely ministerial sometimes; they must show jurisdiction for their acts.

We are unanimously of opinion that upon what appears in this Record against the defendants they are liable in damages, in favor of plaintiff. So the judgment complained of will be reversed; it is impossible to maintain it. The conduct of defendants was outrageous.

Here are some of the authorities upon which our judgment is based: Pages 166, 8, 9, Saunders' Pract. of Magistrates Courts: The man being arrested, examination of the witnesses against him ought to be afterwards, in his presence, before the justices, and for these examinations the witnesses have to be sworn beforehand.

In the case before us no such examinations were; the original informations or affidavits made for the arrest were irregular, the witnesses to them were not sworn beforehand before the justices. They were spent, from the time of the arrest. Rex *vs.* Constable, Vol. 3, Dowling and Ryland, A. D. 1826. *Abbott* Ch. J: Defendant was indicted for misdemeanor, for doing not worse than defendants here, and fined a small fine, £100; "he having, before sentence, "made satisfaction to the injured party."

He had not examined the witnesses under oath, yet had committed a man to house of correction as a vagrant. No corrupt motives could be attributed to the justice, says the chief justice, and he had jurisdiction over the charge, clearly.

Caudle *vs.* Seymour, Ad. & Ell., shows that justices of the peace may be sued sometimes. In that case it was said that justices might have jurisdiction over offences in the abstract, but that, to give them jurisdiction in a particular case over a particular individual, there must be a proper charge and information before them. "If, says Addison, p 680, citing Morgan *vs.* Hughes, the justice "grant a warrant against a person, upon a supposed charge, without taking any "deposition or information on oath, and the party is arrested under the warrant, "this is a trespass, for which an action may, *forthwith*, be taken against such "justice for compensation in damages."

And so here defendants, without depositions, COMMITTED TO JAIL the plaintiff, and he may sue defendants forthwith.

The defendants had no reasonable cause for committing plaintiff, for no proofs were taken before defendants, as ought to have been, and no oath of plaintiff was exhibited; the coroner was not examined nor asked for the evidence taken

before him. As to malice, it can seldom be proved by direct evidence, but is constantly inferred from circumstances.

We see indications of malice of defendants against plaintiff. If malice may be inferred from a justice *arresting* without informations before him under oath, may it not, as fairly, from his committing to jail without examinations of witnesses whatever ?

Plaintiff's respectable position at Laprairie, his ignorance of proceedings proposed against him, the charge against him (misdemeanor only), might have led the defendants to postpone their proceedings till Monday, or to have commenced them during daylight of Saturday. They seem to have been very pliable in the hands of Bourassa. Their proceedings seem to have been hurried, designedly. We give the plaintiff judgment for $100, with costs as in an action for £100. We would have given larger damages, but we have taken into consideration that the defendants will have large costs to pay, partly from their own course of pleading separately; costs of Revision, of course, are also allowed to plaintiff.

The judgment of the Court of Review is as follows :

The Court now here sitting as a Court of Review, having heard the parties by their respective counsel upon the judgment rendered in the Superior Court in the District of Montreal, on the 30th day of January, 1871 ; having examined the record and proceedings had in this cause, and maturely deliberated ;

Considering that there is error in the said judgment, to wit, in maintaining the *défenses* of the defendants and dismissing plaintiff's action, doth, revising said judgment, reverse the same, and, proceeding to render the judgment that ought to have been rendered in the premises ;

Considering that the arrest of plaintiff complained of is not clearly proved to have been preceded by any warrant, but that, even were it or had it been so, the informations or affidavits upon which avowedly it proceeded (according to defendants) were not properly taken and sworn to, but were irregular, prepared and written beforehand by Médéric Lanctôt and his partner, the lawyers of Elzéar Bourassa, the private prosecutor, and written before oath whatever administered to the informants or deponents by the defendants or either of them ;

Considering that the defendants' commitment afterwards, on the same 11th of November, 1865, of the plaintiff to jail, complained of, was without any previous confession of plaintiff, or examinations, or examination, of witnesses or witness, before them, in presence of the plaintiff, such as ought to have been before any such commitment ;

Considering that the charge (perjury) against plaintiff, and that though defendants had jurisdiction over the offence in the abstract, they had no jurisdiction over the plaintiff in this case, for want of a proper charge or information before them, and had not jurisdiction, or right, over plaintiff in this particular case, to commit him to jail on the 11th of November, 1865, for want of previous proper examinations of witnesses before them after the first arrest of the plaintiff, and the plaintiff not having confessed in any way before the defendants ;

Considering that the defendants' said proceedings, particularly their said commitmal of the plaintiff to jail, were without probable cause and malicious ;

Considering, further, that plaintiff has sufficiently proved his allegations to

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entitle him to a judgment against defendants for damages, doth therefore condemn defendants, jointly and severally, to pay to plaintiff $100 as d amages, with interest etc., with costs in the said Superior Court as in a suit for $400 against said defendant, Ste. Marie, upon the issues between plaintiff and him, and with costs in the same Court as in a suit for £100 against said defendant, Moquin, upon the issues between plaintiff and him; and with costs of this Court of Revision against Ste. Marie upon plaintiff's inscription against him, and with costs of this court against said Moquin upon plaintiff's inscription against him, distraction of costs, etc.

Judgment reversed.

Mousseau & David for plaintiff.
Doutre & Doutre for defendants.
(J. K.)

CIRCUIT COURT, 1871.

MONTREAL, 30TH SEPTEMBER, 1871.

Coram BERTHELOT, J.

No. 1975.

Durie vs. *Kennedy.*

HELD:—That no action pour vice redhibitoire will be maintained unless brought within eight days after the sale of the horse.

The 7th March, 1871, the parties transacted as to sale of defendant's horse to plaintiff. At that time $50 was given as earnest money. Action instituted 15th April, 1871, to recover back money so paid upon alleged unsoundness. Defendant, among other grounds, urged that the action had not been brought within a reasonable delay.

Judgment:—"La Cour considérant que l'action du demandeur aurait dû "être intentée dans les huit jours après le sept Mars dernier, l'en a debouté "avec depens."

Action dismissed.

F. A. Quinn, for Plaintiff.
Perkins & Monk, for Defendant.
(E.C.M.)

CIRCUIT COURT, 1871.

MONTREAL, 15TH JUNE, 1871.

Coram TORRANCE, J.

No. 1905.

Nadon vs. *Ollivon et al.*

HELD:—That a servant who leaves the employ of his master before the expiration of his term of service is nevertheless entitled to wages already earned.*

This was an action for wages. Defendants, while they admitted the plaintiff's claim, contended that he had forfeited his right thereto, by reason of his having left their employ without permission.

Judgment for plaintiff.

T. P. Foran, for Plaintiff.
Chapleau & McMahon, for Defendants.
(T.P.F.)

* Vide 4 L. C. R., 26.

COUR DU BANC DE LA REINE, 1870.

QUEBEC, 18 JUIN 1870.

Coram CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J., LORANGER, J., *ad hoc.*

No. 9.

LOUIS EDOUARD PACAUD,

(*Demandeur en Cour Inférieure,*)

APPELANT;

ET

WILLIAM EVANS PRICE,

(*Défendeur en Cour Inférieure,*)

INTIMÉ.

JUGE:—Que celui qui diffame une des parties par des écritures au dossier, sans cause probable, sera passible de dommages.

L'action du demandeur, contre le défendeur, était pour £1000 de dommages, résultant des écritures calomnieuses et diffamatoires que l'Intimé et son frère, Richard Charles Price, avaient faites sur le caractère, la réputation, l'honneur et la bonne fâme de l'appelant, dans une cause devant la Cour Supérieure, pour le District d'Arthabaska, dans laquelle ils étaient *demandeurs* contre Théophile Côté, secrétaire-trésorier de la municipalité du comté d'Arthabaska, la corporation du township de Chester Ouest, et l'appelant, *défendeurs*. Par cette action, les Prices demandaient la nullité d'un acte de vente, que le dit Théophile Côté avait fait et consenti à l'appelant, le 3 avril 1860, du lot de terre No. 12, *Rang Craig Sud, dans le Township de Chester Ouest*, pour taxes:

Ces écritures calomnieuses et diffamatoires sont contenues dans les extraits suivants *de la déclaration*.

"And the said plaintiffs do further represent, that being proprietors of the said lot of land as aforesaid, and the said lot of land having been put up for auction and sale as aforesaid, on the pretence aforesaid, [illegible] the day and year, and at the place aforesaid, to wit: at St. Christophe aforesaid, on the said 7th of February, 1859, he, the said Louis Edouard Pacaud and divers other persons, then present at such sale, fraudulently contriving together to cause the said lot of land to be sold under its real value, did unlawfully contrive, agree and confederate together, and to and with each other, and then and there promised, to and with each other, not to bid for the said lot of land in opposition to him, the said L. E. Pacaud; he, the said L. E. Pacaud, on his part, unlawfully promising, as a supposed consideration, not to bid against them, the said other persons then and there present, on the sale of other lots of land, then and there to be sold or intended to be sold, and hat he, the said Théophile Côté, the said secretary-treasurer, acting in collusion with the said L. E. Pacaud, and the said other persons then present at the said sale, for the purpose of depriving the plaintiffs of their said lot of land, instead of selling or offering for sale such portion of the said lot of land as appeared to him best for the interest of the proprietors thereof, to wit: he plaintiffs, as by law he was bound to do, but did immediately, and before any

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competition could have taken place between the parties then and there present, sell the whole of the said lot, for the sum of twelve shillings and six pence, for taxes, and the sum of five shillings for costs, and never offered to sell any portion thereof, well knowing that the said pretended taxes and all his costs and charges would have been realized by the sale of a very small portion of the said lot of land, to wit: by less than five acres of the same, had he offered the same for sale, and the plaintiffs further say: that the said costs and expenses charged by the said Théophile Côté for selling the said lot of land, were and are exorbitant, illegal, and more than a just proportion of the cost of selling the same in connection with the other lots then and there sold by him, the said secretary-treasurer.

"And the said plaintiffs further aver: that the said L. E. Pacaud, in pursuance of the said agreement, did, with the knowledge of the said Théophile Côté, acting as such secretary-treasurer, and in collusion with him and the said other persons present at the said sale, and by reason of the said unlawful combination as aforesaid, become the sole bidder of the said lot of land, and the said other persons then and there present at the said sale or auction, did abstain from bidding for the said lot of land, and that the same was not adjudged at its proper value, and that such portion thereof was not sold as was best for the interests of the plaintiffs, the proprietors thereof, whereby, and by reason of the premises, the said pretended adjudication and sale, and the said deed of sale last aforesaid, were and are null and void, and so ought to be held by this Court.

"And the said plaintiffs, further complaining of the said defendants, do further represent, that the said L. E. Pacaud, and the said Théophile Côté, in his said quality, and the said Corporation of the township of Chester West, on the first Monday of February 1859, at the said Village of St. Christophe, did unlawfully cause one square inch of the said lot of land to be sold and adjudged to the said L. E. Pacaud, thereby intending and contriving to cheat and defraud the said plaintiffs and covertly to sell the whole of the said lot of land by way of *folle enchère*, secretly and without notice to the public. And the said plaintiffs aver, that in pursuance of the said design, subsequent to the said first pretended sale of the said square inch, he, the said Théophile Côté, acting as aforesaid, did adjudge and sell to the said L. E. Pacaud, not only the part of the said lot first sold as aforesaid, but the whole of the said lot of land, and did afterwards execute the deed of sale in favor of the said L. E. Pacaud, as aforesaid."

Et les demandeurs concluaient, par leur action, à ce que tous les défendeurs, y compris l'appelant, fussent solidairement condamnés à payer les frais.

L'appelant répondit à cette action, par entr'autres défenses, au fond et au mérite, par une défense *au fond en droit:* pour démontrer l'absurdité même de cette accusation de fraude, il leur disait: "votre accusation de fraude est "pure malice: vous dites que le 7 février 1859, j'ai acheté un *pouce quarré* "dans votre lot de terre pour le montant réclamé pour taxes et frais de vente, "et vous dites que le premier lundi de février 1859, qui était le 7 *février* 1859, "j'ai acheté à la *folle enchère* tout le lot de terre, c'est-à-dire que ces deux ventes "auraient été faites le même jour: mais c'était une impossibilité (18 Vict. chap. "100 Sec. 5, §3.) Ces deux ventes ne pouvaient se faire le même jour, puisqu'il

" fallait un ajournement de la vente du 7 février 1859, dans les huit jours suivants. " Les demandeurs admettant l'absurdité d'une pareille accusation, s'en désistèrent *verbalement* devant le Tribunal Inférieur, et ne contestèrent que les autres moyens ou chefs de la *défense au fond en droit* du défendeur ; et la Cour Inférieure, le 18 mars 1861, débouta, avec dépens, l'action des demandeurs.

Ils interjettèrent appel de ce jugement, et au lieu de respecter ce désistement de fraude, qu'ils avaient fait devant la Cour Inférieure, ils le répudièrent formellement devant le Tribunal d'appel et ils alléguèrent ceci dans leur *factum* :

" The frauds alleged against the respondent, Pacaud, are of a class, which it is for the interest of public justice and morality to put down, as being a part of a system, by which absent proprietors of land are defrauded, by speculators, in such a manner that, under colour of executing the municipal laws, a wholesale system of spoliation is carried on, in collusion with corporation officers amounting, in effect, to a confiscation of all the landed property of absentees under the control of this institution. The present case, in its allegations, presents an instance of a most striking kind : It is alleged that the respondent, Pacaud, by the collusion of the secretary-treasurer, is permitted to purchase a square inch of this land in the first instance, at a nominal price, of course ; that as regards this sale, it not being carried into execution, a sort of sale at folle enchère without notice is subsequently held, when the day prescribed by the *Canada Gazette* for the sale being passed, no competition is to be created, and at this sale, the whole lot of land, of the extent of two hundred acres, is sold to the respondent Pacaud, the sole bidder, for 12s. 6d ; that a combination was entered into between those present at the sale, not to bid against each other, each selecting before hand his share of the spoils.....these facts, if proved, would certainly go to implicate the respondent personally to such a degree as to raise a cause of action, without the sphere of operation and beyond the protecting influence of the statute on which he relies, even attaching to it the meaning he does, but which the appellant contends it by no means bears."

L'appelant intenta de suite, contre l'Intimé, une action spéciale, dans laquelle il déclare que toutes les accusations de fraude proférées contre lui, étaient autant de mensonges, de calomnies atroces et diffamantes ; et le 26 novembre 1867, la Cour Supérieure, présidée par M. le juge Polette, condamne le défendeur à $800 de dommages et dépens.

Le jugement est motivé comme suit :

La Cour, après avoir entendu les parties par leurs avocats, tant sur la défense au fond en droit plaidée par le défendeur, à l'encontre de la demande du demandeur, qu'au mérite de la dite demande et des contestations élevées sur icelle, examiné la dite défense au fond en droit, la procédure, la preuve et les pièces produites, et sur le tout délibéré ;

Attendu, que par sa déclaration, le demandeur allègue entr'autre chose ; 1o. Qu'une action a été intentée, devant cette Cour, en ce district, par le défendeur en la présente cause conjointement avec Richard Charles Price, contre le demandeur en la présente cause, Théophile Côté et la Corporation du Township de Chester Ouest, à l'effet de faire déclarer illégal et nul et mettre de côté, un acte

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de vente consenti, le 3 avril 1860, par le dit Théophile Côté, en sa qualité de secrétaire-trésorier du conseil municipal du comté d'Arthabaska au demandeur en la présente cause, du lot de terre numéro douze, dans le rang sud du chemin de Craig, dans le township de Chester, contenant deux cents acres ; qu'il lui avait adjugé et vendu, à la vente publique, qui eut lieu, au village de St. Christophe d'Arthabaska, le 7 février 1859, de terres pour taxes municipales, et de se faire remettre en possession du dit lot de terre, et que par leur déclaration sur la dite action, ils ont terni la bonne fâme et réputation du demandeur en la présente cause, en l'accusant malicieusement et calomnieusement, de s'être concerté et d'avoir agi illégalement, collusoirement et frauduleusement avec le dit Théophile Côté, la dite corporation du township de Chester Ouest et diverses autres personnes, à la dite vente publique, pour se faire adjuger et vendre le dit lot de terre, à vil prix et le ravir au défendeur en la présente cause, et au dit Richard Charles Price, et en alléguant d'autres injures diffamatoires et propres à ruiner son caractère et sa réputation, ainsi que le tout est plus amplement détaillé et expliqué en leur dite déclaration. 2o. Qu'un jugement ayant été rendu, par cette Cour, sur la dite action, la cause a été portée, pour appel, devant la Cour du Banc de la Reine, et que dans leur factum produit devant cette dernière cour, le défendeur en la présente cause, et le dit Richard Charles Price, ont malicieusement et calomnieusement renouvelé les mêmes accusations, en ajoutant entr'autres choses que l'intérêt public et la morale exigeaient qu'on mit fin à ces fraudes, dont le demandeur en la présente cause s'était rendu coupable, et autres injures diffamatoires contenues en ce factum ; Considérant que le demandeur en la présente cause a prouvé les faits essentiels énoncés en sa déclaration, et nommément, les injures diffamatoires, malicieuses et calomnieuses alléguées en sa déclaration ;

Considérant que ces injures ont causé au demandeur, en la présente cause, des désagréments, des peines d'esprit et de l'humiliation ; qu'elles sont de nature à lui attirer le mépris et à lui faire un tort considérable et dans sa réputation et dans ses affaires professionnelles et autres, et qu'il a, en conséquence, droit à des dommages pour l'indomniser ;

Considérant qu'il est prouvé que le demandeur, en la présente cause, n'était pas présent à la dite vente publique, mais qu'au contraire, il était alors au village de Drummondville, dans le comté de Drummond, ce que le défendeur en la présente cause a admis lui-même, qu'ainsi il n'a pas pu se rendre coupable des fraudes et manœuvres que le défendeur en la présente cause et le dit Richard Charles Price, lui ont imputées par leur dite déclaration et leur dit factum ;

Considérant que ces imputations n'auraient été justifiables, qu'en autant que le défendeur en la présente cause, et le dit Richard Charles Price auraient été en mesure de les prouver, et qu'ils les auraient de fait prouvées, ce qu'ils n'ont pas fait et ce qu'ils savaient ne pas être capables de faire, puisque le demandeur en la présente cause n'était pas présent à la vente et adjudication du dit lot de terre, mais qu'au contraire il se trouvait alors dans un autre comté ; comme le défendeur en la présente cause, et le dit Richard Charles Price le reconnaissent et l'admettent eux-mêmes : qu'ainsi rien ne justifiait ces derniers de faire les dites imputations, et qu'en les faisant, ils ont donné lieu à l'action en cette cause, qui

est bien fondée en droit et qui peut être poursuivie contre le défendeur en la présente cause, comme solidaire des injures susdites et tenu solidairement de les réparer, de sorte que la défense au fond au droit du défendeur en la présente cause, est mal fondée.

Considérant que du moment que les dites injures et imputations de fraude ont été faites par le défendeur en la présente cause et par le dit Richard Charles Price par leur dite déclaration et leur dit factum, le demandeur en la présente cause, sans être obligé d'attendre qu'il y eût un jugement final sur l'action intentée devant cette Cour, en ce district, par le défendeur en la présente cause et le dit Richard Charles Price, contre le demandeur en la présente cause, le dit Théophile Côté, et la dite Corporation du township de Chester Ouest, et qu'ainsi l'exception plaidée par le défendeur en la présente cause, intitulé exception temporaire péremptoire en droit, est mal fondée;

Considérant que le jugement rendu par cette Cour, le 4 septembre 1866, sur la dite action du défendeur en la présente cause, et du dit Richard Charles Price, contre le demandeur en la présente cause, le dit Théophile Côté, et la dite Corporation du township de Chester Ouest, n'est nullement fondée sur les dites imputations de fraude faites au demandeur en la présente cause, mais bien sur des moyens et motifs qui lui sont parfaitement étrangers; qu'ainsi le plaidoyer additionnel plaidé par le défendeur sur la présente cause, intitulé Plaidoyer puis darrein continuance, est mal fondé; déboute le défendeur en la présente cause, William Evans Price, de sa dite défense au fond en droit, de sa dite exception intitulée. Exception temporaire péremptoire en droit, et de son dit plaidoyer intitulé Plaidoyer puis darrein continuance, avec dépens contre lui en faveur du demandeur en la présente cause, Louis Edouard Pacaud, et condamne le dit William Evans Price à payer au dit Louis Edouard Pacaud la somme de £200 du cours actuel de cette province, de dommages intérêts pour les causes sus-énoncées, avec les dépens de la présente action.

Cette cause fut portée en Revision, et le jugement de la Cour Inférieure fut infirmé avec les dépens, le 6 juin 1868, par Meredith, Juge en Chef, et Stuart J., Taschereau J., *dissentiens*. Voici les raisons de M. le Juge Taschereau:

TASCHEREAU, J. —La cause actuelle est de la plus haute importance.

L'intérêt et l'honneur du Demandeur y sont en litige, et de sa décision, dans un sens comme dans l'autre, dépend une question; celle de savoir s'il est permis à une partie de diffamer calomnieusement son adversaire dans un acte de procédure judiciaire.

Le défendeur et un de ses parents avaient intenté une action contre le Demandeur actuel, contre le Secrétaire-Tresorier de la municipalité du comté d'Arthabaska, et contre la Corporation du Township de Chester Ouest, pour faire annuler l'acte de vente du lot de terre No. 12, rang *Craig Sud*, dans le township de *Chester Ouest*, qu'ils réclamaient comme leur propriété, et qui avait été vendu et adjugé, à la réquisition de la Corporation de Chester Ouest, au Demandeur Pacaud, pour taxes ou cotisations en vertu de l'acte municipal le 3 Avril 1860. Ils alléguaient deux raisons pour faire annuler cette vente.

1o. Nullité et illégalité absolues des procédés du Conseil Municipal du Township de Chester Ouest, qui avait ordonné cette vente:

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2o. Fraude et combinaison frauduleuse de la part du Demandeur Pacaud et des Municipalités susdites, et de diverses autres individus pour faire saisir et vendre ce lot de terre, et le faire adjuger, au demandeur Pacaud, à vil prix, et que dans ce but, le Demandeur Pacaud s'est lié et entendu frauduleusement avec divers enchérisseurs et les a engagés à ne pas enchérir, afin de lui permettre d'acquérir le lot à vil prix.

Les Price ont réussi à faire déclarer la vente nulle sur le premier chef, consistant dans l'inobservation des formalités légales, précédant et accompagnant ces espèces de vente; mais ils ont complètement failli de prouver que M. Pacaud eut, le moins du monde, trempé dans aucun complot de la nature de celui qu'ils lui reprochaient, et ils n'ont pas même essayé de le prouver. De ce fait, il n'y a aucun doute à entretenir, la preuve en est au dossier, et il a été prouvé que, dès le début, ce moyen a été abandonné comme insoutenable. Le défendeur Price, dans un plaidoyer *de puis Darrein continuance*, a déclaré (j'ignore dans quel but) que cette allégation de fraude n'avait été, par lui et son parent, faite que de bonne foi et dans un but de légitime défense. Notons que c'est lui qui attaquait, et que dans toute la procédure subséquente, comme *réponses, factums, articulation de faits et reponses aux articulations de faits de* M. Pacaud, lui, Price et son parent, avaient déclaré solennellement persister dans leurs allégations de fraudes à l'adresse de M. Pacaud. Indubitablement cette question doit se décider suivant le droit de notre sol et non suivant un prétendu droit étranger et qui n'a pour bâse que des précédents plus ou moins contradictoires. Il est un principe d'éternelle justice, savoir: que chacun est responsable du dommage qu'il a causé, non seulement par son *fait*, mais encore par sa *négligence* ou par son *imprudence;* et en ouvrant aucun des auteurs traitant du droit français ancien, nous y trouvons le principe général suivant, clairement et franchement exposé, savoir: qu'il n'est pas permis de calomnier dans une plaidoirie, et que "la *radiation, la suppression, la lacération, et les dommages intérêts* peuvent être la *suite de ces injures suivant la gravité* et les circonstances." Les autorités suivantes attestent l'existence de ce principe:

1o. L'ordonnance de François 1 du mois d'Août 1539, aux articles 37, 38, 39, 40, 41, défend de ne rien alléguer de calomnieux dans une plaidoirie à l'encontre de son adversaire: et messieurs *Bourdin et Foutanon* en leurs commentaires de cette partie de l'ordonnance en question disent, "*que le fait qui ne sera pas prouvé sera reputé calomnieux.*"

2o. Domat, partie II page 218, liv. III, tit. XI, art. III, dit:

"Les Requêtes et les autres pièces d'écritures, qu'on produit dans les procès, "doivent être mises au nombre des libellés diffamatoires, quand elles contiennent "des paroles injurieuses ou des faits qui nuisent à la réputation des autres; il "n'en faut excepter *que les faits qui sont véritables et dont l'exposition est* "*absolument nécessaire pour la décision du procès.*"

3o. Nous voyons au 5 Vol de *l'encyclopédie méthodique*, les paroles suivantes: Verbo: injures, p. 188: 1 et 2 colonnes: "On est quelquefois obligé d'articuler "des faits injurieux lorsqu'ils viennent au soutien de quelque demande ou défense, "comme quand on soutient la nullité d'un legs fait à une femme, parcequ'elle "était la concubine du défunt. Le juge doit admettre la preuve de ces faits,

" et si la personne que ces faits blessent, en demande réparation comme d'une " calomnie, le sort de cette demande dépend *de ce qui sera prouvé* par l'événe- " ment." Pacaud et Price.

4o. On trouve au 9ème. Vol. du Répertoire de Guyot: Vo. injures, p. 237, Ière. colonne, le principe suivant: " Les injures faites en justice, comme les " *accusations de crimes, les récusations, les reproches, les inscriptions de faux,* " *les requêtes* ou *mémoires* adressés aux ministres, aux gens du Roi ne peuvent " pas être punies *lorsqu'elles sont vraies.*

5o. Cette doctrine est repétée à satiété dans le 1 Vol. de *Dareau*, traité *des Injures*, pages 61, 135, 140, 145, 146, 147. Je me crois donc en droit de dire que l'on ne peut impunément diffamer un adversaire dans une plaidoirie; que celui qui s'en rend coupable, le fait à ses risques et périls, s'il ne peut prouver ses allégations; et que dans ce cas, il mérite le titre de calomniateur, indigne de la protection de la loi; cette Jurisprudence me semble fondée sur la saine raison: elle tend à écarter de la plaidoirie les accusations de crimes ou de fraude faites à la légère, et sans espoir aucun d'en faire la preuve; elle tend à entretenir, entre les parties litigantes, les bons rapports, qui ne sont pas après tout impossibles, malgré la divergence d'intérêt, mais qui le deviennent dans le cas d'une doctrine contraire: elle tend à éviter le recours aux violences brutales, auxquelles se portera une partie justement et d'autant plus justement indignée qu'elle sera innocente des reproches qu'on lui aura faits dans une plaidoirie, et qu'elle n'aura pas de recours civil en dommages à exercer contre un infâme calomniateur, qui sous le spécieux prétexte d'une plaidoirie judiciaire, qu'il n'essayera pas même de prouver, lui aura ravi l'honneur, et la considération de ses concitoyens, le respect et l'amour de sa femme et de ses enfants; cette jurisprudence dénote déjà en France, à l'époque de son existence, un état de société délicate au point de vue de l'honneur et du respect des convenances. Je suis fier de dire que, dans mon opinion, telle est encore aujourd'hui la loi de mon pays et qu'elle n'a été ni changée ni amendée, sous ce rapport, par aucune loi étrangère, dont on puisse indiquer le texte.

Si je comprends bien les raisons de la défense, il faudrait au demandeur pour réussir en la demande, prouver: 1o. L'absence de causes probables. 2o. Malice de la part du défendeur.

Je dois nier ces prétentions du défendeur comme constituant une hérésie en fait de jurisprudence française. Je nie absolument que ce soit au demandeur à prouver ces négatives. Suivant notre droit, c'est au défendeur à prouver non seulement une cause probable, pour le justifier dans ses assertions calomnieuses, mais il doit en faire une preuve satisfaisante, et quant à la malice, c'est à lui à prouver, par les circonstances de la cause, qu'il n'en a pas été affecté. La calomnie veut dire, fausse et mensongère imputation d'une mauvaise action et comporte malice et absence de cause probable, par cela même qu'elle n'a pas aucun fondement. D'après le sens commun, la malice se présume de la nature des injures. M. Dumazeau, en son traité de la diffamation, Vol. I, Page 151, dit: " Si l'imputation est commise en termes injurieux; si le fait qu'elle articule est " de nature à porter atteinte à l'honneur ou à la considération du plaignant et à " lui causer un dommage, alors l'intention du prévenu est, par cela seul, présumée

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" mauvaise jusqu'à preuve contraire, et c'est à lui de la fournir. Le Code de " Justinien renferme une disposition précise à cette égard : *Si non convicii " consilio te aliquid injuriosum dixisse probare potes, fides veri a calomnia " te defendit.* Les interprètes ont mis, en saillie, ce principe qui a été suivi " dans tous les pays où le droit romain avait pénétré. La présomption de " l'intention, dit Schneidurius, se tire de la nature des paroles ; si elles sont " injurieuses, l'intention est présumée mauvaise, et c'est à l'inculpé à prouver " qu'elles ne le sont pas. Une simple allégation à cet égard ne suffirait pas : *Sicut " se habent verba, ita, presumitur esse animus, adeo ut incumbat onus proban- " di eo se non animo injuriandi dixisse.* La malice s'infère donc de la nature " et de la fausseté de l'accusation : s'il y a absence totale de preuve d'une accu- " sation atroce, il y a absence de cause probable, de justification, et nécessaire- " ment malice par implication."

En supposant légale la doctrine du défendeur relative à sa justification au moyen d'une cause probable, je dis que le défendeur n'a pas même ce moyen à invoquer, car il n'y a pas un seul mot de preuve, et je réitère mon assertion, il n'y a pas un seul mot de preuve, de ces honteux reproches faits au demandeur de la part du défendeur, qui n'a pas même osé toucher cette corde. Mais enfin y a-t-il une cause probable ? J'avoue qu'il faut une fertile imagination pour découvrir cette cause probable. Consiste-t-elle dans le fait que le demandeur est devenu, à une vente publique, adjudicataire, pour un très bas prix, d'une terre valant plusieurs centaines de piastres ? Si tel est le cas, il faut dire à tout honnête homme : n'assistez jamais, encore moins, n'achetez jamais à une vente de terre en vertu des lois municipales, car un plaideur de mauvaise foi vous jettera l'ordure à la figure ; si vous faites une bonne acquisition, vous serez conspué, méprisé, diffamé sans qu'il y ait mot de preuve de fraude contre vous, et votre adversaire se retranchera derrière les précédents anglais et américains, et vous dira pour se justifier et échapper aux conséquences d'une infâme calomnie, " *il est arrivé que des spéculateurs se sont liés pour monopoliser et accaparer de telles ventes et adjudications ; donc il s'ensuit que vous avez fait de même ; donc j'avais raison de croire que vous auriez pu en faire autant.*" C'est un singulier raisonnement, qui n'a pour défaut, que celui de pêcher contre la logique. En donnant suite à un tel raisonnement, un honnête homme n'osera jamais acheter à ces ventes municipales, et quoiqu'elles soient déjà bien peu profitables, par le fait, que les terres ainsi vendues, sont toujours ou le plus souvent rachetées par le propriétaire, qui pour cela a un délai de deux ans, on pourra dire, en toute sureté, que ces ventes seront encore plus dépréciées à la suite de l'opinion solennellement exprimée par deux Juges de cette Cour, que *le fait seul* que l'adjudication a été faite à bas prix, est une cause probable de fraude, collusion et pratiques illégales de la part de l'adjudicataire malgré que tout le monde soit invité, au nom de la loi, à venir concourir à de telles ventes, et à les encourager. Cependant c'est un principe fondamental et salutaire que la fraude ne se présume jamais ; c'est un principe que l'on trouve dans tous nos livres de droit français. On dira probablement qu'il ne faut pas priver une partie d'une légitime défense, et que dans bien des cas, ce serait fermer la porte à un honnête plaideur que de lui interdire une allégation injurieuse à son adversaire. Il est

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facile de répondre à un tel argument qui est plus spécieux que rationel. Voici une réponse qui me semble coneluante. Ou la partie qui a une défense à faire, fondée sur des reproches de fraude est capable de les prouver ou elle ne l'est pas; car on doit la supposer douée d'une discrétion et d'une prudence ordinaires, et capable et disposée à s'assurer d'avance de ses moyens de défenses. Si elle peut les prouver, elle peut hardiment en faire l'allégation, et son adversaire en supportera les conséquences; si elle ne peut les prouver, pourquoi faire de telles allégations, c'est en pure perte pour la cause, c'est chose inutile, et on peut dire de ces allégations, *de non apparentibus et non existentibus eadem sit lex*, c'est alors calomnie dans la bouche de celui qui fait ces allégations; mais chose assez extraordinaire en cette cause et que je ne puis expliquer, et qui dénote avec quelle imprudence et quelle impardonnable légèreté le défendeur a agi en cette occasion, son avocat, M. Pentland, qui s'est fait entendre comme témoin de son client, dit, que M. Price n'a jamais autorisé ces allégations de fraude, et qu'il n'en a eu connaissance que par la signification de la déclaration en la présente cause.

Il est assez singulier, que ces Messieurs aient entr'eux violé la règle qui veut que ce soit la partie qui donne les instructions au procureur, et aient agi en raison inverse, savoir: que l'avocat, sans instructions de la part de son client, et sans l'en informer, ait fait dans la cause les accusations atroces dont il s'agit, sans s'enquérir des circonstances, et sans s'inquiéter des conséquences pour son client qui, jusqu'à désaveu, est légalement responsable du fait de son avocat.

Peut-il y avoir rien de plus imprudent que cette conduite? La conduite de ces Messieurs a été celle-ci: "*calomnions et injurions le défendeur* (il en restera "quelque chose) et confions-nous à la providence pour nous fournir les preuves, "que nous chercherons plus tard, et que nous trouverons dans des présomptions "de fraude, que le hasard nous fournira, sous forme de cause probable." Ne peut-on pas assimiler ces allégations de fraude à celles que l'on fait tous les jours, dans des affidavits, pour *capias, arrêt-simple, et saisie-arrêt*, au moyen desquels un homme est arrêté en sa personne; saisi en ses biens; ces allégations sont sanctionnées par la loi, et sont une partie nécessaire de la plaidoirie pour exercer un droit, sauvegarder des intérêts, et cependant les fait-on avec la légèreté et l'imprudence qui caractérisent la procédure du défendeur, et ne voit-on pas, tous les jours, des dommages, à un montant considérable, accordés à une partie auquel on faisait le reproche de vouloir laisser la Province, sans payer son créancier ou de celer ses biens, dettes et effets, dans l'intention de frauder son créancier? A défaut des plus fortes présomptions de fraude, la partie obtiendra des dommages contre le créancier qui ne prouvera rien de ces allégations, et il ne serviruit de rien au créancier d'invoquer *une cause probable* de justification, dans le fait isolé, que beaucoup de débiteurs frauduleux ont laissé la Province et recelé leurs biens, avec intention de fraude. Les causes de Dunn et Booth, Dennis et Glass, Warren et Morgan et une foule d'autres, sont devant nos tribunaux, pour dire que les dommages accordés, soit par un Jury, sous la direction du Juge; soit par les juges siégeant en Cour Supérieure et d'appel, sont la punition du plaideur imprudent alléguant et invoquant des faits qu'il ne peut espérer de prouver. Pourquoi faire une distinction en cette cause de Pacaud et Price? Je n'en vois

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aucune plausible. Serait-ce parce qu'il ne s'agit que de la réputation? Il me semble que la règle devait recevoir une interprétation plus favorable dans ce cas, car on peut recouvrer sa liberté; on peut refaire une fortune, mais peut-on dire que celui auquel on aura publiquement et dans une plaidoirie judiciaire, reproché une conduite telle que celle imputée au demandeur Pacaud, pourra jamais s'en relever surtout après un jugement qui déclare qu'il y a *eu cause probable*, justifiant le défendeur Price de faire l'imputation?

Pour en venir au chapitre de cause probable comme justification, je supposerai le cas d'un demandeur poursuivant son débiteur pour le recouvrement d'une somme de $1000, sur billet promissoire ou sur un acte d'obligation notarié. Je suppose que le défendeur plaide les faits suivants, savoir: Je n'ai pas signé ce billet; vous, le demandeur, de concert avec un autre fripon de votre trempe, avez fabriqué ce billet, et forgé ma signature; ou dirait, je n'ai pas signé cet acte d'obligation, c'est un faux auquel vous le Demandeur et le Notaire avez sciemment contribué pour me frauder; Si le défendeur ne fait pas un mot de preuve de cette accusation de faux, je le demande à aucun homme: le Demandeur n'aurait-il pas le droit de se plaindre en dommages? Le défendeur pourait-il dire pour se justifier, "*j'avais une cause probable, dans le fait qu'il y a eu d'autres faux commis et que c'est une chose commune que le faux, et comme vous ne prouvez pas malice, je dois être absous de votre demande en dommages.*" Ce raisonnement mériterait peu de faveur, et il me semble que la réponse devrait être affirmative d'une condamnation en dommages, contre l'auteur d'une telle calomnie.

La Cour du Banc du Roi, à Québec, a consacré ce même principe, dans une cause de Vallée vs. Monroe, jugée en 1816, par les quatre Juges de cette Cour, alors présidée par feu M. le Juge en chef, Sewell. Le défendeur avait allégué dans une Requête, par lui présentée aux magistrats, siégeants aux sessions de la paix, des injures à l'adresse du demandeur qui était inspecteur des rues, en la cité de Québec, et qui avait fait condamner le défendeur à une pénalité, pour défaut d'entretien de sa part de chemins. Cette requete était une légitime défense, par laquelle il demandait d'être relevé de la condamnation, cependant il ne prouva pas sa défense, et il fut condamné à des dommages, en faveur du demandeur Vallée, au montant de (je crois) £50. En France, aujourd'hui le principe est encore le même quoique modifié dans la forme de l'exercice du droit d'action. A une époque, depuis le code Napoléon, la partie qui croyait avoir le droit de se plaindre d'injures pouvait exercer son recours en dommages mais devait, au préalable, en obtenir la permission du tribunal, qui avait jugé de la cause, en première instance, si son recours n'avait pas été expressement réservé par le jugement; c'était chose raisonnable, car le Juge, qui avait décidé la cause, était plus que tout autre capable d'appréciер les faits, et de dire si le demandeur avait été ou non calomnié. Plus tard, et c'est aujourd'hui la pratique en France, si une partie se croit calomniée par son adversaire, elle doit dans cette même instance prendre de conclusions à l'effet de la faire condamner à des dommages, pour l'injure qu'elle lui a faite. J'avoue que c'est un admirable système, bien calculé à inspirer aux parties un respect mutuel des convenances dans leurs plaidoiries, mais le principe immuable est encore conservé en France, savoir: qu'il n'est pas

permis de calomnier son adversaire dans une plaidoirie sans s'exposer à une punition, par forme de dommages et intérêts civils, dans cette même instance. Cette doctrine se trouve énoncée aux pages 215, 216, 192 à 196 du 2e. vol. de Dumazeau, *traité de la diffamation*. Il est digne de remarque, que les circonstances ont voulu que le juge qui, en première instance, a jugé la cause de Price et Pacaud, en nullité de la vente de terre en question, soit celui qui a prononcé le jugement actuellement soumis à la révision. Pour moi, je n'hésite pas à dire que son opinion mérite un grand respect, et que je suis disposé à confirmer son jugement quoique le chiffre des dommages accordés puisse, à première vue, être considéré comme élevé. Dans le cours de ces observations, je n'ai pas perdu de vue le fait que la défense pouvait citer au soutien de ses prétentions un nombre de précédents anglais et américains, fondés sur des cas isolés, mais comme ce n'est pas au droit anglais qu'appartient la décision (en le Bas-Canada) d'une telle question, mais uniquement au droit ancien Français, je n'ai pas cru devoir me préoccuper sérieusement des décisions en question. D'ailleurs ces précédents, si on consulte leur âge, font voir que petit à petit, en Angleterre, on semble disposé à abandonner ce principe, que l'on peut dans une plaidoirie proférer l'injure la plus calomnieuse, sans s'exposer à aucun recours en dommages; en effet telle était la doctrine première, en toute sa pureté primitive: depuis, les décisions ont eu une grande tendance à modifier la sévérité et le danger de cette doctrine, et on a adopté un juste milieu, qui va à dire que si l'on a une cause probable et que l'adversaire ne prouve pas malice, l'on peut espérer se tirer parfaitement indemne.

De nouveaux précédents nous amèneront probablement une doctrine qui sera encore plus modifiée, et plus en harmonie avec l'équité et la justice. Mais la loi anglaise, (je dois dire, plutôt les précédents anglais,) n'est pas la loi de ce pays-ci et ne peut nous servir de guide, en pareille matière, quelque respectable qu'elle soit aux yeux de ceux qu'elle régit exclusivement.

Le jugement de la Cour de Révision est motivé comme suit:

The Court, sitting in review, having seen and examined the proceedings, evidence and documents of record, and heard the parties by their Counsel respectively finally upon the merits of the judgment complained of by the defendant, rendered in the present cause by the Superior Court, sitting in the District of Arthabaska, on the 26th November, 1867, and upon the whole maturely deliberated;

Seeing, that the lot of land belonging to the defendant, mentioned in the pleadings in this cause fyled, was illegally sold to the plaintiff, for taxes alleged to be due, but not due, and that the defendant, in order to avoid difficulty and without being under any legal obligation so to do, paid to the Secretary-Treasurer, entitled to receive the same, the amount which, according to law, would have been necessary to redeem the said land, had it been legally sold;

Seeing, the said lot of land, at the time of the said sale, was worth about five hundred dollars, and that it was adjudged to the said plaintiff, at the said sale, for four dollars, and that the plaintiff having insisted upon holding the said lot of land, under colour of the said illegal sale, the defendant was obliged to seek redress by legal proceedings in the Superior Court and afterwards in the Court of Appeals, which proceedings terminated in his favor;

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Seeing that, although it is now admitted, the plaintiff was not guilty of any fraud, or wrongful practice of any kind, in relation to the sale of the said lot of land; yet, that, under the circumstances of the case, the said defendant had reason to believe that the said lot of land could not, after having been advertised as required by law, have been sold, at a public sale, for less than the one-hundredth part of its value, and of the value of wild land generally in the same vicinity, unless there had been, as the defendant alleged, a wrongful conspiracy between the persons present at the sale, not to bid against each other, in order that each of them might get a part of the land, to be sold at a merely nominal price, as it is very frequently done at such sales;

And considering, the said defendant had also reason to believe, that the Plaintiff to whom the said lot of land had been so adjudged for a wholly inadequate price, and who insisted upon retaining it for the said price, under an illegal sale, had participated in the said fraud;

Seeing that the defamatory averments of which the plaintiff complains are contained in the declaration and factum filed by the defendant in the course of the legal proceedings which he was forced to institute, in consequence of his said property having been so illegally withheld from him;

Considering that the said averments were pertinent and material to the controversy between the plaintiff and the defendant, and that the defendant made the said averments, without malice, as is clearly proved, and had moreover reasonable cause for making the same;

Considering, therefore, that, in the judgment of the Court below, condemning the defendant to pay to the plaintiff £200, there is error, this Court doth reverse the said judgment, to wit: the said judgment rendered in this cause on the 26th of November last, and proceeding to render the judgment which ought to have been rendered in this cause, doth dismiss the action and demand of the plaintiff, and doth condemn him to pay to the defendant his costs, as well in this Court as in the Court below. *Dissentiente:* The Honorable Mr. Justice Taschereau.

En appel, J. S. Parkin, avocat de l'intimé, par son factum pretendit ce qui suit.

The present respondent by no means desires to shield himself under a mere formal defence, inasmuch as he conceives himself to be fully justified on the merits of this case. He maintains—1st. That proceedings in a Court of Justice are privileged, and that allegations *pertinent* to the issue, however libellous, are protected. 2ndly. That the *facts* of this case show that the respondent at the outset had every reason to entertain the expectation that he should be able to prove his allegations. 3rdly. That the allegations themselves are pertinent and not introduced either in substance or mode of statement into the proceedings, for the purpose of malice or slander.

1st. The first proposition is one of law, supported by numerous authorities. To refer to some of these—Hilliard on Torts. Vol. 1, page 416, Ch. 16, Sec. 4, et seq., and page 318. Ch. 14, Sec. 2. The last authority is to this effect: "But it is also said *absolutely* (sic) privileged communications are confined to two classes of cases, namely, proceedings in Courts of justice, and applications.

memorials, &c., presented to the legislature or growing out of legal proceedings. And in these cases the privilege is confined to matters pertinent to the legal or legislative proceedings to which the communication relates." Sec. 3 is still more positive as to their privileged character. 2. Saunders on pleading, &c., pages 933, 934, Plea of justification. "Defendant may also show that the libel was contained in articles of the peace, or in any other proceeding in a regular court of justice, whether civil or criminal, and even though the Court want jurisdiction, or though the process were improper." The case of Jekyll *vs.* Sir John Moore is, as a leading case, useful to show the general spirit of the law in relation to such privileges. 6, Espinasse, p. 93.

The French authorities also appear to precisely coincide with the English, as might be expected, both taking their origin in reason and the necessities of the position. Dareau, Traité des Injures, pages 28, 115, 118, 134, 136, refers to numerous cases. These cases, though affirmative of the law as incurring liability, showing where protection does *not* lie, establish *ex converso* where it does lie. On the general principle, Dareau observes: "En parlant des injures par écrit, nous ne devions pas oublier de dire deux mots de celles qui se répandent dans les écritures du Palais. Les avocats et les procureurs devraient ne jamais s'écarter de cette modération qu'ils doivent à leur ministère et ne rien dire *que de ce qui a rapport à l'affaire*, &c., et 1o. Il ne faut pourtant pas prendre pour injures les différents faits allégués pour exceptions, lorsque ces faits ou ces exceptions derivent de la cause, ou en deviennent les moyens nécessaires, &c. 2. Grellet Dumageau, under the Code Nap., page 191, Art. 881. "La liberté de discussion est une des conditions les plus essentielles de la bonne administration de la justice" et seq.; while a law of the 17th May, 1819, expressly provides—"Ne donneront lieu à aucune action en diffamation ou injures les discours prononcés ou les écrits produits devant les tribunaux."

These rules, without which the administration of justice would be so obstructed as to become impracticable, have been adopted by our Courts, in Fitsimmons *vs.* Byrne, 12 L. C. Rep. p. 390, which is precisely this case.

2ndly. The Respondent contends that the facts ultimately disclosed in this case, fully justified him in the allegations of his declaration. If the conspiracy to purchase at a nominal price was not, ultimately, fully brought home to the appellant, it must be borne in mind that the allegations were made *in anticipation*, and without the lights thrown upon the matter by the ultimate proof, and that in the absence of the allegations the proof could not have been gone into.

CARON, J. (*diss.*)—Action en dommages par Pacaud pour diffamation de caractère, contenue dans une déclaration et dans un Factum on appel produit par les intimés dans une cause où ils étaient demandeurs en Cour de première instance et appelants en appel, et le dit Pacaud, défendeur et intimé.

Les faits sont succinctement comme suit:

Pacaud avait vendu aux intimés une terre située dans un des Townships, pour la somme de $400 (200 arpents). Les intimés ayant négligé pendant 2 ans de payer les taxes municipales sur cette terre, le secrétai[illegible] la municipalité l'a fait mettre en vente, et Pacaud à cette vente a acheté pour 12½ cette terre que deux ans plutôt il avait lui-même vendu $400 et qui est prouvée valoir,

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lors de la vente, la somme de $500. Informés de cette vente, les Intimés ont fait offrir au secrétaire-trésorier, qui avait fait la vente, le montant requis, d'après la loi pour retirer la terre, mais le secrétaire a refusé et a consenti à l'appelant le contrat ou acte constatant l'adjudication qui lui avait été faite.

Les intimés pensant dans cette affaire que tout n'avait pas été correct, portent en 1860 contre l'appelant (Pacaud) une action pour faire annuller la dite vente. Les instructions à cet effet furent données à Mr. Pentland, avocat résidant sur les lieux et aussi alors l'agent *ad negotia* des intimés. Cette action, à la rédaction de laquelle, comme de raison, les intimés n'eurent rien à voir, était fondée sur deux motifs : l'une que les formalités voulues n'avaient pas été suivies, l'autre qu'il y avait eu entente et collusion entre le secrétaire, l'appelant adjudicataire, et les autres personnes présentes, lesquelles avaient consenti à ne pas enchérir afin de permettre à l'appelant d'avoir la terre à bas prix. Que les offres de la part des intimés de payer ce qui était nécessaire pour reprendre la terre, avaient été refusées. Tels étaient leur grief et la base de leur action. Comme l'on s'en doute bien, les intimés n'ont rien eu à faire avec la manière de les exprimer.

C'est dans la déclaration produite au nom de l'intimé que se trouvent les expressions dont se plaint l'appelant en cette cause, et aussi dans le factum produit de la part des intimés sur un appel qui a eu lieu en la dite cause sur un incident décidé en leur faveur.

Qu'il suffise de dire ici que les intimés ont réussi sur leur action en nullité, et la vente mentionnée plus haut a été annullée. C'est sur le défaut de formalités que ce jugement parait avoir été fondée, ce qui explique pourquoi, lors de la preuve et lors de l'audition, l'on a peu insisté sur les allégations de collusion, de connivence et de fraude qui formaient le second grief de l'action.

Les allégations de la déclaration et du factum mentionnées plus haut font le sujet de la présente action, le demandeur Pacaud prétendant que ces allégations sont libelleuses et de nature à détruire son caractère et sa réputation.

La défense est dénégation générale. Nombre de témoins ont été entendus de part et d'autre et dans la Cour de première instance (Polette, J.,) jugement a été rendu contre les défendeurs pour £200.

La Cour de Révision a renversé ce jugement et renvoye l'action.

C'est le sujet du présent appel.

La présente action fut portée en Cour Inférieure, avant que la première, dont il a été parlé plus haut entre les mêmes parties, (No. 201) fut décidée. Les Intimés allèguent comme fatale à la seconde action de l'appelant cette litispendance. Je crois qu'il a tort sous ce rapport.

Quant au mérite même du jugement qui renvoie l'action de l'appelant, je suis enclin à l'approuver ; mes raisons sont les suivantes :

1o. Les Intimés, en donnant instruction à leur procureur *ad litem*, n'ont pu lui dicter la manière dont l'action devait être libellée ; cette manière d'exprimer les griefs dont se plaignaient les demandeurs, était absolument du ressort de ce procureur qui partant est et doit être tenu pour seul responsable des expressions offensantes, libelleuses et diffamatoires que peut contenir la déclaration, si elles s'y trouvent.

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2o. Quant au fond même de l'accusation portée par les intimés contre l'appelant et qui fait le sujet de leur action No. 201, il ne contient rien de libelleux ou de dommageable, ni de nature à nuire au caractère de l'appelant.

En effet, ce n'est pas calomnier ni détruire le caractère d'une personne que de dire qu'à une vente publique, telle personne a envoyé les autres personnes présentes à ne pas enchérir sur un certain immeuble, afin qu'il pulsse lui être adjugé à plus bas prix ; *c'est une chose qui se fait tous les jours, et personne n'est réputé malhonnête pour l'avoir fait.* Si la manière dont la chose a été exprimée l'a rendue libelleuse, ce n'est pas la faute des Intimés.

3o. Insister à maintenir les prétentions de l'appelant, et trouver matière à action dans les allégations dont il se plaint, telles qu'elles sont exprimées, serait restreindre dans des limites beaucoup trop étroites, le droit d'exposer ses griefs devant les Cours de justice, et l'usage universel et la pratique constante est de ne donner aucun sens offensant et diffamatoire à des allégations de la nature de celles en question. Ce style est employé dans les causes les plus simples.

4o. Il a été déclaré, dans le cours de l'instance, de la part des Intimés, qu'ils n'insisteraient pas sur cette partie de la déclaration, c'est peut-être la cause pour laquelle la preuve sur ce point n'a pas été plus forte.

5o. Les apparences étaient contre l'appelant et de nature à justifier les intimés ou eur procureur de croire que tout n'était pas correct dans les procédés qui avaient amené l'adjudication de l'immeuble au demandeur. Toutes ces circonstances avaient cause probable, savoir ; l'omission des formalités, déclarée fatale par le jugement de la Cour, la villité du prix, l'offre de vente de toute la terre lorsqu'une partie aurait suffi ; l'absence d'enchères, la présence du frère du demandeur. L'appelant est connu pour spéculer sur les terres : le refus par le secrétaire d'accepter les offres des Intimés et la présomption que ce refus procédait de la part de l'appelant puisqu'il s'est ensuite fait donner le titre constatant son adjudication, la futilité de la raison sur laquelle est basée ce refus, la non production du titre, qui procédait de l'appelant lui-même.

6o. L'absence de l'appelant est sans importance, son frère le représentant.

7o. Il était nécessaire de faire usage des mots employés, afin de pouvoir procéder à la preuve pour établir comment les choses se sont passées ; sans cela l'action eut été renvoyée sur défense en droit.

8o. Pas de malice de la part des intimés ; ignorance de ce qui s'était fait prouvée par Pentland ; pas de motif de ruiner le caractère de l'appelant.

9o. La répétition au Factum nécessaire pour montrer comment étaient les choses lors de l'action et au reste, cette répétition, comme le reste, est le fait du procureur et ne saurait être imputée aux intimés.

10o. Quel intérêt pourraient avoir les intimés de vilipender l'appelant ?

11o. De fait l'appelant n'a encouru aucun dommage réel ; quant aux chagrins et peines d'esprit qu'il prétend lui être résulté des imputations dont il se plaint il me parait suffisamment consolé par la bonne chance qu'il a éprouvée d'obtenir pour 12/6 une terre de 200 arpents qu'il avait lui-même vendue, il n'y avait pas longtemps, pour $400, et qui est prouvé valoir $500 lorsqu'elle fut adjugée au demandeur.

12o. Il est, à mon sens, absurde d'essayer à faire croire que la réputation et

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la bonne-foi de l'appelant ont été compromises par ce qu'on aurait dit ou écrit en Cour ou ailleurs, que l'appelant se serait entendu avec d'autres personnes et les aurait engagées à ne pas enchérir afin de lui permettre de réacquérir l'immeuble à un bas prix, il serait bien plus surprenant s'il eût été prouvé qu'il ne l'avait pas fait.

13o. Il est à regretter, dans l'intérêt de l'appelant, que rien n'ait percé dans la cause qui puisse expliquer comment il est arrivé qu'une terre de $500 ait été adjugée pour 12½ lorsqu'il est en preuve que plusieurs personnes étaient présentes, et aussi pourquoi la totalité de cette terre ait été mise en vente tandis que l'on pouvait bien en vendre que ce qu'il fallait pour payer les taxes que l'on prétendait dues, lesquelles étaient, pour un montant bien minime, s'il n'y a pas eu connivence et fraude, ce en a bien l'air, et les intimés ou leur représentant ne sont guère à blâmer pour s'y être mépris, si toutefois il y a eu méprise.

Pour toutes ces raisons, je crois l'action de l'appelant mal fondée, à présent surtout que l'action des intimés qui a donné lieu au présent litige, a eu le résultat de faire annuler la vente et l'adjudication faites à l'appelant sous les circonstances mentionnées plus haut.

Je confirmerais donc le jugement de la Cour de Révision qui a renversé le jugement de la Cour Supérieure. Meredith J., Stuart J., Taschereau J., différant.

BADGLEY, J., déclara concourir dans l'opinion de M. le juge Caron.

La majorité de la Cour déclara concourir dans l'opinion donnée par M. le juge Taschereau en Cour de Révision; et ils s'accordaient à dire que l'intimé n'avait pas eu raison, ni *cause probable* d'injurier l'appelant ainsi qu'il l'avait fait, et qu'il devait être condamné à payer $50 de dommages, et les dépens.

Le jugement de la Cour d'Appel est motivé comme suit:

La Cour, après avoir entendu les parties, *de novo*, par leurs avocats respectifs, sur le mérite, examiné tant le dossier de la procédure en Cour de première instance que les griefs d'appel produits par le dit appelant et les réponses à iceux, et sur le tout mûrement délibéré:

Considérant que dans le jugement rendu en premier lieu par la Cour Supérieure, siégeant à Arthabaska, le vingt six Novembre mil huit cent soixante et sept, il n'y a pas d'erreur quant aux principes sur lesquels le dit jugement est ba[illegible] que les motifs en sont improbables, mais que le montant des dommages et in[illegible]rêts à l'appelant, demandeur en première instance, est excessif et doit être [illegible] à la somme de cinquante piastres;

Considérant que dans le jugement rendu par la dite Cour Supérieure, siégeant en Révision, à Québec, le six Juin mil huit cent soixante et huit, infirmant le premier jugement et déboutant l'appelant de sa demande, il y a partant erreur et mal jugé dans le jugement en premier lieu doit être modifié dans son dispositif et le second [illegible] et annulé, infirme et casse le dit jugement en second lieu rendu par la [illegible] Supérieure siégeant en Révision comme susdit, et modifie le dit premier jugement en réduisant les dommages et intérêts à être accordés à l'appelant, et faisant ce que la dite Cour Supérieure, siégeant en Révision, eut dû faire, a maintenu et maintient la condamnation faite contre les intimés jusqu'à la dite somme de cinquante piastres de dommages adjugées à l'appelant, avec intérêt de la date du dit jugement.

Et la Cour condamne les intimés au paiement des frais encourus par l'appelant, tant devant la Cour Supérieure en premier lieu et en Révision que devant cette Cour, et la Cour ordonne le renvoi du dossier à la Cour Supérieure, à Arthabaskaville. Archambeault vs. Archambeault.

Dissentientibus, les juges Caron et Badgley.

E. L. Pacaud, Procureur de l'appelant.

Parkin & [illegible], Procureurs de l'intimé.

(S. L. R.)

COUR SUPERIEURE.

ST. HYACINTHE, LE 30 JANVIER, 1871.

Coram SICOTTE, J.,

No. 1208.

J. Archambeault vs. N. Archambeault.

JUGE:—1o. Que dans la désignation suivante d'une servitude de coupe de bois donnée par un père à son fils, savoir " la coupe de trois quarts d'arpent de bois de front sur la profondeur du bois, " à prendre sur la terre des donateurs, au dit lieu du quatrième rang de St. Denis," les caractères essentiels de la servitude, savoir: la nature, l'étendue et la situation, sont suffisamment spécifiés pour constituer la dite coupe une servitude sur le fonds d'autrui.

2o. Qu'une telle servitude est une servitude personnelle, mais n'en constitue pas moins une charge réelle, grevant le fonds au profit du propriétaire de la servitude.

3o. Que telle servitude ne constitue pas un simple engagement personnel de la part du donateu de fournir une coupe de bois, au donataire, sujet à la prescription trentenaire des actions mobilières, mais constitue une charge réelle sur le fonds du donateur au profit du donataire.

4o. Qu'une servitude de coupe de bois de cette espèce ne peut être prescrite par le laps de trente ans écoulés depuis la date de l'acte de donation qui la crée; mais seulement par le non-usage pendant trente ans.

5o. Que dans l'espèce, la preuve démontrant que le demandeur a toujours exploité cette coupe annuellement depuis sa création par le dit acte de donation, qui a été duement enregistré, cette servitude n'est point prescrite, et le défendeur, tiers détenteur, ne peut prétendre en être libéré.

Les faits de la cause sont suffisamment expliqués par les notes de son Honneur le Juge Sicotte, sans qu'il soit besoin de les résumer ici.

SICOTTE, J.—L'action est la complainte confessoire, pour obtenir la maintenue dans la possession d'une coupe de bois, comme servitude sur l'héritage du défendeur.

La défense est que, par le titre même, il n'y a pas de servitude sur un héritage, mais seulement un simple engagement personnel entre Archambault père et son fils, le demandeur, et que cet engagement personnel est éteint par la prescription trentenaire; que l'acte de 1838 qu'on invoque n'a pas créé de servitude, et qu'il n'y a pas de titre pour la justifier; que, d'ailleurs, le défendeur, ayant acquis sans la charge de la servitude, et possédé durant 10 ans et même 20 ans, à acquis par la prescription, l'affranchissement de cette servitude.

La coupe de bois a été constituée le 25 septembre 1838, dans un acte de donation du père à son fils, dans les termes suivants: 1o. La coupe de trois quarts d'arpent de bois de front sur la profondeur du bois, à prendre sur la terre du donateur au dit lieu du 4e rang de St. Denis, avec droit de passer sur la dite terre pour charroyer le bois tant en hiver qu'en été. Le père avait aussi donné préalablement une terre, voisine des terres de ce dernier et située au même lieu. Désignation complète de ces terrains est donnée dans l'acte.

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Le demandeur a été dans la possession et l'exercice de cette coupe de bois depuis 1838, sans empêchement et trouble jusqu'à 1868, époque où il en fut empêché par le défendeur, qui est propriétaire de la terre où cette coupe de bois devait se prendre et avait été prise, pour l'avoir acquise du même donateur, et son père également, par acte de donation de 1839.

L'acte de 1838 est-il constitutif d'une servitude? Toute servitude est charge imposée sur un héritage, pour l'usage et l'utilité d'un héritage, ou pour l'usage d'une personne.

Dans l'espèce, la charge est une servitude discontinue, donnant un droit d'usage et de passage au demandeur sur le fonds asservi à la charge. Tel droit d'usage et de passage constitue des servitudes réelles. Il y a dans le titre invoqué, l'assiette de l'héritage, l'étendue de la coupe de bois et son assiette. Tout est défini, rien n'est précaire. Il y a ce que Bourjon, comme tous les auteurs, exigent: que les servitudes soient désignées, par leur qualité, leur endroit, leur mesure.

La servitude donne à celui à qui elle appartient, un droit réel dans l'héritage d'autrui; c'est la différence de l'obligation, qui ne donne qu'un droit contre la personne obligée.

On range dans la classe des servitudes personnelles, toutes les espèces de servitudes réelles, lorsque, au lieu d'être dues à un fonds, elles sont simplement dues à des personnes. Il y a donc dans l'espèce titre de la servitude.

Dans les cas où la servitude est fondée sur un titre, celui qui est troublé dans son exercice, peut agir au possessoire pour deux raisons, ainsi expliquées par Curasson, No. 76. 1o. La possession n'a rien de précaire, puisqu'elle est appuyée sur un titre. 2o. Son droit, quoique fondé, peut s'éteindre par le non-usage, il lui importe donc d'obtenir la maintenue, afin d'empêcher la prescription, qui sans cela, courrait contre lui. Le droit se perd, le titre s'éteint par le non-usage durant 30 ans.

La possession invoquée par les défenses est celle de 10 et 20 ans. Lors de l'argument, on a parlé de prescription trentenaire, mais le défendeur n'a pas une possession trentenaire. Et il ne peut joindre à sa possession celle de son auteur parce que ce dernier avait lui-même constitué la servitude sur son fonds.

La prescription applicable dans l'espèce est celle établie par l'art. 114 de la Coutume et celle qui prévalait avant le Code. Quand aucun a possédé par lui et ses auteurs, d'héritage, franchement et paisiblement, par juste titre et de bonne foi, par 10 ans, tel possesseur a acquis, par prescription, l'affranchissement contre toutes rentes et hypothèques prétendues sur le dit héritage.

La possession, pour opérer la prescription, doit être de bonne foi, dit Pothier, No. 149 et 364. Par la connaissance qui survient au possesseur que la chose qu'il avait commencée de bonne foi à prescrire, ne lui appartient pas, il contracte l'obligation de la rendre. Cette obligation vient du précepte de la loi naturelle, qui défend de retenir le bien d'autrui; cette obligation, une fois contractée, dure toujours, jusqu'à ce qu'elle soit acquittée. Pothier qualifie la bonne foi, pour acquérir par prescription, d'affranchissement, dans les termes suivants. No. 150. "Cette bonne foi n'est autre chose qu'une opinion fondée sur un juste fondement, que ce possesseur doit avoir, qu'il a acquis le domaine de l'héritage, libre et franc des rentes, hypothèques et autres droits qu'on ne lui a pas déclarés."

Il faut que le possesseur ait ignoré les charges ; et Pothier explique ainsi cette ignorance: (No. 139) " L'acquéreur d'un héritage sujet à des droits de servitude soit personnelles, tels qu'un droit usufruit, ou droit d'usage, soit prédiales, en acquiert par la prescription de 10 ou 20 ans, l'affranchissement, lorsquelles n'ont pas été déclarées, et qu'il n'en a eu aucune connaissance, pendant tout le temps de cette prescription, ceux qui avaient ces droits de servitude, n'en ayant pas usé pendant ce temps." Pothier, continuant et parlant de la prescription de 30 ans, s'exprime ainsi: " Je réponds que la prescription de trente ans, qui fait acquérir la liberté des servitudes, dont il est parlé dans l'article 186, est la prescription à l'effet de libérer, qui résulte uniquement du non usage de la servitude, et qui en fait acquérir la libération même à ceux qui les auraient constituées."

Bourjeon, parlant de la prescription des servitudes dit: vol. 2, t. 3. " A l'égard des servitudes dont l'usage est continuel, la prescription commence du jour que celui à qui une telle servitude appartient, a cessé d'en jouir ; quant à celles dont l'usage n'est pas continuel, la prescription ne commence à courir que du jour qu'il y a jouissance et possession contraire au titre de la servitude.

On a décidé, d'après ces principes, dans Dorion vs. Rivet, que la servitude acquise avant l'ordonnance des bureaux d'enrégistrement, était une charge réelle, et qui n'avait pas besoin d'être enrégistrée.

Le défendeur a-t-il ignoré la servitude ; a-t-il eu connaissance de la servitude pendant le temps de la prescription.

Le titre du demandeur émane du père, celui du défendeur et des autres enfants fait un an après, en 1839, émane également du père. Les actes sont des donations, et ont été faits évidemment en vue de l'établissement des enfants. Ils contiennent des dispositions de servitudes semblables, au profit les uns des autres. Chaque enfant, immédiatement après ces donations, a exercé la servitude de la coupe de bois, suivant son titre, et chez son frère. Le défendeur a laissé jouir le demandeur de la servitude, et de concert avec ce dernier, dès les premiers temps de sa possession, a délimité sur le terrain même, l'endroit, la mesure de la servitude.

Le défendeur a donc toujours eu la connaissance de la servitude, et en a permis l'exercice durant tout le temps de sa possession de 1839 à 1868, époque où il a déclaré se refuser à en souffrir l'exercice. De là, la complainte confessoire portée par le propriétaire.

Le défendeur n'a donc pas la possession de bonne foi, nécessaire pour lui faire acquérir, par la prescription qu'il invoque, l'affranchissement de la servitude.

La possession trentenaire ne fait acquérir libération par la prescription, que dans le cas de non-usage, comme le fait remarquer Pothier. Dans l'espèce; on ne peut s'appuyer sur le non-usage, car la complainte a été instituée dans l'année même du trouble.

Le demandeur n'a fait aucune preuve de dommages causés par le trouble dans sa possession.

Il ne peut être accordé que des dommages nominaux, comme la punition du défendeur d'avoir sans droit empêché le demandeur dans l'exercice d'une servitude due par son fonds et qu'il connaissait.

La cour fixe ces dommages à 50s.

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Les frais sont ceux de l'action tel qu'intentée.

La maintenue est accordée suivant les conclusions de la demande.

Le jugement de la Cour est motivé comme suit :

La Cour, après avoir entendu les parties par leurs avocats, examiné la procédure, les pièces produites, et la preuve et délibéré.

Attendu en fait que le demandeur prétend avoir sur la terre du défendeur décrite dans la déclaration, le droit d'une coupe de bois de trois quarts d'arpent de largeur sur la profondeur du bois, établie par acte du 25 septembre 1838, et duement enrégistré, et demande contre le défendeur qui le trouble dans l'usage de ce droit que la dite terre soit déclarée sujette à ce droit de servitude et qu'il soit fait défense au défendeur de l'y troubler;

Attendu en fait que le défendeur prétend qu'il n'existe aucune telle servitude ou charge réelle sur sa dite terre et que l'acte de donation qu'on invoque ne constate qu'un engagement personnel de la part des donateurs au profit du demandeur, qui est prescrit par le laps de trente ans; qu'il a acquis la dite terre du dit Jean-Baptiste Simon Archambault, quitte de toutes servitudes et qu'en ayant joui sans trouble pendant plus de dix ans il a acquis la prescription de dix et même celle de vingt ans contre cette action; et que d'ailleurs la prétendue servitude est nulle et sans effet vû qu'elle n'est pas suffisamment décrite quant à son espèce, grandeur et situation; Considérant que le dit Jean Baptiste Simon Archambault, après avoir constitué la dite servitude et lorsqu'il était propriétaire de la terre du défendeur en a assigné l'exercice au demandeur à l'endroit où celui-ci l'a réclamé, et considérant qu'il appert par la preuve et spécialement par l'acte d'acquisition du défendeur que l'intention du dit Jean Baptiste Simon Archambault, était que le défendeur souffrit la dite servitude du demandeur.

Considérant que le demandeur a toujours usé de sa dite coupe de bois sur la terre du défendeur et ce sans trouble de la part de celui-ci, qui de concert avec le demandeur en aurait réglé et fixé les limites, dans les mêmes que celles déjà règlées et fixées, si ce n'est quelques mois avant l'action;

Considérant que la dite coupe de bois est bien désignée quant à son espèce, grandeur et situation; considérant que le défendeur est mal fondé dans ses défenses déclare que le demandeur est propriétaire de la dite coupe de bois, droit de passage pour charroyer le dit bois, ordonne au défendeur de supporter la dite coupe de bois, lui fait défense de troubler et inquiéter le demandeur dans l'exercice de son droit de servitude et le condamne à payer au demandeur la somme de dix piastres courant, pour les dommages et intérêts encourus par le demandeur à raison de son refus de permettre l'exploitation de la coupe de bois, avec intérêt et les dépens.

Chagnon, Sicotte, & Lanctot, avocats du demandeur.

Bourgeois & Bachand, avocats du défendeur.

Jugement pour le demandeur.

(H.W.C.)

COUR SUPERIEURE, 1871.

EN REVISION.

MONTREAL, 30 JANVIER, 1871.

Coram MONDELET, J., MACKAY, J., BEAUDRY J.

No. 139.

Désautels et vir. vs. *Ethier.*

JUGE:—1° :—Que sur une action en vertu de l'article 2055 du Code Civil, accompagnée du *capias* en vertu de l'article 800 du Code de Procédure Civile; pour les dommages résultant de détériorations sur un immeuble hypothèqué; ces dommages ne consistent pas tant dans la valeur du bois coupé et enlevé que dans l'estimation qui doit être faite des dommages à raison de la détérioration en valeur de la propriété en conséquence de cette coupe de bois.

2° :—Qu'aucuns frais ne seront accordés sur les articulations de faits et les réponse à icelle lorsque ces articulations de fait sont générales et partant irrégulières.*

La demanderesse avait obtenu un jugement contre le Défendeur pour $320, qu'elle fit enrégistrer et en conséquence elle acquit une hypothèque sur une propriété que possédait alors le défendeur.

Cette propriété était en grande partie couverte de bois et en réalité, dit le défendeur, elle n'avait de valeur que par son bois.

Le 14 Janvier 1868, le demanderesse, créancière hypothécaire et personnelle du défendeur, fit émaner sur affidavit un *capias* contre le défendeur en vertu des dispositions de l'article 800 du Code de Procédure Civile.

L'affidavit alléguait que le défendeur, dans l'intention de frauder la demanderesse, avait depuis cinq à six ans et continuait à endommager et détériorer la propriété hypothéquée et d'en diminuer la valeur de $300—en enlevant de la cloture, coupant des arbres et enlevant du bois.

Les parties ayant procédé à l'enquête et ayant été entendues au mérite, par un jugement final, la Cour Supérieure dans le district d'Iberville, décida que le défendeur n'avait détérioré la propriété, que pour $31, et qu'en conséquence il n'y avoit pas lieu de maintenir le *capias* et elle en donna *main-levée* au défendeur.

En Révision; la demanderesse, qui s'y était pourvue pour y faire infirmer ce jugement comme ne lui accordant pas toute l'étendue de ses droits, prétendit que par la loi, il n'exiate que deux moyens indiqués par notre Code de Procédure Civile pour attaquer un *capias*: savoir la motion et la requête, et non pas par exception.

15 L. C. R., p. 191.

12 L. C. R., p. 265.

Statut de 1849. St. R. B. C., chap. 87, secs. 1 et 8, reproduit dans les articles 819 et seq. du Code de Procédure Civile. L'Art. 821 C. P. C. dans sa dernière disposition ne sauroit être appliqué au cas actuel, car l'exigibilité de la créance ne dépend aucunement de la vérite des allégations de l'affidavit.

Le défendeur exposa ses prétentions dans son factum devant la cour de revision comme suit: The case is not, under the decisions of this Court, subject to

* C. P. C. Art. 208.

Desautels et vir vs. Ethier.

review, and should be so declared. The law never intended *capias* to be in a case like the present, where the mortgage was caused by the registration of a judgment upon a property owned by the defendant. The *capias* was for unliquidated damages and issued without an order as required by law.*

MONDELET, J. (dissenting.)—The female plaintiff in this action took out a *capias* against defendant and also a *demande* for $320 for waste and damage caused to the land of defendant on which plaintiff had a hypothec, by cutting timber and other waste committed thereon. The judgment of the Court below condemned defendant to pay $31 for the value of trees cut down on the property mortgaged to the female plaintiff. His Honor was of opinion that the judgment of the Court below was in accordance with a correct appreciation of the evidence, —and would therefore dissent from the judgment rendered by the majority of the Court.

MACKAY, J., said there was a principle in our law that a mortgage debtor who diminished the value of the land on which the mortgage existed by cutting down trees, or otherwise committing waste, was liable to a *capias*. In the present case the female plaintiff, who held a mortgage on the land occupied by the defendant, made an affidavit to the effect that defendant had diminished the value of the land by cutting down trees and committing waste to the value of $320. At *Enquête* there was great diversity of testimony as to the value of the waste committed. Some witnesses put down the deterioration at $150; some at $100, and some at a less sum. Defendant's witnesses, however, were nearly all his own relations,—whereas plaintiffs' witnesses were disinterested persons. His Honor said that it was the duty of the Court to appreciate testimony; and in the present case, in the opinion of the majority of the Court, the evidence clearly proved waste, to the amount of $100. The *capias* issued for $320: but when the case came up in the Court below, the Judge only looked at the value of the wood cut and sold off the land, though he was by no means limited to this valuation. This, however, was a mistaken view of the case. The question for the Court to decide was not what was the value of the wood sold off the property of defendant, but by how much had the property been deteriorated in value in consequence of the cutting down of timber. The case was provided for by Article 2055 of our Code. Plaintiffs kept strictly within the letter of the law, and did not think it necessary to prove the value of the wood sold by defendant. His Honor thought that $100 was not an excessive amount and would not be attended with much hardship to defendant, as this amount would go in reduction of the mortgage. This decision would also prevent actions for damages which might be instituted by defendant against plaintiff.

The judgment is *motivé* as follows:

The Court here sitting as a Court of Review, considering that there is error in the said judgment, to wit: in granting *main levée* of the *capias* issued in this cause against defendant at the suit of plaintiffs, and in finding only $31 damages, as in and by the said judgment, doth, revising said judgment, reverse the same; considering that plaintiffs have sufficiently proved their allegations of

* C. P. C., Art. 801.

affidavit and declaration to entitle them to judgment against defendant for $100 and to have and maintain the writ of *capias* issued against defendant as a *capias* to extent of that amount of $100; considering that the female plaintiff had and has a hypothec upon the real property in possession of defendant, described in plaintiffs' declaration, and that defendant was, at date of the *capias* issuing against him in this cause, wasting and diminishing in value the said immovable property, subject to female plaintiff's hypothec, by destroying on and carrying away timber from said land, so as to prevent the female plaintiff, defendant's creditor, from recovering her *créance* to an amount over $40, and that defendant had wilfully, and with intent to defraud female plaintiff, diminished the value of said real property by wilfully, and with intent to defraud plaintiffs, cutting down trees and timber on said land and carrying away timber from said land; and that defendant ought to be condemned to pay plaintiffs' damages equal to the diminution of value of said land, through his, defendant's, misdoings aforesaid, and that such damages have been proved to an extent to warrant reasonably a judgment against defendant in respect of them, for an amount not less than $100, doth maintain said *capias ad respondendum* as good and valid and well taken as a *capias*, to wit, to an extent of $100, and doth condemn the said defendant to pay and satisfy to the said Dame Catherine Desautels, the said sum of $100, with interest thereon from this day, the payment of said $100, when made, to reduce *pro tanto* the *créance hypothecaire* of the female plaintiff, according to article 2055 of the Code Civil, and, in default by defendant to pay and satisfy to the said female plaintiff the aforesaid condemnation money, it is ordered and adjudged that a *contrainte par corps* do issue against said defendant, according to law, with costs in the said Superior Court against the said defendant, in favor of said plaintiffs, save only as regards costs of plaintiffs so called, *articulation de faits* and answers to defendant's *articulation de faits*, which costs are disallowed owing to plaintiffs' and defendant's *articulation de faits* being general and irregular; and with costs of this Court of Revision: MONDELET, J., dissenting.

Capias maintained.

Sylvestre and Saunders.

Carreau, attorney for plaintiff.
Charland, attorney for defendant.
(P. B. L.)

SUPERIOR COURT, 1871.

IN CHAMBERS.

QUEBEC, 31ST OCTOBER, 1871.

Coram MEREDITH, C. J.

In Re George Sylvestre, and Napoleon Sanders and others, petitioners.

HELD:—That, according to articles 1998 and 1999 of the Civil Code of Lower Canada, in a case of insolvency, the revendication must be made within fifteen days of the sale and within eight days of the delivery of the goods revendicated.

Gauthier and Roy, attorneys for petitioners.
Andrews, Caron & Andrews, attorneys for assignee.
(J. K.)

CIRCUIT COURT, 1871.

ST. JOHN'S, P. Q., 14TH JUNE, 1871.

Coram SICOTTE, J.

Les Syndics de Lacolle vs. *Gédéon Duquette.*

HELD:—That a judgment dismissing an action against the defendant at the suit of the present plaintiffs for the recovery of an instalment claimed as assessment for the building of a R. C. Church, on the ground that the defendant was not a Roman Catholic, but a Baptist, was *chose jugée* between the parties, and could be so pleaded against a subsequent action, for another instalment, notwithstanding that the plaintiffs, in such subsequent action, allege and prove a confession of faith as a R. C. antecedent to the homologation of the report of the syndics.

The plaintiffs, syndics named to oversee the building and repairs for the construction of a church, &c., at Lacolle, claim from the defendant the sum of $55.44, being seven payments or instalments due on the sum of $95.00, assessed against defendant's property, on the 1st July, 1863, and homologated 10th August, 1863. Included in said sum of $55.44, was a sum of $22.75, being an amount of a previous action instituted by the plaintiffs in this cause against the defendant in 1866, which action was dismissed by the same Judge.

The defendant pleaded in effect as follows:

1st. Chose jugée.

2nd. That he was not a Roman Catholic but a Baptist, publicly and openly professing to be a member of said church and attending the same, besides which notice was duly served by a bailiff of the Superior Court in and for the District of Iberville, on the 23rd of July, 1863, a date long before the homologation of the report, that the defendant had ceased to be a Roman Catholic for over three years, and could not be assessed, as provided for by cap. 18, sec. 23, of the C. S. of L. C.

3rd. That, even supposing the notice so served to be defective in form, no law required a Roman Catholic so withdrawing from his church to give any notice of such withdrawal to any priest, and concluded by asking the dismissal of the action.

The plaintiffs replied that the defendant was in bad faith, inasmuch as in 1858 he consented and made a formal profession of faith announcing his adhesion to the Roman Catholic Religion, and with their reply fyled a retraxit for the amount of the first action, which was dismissed, viz.: $22.75.

The defendant, notwithstanding the profession of faith so made, and notice given by him, made proof by two witnesses that it was a notorious fact that he attended the Baptist Church at Lacolle for the last 15 or 16 years, that he never owned a pew in the Roman Catholic Church, and never attended same except at funerals. This was the same evidence as was adduced in the first case, save and except that in the first case the *Court* being composed of the same Judge as in the present, deemed it advisable, as the proof was not quite conclusive as to defendant's openly professing to belong to the Baptist Church, to defer the oath to defendant, who then swore that he belonged to the Baptist Church, and was a communicant.

The Court sustained the points of law raised by defendant, and in rendering

judgment, dismissing the present action, said that it could not ignore what had already been adjudicated in the first case, and that the defendant's plea of *chose jugée* was well founded as well for the $22.75 as for the balance of this action, that, in fact, it was *chose jugée* for the whole assessment made by the syndics on the defendant by the repartition, viz.: $95.00, notwithstanding the profession of faith fyled in this cause, which profession of faith (for reasons best known to the plaintiffs) was not invoked or fyled in the first case. For all these reasons the action must be dismissed with costs.

Action dismissed.

C. J. Laberge, Q.C., for plaintiffs.
L. G. Macdonald, for defendant.
(L. G. McD. & S. B.)

COURT OF REVIEW, 1870.

MONTREAL, 31st JANUARY, 1870.

Coram MONDELET, J., MACKAY, J., TORRANCE, J.

No. 207.

Belleisle vs. *Lyman*, et al.

HELD:—That damages given for illegal and unwarranted attachment, *saisie arrêt*, may be compensated by debt due upon which *saisie arrêt* issued.

At St. John's, District of Iberville, the defendants, Lymans, Clare & Co., by their attorney, Mr. Hungerford, issued for debt due them upon account, a *saisie arrêt* before judgment and also proceedings in compulsory liquidation in insolvency. The attachment was not returned and the proceedings in insolvency were discontinued. The present action of damages for such illegal seizures followed, and, among other pleas, defendants (denying damage) offered in compensation to any sum awarded for damages, the sum of $181, due them by plaintiff. The action was dismissed with costs by the Superior Court at Iberville (Sicotte, J.) upon other grounds, but the judgment was reversed in Review, and judgment rendered as follows:—

The Court, now here sitting as a Court of Review, having heard the parties by their respective counsel, upon the judgment rendered in the Superior Court District of Iberville, on the 19th June, 1869, having examined the record and proceedings had in this cause, and maturely deliberated;

Considering that the defendants, at the time they brought the plaintiffs into the Court of Insolvency, had no right so to do, inasmuch as they were his creditors to the amount of $182 and no more;

Considering, nevertheless, that the damage was caused solely by the aforesaid act of defendants, inasmuch as, at the time of the issuing of the attachment in this cause, the plaintiff was actually in a state of insolvency;

Considering that there is error in the judgment appealed from, to wit, the judgment of the said 19th June, 1869, dismissing plaintiff's action inasmuch as the defendants had no right to cause the said attachment to be issued as it has been, this Court doth reverse, annul and set aside the said judgment and,

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proceeding to render the judgment which should have been rendered by the Court below, it is ordered and adjudged that the defendants do pay and satisfy to plaintiffs ten dollars currency *damages et intérêts* and ten dollars costs, with costs also in this Court, distraction of which said several costs is awarded to Messieurs Labergo and Paradis, attorneys for plaintiff; and, as to the ten dollars *damages et interets*, its amount is declared compensated by larger amount, which this Court finds to have been and to be due to the defendants by the plaintiff, before and at the time of the committing, by the defendants, of the grievances charged against them.

And it is finally ordered that the record be remitted to the Court below.

Laberge & Paradis, attorneys for plaintiff.

Doutre, Doutre & Doutre, attorneys in review.

Perkins & Ramsay, attorneys for defendants.

(J.A.P.)

SUPERIOR COURT, 1871.

MONTREAL, 31st OCTOBER, 1871

Coram BEAUDRY, J.

No. 1803.

Hon. G. Ouimet, Atty. Gen. vs. *Hon. J. H. Gray.*

HELD:—That the Superior Court of Lower Canada has jurisdiction over an Arbitrator appointed by the Government of the Dominion of Canada, under Sec. 142 of the B. N. A. Act, while acting as such within the Province of Quebec, and may inquire whether such Arbitrator is in the legal exercise of his office.

This was a proceeding in the form of a *quo warranto*, praying that the Hon. J. H. Gray, the arbitrator appointed by the government of Canada, under the B. N. A. Act, Sec. 142, be declared to be acting illegally, as such arbitrator, and be removed from office. The facts of the case appear in the following remarks of the honorable judge in rendering judgment:

BEAUDRY, J. La plainte est en forme de Quo Warranto, contre le défendeur, un de sarbitres nommés en vertu de la section 142 de l'Acte Impérial concernant la Confédération des Provinces de l'Amérique du Nord Britannique, pour faire déclarer, qu'à raison de la résidence du Défendeur dans la Province d'Ontario depuis plus d'un an, il soit déclaré qu'il n'a pas droit de siéger ou agir comme tel arbitre, que illégalement il usurpe, tient et exerce cet office d'arbitre et qu'il e soit exclu.

A cette demande, le défendeur oppose d'abord une exception déclinatoire sur laquelle je suis appelé à prononcer. Il y allègue qu'ayant été nommé à cette charge par Lettres Patentes, sous le grand Sceau de la Puissance, suivant un ordre du Conseil Privé de la Puissance en date du 23 mai, 1868, *cette nomination a été duement faite dans l'exercice de la prérogative indubitable de la Couronne et ne peut être contestée ou mise en question devant aucune Cour de jus-*

tice ou juge de telle Cour dans cette Province. Pourquoi il conclut à être renvoyé de la demande et à ce que la requête et procédés sur icelle, soient déboutés avec dépens. Hon. G. Ouimet vs. Hon. J. H. Gray.

Les parties ont lié contestation sur cette exception déclinatoire et la seule question à juger maintenant est de savoir si cette exception peut être maintenue.

Il faut observer d'abord que la requête ne met nullement en question la nomination du défendeur, mais seulement son droit de continuer à siéger et agir comme arbitre. On pourrait donc, sur ce point seul, faire justice de cette exception. Mais en supposant que les termes de l'exception puissent s'appliquer à la demande telle que formulée, voyons jusqu'où elle est fondée et les raisons sur lesquelles on l'appuie.

D'abord on dit que la nomination affectant trois gouvernements, a été faite comme prérogative royale, sous l'autorité du Parlement Impérial, et qu'aucun tribunal d'une des provinces ne peut contrôler cette nomination. Pour juger de ce moyen, il est bon de consulter la loi constitutive de la Cour Supérieure.

Le ch. 78 des S. R. B. C., s. 4, déclare qu' "à l'exception de la Cour du Banc " de la Reine, toutes les Cours et magistrats *et autres personnes* et corps politi- " ques et incorporés, dans le Bas-Canada, seront soumis au droit de surveillance " et de réforme, aux ordres et au contrôle de la Cour Supérieure et de ses juges " de la manière et forme que le prescrit la loi." Le Statut de la 12e Vict. c. 38, s. 7, dit: "de la même manière et forme que les cours et magistrats et autres " personnes et corps politiques et incorporés dans le Bas-Canada, seront immé- " diatement, avant l'époque de la mise en vigueur de cet acte, soumis au droit " de surveillance et de réforme, aux ordres et au contrôle des différentes Cours " du Banc de la Reine et des juges de ces Cours durant le terme et durant la " vacance." Voici une juridiction universelle: sauf sur la Cour du Banc de la Reine, et l'exercice de cette juridiction est réglée dans les ch. X et XI du liv. II, de la 2e partie du Code Civil, sur les procédures relatives aux corporations et fonctions publiques.

L'article 1016 établit cette juridiction dans tous les cas où " un individu " usurpe, prend sans permission, tient ou exerce illégalement une charge publi- " que, une franchise, une prérogative, dans le Bas-Canada." La requête en cette cause allègue que le défendeur et l'hon. David L. Macpherson ont notifié le gouvernement de Québec qu'ils procéderaient à l'arbitrage en la cité de Montréal, le 21 juillet 1870, et que depuis plus d'un an le défendeur était résidant dans la province d'Ontario contrairement aux dispositions du Statut Impérial et qu'en conséquence il était devenu incapable de siéger et agir comme tel arbitre, et continuait néanmoins à le faire et par là usurpait, tenait et exerçait la dite charge d'arbitre qui est une charge publique. Il y a donc là suffisamment pour établir la juridiction, si quelqu'autre obstacle n'apparait; aussi le défendeur allègue-t-il que c'est à raison de la nomination par la Couronne et de l'exercice de sa prérogative que la Cour Supérieure ne peut prendre connaissance de la plainte actuelle; cependant l'art. 1034 du Code Civil déclare formellement que " toutes lettres patentes accordées par la Couronne peuvent être déclarées nulles " ou mises au néant *par la Cour Supérieure,* dans les cas y mentionnées et nom-

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" ment, lorsque la personne à laquelle les lettres patentes ont été octroyées " ou ses ayant droits, ont fait ou omis quelqu'acte, en violation des termes et " conditions auxquelles ces lettres patentes ont été accordées, ou ont pour quel- " que'autre cause, perdu leurs droits ou intérêts dans telles lettres patentes." Comment, avec une semblable disposition, peut-on soutenir que la Cour Supérieure n'a pas jurisdiction dans le cas actuel ?

L'art. 1035 dit que " la demande en nullité des lettres patentes peut se faire par poursuite en la forme ordinaire, ou par *scire facias* sur information du procureur ou du solliciteur général de S. M. ou autre officier duement autorisé à cette fin. " La requête en cette cause est par le Procureur général pour le Bas-Canada, fonction reconnue par l'acte de la Confédération et c'est un fonctionnaire dont aucune Cour de justice dans le Bas-Canada ne peut méconnaître l'action. Il représente pour nous Sa Majesté à toutes fins que de droit et il n'y a rien ici qui fasse voir qu'il ait excédé ses pouvoirs. Cet article 1035 met au néant l'objection faite de la part du défendeur, que la demande en question étant un procédé de la Couronne contre elle-même et contre sa prérogative, ne peut être reçue. La Couronne peut bien user de sa prérogative, en révoquant la nomination qu'elle a faite, mais elle peut aussi laisser cette action aux tribunaux, et c'est ce que nous devons inférer ici de la procédure adoptée pour le Procureur Général pour le Bas-Canada, représentant, comme je l'ai dit plus haut, la Couronne à toutes fins que de droit, sans que le défendeur puisse mettre en question le mode adopté par la Couronne pour révoquer la commission du défendeur. Il nous faudrait une autorité supérieure pour arrêter les tribunaux ; ce ne pourrait être que le désaveu du Procureur Général du Bas-Canada ; jusque là nous devons considérer que la poursuite actuelle est la volonté de la Couronne.

On a prétendu de la part du défendeur que la charge qu'il occupe n'est pas *une charge dans le Bas-Canada*, voulant dire, que les dispositions du code de Procédure ne peuvent s'appliquer qu'aux charges créées dans ou pour le Bas-Canada. Tel ne me semble pas l'intention du Code. La jurisdiction de contrôle de la Cour Supérieure s'étend à tout individu qui veut exercer une charge publique dans la Province de Québec ; de quelque source que dérive cette charge, la Cour Supérieure, et ses juges ont droit de s'en enquérir, ainsi que de la manière dont elle est remplie. Que cette charge puisse également s'exercer en dehors de notre jurisdiction, cela ne peut diminuer l'exercice de la jurisdiction de la Cour Supérieure, dans les limites du Bas-Canada, et l'empêcher d'y arrêter l'action du fonctionnaire étranger.

L'exception plaidée par le défendeur ne met en question que le droit de la Cour Supérieure et des juges de cette cour, de prendre connaissance d'une commission ou lettres patentes sous le Grand Sceau. Cette exception ne peut être reçue pour les raisons exprimées plus haut. La requête peut demander, il est possible, plus qu'il ne peut être accordé, mais cela ne peut être la matière d'une exception déclinatoire, et sur ce point, le défendeur n'est pas privé de son recours.

Declinatory exception dismissed.

Ritchie, Morris & Rose, for the Attorney General.

Dorion, Dorion & Geoffrion and *Hon. J. H. Cameron*, for the defendant.

(J. K.)

COURT OF QUEEN'S BENCH, 1870.

APPEAL SIDE.

MONTREAL, 9TH SEPTEMBER, 1870.

Coram DEVÁL, C. J., CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

No. 38.

WILLIAM MUIR *et al.*, APPELLANTS;

AND

JAMES MUIR, RESPONDENT.

HELD:—1. That *aliments*, whether by disposition of the law or of man, are favored, and *insaisissables* by law.

2. That a testamentary alimentary allowance by a father, testator to his children until the time fixed by him for the final partition of the corpus of his estate, is valid.

3. That the testamentary condition attached to the alimentary allowance against seizure, mortgage or anticipation by the alimentary beneficiaries and against its subjection, seizure or other contingencies to which personal or other property is subject, frees it from compensation upon debts due to the testator or his estate by the alimentary debtor.

4. That testamentary quarterly payments to the alimentary beneficiaries of the net annual revenue applicable as aliments are not the legal equivalent of the final partition and distribution of the corpus of the estate at the time fixed by the will for its final partition.

The facts of this cause appear from the reasons of Mr. Justice Badgley's opinion hereafter given. The judgment was rendered by His Honor Mr. Justice Mackay in the Superior Court, Montreal, the 30th day of November, 1869, as follows:—

"The Court having heard the parties by their counsel upon the merits of this "cause, examined the proceedings, proofs of record and evidence adduced, and "having maturely deliberated; Considering that the plaintiff has sufficiently "proved the allegations of his declaration to warrant the present judgment; "Considering the favor of *aliments* such as plaintiff's demand is for, and the "plaintiff is not bound to suffer the compensation claimed by defendants, and is "not bound to make at present, and so as to vacate or diminish his claim in this "cause the *rapport* claimed by defendants by reason of plaintiff's indebtedness "to the estate of his late father; Considering, further, that the defendants have "not proved their plea of payment, doth overrule defendants' exceptions, and "doth condemn the defendants in their said quality, jointly and severally, to "pay and satisfy to plaintiff the sum of four hundred and fifty-eight dollars, "current money of Canada, being the aggregate amount of the three several "quarterly payments of alimentary allowance accrued and become due respec- "tively on the first day of September, one thousand eight hundred and sixty- "eight, and first of March, one thousand eight hundred and sixty-nine, and "which the said plaintiff hath a right to have and recover from said "defendants *ès qualités*, under and in virtue of the last will and testament of

Wm. Muir and James Muir.

"the late Ebenezer Muir, Esquire, bearing date and executed at Montreal before "Maître James Smith and his colleague, Notaries Public, on the 23rd May, "1857, with interest on $165 from the said 1st of September, 1868, on $140 "from the 1st day of December, 1868, and on $153 from the 1st day of March, "1869, until paid, and costs of suit, *distraits*, etc."

IN APPEAL.—*H. L. Snowdon and Hon J. J. C. Abbott, Q.C.*, for appellants, cited Redfield on Wills, p. 523; Civil Code, Article 913; Civil Code, Articles 712, 717, 719, 720; Grenier, Traité des Donations, vol. 2, p. 148, 149, 231; Lebrun des Successions, L. 3, chap. 6, sec. 2, No. 7; Denisart, verbo Rapport, No. 79; Furgole, vol. 4, p. 117 to 119; Merlin, verbo Rapport, & Succession; Poujol, Traité des Successions, vol. 2, p. 121, p. 132; A. Michaud, Traité des Liquidations et Partages, Arts. 1541 and 1542; Vazeille, Traité des Successions, vol. 1, p. 345; Toullier, vol. 4, p. 490; Code Civil, Art. 597.

John A. Perkins, for respondent.—Cited Cod., L. 3, L. 14; De Comp., L. 11; Depos. ff. L. 24, L. 25, §1, L. 26, §1; Depos. L. 4. De agn. et al., lib. Arr. Lam. T. 28, a. 7; Pothier, 625; Dom. L. 1, T. 7, S. 3, N. 14; L. 4, T. 2, S. 2, N. 6. C. N. 1293; also L. 1, De Coll.; Pothier, Successions, C. 4, A. 2, §6, ff. C. O. T., 17, N. 88; Poequet, Regle 9, p. 225, 7; Pand. Franc. on Art. 857, p. 301, C. N. 857.

BADGLEY, J.—The late Ebenezer Muir, father of the contesting parties, executed his will in due form before witnesses, at Montreal, on the 23rd of May, 1857, and, after devising certain special legacies, bequeathed the residue and remainder of his estate, real and personal, ready monies, rights of action, debts, claims and demands generally whatsoever owned by him, or to which he might be entitled at the time of his decease, in trust to his three sons, the above-named appellants, to reduce the same into their possession without delay; and, after payment of all necessary expenses for his property, and for the allowance for the management of the estate, to pay from and out of the net annual proceeds to Jane Steele, his wife, the annuity mentioned in the will, *and the remainder of the said annual revenue, to divide and pay to the whole of his children, issue of his marriage with the said Jane Steele, or their lawful issue surviving, share and share alike, par souches, yearly and every year, by quarterly payments, until the age of majority of his youngest grandchild, when the whole of his immoveable part of his estate and the residue and remainder thereof should be then sold; and, as soon as his entire estate should be converted into cash, the same should be divided between his said children who might be then alive, or their lawful issue, representing them in full property, share and share alike, par souches, in the order in which successions are divided in this country.* He further expressly directed in the following terms: "And I do hereby declare it to "be my will and desire that the revenue of my estate is bequeathed and intended "to be bequeathed unto my beloved wife and children, and the lawful issue of "the latter, as an alimentary pension or allowance until the accomplishment of "the majority of my youngest grandchild as aforesaid, and the said alimentary "allowance shall not be seized, mortgaged or made away with by anticipation, "by them or either of them, nor shall be subject to seizure or other contin-

"gencies to which personal or other property is subject, but shall be paid to "them only as an alimentary allowance."

It is only necessary to add that the appellants were also appointed executors under the will, with the amplest authority in that respect, with extension in their favour beyond the common law limitation of the year and day, and that the said William Muir, one of them, was appointed by the testator to be manager of the estate.

Mrs. Jane Steele pre-deceased the testator, and he died at Montreal on the 12th January, 1866, without having in any manner revoked or altered his will which was afterwards duly registered according to law. At the time of the testator's decease there were ten participants in the net annual revenue of the estate—of whom the said James Muir was one—entitled, as directed by the will, each of them to an equal share of that revenue, until the final division of the estate, to be made at the majority of the testator's youngest grandchild, an event which is still in abeyance.

The appellants entered into possession of the estate without delay after the testator's death, and became and were the *trustees*, administrators, and executors thereof as directed by the will; an inventory of the estate was duly executed before notaries, to which the trustees and the others interested under the will became parties, and the trustees fixed the quarterly division of the net annual revenue to be made on the first day of March, June, September and December of each year. As introductory to this contention, the following facts must be noticed: Previously to the testator's decease, several of his children, these contestants amongst the number, were directly indebted to him in various sums of money, and also indirectly liable to him for his accommodation indorsements upon their commercial and business paper. Their indebtedness, which originated some time before his death, continued until that event occurred, and, confining this matter to the position of the said James Muir in that respect, he was indebted to his father directly in the sum of $2200 by his note, payable at three months, with interest at seven per cent., semi-annually, which matured in July, 1864, but which remained unpaid at the testator's decease. The indirect liabilities of James at that time amounted to a considerable sum also, and the balance, which he declared his inability to pay after his father's death, was $3150, which was paid and retired by the trustees, and which the above James agreed should be held as a claim against him by the estate at the interest of seven per cent., payable by him quarterly until he should refund the amount so paid. These two sums formed together $5350, constituting the personal indebtedness of James to the estate, besides interest, but which he reduced to $5.201.20, by voluntarily applying his quarterly payments up to the first of June, 1868, inclusive, in reduction of his indebtedness.

After this date, James Muir, having refused to continue his previous application of his quarterly payments, instituted this action against the appellants (defendants) upon their refusal to make further payments to him, and by his declaration he averred the making of the will by the testator, the establishment of *the trust*, in the appellants, the bequest of the alimentary allowance amongst the children of the testator, including the plaintiff, for equal shares of the net

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annual revenue of the residue of the estate, the condition attached to the payment of the allowance against its seizure or being made away with by anticipation, by either of the beneficiaries, the plaintiff's right to a tenth share of the said net annual income, whereof three quarterly payments were due and refused to be paid to him, severally for $165, $140, and $153, together $458, the last payment due the 1st February, 1869, and concluding for a joint and several condemnation against the appellants with interest and costs.

To this action the appellants filed four *pleas*. 1st. A plea of compensation. 2nd. A plea of return, *rapport*, by the plaintiff to the estate of the said sum of $5201.20 due by him, before benefiting by the allowance made to him. 3rd. A plea of payment. 4th. A *défense au fond en fait* or general denegation of facts averred by the plaintiff. It will be observed that these are pleas to the merits, and that the appellants having filed no preliminary exceptions either as to the form of the action or as to the parties suing and being sued by it, they necessarily remain unexcepted against, and stand in their respective qualities and as they appear on the face of the proceedings and in the record before the court.

The plaintiff completed the issues, 1st. By a general answer. 2nd. By a replication denying that compensation could lie against the testamentary alimentary allowance made to him, conditioned by the direction of the testator to be free from any such charge. 3rd. The plaintiff's insolvency and discharge under the insolvent law, whereby he was freed from the claim of the appellants as representing his creditor, the estate. 4th. That the claims against him did not arise out of his indebtedness, but out of that of the late firm of William and James Muir to the testator.

With reference to the facts set out in the pleas of the appellants in support of their pleas and factum here submitted, they contain averments of the principal facts above mentioned as to the plaintiff's indebtedness to the estate to the amount stated of $5201.20 which it would be useless to repeat, and further aver that, in making the plaintiff a trustee and executor, the testator did not intend his participation in the net annual revenue whilst he continued indebted to the estate, nor during such continuance intended to exempt his share of the revenue from lien or charge upon it until his debt was paid, and that until that event the plaintiff could not claim to be paid his share or allowance, which the appellants were entitled to apply by compensation in deduction of his debt until his final payment.

Now it is not denied that the testator was fully aware of the plaintiff's indebtedness to himself for several years previously to and up to the time of his decease. His private ledger fyled by the appellants, made up by the testator to the year of his death, established the fact clearly, and yet, notwithstanding, he did not alter his will, which contained the mentioned provision for his children, including the plaintiff, making them the equal participants, share and share alike, in the net annual revenue of his estate by quarterly payments, and which also contained his express declaration and will to be "that the said revenue was bequeathed and intended to be bequeathed as an alimentary pension or allowance, not to be sold, mortgaged or made away with by anticipation by them or either of them, nor

subject to seizure or other contingencies to which other personal or other property is subject, but shall be paid to them only as an alimentary allowance."

The intention of the testator averred in the appellants' pleas is entirely gratuitous and unfounded, and altogether in contradiction to the plain and precise intention declared by his will. It is also incontestable, that the law not only sanctions but expressly favors bequests of property for aliment, and not only frees it from liability to seizure for the debts of the legatee, but also from compensation. In 1st Vol., Ancien Denisart, Vo. Alimens, p. 457, § 8, it is said: Les lois attachent une très grande faveur à la cause d'alimens, &c.; § 9: Les lois et l'usage ont introduit plusieurs priviléges tendant à conserver les alimens à ceux à qui ils sont dus soit par la disposition de l'homme soit par la disposition de la loi, Celui qui veut donner ou léguer des alimens à quelqu'un peut ordonner que la somme ou la pension qu'il destine à cet objet ne pourra pas être saisi par les créanciers du donataire ni du légataire et sa disposition est valable. Il y a plus, la loi § de Cess. Bon. veut que s'il a été fait un legs pour cause d'alimens à celui qui a fait cession de biens, les créanciers des légataires ne puissent pas saisir le legs, bien que le testateur n'ait pas ordonné qu'il serait insaisissable. C'est donc aux termes de la loi une faveur attachée à ce qui est donné d'être insaisissable. He refers to 2 Duperrier, Edit. of 1759, p. 156, who cites an arrêt qui est conforme à cette jurisprudence.

So also Guyot, Répertoire de Jurisprudence, verbo Alimens, p. 324, and at p. 325, he says, on ne peut pas admettre la compensation en matière d'alimens si celui qui doit des alimens est d'ailleurs créancier de celui auquel ils sont dus, il faut qu'il les paie sauf à se pourvoir sur les autres biens de son débiteur s'il en a, et quand il n'y en aurait point la compensation n'aurait point lieu parcequ'il faut que les alimens soient employés suivant leur destination à l'entretien de celui à qui ils ont été assignés.

Pothier, Tr. des Obligations, No. 625, says, la dette d'une somme qui m'a été donnée ou léguée pour servir à mes alimens, sans la clause qu'elle ne pourrait être saisi par mes créanciers, est une dette contre laquelle on ne peut opposer aucune compensation, car de même que cette clause empêche qu'elle ne puisse être saisie par des tiers, elle empêche par la même raison que cette somme ne puisse par le moyen de la compensation être employée au paiement de ce que je devais à celui qui en est le débiteur, &c.

Bell, in his commentaries on the Laws of Scotland, 1 Vol., Ed. of 1826, p. 129, says this might be cited as a passage in a Book of Scottish Law, and referring to Dirleton who reports the case of Bromhall and Darsie, 7th July, 1678, to the same effect. All these give full force to the condition of freedom when directed as here.

Many other authorities might be cited to the same effect. It is only necessary to add that our Civil Code, No. 1190, enacts as follows: "Compensation takes place whatever be the cause or consideration of the debts, or of either of them, except in the following cases, &c. 3rd, a debt which has for object an alimentary provision not liable to seizure:" and that Pothier in his Procédure Civile, No. 501, says:—"Les revenus des biens qui ont été donnés ou légués à la charge de n'être susceptible d'aucune saisie-arrêt n'en sont pas susceptible, car il est

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permis au donateur ou testateur d'assurer telle condition que bon lui semblera à sa libéralité, c'est ce qui a été jugé par un arrêt du 29 Nov. 1734, qui a donné mainlevée des saisies-arrêts d'un usufruit légué par un parent collatéral, à la charge de ne pouvoir être saisi." It is manifest that the authoritative disposition of the testator concurring with the authoritative disposition of the law sets aside and rejects the appellants' plea of compensation against the plaintiff's demand.

The second plea of *rapporter à la succession ou moins prendre par le legataire*, return by the beneficiary legatee or the plaintiff to the estate of the amount of his debt, is predicated upon an entire misapprehension of law. By the law, when an estate devolves upon the heirs or legatees, inasmuch as none of them can be compelled to remain in undivided ownership, a partition of the estate may be required, and for such partition each co-heir returns into the mass of the estate the gifts made to him, and the sum in which he is indebted, see Code Civ. No. 700, after which the shares are equalized amongst the co-heirs, or if the return be not made by one or more of them, he or they take a less share *en nature* in proportion to what may not be returned by them. But this return applies to final partitions of estates, and can have no reference to the quarterly payments of the revenue of this estate, directed to be paid for the support of the testator's children until the majority of his youngest grandchild, when alone the estate is to be finally divided amongst the participants entitled thereto *who might be then alive*. C'est au moment ou le partage doit se faire l'héritier qui doit rapporter peut être obligé de prendre autant moins en nature sur la succession pour sa portion héréditaire, 2 Grenier, Des Donations, p. 231; and so also the great body of authority upon this point. The return in this case is subject to the contingency of the survivorship of the children at the time fixed for the final division, the testator by his will declaring, "And it is my wish and desire "that in the event of any one or more of my children dying unmarried, or dying "married but without issue, or such issue predeceasing themselves, the share of "the party so dying, either in the revenue or capital, shall revert and fall into "the mass of my estate, and be divided between the survivor or survivors of them "or their lawful issue, as aforesaid, share and share alike," thereby plainly indicating the fixed period of the final division. It is manifestly a legal fallacy to contend, as has been done by the appellants, that the quarterly participation in the annual revenue, intended merely for the temporary alimentary support of the children, is the equivalent of the final partition, when and by which the share of each survivor in the corpus producing that alimentary revenue was to be specially appropriated to each survivor in full property of his share. This second plea cannot stand therefore against the action, without importing into the will a patent contradiction of the testator's declared desire and wish as well as intention.

The third plea of payment is entirely unsupported in law, and unproved in fact, and is also untenable: whilst the fourth, the *défense au fond en fait*, a general denegation of the plaintiff's averments in his declaration, is quite unavailing, the averments themselves and their sufficiency having been fully established.

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It would be waste of time to examine the case in greater detail. It has been argued before us much, so to speak in the nature of a family contention, upon the liability or charge and legal extent and effect of the alimentary allowance made to the plaintiff; assuming even that as between the plaintiff and his father, the testator, or between him and the testator's estate, the relation of debtor and creditor existed, that relation in neither case could affect the plaintiff in regard to his alimentary allowance under the will, for so far as the testator himself was concerned, it produced no effect upon him, and did not induce or influence him to make any alteration in his testamentary provision in favour of his children, the plaintiff included, for their *free and uninterrupted enjoyment of the annual net revenue of his estate set apart by himself for their support and maintenance*, until the time limited by himself for the final division of this estate, nor on the other side, so far as the estate was concerned, could it have effect against the will itself, the only title under which the appellants could have or had a right to question the plaintiff's demand, because the will was mandatory upon them and absolutely in favour of the plaintiff, the provision in question being perfectly consistent with law and the right of the testator to make, and moreover unrestricted and unlimited in its terms of protection and freedom of enjoyment by the testator's children, intended beneficiaries, against their own acts of alienation or anticipation as well as against the acts of their creditors. Under these circumstances, and in the face of the testator's express intention of the application of the annual revenue and its quarterly payments for aliment only, and with his decided and precise condition guarding his paternal bounty for the support of his children against action either by themselves or their creditors, it is impossible to conceive that he intended to permit that same alimentary support to be diverted by the appellants from its purpose and object, and converted into a means of paying off his own or his estate's claim, by the withholding of that support and the application of the quarterly payments in the manner proposed by the appellants. He must have known that at the time of the final partition of his estate, the indebtedness of his children might then be taken into account in establishing the amount of their respective shares in the corpus, but until that event occurred he manifestly intended that they should freely receive the alimentary support he gave them. The respondent's case has been established, and the appeal must be dismissed.

Judgment confirmed.

Stuart & Snowdon, attorneys for appellants.
Hon. J. J. C. Abbott, Q.C., counsel.
Perkins & Ramsay, attorneys for respondent.

(J.A.P.)

COUR DU BANC DE LA REINE, 1871.

MONTREAL, 9 MARS 1871.

Coram DUVAL, Juge en chef, CARON, J., BADGLEY, J., MONK, J.

CHARLES Z. DORION,

(*Défendeur en Cour Inférieure,*)

APPELANT;

ET

L. NAPOLEON L. ST. GERMAIN,

(*Demandeur en Cour Inférieure,*)

INTIMÉ.

JUGE:—1. Dans une vente à réméré, la loi n'exige pas des offres réelles et une consignation préalable pour que le vendeur puisse exercer la faculté de réméré.
2. Des offres irrégulières ou verbales sont suffisantes.

Les faits de la cause sont rapportés ainsi dans le factum de l'intimé.

Par acte du 31 mars 1865, passé devant Mtre. Hétu et son confrère, notaires, le défendeur acheta d'un nommé Joseph L. St. Germain, une certaine propriété décrite en la déclaration en cette cause. Le prix de cette vente était le montant en dette, intérêt et frais, que le dit défendeur avait payé au Shérif du District de Montréal, dans une certaine cause du *Séminaire des Missions Etrangères* vs. *Dame Monique Marinau*, dans laquelle cause la propriété ci-dessus mentionnée avait été vendue sur la dite défenderesse, Marinau.

Cette vente fut de plus faite à la condition contenue dans la clause suivante:

"Cette vente ainsi faite à la charge par le dit Sieur Charles Zéphir Dorion, représenté comme susdit, de payer tous les frais au dite shérif dans la dite cause et en outre de rendre et céder la susdite terre, libre de toutes dettes et hypothèques provenant de ses faits, à Léopold Napoléon Lemaire St. Germain, actuellement mineur, demeurant en la dite paroisse de Ste. Rose, à son âge de majorité; en par ce dernier remboursant un an après sa majorité au dit Sieur Dorion, tous les argents qu'il aura payés dans la susdite cause, avec intérêt de douze pour cent par an, sur le capital de ces argents à compter de ce jour."

Le demandeur devint majeur le 22 mars 1868.

La présente action fut intentée pour forcer le défendeur à exécuter la clause de réméré stipulée à l'acte précité. En instituant l'action, le demandeur, quoiqu'il n'y fut pas obligé, fit des offres et consignation au montant de $306.

Le défendeur, par sa défense, plaida qu'il était prêt à remettre la propriété, mais il demanda à le faire sans frais. La Cour Inferieure, donnant à la loi qui régit ces matières une interprétation erronée, admit la prétention du défendeur appelant par jugement rendu le 27 février 1869, qui condamne le défendeur à remettre au demandeur la propriété susdite; mais en mettant les frais de la Cour Inférieure entièrement à la charge du dit demandeur. Le jugement est motivé comme suit.

"The Court having heard the parties by their respective counsel upon the merits of this cause, examined the proceedings, proof of record, and having

deliberated; Considering that by article 1546 of the Civil Code of Lower Canada, the plaintiff could only have possession of the land after he had satisfied the obligations set forth in the deed of date the 31st March, 1865, to be performed by him; Considering that the plaintiff did not, before the institution of this action, tender to the said defendant such sum of money as was payable by him for the redemption of said lands; Considering, however, that the defendant, by his plea in this cause, has accepted the offer made by the plaintiff in and by his declaration in this cause; the Court doth grant *acte* to the said plaintiff of his deposit and *consignation* in the hands of the prothonotary of this Court the sum of $305.81 as the amount which the said plaintiff is bound to pay to the said defendant before obtaining the possession of the land in question, and doth declare the said offer and tender good and valid, and doth order that the said sum of $305.81 be paid by the prothonotary of this Court to the said defendant; and adjudging upon the *demande* of the said plaintiff, it is ordered that the said defendant do, within fifteen days from the rendering of this judgment, reconvey, retrocede and give back to the said plaintiff the land mentioned and described in the declaration in this cause, as follows, to wit:

"Une terre située dans la dite paroisse de Ste. Rose, dans le district de "Montréal, contenant douze arpents de profondeur sur quatre arpents de largeur "le tout plus ou moins, sans garantie de mesure précise, à savoir: bornée en "front par la Rivière des Mille Isles, en profondeur par Louis Isaac Seers, "écuier, du côte Est partie par Louis Nadon et partie par Michel Dutrisac, et "du côte ouest par Joseph Nadon, avec une maison en bois, une grange et autres "bâtisses dessus érigées."

And that the said land be delivered up to the said plaintiff free, and discharged from all debts, *hypothèques*, and charges thereon arising from the acts of the said defendant; and in default of the said defendant so to do within the above mentioned delay, it is ordered that the said plaintiff be put into the peaceable possession and enjoyment of the said hereinbefore described land and premises, under the authority of this Court, and the present judgment shall serve and be to the said plaintiff in place of a deed of reconveyance.

"And the Court adjudging upon the costs of the present action, and considering that the plaintiff is not well founded in his pretension, that the defendant should pay the costs of plaintiff in this action, doth condemn the plaintiff to pay the costs of this suit to the defendant *distraits* in favour of Messrs. Kelly et Dorion, the attornies of the said defendant."

Ce jugement, en autant qu'il condamne le demandeur à payer les frais d'une instance dans laquelle il réussit, parut erroné au dit demandeur. Il en demanda, en conséquence, la révision devant la Cour Supérieure siégeant en Révision, et ce tribunal, par son jugement rendu le 30 octobre 1869, soutint en tout point la prétention du demandeur, réforma le jugement de la Cour Supérieure, et condamna le défendeur aux dépens des deux Cours, tel que demandé par les conclusions du demandeur. Voici le texte de ce jugement:

"La Cour Supérieure siégeant à Montréal présentement comme Cour de Révision, ayant entendu les parties par leurs avocats respectifs sur le jugement rendu le 27 février 1869, dans et par la Cour Supérieure du district de Montréal, ayant

Chs. Z. Dorion et St. Germain.

examiné le dossier et la procédure dans cette cause, et ayant pleinement délibéré ; Considérant que dans le jugement dont est appel, savoir le susdit jugement du 27 février 1869, il n'y a aucune erreur quant au fond; cette Cour le confirme. Mais attendu que le défendeur aurait dû être condamné à tous les dépens, lesquels par erreur ont été divisés, cette Cour réforme à cet égard le dit jugement et condamne le dit défendeur à payer tous les dépens de la première instance.

" Et quant aux dépens de la Cour de Revision cette Cour y condamne également le défendeur ; distraction de tous lesquels dits dépens est accordée à M. J. O. Turgeon, procureur du demandeur."

C'est ce jugement que l'appelant voulut faire infirmer par la Cour du Banc de la Reine.

L'exposé ci-dessus fait voir qu'il ne s'agissait plus que de déterminer quelle est la partie qui devait être chargée des dépens. C'était là toute la question en litige.

Dorion pour l'appelant:—Un vendeur à faculté de réméré peut-il ravoir l'objet vendu de l'acheteur, dans les délais voulus et rentrer dans la possession de la dite propriété avant d'avoir payé entre autre chose le prix d'achat porté au contrat, à l'acheteur qui ne lui refuse point de lui retrocéder la propriété en par le vendeur lui payant le prix d'achat ?

La péremption de la faculté de reméré est-elle distincte du rachat effectif de l'objet vendu, ou de la livraison de cet objet par l'acheteur au vendeur en matière de réméré ?

Tel est la seule question qui se rencontre dans la présente cause et que nous traiterons généralement dans cet exposé. Si l'intimé a droit d'avoir la détention de la chose vendue avant d'en avoir payé le prix d'achat, il a droit de poursuivre l'intimé avant de lui offrir, à déniers découverts, le prix d'achat ; il a droit de le faire condamner aux frais pour lui avoir refusé ainsi l'objet vendu ; si au contraire l'intimé ne peut ravoir la chose vendue, c.-à-d. la possession, avant d'en avoir payé le prix d'achat, il n'a pas droit de le poursuivre pour le faire condamner à des frais, sans le mettre en demeure par des offres réelles. Sans considérer la preuve de l'intimé qui a voulu prouver par son procureur, M. DeBellefeuille et l'appelant lui-même, que M. DeBellefeuille avait dit qu'il avait demandé à l'appelant tant par lettres que verbalement l'état du montant que l'intimé devait à l'appelant en vertu du susdit acte de vente, lequel état a été admis avoir été donné par le procureur de l'intimé, et que comme avocat lui-même, il pouvait avoir en aucun temps puisqu'il ne s'agissait que de référer à une certaine clause mentionnée dans le susdit acte de vente ; nous ne craignons point d'aborder la question directement en disant que l'intimé a pris la présente poursuite contre l'appelant qu'en interprétant mal les commentateurs sur le droit à réméré, et que l'appelant ne peut être condamné aux frais d'action avant d'être régulièrement mis en demeure de livrer la chose vendue par des offres réelles, à deniers découverts.

Tout en procédant à examiner les commentateurs sur notre question, nous montrerons jusqu'à l'évidence combien l'intimé a confondu *la faculté de réméré avec l'exercice du réméré ou le rachat effectif de l'objet vendu.*

Ainsi l'intimé pose comme première proposition dans son Factum de la Cour de Révision (notre réponse à ces différentes propositions, car il en a trois sur ce point, se trouve comprise dans notre réponse à sa présente première proposition,) la question suivante:

"La loi exige-t-elle des offres réelles et consignations préalables avant que le vendeur puisse exercer la faculté de réméré?"

Quoique l'intimé dise formellement qu'il n'y a pas un seul auteur, pas un seul écrit qui exige des offres réelles avec une consignation pour qu'un vendeur puisse rémérer l'objet vendu; nous répondrons que tous les auteurs sans exception, même ceux cités par l'intimé dans son Factum produit en Cour de Révision, veulent tous que le vendeur fasse des offres réelles avant de pouvoir avoir la propriété.

Quelqu'extraordinaire que paraisse cette allégation de notre part, après les avancés de l'intimé, le tribunal comprendra de suite cette contradiction en lisant les commentaires des auteurs cités sur cette question. Qu'il nous suffise pour le moment de dire que l'intimé est tombé dans une profonde erreur, et le Tribunal de la Cour de Révision avec lui en ne distinguant pas la déchéance du droit de réméré avec l'exercice de ce droit, ou le rachat en matière de réméré.

Les commentateurs sur l'article 1673 du Code Napoléon font une distinction grave et bien importante entre la déchéance du droit et le rachat effectif, comme nous verrons en lisant les commentaires sur la question, mais toutefois ces commentaires ne confondent point les deux questions et les traitent bien séparément; ainsi donc nous ne nous occuperons de ces deux questions que pour montrer la différence qui existe entre l'une et l'autre, puisque dans la présente cause, il ne s'agit pas de déchéance du droit de réméré, puisqu'il n'est pas contesté par l'appelant, et que l'appelant n'a jamais refusé de remettre la propriété à l'intimé au contraire il a toujours été prêt à remettre la propriété de l'intimé.

La vente qui fait la bâse de cette action et passée à Montréal le 31 mars 1866, devant Mtre. L. O. Hétu, et confrère, a été faite sous l'empire de l'article 1546 du Code Civil du Bas-Canada, qui se lit comme suit: "La faculté de réméré stipulée par le vendeur lui donne le droit de reprendre la chose en en restituant le prix et en remboursant à l'acheteur les frais de la vente, ceux des réparations nécessaires et des améliorations qui ont augmenté la valeur de la chose jusqu'à concurrence de cette augmentation. Le vendeur ne peut entrer en possession de la chose qu'après avoir satisfait à toutes ces obligations."

L'article 1673 du Code Napoléon est l'article correspondant à l'article ci-dessus, et que l'intimé, avec le Tribunal de la Cour de Révision, ont confondu d'une manière si étrange avec l'article 1550 du Code Civil correspondant à l'article 1662 du Code Napoléon.

Nous répétons de suite qu'il ne s'agit nullement dans la présente cause de l'article 1550 du Code Civil C. ou l'article 1662 du Code Napoléon, mais seulement de l'article 1546 du Code Civil C. ou l'article 1673 du Code Napoléon, qui sont la loi du pays qui veut que le vendeur qui s'est conservé la faculté de réméré ne puisse rentrer dans la possession de l'objet vendu sans en payer le prix, si bien que le prix d'achat ou le remboursement du prix de vente est de l'essence même du contrat de faculté à réméré.

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Malgré cette loi formelle, l'intimé n'hésite pas à poser comme proposition première dans son Factum de la Cour de Révision, le contraire de cette loi. La loi, dit-il, n'exige pas des offres réelles et une consignation préalable pour que le vendeur puisse exercer la faculté de réméré, et commence à citer dans le même Factum, Sirez, Codes annotés, Tome 1, Code Napoléon, page 795, § 5, 6, 7, 8. Les arrêts et commentateurs rapportés dans ces différents paragraphes de Sirez, n'ont aucune application dans la présente cause, ils se rapportent tous à l'article 1662 du Code Napoléon ou l'article 1550 du Code Canadien qui n'a aucun rapport à la présente cause, comme nous avons déjà dit; ainsi les auteurs français distinguent la déchéance du droit de réméré avec l'exercice de ce droit ou le rachat. Ces auteurs dans les paragraphes ci-dessus cités s'occupent du délai accordé au vendeur pour racheter l'objet vendu, afin de savoir quelle est cette action dont parle la loi que le vendeur devra prendre dans le délai stipulé. Parmi les auteurs cités dans les différents paragraphes de Sirez, les uns prétendent qu'il suffit au vendeur de lui faire connaître, verbalement, son intention de racheter dans le délai stipulé, d'autres veulent que ce soit par écrit, sauf à payer ce qu'il a promis de faire par son acte dans le cas qu'il exercerait la faculté de réméré plus tard, mais Sirez n'a jamais voulu dire dans ces paragraphes que l'acheteur pouvait entrer dans la possession de l'objet vendu avant d'en payer le prix convenu. D'ailleurs si l'intimé avait consulté ce même Sirez un peu plus loin sur l'article 1673 du Code Napoléon, il aurait trouvé que cet auteur dit tout le contraire de ce qu'il lui fait dire. Le vendeur, dit Sirez, qui exerce le réméré contre un *tiers acquéreur* doit rembourser le prix porté dans la vente qu'il a faite, bien que la *revente* ait été faite pour un prix moindre.

L'intimé cite ensuite Troplong, Vente, Tome 2, Nos. 719, 720, 721, 722, mais c'est toujours en commentant l'article 1662 qui ne s'applique point dans la présente cause, comme l'intimé aurait pu s'en convaincre en consultant le même auteur un peu plus loin sur l'article 1673 du Code Napoléon. Voici comment Troplong s'exprime, idem No. 759: "J'ai examiné avec soin sur l'article 1662 les "conditions dont la loi fait dépendre la conservation du droit du rachat afin "d'empêcher une péremption.

"Le droit étant conservé, il ne s'agit plus que de le réaliser par la prise de "possession, mais cette prise de possession est subordonnée elle-même à des "obligations importantes. Le retrayant doit payer à l'acheteur des prestations "et des indemnités, sans quoi celui-ci conserve le droit de retention de la chose," évidemment que l'intimé a confondu les commentaires de Troplong sur la faculté de pouvoir exercer le réméré avec l'exercice du réméré même, qui sont deux choses bien différentes.

Zachariæ, à la page citée par l'intimé, Droit Civil français, Tome II, article 357, page 541, tout en parlant de la déchéance de la faculté du retrait, dit qu'en général, même pour conserver cette faculté, les offres réelles sont nécessaires, quoique souvent, suivant les circonstances, si la Cour voyait l'intention bien arrêtée de l'acheteur d'exercer la faculté de retrait, alors des offres verbales suffiraient; après avoir parlé ainsi sur la déchéance de la faculté de retrait, l'auteur s'exprima ainsi, dans *l'alinéa* suivant: "Le vendeur qui veut exercer le retrait "doit rembourser à l'acheteur le prix de vente ainsi que les frais. Du reste, dit-

" il, ce n'est qu'après avoir satisfait à toutes les obligations ci-dessus énoncées, " que le vendeur peut demander le délaissement." Chs. Z. Dorion et St. Germain.

Dursanton, invoqué par l'intimé au Tome 16, page 419, No. 403, parle toujours de l'article 1662 du Code Napoléon ; cet auteur, en commentant l'article 1673, au No. 421, même vol., dit bien que le vendeur ne peut rentrer en possession avant d'avoir payé à l'acheteur le prix principal.

L'intimé cite encore Lahaye, sur l'article 1662, page 739, qui traite de la déchéance, comme les auteurs ci-dessus. Ce n'est pas la citation que l'intimé aurait dû faire, mais le même auteur sur l'article 1673, où il aurait lu que Lahaye idem 741 n'en fait seulement pas de question, tant il est vrai que le vendeur doit repayer le prix pour ravoir la terre, etc.

Vasille, Prescription, Tome II, No. 625, cité par l'intimé, dit en toutes lettres en parlant de l'article 1673, que le vendeur ne peut rentrer en possession qu'après avoir satisfait à toutes ces obligations qui lui sont prescrites.

Dallos, jurisprudence générale du royaume, Tome 12, verbo, vente, c. 1, v. 4, art. 1, § 18, page 904. Ce paragraphe ne s'applique qu'à l'article 1662 du Code Napoléon que l'auteur traite au point de vue de déchéance. C'est le paragraphe 30 idem, que l'intimé aurait dû voir, qui dit comme les auteurs précédents qu'avant de rentrer en possession l'acheteur doit payer à l'acquéreur le prix principal.

Rolland de Villargues, que l'on trouve encore cité dans le Factum de l'intimé, dictionnaire du droit civil, Tome 8, verbo réméré, § 5, Nos. 70, 71, 72, 73, pages 58, 59, commente dans ces différents Nos. l'article 1662 du Code Napoléon, spécialement au point de vue de la déchéance de la faculté de réméré ; mais au numéro 115 sur l'art. 1673 du Code Napoléon, dit formellement que le vendeur doit payer le prix principal avant d'avoir la propriété, *vide.*

Le journal du Palais, Répertoire Universel (en général) verbo, vente à réméré paragraphe 1, Nos. 66 et suivants, Nos. 70, 78, mentionné aussi dans le susdit factum, parle toujours dans ces Nos. de l'article 1662 du Code Napoléon, et les Nos. cités par l'intimé, comme les commentaires du No. 64, où l'article 1662 est mentionné, il suffisait à l'intimé de lire le No. 73 de la même page (page 853) pour comprendre à quelle phase l'auteur examinait la vente à faculté de réméré, car au No. 73 il est formellement dit que la cour de Montpellier, tout en reconnaissant que les offres réelles ne sont pas mauvaises pour conserver les droits du vendeur à la faculté de réméré, dit que l'article 1673 du Code Napoléon exige le paiement du prix de la vente et préalablement à l'entrée en possession du vendeur. D'ailleurs il fallait voir l'auteur sur l'article 1673 pour savoir quelle est la loi et la jurisprudence sur la question qui se rencontre dans cette cause. Au No. 137 et les suivants, idem, page 850, il est écrit que le vendeur ne peut entrer en possession tant qu'il n'a pas satisfait à toutes ces obligations, jusque-là, l'acquéreur est autorisé à retenir l'immeuble à titre de nantissement, etc., etc.

Code Napoléon expliqué :

Delsol, invoqué par l'intimé est contre lui *loco citato.* De plus, voir page 168, idem.

Sirey, Recueil général.

1ère. partie, année 1812, 1814, page 85, produit par l'intimé. Il est évident,

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en lisant seulement la deuxième note marginale de cette cause (Harnoye *vs.* Boulanger) qu'il ne s'agit que de la prescription ou déchéance du droit de rachat, qui est interrompu par les offres verbales, réelles, ou écrites du vendeur ; mais veut-on dire que le vendeur doive rentrer en la possession de l'objet vendu avec cette clause sans en payer le prix principal, aucunement, il ne s'agit point de cela. C'est une poursuite pour la faculté à réméré même, mais dans la présente cause, la faculté de réméré n'est point refusée, l'appelant n'a jamais prétendu que l'intimé n'avait pas droit d'avoir sa propriété faute de l'avoir demandée dans les délais ; l'appelant prétend seulement qu'il ne peut être forcé à remettre la propriété, d'en abandonner la rétention avant d'être remboursé, suivant l'article 1673 du Code Napoléon ou 1646 du Code Canadien. Pothier, du retrait, No. 275, cité par l'intimé, n'a point d'analogie avec l'article 1646 du Code Canadien ou 1673 du Code Napoléon ; il peut s'appliquer à l'article 1662 du Code Napoléon, et même dans cette citation, *Pothier* nous dit qu'en matière du retrait, sous la coutume d'Orléans, que le retrayant était obligé de faire des offres réelles pour avoir les fruits. S'il était obligé de faire des offres pour avoir les fruits, combien à plus forte raison était-il obligé de payer le prix principal pour avoir la propriété vendue ; bien plus, la coutume de Paris, article 140, voulait des offres réelles dans l'an et jour, en matière de retrait, mais tout ceci ne regardait que la déchéance et non la possession de la propriété. L'intimé paraît vouloir dire par cette citation que le retrayant pourait entrer dans la possession de la propriété et avant d'en compter les deniers, chose qui serait souverainement absurde. La coutume article 134, voulait qu'il remboursât l'acquéreur du prix avant d'avoir la possession de la propriété et pour cela donnait que 24 heures.

L'intimé parle de six différents arrêt rapportés dans Sirez, recueil général des arrêts, toutes ces décisions se rapportent à la déchéance de la faculté de réméré et toujours dans ces divers cas, l'acheteur refusait de remettre la propriété au vendeur faute d'avoir usé utilement de la faculté de réméré dans les délais stipulés, et toujours dans ces divers cas, il y a eu des offres quelconques de faits dans les délais voulus qui interrompent cette prescription. Nous reconnaisons que dans ces Cours il a toujours été décidé que la signification par le vendeur de son intention de racheter, faite à l'acheteur, dans les délais stipulés, lui assurait son droit de pouvoir racheter la propriété, même après ce délai en payant, bien entendu, le prix principal, etc. Mais dans la présente cause il ne s'agit point de cela ; nous ne contestons pas le droit du vendeur de racheter sa propriété, nous ne contestons pas ses offres d'aucune manière, il n'en a jamais faite avant l'action ; nous prétendons qu'il ne peut nous poursuivre en justice, qu'il n'a aucun droit de nous traduire devant les tribunaux, qu'il ne peut entrer en possession de sa propriété avant de nous payer le prix stipulé ou au moins nous en offrir le montant.

L'intimé cite une seconde foi plusieurs des mêmes autorités pour prouver que des offres irrégulières ou nulles sont suffisantes pour conserver les droits du vendeur à la faculté de réméré, nous avons prouvé plus haut que cette question ne se rencontre point dans la présente cause, nous y renvoyons.

En résumé, nous disons que tous les auteurs qui ont commenté l'article 1673 du Code Napoléon, sans même excepter ceux que l'intimé a invoqués, comme nous avons dit en commençant, et tous le disent sans entretenir le moindre doute,

sans soulever la moindre controverse, que le vendeur doit payer le prix avant d'entrer en possession, si le vendeur n'a pas droit d'entrer en possession avant de payer l'acheteur, il n'a pas plus droit de le poursuivre, à moins qu'il ne le mette régulièrement en demeure, or l'appelant n'a jamais mis l'intimé en demeure régulièrement: L'intimé l'a poursuivi injustement et illégalement; il doit payer les frais de sa témérité.

L'argumentation de l'intimé dans son factum de la Cour de Révision, n'a aucune raison de se trouver dans la présente cause, traitant de faits, ou d'une question de droit qui ne se soulève point dans la présente cause, du moins quand l'intimé veut parler de la faculté de réméré qui n'est pas invoquée par l'appelant.

2o.—Une mise en demeure verbale interrompt-elle la faculté de réméré, et peut-elle se prouver par témoin?

Indépendamment de tout ce que nous avons dit ci-dessus dans notre première partie, supposons pour un instant qu'il s'agisse de la péremption ou du délai arrêté entre les parties pour la faculté de réméré. Avant de prendre son action, l'intimé ne pouvait se dispenser de mettre l'appelant en demeure ou de le notifier légalement de son intention d'exercer la faculté de réméré, du moins s'il ne voulait pas faire des frais qui retombassent sur lui. Dans la présente cause, nous prétendons que l'intimé n'a pas même mis l'appelant régulièrement en demeure d'exercer la faculté de réméré avant l'institution de la présente action.

L'intimé n'a aucune preuve authentique ni écrite de ces faits. Il a questionné l'appelant comme témoin, et de plus il l'a interrogé sur faits et articles pour avoir un commencement de preuve, or l'appelant nie formellement que l'intimé, par son procureur, l'ait en aucune manière notifié de son intention d'exercer la faculté de réméré avant l'action; l'appelant dit que le procureur de l'intimé, Edouard Lefebvre de Bellefeuille, lui a demandé l'état du montant que l'intimé avait à payer à l'appelant pour ravoir sa propriété pour laquelle l'appelant a référé le procureur de l'intimé à Montréal, chez son avocat, qui avait transigé toute l'affaire, alléguant que lui (l'appelant) n'avait aucun des papiers de cette affaire qui se trouvent tous à Montréal, mais rien de plus. Rien quant aux offres, rien quant à la mise en demeure, de racheter la propriété ou de son intention de se prévaloir de la faculté à réméré. Il corrobore pleinement le témoignage de l'appelant.

Il a demandé un état pour le payer; il a écrit à l'appelant des lettres au nombre de trois pour recevoir un état pour payer l'appelant. Tout cela ne prouve pas que l'intimé ait notifié l'appelant de son intention d'exercer effectivement la faculté de réméré; jamais l'intimé a dit à l'appelant, même verbalement, qu'il était prêt à le payer et qu'il voulait avoir la propriété, il dit bien qu'il voulait avoir un état pour le lui dire; mais il ne dit pas qu'il le lui ait dit réellement.

D'ailleurs qu'a fait le procureur de l'intimé, car il a eu l'état finalement de l'avocat de l'appelant, comme il l'admet lui-même, qu'a-t-il dit à l'appelant? rien depuis cette date, il n'a rien dit, l'appelant n'en a plus entendu parler avant l'action, ce qui prouve sa mauvaise foi.

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Sans compter que nous maintenons avec tous les droits du monde, que la preuve testimoniale faite par l'intimé est tout-à-fait illégale. Nous nous y sommes objectés lors de l'Enquête, et nous en voulons pas plus maintenant; il n'y a aucun commencement de preuve par écrit, ni aucun aveu sur les faits et articles qui puissent l'autoriser. Tout ce que l'appelant admet a trait à un état que l'intimé voulait avoir par son procureur, quant à la notification ou mise en demeure, l'appelant nie positivement qu'aucune allusion en ait été faite par le procureur de l'intimé; est-ce là un commencement de preuve par écrit, non, assurément.

L'intimé dit dans son susdit factum, que l'appelant admet avoir reçu une lettre du procureur de l'intimé, qui lui demandait quand il pourrait le voir. "*C'est là assurément un commencement de preuve par écrit, dit l'intimé,*" et cite après cela pour notre *édification* la définition du commencement de preuve par écrit, c'est dit-il, "quand *l'écrit émane de la personne à qui on veut l'opposer sur le sujet en question ou en litige.*" Mais ici, c'est l'intimé ou son procureur qui l'a écrite. Est-ce bien la même chose?

Cette preuve testimoniale, est donc illégale; si nous disons que l'intimé se trouve sans preuve testimoniale, il n'en a point du tout ni pour la péremption de la faculté de réméré, ni pour paiement du prix de vente pour entrer en possession de la chose vendue, du moins avant l'institution de la présente action; il doit payer les frais de sa poursuite injuste et vexatoire.

3o. Quand le vendeur devait-il payer le prix de vente à l'acheteur?

L'intimé dans son factum, conséquent avec sa doctrine que nous avons examiné dans notre première partie, donne une singulière interprétation à l'acte de vente qui fait la base de la présente action, et prétend qu'aux termes de l'acte, l'intimé avait droit d'avoir sa propriété avant d'en payer le prix; il suffit de lire toute la clause de l'acte de vente se rapportant à la faculté de réméré pour se convaincre du contraire; il est formellement stipulé à l'acte que c'est à l'âge de majorité de l'intimé que l'appelant lui remettra sa propriété, pourvû que l'intimé lui paie tel montant porté à l'acte, dans l'année à compter de sa majorité. Il est bien entendu que ce n'est pas avant d'être payé.

Il est de l'essence du réméré que le vendeur en paie le prix de vente avant d'entrer en possession de l'objet vendu, à moins d'être absurde, au moins dans un contrat comme celui fait entre les parties.

Supposons que le jour de majorité, l'appelant ait été obligé de livrer la propriété à l'intimé avant d'être payé et que l'intimé n'ait pas voulu rembourser les deniers plus tard, l'appelant aurait été obligé de poursuivre l'intimé pour le prix pour lequel l'appelant, dans notre supposition, n'aurait point eu de privilége hypothécaire sur la propriété. Il aurait donc fallu à l'appelant le temps de prendre un jugement contre l'intimé qui, dans l'intervalle, pouvait créer des dettes sur la propriété, l'hypothéquer et réduire la réclamation de l'appelant à rien, tandis qu'il appert clairement par l'acte que l'appelant avait avancé sur la propriété, toute sa valeur, puisqu'il avait payé tout le montant pour lequel elle avait été vendue au shérif dans la cause du Séminaire de Québec vs. Dame Monique Marineau, et qu'il prenait une vente à réméré pour ne pas être dans l'obligation de faire de nouvelles avances sur la propriété dans le cas où l'intimé ne voudrait pas rembourser l'appelant des avances faites par lui à l'intimé.

Et dans ce cas, nous attirons l'attention de la Cour sur ceci ; l'intimé devait faire connaître son intention à l'acheteur de ce faire, et le mettre régulièrement en demeure, chose qu'il n'a point faite régulièrement, ni par écrit ni verbalement ; parce qu'il n'y a aucun écrit de produit, et parce qu'il ne pouvait prouver par témoins cette mise en demeure comme nous l'avons examiné dans notre seconde partie.

Turgeon, pour l'intimé. Il n'y a qu'une seule question dans cette cause : celle de déterminer quelle est la partie qui doit supporter les dépens.

Or cette question devra être décidée en faveur de l'intimé, s'il fait voir qu'il a suffisamment mis le défendeur en demeure de remplir sa part de prestation dans l'obligation à réméré contenue dans l'acte du 31 mars 1865.

Je soumets à cet honorable tribunal, que la mise en demeure de la part de l'intimé a été suffisante, et qu'en conséquence il n'y a pas lieu de le condamner aux frais, et que le jugement de l'Honorable Cour de Révision doit être confirmé.

Il est prouvé par l'enquête (témoignage de M. de Bellefeuille) que le procureur de l'intimé notifia l'appelant à plusieurs reprises, par lettres, des pouvoirs dont l'intimé l'avait revêtu et du fait que l'intimé avait atteint son âge de majorité.

Par les mêmes lettres, le procureur de l'intimé informait aussi l'appelant qu'il était prêt à lui rembourser le montant que le dit appelant pouvait avoir déboursé dans la cause du *Séminaire des Missions Etrangères* vs. *Dame Monique Marinau*, avec l'intérêt, suivant la stipulation contenue à l'acte précité, et le dit procureur demandait en même temps à l'appelant de lui envoyer un état de ce montant à rembourser. M. de Bellefeuille prouve par son témoignage avoir envoyé, au moins deux fois à l'appelant, des lettres dans ce sens, et il prouve de plus que l'appelant n'a jamais donné l'état demandé, rendant par là même l'intimé incapable de connaître le chiffre précis des sommes qu'il avait à rembourser, pour exercer la faculté de réméré contenue à l'acte du 31 mars 1865. De plus, il est prouvé par le même témoignage que M. de Bellefeuille a eu avec l'appelant des conversations sur ce sujet et lui a plusieurs fois demandé verbalement de lui envoyer le dit état.

Voilà les faits de la cause. Quant au droit, il provoque quatre questions :

1o. La loi exige-t-elle des offres réelles et consignation préalables avant que le défendeur puisse exercer la faculté de réméré ?

2o. La loi exige-t-elle au moins certaines offres, et des offres irrégulières ou verbales suffisent-elles ?

3o. Les démarches faites par le procureur de l'intimé, M. de Bellefeuille, et rapportées dans son témoignage, constituent-elles les offres irrégulières ou verbales requises par la loi, et ont-elles mis suffisamment l'appelant en demeure pour que l'intimé puisse avoir ses frais ?

4o. Ces démarches sont-elles prouvées par une preuve légale ?

En réponse à ces quatre questions, je soumets quatre propositions :

1o. La loi n'exige pas des offres réelles et une consignation préalables pour que le vendeur puisse exercer la faculté de réméré.

2o. Des offres irrégulières, labiales, sont suffisantes.

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3o. M. de Bellefeuille, procureur de l'intimé, a fait a l'appelant des offres irrégulières, mais plus que labiales, il les a faites par écrit. Il lui a aussi fait des offres verbales.

4o. Enfin, ses offres sont établies sur une preuve légale.

Voilà toute la cause.

Il est certain que l'intimé doit réussir dans sa demande de frais, si l'on peut démontrer ces quatre propositions.

PREMIERE PROPOSITION. La loi n'exige pas des offres réelles et une consignation préalables pour que le vendeur puisse exercer la faculté de réméré.

Il n'y aurait que l'article 1546 du Code Civil du Bas-Canada qui pourrait exiger ces formalités préalables. C'est, en effet, sur cet article que le savant juge qui a rendu jugement en la Cour Supérieure, s'est basé pour rendre ce jugement. Cet article 1546 est la reproduction presque littérale de l'art. 1673 du Code Napoléon. Il est donc intéressant de voir comment les auteurs français et la jurisprudence des arrêts ont interprêté cet article 1673. L'interprétation qu'ils en ont donnée devra aussi s'appliquer à l'art. 1546 du Code Civil du Bas-Canada, puisque ces deux articles sont semblables.

Or, je ne crains pas d'affirmer, qu'il n'y a pas un seul auteur français et pas un seul arrêt qui exige des offres réelles et une consignation préalables pour que le vendeur puisse exercer la faculté de réméré.

Je cite à l'appui de cette proposition les auteurs suivants qui tous disent que les offres et la consignation préalables ne sont pas nécessaires.

Sirey, *Codes annotés*, t. I, Code Napoléon, p. 795, § 5, 6, 7, 8.

Troplong, *Vente*, t. 2, No. 719, 720, 721, 722, 723.

Zachariæ, *Droit Civil Français*, t. II. art. 357, p. 541, note 6.

Championnière et Rigaud, *Droits d'Enregistrement*, t. III, No. 2113, p. 267.

Duranton, *Droit Français*, t. 16, p. 419, No. 403.

Marcadé, *Explication du Code Napoléon*, t. 6, p. 303, sur l'art. 1662, et les autorités y citées.

Vazeille, *Prescription*, t. 2, No. 625.

Dalloz, *Jurisprudence générale du Royaume*, t. 12, vo. Vente, c. 1, s. 4, art, 1, § 18, p. 904.

Rolland de Villargues, *Dict. de Droit Civil*, t. 8, vo. Réméré, § 5, Nos. 70, 71, 72, 73, pp. 58, 59.

Journal du Palais, Répertoire Universel, vo. Vente à réméré, § 1, No. 66 et suiv., Nos. 70, 71

Delsol, *Le Code Napoléon expliqué*, t. 3, p. 173, liv. III, tit. VI, c. VI.

Sirey, *Recueil Général*, 4e volume, an 1812-1814, p. 85.

Cette opinion unanime parmi les commentateurs n'est pas nouvelle : on la retrouve chez plusieurs des anciens auteurs les plus respectés. Ainsi :

Pothier, *Des Retraits*, No. 275.

Favre, *Codex Fabrianus*, lib. 4, tit. 36. def. 6.

Tiraqueau, sur la Coutume du Poitou, § 4, glose 6, No. 4, cité dans Troplong, *Vente*, No. 719.

Voici maintenant les arrêts sur la question, tous en explication de l'art. 1673 du Code Napoléon.

Arrêt de la Cour de Besançon, du 20 mars 1809, dans Sirey, *Rec. Gen.*, 1809-1811, II, p. 42.

Arrêt de la Cour de Cassation du 25 avril 1812, dans Sirey, *Rec. Gen.*, 1812-1814, I, pp. 85, 86.

Arrêt de la Cour de Douai, du 17 décembre 1814, dans Sirey, *Rec. Gen.* 1812-1814, II, p. 428.

Arrêt de la Cour de Cassation du 5 février 1856, dans Sirey, *Rec. Gen.*, 1856, p. 671.

Arrêt de la Cour de Nîmes du 31 mars 1840, dans Sirey, *Rec. Gen.*, 1840 II, pp. 319, 320.

Arrêt de la Cour de Besançon du 20 mars 1819, dans Sirey, *Rec. Gen.*, 1819-1821, II, p. 45.

Arrêt de la Cour de l'Ile de la Réunion, cité en Sirey, *Rec. Gen.*, 1856, p. 671, confirmé ensuite en Cour de Cassation, voir Sirey, *Rec. Gen.*, 1856 p. 671.

A l'encontre de cette opinion unanime parmi les auteurs et les arrêts, on ne peut citer que l'autorité isolée de Duvergier, *Droit Civil*, t. II, pp. 43 et suiv., No. 27, qui, tout en reconnaissant que la consignation des sommes offertes par le vendeur n'est pas indispensable pour empêcher sa déchéance, rejette cependant comme absolument inefficaces, des offres purement verbales. Duvergier exige des offres écrites, mais non la consignation. "Cet auteur ne nous paraît pas conséquent avec lui-même," dit Zachariæ (*Droit Civil Français*, t. 2, p. 541 No. 357, note 6.) En effet, "si le vendeur ne devait être considéré comme ayant exercé la faculté de réméré, qu'autant qu'il se serait réellement libéré envers l'acheteur, ou qu'il aurait fait faire un acte équivalent à paiement, il faudrait en conclure que des offres réelles non suivies de consignation, sont tout aussi inefficaces que des offres purement labiales." (Zachariæ, id.)

Ainsi donc, à part Duvergier, les auteurs et les arrêts sont unanimes pour dire que la loi, c'est-à-dire l'article 1673 du Code Napoléon, qui est notre article 1546 du Code Civil, n'exige pas des offres réelles suivies de consignation préalables pour que le vendeur puisse exercer la faculté de réméré.

SECONDE PROPOSITION. Les offres irrégulières ou verbales sont suffisantes, sans toujours être exigées.

Après avoir établi que la loi n'exige pas des offres réelles et consignation, il faut voir si elle exige, au moins, certaines offres, des offres irrégulières ou verbales.

Sur ce point les auteurs et les arrêts se divisent.

Les uns exigent des offres irrégulières ou verbales.

Troplong, *Vente*, t. 2, No. 723.

Zachariæ, *Droit Civil Français*, t. II, art. 367, p. 541.

Duranton, *Droit Français*, t. 16, p. 419, No. 403.

Dalloz, *Jurisp. générale du Royaume*, t. 12, vo. Vente, c. 1, s. 4, Art. 1, § 1, p. 904.

Et quelques-uns des arrêts ci-dessus.

D'autres auteurs et certains arrêts n'exigent pas même des offres irrégulières ou verbales; ils se contentent d'une manifestation de la volonté du vendeur d'exercer la faculté de rachat.

Chs. Z. Dorion et St. Germain.

Marcadé, t. 6, p. 302, sur l'art. 1662.

Sirey, *Codes annotés, Supplément*, p. 396, sur l'art. 1662.

Troplong, *Vente*, No. 723, à la fin semble aussi pencher vers cette opinion.

Vazeille, *Prescription*, t. 2, No. 625.

Arrêt de Besançon du 20 mars 1809, dans Sirey, *Recueil Général*, 1809-1811, II, p. 42.

Arrêt de la Cour de Cassation, du 5 février 1856, dans Sirey, *Rec. Gen.*, 1856, p. 671.

Ainsi ce point particulier ne paraît pas encore bien déterminé; mais ce qui est certain, c'est que les auteurs même les plus sévères, et les arrêts les plus exigeants, se contentent d'offres irrégulières ou verbales, ou labiales, suivant l'expression de Troplong.

TROISIEME PROPOSITION. Des offres irrégulières, tant verbales que par écrit, ont été faites dans la cause actuelle par l'intimé à l'appelant.

Elles ont été faite amplement, et pour l'établir, je réfère au témoignage de M. de Bellefeuille, le procureur de l'intimé, qui affirme avoir écrit deux fois à l'appelant pour l'informer que l'intimé voulait exercer la faculté de réméré stipulée à l'acte du 31 mars 1865, qu'il avait l'argent prêt pour payer l'appelant, et qu'il voulait savoir le chiffre de la somme qui devait être remboursée à l'appelant. Il affirme aussi avoir eu avec l'appelant deux ou trois entrevues sur le même sujet et dans lesquelles les mêmes demandes furent faites à ce dernier. Ces lettres et ces demandes verbales ne produisirent aucun résultat. L'appelant désireux, sans doute de continuer à retirer le plus longtemps possible son intérêt de douze pour cent par an sur la somme dont le paiement formait la condition du réméré, persistait à différer cette affaire, et à entraîner le règlement en longueur.

QUATRIEME PROPOSITION. Les démarches de M. de Bellefeuille, tant écrites que verbales, sont prouvées par une preuve légale.

Telle est la dernière question qui se présente à l'examen.

Elles le sont incontestablement comme le fera voir une brève récapitulation des faits et de la procédure.

Il s'agissait de prouver des offres verbales et des offres écrites, quoique irrégulières, faites par le procureur de l'intimé à l'appelant, du montant déposé en cette cause, $306; en un mot, il fallait établir de la part de l'intimé ou de son procureur, une manifestation de volonté de retraire la propriété vendue.

L'appelant, interrogé sur faits et articles, admet d'abord (au 8e interrogatoire) que le procureur de l'intimé lui a écrit au sujet de l'affaire qui fait l'objet de la contestation en cette cause.

Interrogé comme témoin, l'appelant l'admet encore. Il reconnait avoir reçu une lettre de M. de Bellefeuille, le procureur de l'intimé, lui demandant quand il pourrait le voir au sujet de cette affaire.

C'est là assurément un commencement de preuve par écrit, qui permet de compléter par témoin la preuve du fait contesté; car, dit Desquiron, (*Preuve testimoniale*, p. 195, no. 346) "on appelle commencement de preuve par écrit, tout acte émané de celui contre lequel la demande est formée, ou de celui qui le représente, lorsque cet acte ou cet écrit rend vraisemblable le fait allégué."

Personne ne niera que ce que le défendeur admet, rend extrêmement vraisemblables les offres verbales, fréquentes et répétées faites à l'appelant par M. de Bellefeuille et racontées dans le témoignage de ce dernier.

Cette preuve est donc légale. Le jugement de la Cour Supérieure et celui de la Cour de Révision l'ont reconnu.

Ainsi donc, pour résumer toute cause, l'art. 1546 du Code Civil du Bas-Canada, qui est l'art. 1673 du Code Napoléon, n'exige pas d'offres réelles et consignation avant que le vendeur ne puisse exercer la faculté de réméré. Le plus que l'on puisse induire de cet article, d'après les commentateurs de l'art. 1673 du Code Napoléon et les arrêts français, c'est qu'il faut des offres verbales ou labiales. Or ces offres ont été faites, cela est prouvé.

Enfin, par l'acte de vente à réméré dont il est ici question, l'Intimé avait droit de reprendre la propriété à son âge de majorité, et il avait un délai d'un an après sa majorité pour payer le prix. Il n'était donc pas obligé de faire aucune offre avant de pouvoir exiger que sa propriété lui fut remise. S'il a fait des offres et consignation en intentant la présente action, ça été pour se libérer de l'intérêt de 12 p. 100 qu'il était tenu de payer en vertu du dit acte.

Puisque l'Intimé a fait tout ce qu'il était tenu de faire par la loi, pourquoi serait-il obligé de payer les frais de son action, laquelle est reconnue bien fondée même d'après le jugement de la Cour Supérieure? pourquoi l'appelant, comme dans les cas ordinaires, ne serait-il pas condamné aux frais? Lequel est en défaut d'accomplir sa part de ce contrat bilatéral? Est-ce l'Intimé ou l'appelant? L'Intimé a manifesté à plusieurs reprises et d'une manière sérieuse sa volonté de reprendre sa propriété et d'exécuter les prestations qui lui sont imposées. L'appelant, au contraire, a toujours négligé et refusé de lui faire connaître le chiffre de ces prestations et des intérêts qui devaient les accompagner, et n'a jamais accompli sa part du contrat bilatéral, c'est-à-dire la restitution de l'immeuble vendu. A l'heure qu'il est cet immeuble est encore la propriété de l'appelant. Il est bien vrai que dans sa défense le défendeur a annoncé son *intention* de remettre la propriété en question; mais il n'a pas encore exécuté cette intention, et tout en annonçant solennellement cette intention, il a demandé le débouté pur et simple de l'action du demandeur.

Du reste, depuis quand l'intention de remettre la propriété vendue à réméré suffit-elle pour libérer l'acheteur? Il faut plus qu'une intention: il faut une remise ou retrocession réelle de l'immeuble par l'acheteur au vendeur. Voilà la prestation qui incombe à l'acheteur dans la vente à réméré; voilà sa part d'obligation dans ce contrat bilatéral. Celle du vendeur, c'est d'abord, de manifester sa volonté d'exercer son droit de réméré, et puis ensuite de payer la somme convenue lorsque l'acheteur lui rend sa propriété. Rien ne l'oblige de payer auparavant. Comment donc le défendeur peut-il venir se plaindre qu'on ne lui ait pas fait d'offres avant l'institution de l'action, quand lui-même est tellement en défaut de remplir sa part de prestation?

Enfin l'Intimé, après plusieurs mois de pourparlers qui semblaient ne devoir produire aucun résultat, a intenté la présente action avec offres et consignations pour mettre un terme aux lourds intérêts que l'appelant le forçait de payer.

Chs. Z. Dorion et St. Germain.

Sous toutes ces circonstances, il semble que ce tribunal ne pourra hésiter un instant à confirmer le jugement rendu par la Cour de Révision.

Jugement confirmant celui de la Cour de Révision.

Dorion & Kelly, pour l'appelant.

J. O. Turgeon, pour l'intimé.

(P. LEF. DE B.)

COUR DE CIRCUIT, 1871.

MONTREAL, 29 MARS 1871.

Coram BEAUDRY, J.

No. 1364.

Thibault vs. *Coderre*.

JUGE.—Qu'un plaidoyer au mérite dans une cause au-dessous de $60, produit à la suite d'une exception préliminaire doit être reçu sans honoraire par le greffier, si l'honoraire requis par la loi et le tarif, sur la contestation d'une action de cette classe, a été payé sur l'exception préliminaire.

Le demandeur en cette cause avait poursuivi le défendeur par une action en expulsion, à laquelle il avait joint une demande de $9.75, pour loyer.

Le défendeur répondit à cette action par une exception à la forme qu'il produisit en payant l'honoraire de 30 centins, requis par le tarif pour la contestation des actions de cette classe.

En second lieu, et après que la Cour eut adjugé sur l'exception à la forme, il produisit un plaidoyer au mérite que le greffier reçu et paraphe, sans exiger un nouvel honoraire.

Lors de l'audition au mérite, le demandeur fit motion pour faire rejeter ce plaidoyer du dossier, parce qu'il n'était pas revêtu du timbre requis par la loi et les Règles de Pratique; et à l'appui de sa prétention, cita la 24e règle de la C. C. qui se lit comme suit:

"Le greffier ne recevra aucun plaidoyer ou écrit à moins que l'honoraire requis par la loi pour la production de ce plaidoyer ou écrit, ne soit payé."

J. G. D'Amour, pour le défendeur, soutint qu'en pareil cas, aucun honoraire nouveau n'était requis, et que le tarif n'imposait, en ce cas, aucun honoraire particulier pour la production d'un plaidoyer au mérite. Dans les causes au-dessous de $60, l'usage constant avait toujours été de ne payer qu'un seul et même honoraire, sur la contestation de ces actions, que cette contestation se fit au moyen d'exceptions préliminaires ou simplement par un plaidoyer au mérite. Le défendeur n'était pas d'ailleurs en défaut, et son plaidoyer au mérite avait été reçu et paraphé par le greffier.

PER CURIAM:—Nul doute que si le tarif imposait un honoraire particulier sur les plaidoyers au mérite dans les causes au-dessous de $60, celui du défendeur ne pourrait être considéré comme produit régulièrement; mais le tarif étant silencieux à cet égard, et la somme de 30 centins, seul honoraire exigé sur la contestation des actions de cette classe, ayant été payée sur l'exception à la forme, la motion du demandeur doit être rejetée et le plaidoyer du défendeur admis.

Motion rejetée et plaidoyer admis.

Thibault & Lareau, pour demandeur.

J. G. D'Amour, pour défendeur.

(J.G.D.)

COURT OF QUEEN'S BENCH, 1871.

IN CHAMBERS.

MONTREAL, 16TH NOVEMBER, 1871.

Coram DRUMMOND, J.

Ex parte *Crebassa*,

Petitioner for a Writ of *Habeas Corpus*.

HELD:—1st That a writ of *habeas corpus* will be granted in the case of a defendant confined in gaol on a writ of *contrainte par corps* by reason of a *rebellion à justice*. (1)

2nd—That the debtor in such a case who has been once discharged, is no longer liable to coercive imprisonment for the same debt, as the act committed by him is an offence in the sense mentioned in section eleven of chapter 95 of the Consol. Statutes for Lower Canada.

In a suit No. 2123 of G. A. Massue, plaintiff, against J. G. Crebassa, defendant, before the Superior Court, in Montreal, a judgment was rendered on the 31st of May, 1864, (Berthelot, J.) ordering the *contrainte par corps* of the defendant for having committed à *rébellion à justice* in opposing the sheriff of the district of Richelieu making seizure of his goods and chattels, on the 23rd April, 1864.

This judgment orders the sheriff of the district of Richelieu to arrest the defendant within his district, and to confine him in the common gaol of the district of Richelieu until he satisfies the judgment, according to the provisions then in force, contained in sections 141 and 209 of chapter 83 of the Consolidated Statutes for Lower Canada, and 25 Geo. 3, ch. 2, section 39, and 22 Vict., ch. 5, sect. 57, in 1858.

This judgment was confirmed in appeal, on the 8th March, 1866.

In the year 1866, the defendant was arrested under a writ for *contrainte par corps*, in pursuance of the above judgment; but he was liberated upon a writ of *habeas corpus*, granted in chambers at Montreal, (Drummond, J.) upon informalities alleged to exist in said writ of *contrainte*, such as the omission of the details and of the amount of certain costs, &c.

The plaintiff had opposed the granting of the writ of *habeas corpus* and the discharge of the defendant, who was confined in gaol under *civil process*.

On the 9th November, 1871, the plaintiff, whose judgment was wholly unsatisfied, issued another writ of *contrainte par corps* against the defendant, relying on the fact that the discharge of his debtor not having been obtained by reason of any of the causes set forth in article 793 of the Code of Civil Procedure, nor he having been discharged by reason of default of payment of an alimentary allowance, he, the said defendant, according to the provisions of article 795 of the Code of Civil Procedure, was liable to coercive imprisonment for the same debt.

The defendant, having been arrested and confined in the common gaol of the *district of Richelieu*, according to the tenor of the judgment as rendered, and not in

(1) Vide 4 L. C. Reports p. 45, note 3.; *Sed Contra* 8 L. C. Reports, p. 216; Barber & al. vs. O'Hara, 9 L. C. R. p. 286, Exparte Donaghue.

Ex parte Crebassa.

the common gaol of the district of Montreal, being the district in which the writ of *contrainte* issued, in accordance with the provisions of the article 789 C. C. P., in force more than a year after the judgment rendered on the 31st day of May, 1864, to wit, on the 28th June, 1867, applied for a writ of *habeas corpus*. The petitioner for the writ of *habeas corpus* issued on the 13th November, 1871, —by his counsel, Mr. Kerr—raised several objections to the sufficiency of the writ of *contrainte* and to the legality of his arrest under it.

He urged in his petition the illegality of his coercive imprisonment a second time; he invoked the maxim of the criminal law—*non bis in idem*; and cited, in support of this proposition, chap. 95 section 11 of the Cons. Stat. for Lower Canada and the case of Elmire Prince not reported in any law Reports. (1)

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(1) COURT OF QUEEN'S BENCH.

IN VACATION.

TUESDAY, March 29, 1853.

Before the Hon. THOMAS CUSHING AYLWIN.

Exparte ELMIRE PRINCE, *for Writ of Habeas Corpus.*—The petitioner in this instance had been imprisoned in the common gaol of this district, from the month of September last, in virtue of a writ, purporting to be a writ of *contrainte par corps*, issued in a case wherein one Olive Marcotte was plaintiff, and the petitioner was defendant, from the Circuit Court for the Montreal Circuit.

The alleged ground of commitment was, that she had refused to *représenter*, deliver up, certain goods and chattels to which she had been appointed guardian according to law, seized under the writ of *saisie gagerie* in the above cause issued.

A petition for a writ of Habeas Corpus was now presented, praying for her release, on the ground of nullities apparent on the face of the copy of the commitment, furnished by the gaoler.

Mr. Driscoll, on the part of the Crown, declared that he had no objection to the enlargement of the prisoner. He had no doubt whatsoever on his mind that the commitment was bad, from the want of any alternative being given to the petitioner; in default of payment, she was condemned to perpetual imprisonment. The commitment should have contained the alternative of the representation of the effects originally seized.

Mr. Papin, the attorney for the plaintiff in this case, appeared, and urged that, being a civil suit, giving a judgment on the commitment would, in fact, be constituting His Honor a Court of Review for judgments pronounced in parallel cases in the Circuit Court.

Mr. Kerr, for the petitioner, drew attention to the fact that there was no sum expressed in the writ of *contrainte par corps* or commitment, on payment of which the petitioner might be discharged, the words being, "until she shall have paid the amount of the judgment against her, in capital, interest and costs, together with seventeen shillings and nine pence costs accrued on the rule declared absolute as aforesaid, with three shillings and sixpence, cost of this writ, and your own fees." There were, to be sure, some letters and figures at the bottom of the first page, purporting to be a statement of the debt, costs and sub-costs in the case; but there was no reference made to this statement in the body of the commitment. Even taking it for granted that reference had been made to it still the sums being in figures in lieu of letters, it would be bad, as not being sufficiently certain.

The writ of Habeas Corpus was ordered to issue, returnable immediately.

On the return of the writ, His Honor proceeded to render judgment.

Ex parte Crebassa.

The petitioner also cited the chapter 110, sec. 13, of the Cons. Stat. for L. C., and the article 789 of the Code of Civil Procedure, to show that the defendant ought to have been confined in the common gaol of the district of Montreal, the Code of Civil Procedure having superseded and overruled the terms of the judgment.

Several other objections were also raised and discussed, but not necessarily decided. The plaintiff, by his counsel, Mr. Lafrenaye, contended: 1st. That a writ of *Habeas Corpus* will not be granted in the case of a defendant confined in gaol on civil process. (1)

2nd. That the debtor is liable to a second coercive imprisonment, *contrainte par corps*, if he has been discharged on other grounds than those mentioned in articles 793, 794 and 795 C. C. P. Under the French Law: Teulet, Codes Annotés, page 244, art. du Code de Procédure Français, 804, page 245, Nos. 1, 2, 17, 18, 19 and 20. Under the English Laws: English Law and Equity Reports, vol. 24, anno 1854, page 146; Exparte Eggington, and page 150. Erle, J.'s remarks. The chap. 95, sec. 11 of the Cons. Stat. for Lower Canada applies only to criminal offences and not to civil process.

3rd. That the Code of Civil Procedure had no retroactive effect upon the order in the judgment *quoad* the gaol of the district, article 1360.

On the return of the writ, His Honor proceeded to render judgment.

The parties having been fully heard before me, I find two questions raised by the petition for *Habeas Corpus*; both, however, constitute in reality but one. Strictly speaking, I have only to decide the reasons assigned in the petition. I was right when I first decided that the petitioner should be discharged at the time of his first arrest. The chap. 95, C. S. L. C., sec. 11, which is the old law, prohibits the unjust vexation by reiterated commitments for the same offence;

Apart from the technical objections regarding the form of this *contrainte par corps* or commitment, which are insuperable, even supposing that the present writ had been drawn carefully, in lieu of negligently, that the sums which the petitioner had to pay before being liberated were clearly written and expressed, still I have great doubts as to the fact whether the Legislature has not, by the Act 12 Vic., ch. 42, abolished all recourse by landlords against their tenants (*par corps*) in the event of their not producing, when duly required therein, the effects entrusted to their charge by the operation of the law, in cases of *saisie-gagerie*.

The tenant created guardian by the operation of law to the *saisie-gagerie* does not come within the exceptions created by that Statute to its general effects. The Act 12 Vic., ch. 42, abolishes the writ of *capias ad satisfaciendum*, and also all other writs of execution against the person, with the exceptions contained in the 15th section. The present case does not fall within those exceptions; therefore, it is still a question undetermined, though one about which I have little doubt. But this point does not come up at present. The commitment or *contrainte* in this case is partly bad on the face of it. I cannot allow the liberty of the subject to be infringed upon, as it is in the present instance, and, therefore, order her to be discharged. The learned Judge referred to Paley on Convictions, p. 255. And prisoner was discharged.

(1) 8 L. C. Reports, page 216, Barber *vs* O'Hara, Exparte Mercure petitioner for a writ of *Habeas Corpus* for his discharge from coercive imprisonment, by reason of a *rébellion à justice*, in Chambers, at Montreal, Aylwin, J. Decision not reported. See 5 L. C. Reports, page 168, as to the nature of the case. 9 L. C. R., p. 285, Exparte Donaghue.

Ex parte Crebassa.

whether the first discharge takes place by reason of a variance or not, it is indifferent.

This is the same cause of arrest for the same offence. The authorities of the plaintiff's counsel do not apply. I must put the law into execution. This is not an imprisonment for debt, but for an offence against the law. It was resisting a bailiff in the execution of his duty, and it is punishable more severely than any misdemeanor, inasmuch as the debtor is bound to remain in gaol the whole time of his natural life, if he cannot pay the debt, being the amount of the judgment recovered against him by the plaintiff. If a man steals £500 he is sentenced to a certain number of years in the penitentiary, but the law in the present case is much more severe. I maintain that by law it is an offence within the meaning of the Statute, ch. 95, sec. 11. The petitioner was discharged once and I am bound by the same law to discharge him again.

The judgment ordering the mode of its execution was good when pronounced, and according to the law of the land; but the law now in force, art. 789, C. C. P., must override that judgment, so far as its mode of execution goes, but the judgment would not fall to the ground for that reason.

Suppose that another writ would issue—but I decide that it cannot—that writ would have to be executed according to the law now in force.

I will order that the petitioner be discharged in the usual form, as it is not necessary to enter any reason in the order of discharge.

The causes in the writ of *contrainte par corps* being insufficient to warrant his arrest, the petitioner is discharged.

Kerr, attorney for petitioner.

Lafrenaye, attorney for plaintiff.

(P. R. L.)

MONTREAL, 24TH NOVEMBER, 1871.

IN CHAMBERS.

Coram DRUMMOND, J.

Exparte PAPIN,

Petitioner for a Writ of Habeas Corpus.

HELD—1st. That the powers conferred by the Local Act of the Province of Quebec, contained in section 17 of the 32 Vict., ch. 70, on the Corporation of Montreal for cumulative punishments therein enacted, are unconstitutional.

2nd. That the By-Law of the Corporation of the City of Montreal, imposing a fine *and* imprisonment for the infraction of its provisions against gambling, made under the provisions of the Statute 32 Vic., chap. 70, section 17, passed by the Legislature of Quebec in 1869, is null and void, inasmuch as by the British North America Act, 1867, section 92, sub-section 15, the punishment imposed by Local Legislatures for an offence against its own laws, cannot be cumulative.

[redacted] the Recorder's Court for the City of Montreal, the petitioner was convicted [redacted] gambling in a tavern in the city, contrary to the By-Law in such case made [redacted] provided, and was condemned to pay a fine of $20, *and* to be imprisoned for two months, and was, in consequence, committed to the common gaol about the 2nd November, 1871. A writ of *Habeas Corpus* was issued, and the case was argued in Chambers. The Counsel for the petitioner, amongst other objections to the conviction and commitment, contended that the Legislature of Quebec exceeded its authority in granting to the Corporation of Montreal, by the Act

Ex parte Papin.

32 Vict., ch. 70, sec. 17, the powers of punishment for infraction of by-laws more extensive than it possessed itself with respect to offenders against its own laws. By that Local Act the Corporation is vested with the right of imposing a cumulative punishment, fine and imprisonment, whereas the Local Legislature does not possess that right, under the British North America Act, 1867, 30 and 31 Vict., ch. 3, sec. 92, sub-sec. 15.

DRUMMOND, J.—The most important point to be considered is the extent to which the Local Legislature can empower the Corporation to punish by fines, imprisonment or both, parties detected in the infraction of the by-laws. The Local Legislature, under the 32 Vict., ch. 70, 1869, cannot endow Municipal Corporations with powers of punishment for infraction of their by-laws more extensive than it possesses itself. The enactments of the British North America Act, 1867, 30 and 31 Vict., ch. 3, sect. 92, sub-sec. 15, are as follows: "The imposition of "punishment by fine, penalty or imprisonment for enforcing any law of the "Province made in relation to any matter coming within any of the classes of "subjects enumerated in this section." Therefore the punishment imposed by Local Legislatures on an offence cannot be cumulative; it must be either fine, penalty or imprisonment; it cannot be fine *and* imprisonment. This provision therefore, limits the whole of the powers of imposing punishment by Provincial Legislatures, and they cannot grant to Corporations any greater powers of punishment than they possess themselves, so that the 32 Vic., ch. 70, sec. 17, is clearly *unconstitutional* in so far as it assumes to authorize the imposition of punishment by fine and imprisonment for an infraction of a by-law of the City of Montreal. This section 17, of the 32 Vict., ch. 70, being the clause relied on to maintain the commitment and conviction in this matter, Papin having been condemned to pay $20 and to be imprisoned for two months, it is clear that both conviction and commitment are null and void. The petitioner must therefore be discharged.

Order for his discharge granted.

Kerr, attorney for petitioner.

Devlin, attorney for the Corporation of Montreal.

(P. R. L.)

SUPERIOR COURT, 1871.

MONTREAL, 30TH SEPTEMBER, 1871.

No. 1785.

Coram BERTHELOT, J.

Phillips et al. vs. *Joseph.*

HELD:—That where defendant, holding a power of Attorney, has collected but not paid over a dividend, awarded plaintiffs by a Court of Bankruptcy, the plaintiffs' recourse is not confined to an action to account, but they may sue for the specific sum awarded by such Court of Bankruptcy.

This action is brought by the representatives of the late firm of Lawrence Phillips & Sons, of London, England, against the defendant to recover a sum of

Phillips et al. vs. Joseph.

money collected by the defendant, but never paid to the plaintiffs. The declaration sets up:

That, previous to the 3rd October, 1848, the firm of Benjamin Hart & Co., of Montreal, were indebted to the firm of Lawrence Phillips & Sons in the sum of £5042.18; that the firm of Benjamin Hart & Co., at Montreal, on the 13th September, 1848, declared themselves bankrupt; that at Montreal, on or about the 3rd October, 1848, the said defendant, acting as the attorney of the firm of Lawrence Phillips & Sons, under and by virtue of a power of attorney duly executed at the City of London, 27th January, 1848, fyled a claim in the Court of Bankruptcy for the District of Montreal for the said sum of £5042.18;

That afterwards, to wit, on the 17th June, 1853, a first and final dividend was declared on the said bankrupt estate, and the said firm of Lawrence Phillips & Sons was awarded a dividend of £123. 7. 4; that, on the 3rd November, 1853, George Weekes, the official assignee in the said matter, paid the said dividend to the said defendant, acting as the agent of the then existing firm of Lawrence Phillips & Sons; that the said defendant never paid over the said dividend to the said firm, but fraudulently appropriated to his own use the said dividend, and never notified nor informed the said then existing firm of Lawrence Phillips & Sons, or any of the partners thereof, that he had ever received any sum of money from the said estate, though requested; and concludes by asking for a condemnation against Joseph for £123. 7. 4, and interest from the date of payment of the said dividend.

The defendant demurred to the above, alleging,

1st. That the plaintiffs are not in law entitled to claim a specific sum of money, but that the plaintiffs should have brought the *actio mandati*, asking the Court to condemn the defendant to render an account.

2nd. That no other action than the *actio mandati* to render an account can be exercised in law by the principal against his agent.

The plaintiffs referred to the following cases:

Leclerc vs. *Roy*, Robertson's Digest, page 18, and K. B. Q. 1817.

Dubord vs. *Roy*, Robertson's Digest, p. 19, and K. B. Q. 1818, and Revue de Legislation, vol. 1, p. 352.

Leclerc vs. *Ross*, Robertson's Digest, p. 1, and K. B. Q. 1809.

Phillips vs. *Fyshe*, 25 January, 1865,—same point raised by peremptory exception in law. Judgment for plaintiffs by Hon. Mr. Justice Badgley.

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Dunlop & Lyman, for plaintiffs.

G. Joseph, for defendant.

R. Roy, Q.C., counsel.

(F. S. L.)

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" :—*Vide* EVIDENCE.

" :— " PRESCRIPTION.

" :—An *employé* occupying a house belonging to his master, by his permis-

sion, and as part consideration for the services of such *employé*, is liable to ejectment under the lessors and lessees Act, so soon as he ceases to be in the employ of the owner of the house. (Hart *vs.* O'Brien, C. of. R.)..... 42

LESSEE:— A, who has abandoned the leased premises, under protest, on account of their uninhabitable condition, can claim the resiliation of the lease by his plea to an action for recovery of the rent, as well for the past as for the future. (Coucher and *vir vs.* Brault, S. C.)..... 117

" :—Reversed in Review..... 274

" :—Under the fact proved, no contract of lease existed between plaintiff and defendant, but plaintiff's recourse "for money or damages, or for what else plaintiff may be advised as to law and justice and under the facts may appertain" will be reserved. Delisle *vs.* Sauvageau *es qualité* C. C.)..... 256

LODS ET VENTES:—A donation of land by a father to his sons, with the obligation of paying a life rent and alimentary pension to the sisters of the donees, and also certain debts of the donor, does not give rise to *lods et ventes*. (Fraser *vs.* Duprés, C. C.)..... 111

MAINMORTE:—*Vide* WILL.

MARRIED WOMAN:—A, *séparée de biens*, cannot relieve herself from payment of an obligation, given by her and her husband, jointly and severally, for a loan therein stated to have been made to her, without proving that the creditor knew that the loan was not made to her but to her husband, and that she was consequently merely the security of her husband. (Mailhot, appellant, and Brunelle and *vir*, respondents, Q. B.)..... 197

:—A, whose husband has been already married to a woman still living, is not deprived of her matrimonial rights if she were ignorant of the existence of such prior marriage. (Gregory *vs.* Dyer, *es qual.*, and Hughes et al., *tiers opposants*, Q. B.)..... 213

" :—During the existence of the community, the wife is obliged to live with her husband, and cannot, therefore, claim an alimentary allowance, unless the husband refuse to receive her. (Conlan *vs.* Clarke, C. of R.).... 263

MONTREAL, CORPORATION OF:—A contract of lease of a market stall, entered into by a city councillor and subsisting when he is re-elected as such, will not disqualify him from being so re-elected under the Act which enacts that "any member of the said council who shall directly or indirectly become a party to, or security for, any contract or agreement to which the Corporation of the said city is a party, or shall derive any interest, profit or advantage from such contract or agreement, shall thereby become disqualified and lose his seat in the said council." (Smith, petitioner, *vs.* McShane, jr., and the Mayor et al., of Montreal, S. C.)..... 203

" :—The, cannot legally contract otherwise than under the seal of the Corporation, and deeds professing to cancel existing leases cannot be legally made by the Mayor or city clerk, without special authority. (Do.) 203

" :—The By-Law of the, imposing fine *and* imprisonment for the infraction of its provisions against gambling, made under the provisions of the Prov. Stat. 32 Vic. ch. 70, s. 17, is null and void, inasmuch as the British N. A. Acts limits the power of the Local Legislature to the imposition of fine *or* imprisonment, for enforcing the laws which such Legislature can enact, and, therefore, the Act authorizing the Corporation to enact such a By-Law was and is unconstitutional. (Exparte Papin, for a writ of *habeas corpus*, Q. B.)..... 334

MOVEABLE:—*Vide* SALE.

MUNICIPALITIES alone have a right to sue for removal of obstructions and encroachments on the public roads, and individuals have no right of action in the premises, unless in the case of real and special damage incurred by them. (Bourdon, appellant, and Benard et al., respondents, Q. B.)..... 60

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OPPOSITION *à fin d'annuler*:—The fact of partial payments having been made on account of the judgment does not justify the conclusions of an opposition by the debtor, in demanding the total nullity of the seizure, but, in such a case, the opposition ought not to be dismissed *in toto*, but the exact amount due on the judgment should be determined—each party paying his costs on said opposition. (Grange et al. *vs.* McDonald, & McDonald, opposant, C. of R.)..... 252

PARTNERSHIP:—In an action *pro socio* brought by a surviving partner against the executors of the deceased partner, the heirs and universal legatees must be called into the cause and made parties thereto, to account for the business of the partnership, but, instead of dismissing the action on that ground, the Court will order the heirs and legatees to be brought into the cause, at the diligence and costs of the plaintiffs. (Doak, appellant, and Smith, respondent, Q. B.)..... 53

PEREMPTION D'INSTANCE:—The service, by the defendants, of a *notice* of motion (not really fyled or presented to the Court) does not interrupt *péremption*. (Terrill *vs.* Haldane et al., S. C.)..... 215

" :—A motion for, may be legally made by two out of three members of a legal firm (the attorneys of record of defendants) without any substitution of attorneys previously allowed by the Court, and without evidence that the remaining member of the firm is either dead or has ceased to practice. (Do.)..... 245

" :—A requisition by plaintiff for process to examine defendants *sur faits et articles*, fyled on the same day that service is made of the defendants' motion for *péremption*, will not interrupt the *péremption*. (Do.)..... 245

" :—(Overruling Howard et al. *vs.* Childs et al., 9 L. C. Jur., p. 22), the death of two of the defendants does *not* interrupt *péremption*. (Do.)..... 245

PHYSICIAN:—The fact that a, was a relation of the deceased, is no bar to his recovering the value of his services during the last illness of the deceased, even when it is proved that other medical men residing nearer to the deceased might have been called in. (Beaudry *vs.* Desjardins, and divers opposants, and Desjardins, Cr. collocated, and Thomas et al., contestants, C. of R.)..... 267

" :—The services of a, during last illness, are not subject to reduction, on the ground of the insolvency of the deceased. (Do.)..... 267

" :—The registration of the claim of a, under above circumstances, whilst the property was *sous saisie*, was valid, if made within the prescribed delay. (Do.)..... 267

PRACTICE..... :—*Vide* JURY.

" :— " CONTEMPT.

" :— " JUDGMENT.

" :— " EXPERTS.

" :— " INSCRIPTION EN FAUX.

" :—The hearing on the merits of a writ of *certiorari* must be had in one of the two divisions of the Court set apart for the hearing of cases on the merits. (Exparte Whitehead, for *certiorari*, S. C.)..... 43

" :—The permission to proceed in *formâ pauperis* does not absolve the party from the necessity of making the usual deposit of the amount necessary to cover the attorney's costs. (Dubant *vs.* Lacombe et al., and Brunelle, plaintiff *par reprise d'instance*, and Tranchemontagne et al., opposants, S. C.)..... 43

" :—In an action under $60, no deposit is necessary with an exception *à la forme*. (Desjardins *vs.* Chrétien, C. C.)..... 56

PRACTICE.....:—Where a married woman has been summoned, without her husband, the parties will be put *hors de Cour*. (Do.)..... PAGE

" :—*Vide* APPEAL.

" :— " PARTNERSHIP.

" :— " PROHIBITION.

" :— " COSTS.

" :—Where a *défense en droit* has been fyled, on the ground that the registration of a transfer set up in the declaration has not been alleged, the Court will reserve to pronounce with respect to the points raised until final hearing on the merits. (Desbarats et al. *vs.* Lemoine et al., S. C.)..... 61

" :—The debtor of an alimentary pension, condemned alone to pay it, has a right to sue any other party equally liable with himself, en *déclaration de jugement commun*, and to cause him to be condemned to pay his share of the pension and of the costs already incurred. (Labelle and ux. *vs.* Dubé, S. C.)..... 91

" :—*Vide* COSTS.

" :— " EMPLOYÉ DU GOUVERNEMENT.

" :—A return of a bailiff, that he served a paper between eleven o'clock and noon, is sufficient. (Dubois *vs.* Bélanger, S. C.)..... 84

" :—The permission to prosecute *en forma pauperis* ought to be revoked, when the creditor has transferred a certain sum to be taken from the amount of the judgment and other claims. (Duhaut *vs.* Lacombe et al., and Brunelle, plaintiff, *par reprise d'instance*, and Tranchemontagne *et ux.*, opposants, S. C.)..... 102

" :—*Vide* CAUSE AD RESPONDENDUM.

" :—A judgment upon the merits, which leaves a *défense en droit* undisposed of, is bad. (Hart *vs.* Rose, C. of R.)..... 133

" :—A petitory action, not setting out the district in which the land claimed is situate, will be dismissed, in the absence of evidence or an admission of the identity of the township within which the land is alleged to lie, with the township mentioned in the titles produced. (Do.)..... 133

" :—*Vide* GARDIEN.

" :— " QUO WARRANTO.

" :—Delay will be granted to a defendant to plead, if it appear that he is under criminal charge which might be influenced by pleading within the prescribed delays. (Burn *vs.* Fontaine, dit Bienvenu, S. C. 144

" :—The word "I" or "We," having been omitted in the beginning of an inscription for *enquête*, and no consent in writing that the *enquête* be taken under the old system having been fyled, but the parties having proceeded with their *enquête*, the irregularities will be held to have been waived by the consent of the parties. (Bonnell *vs.* The Drummondville Bark Extract Manufacturing Co., S. C.)..... 144

" :—*Vide* COURT OF REVIEW.

" :—Whilst a record is in appeal, an application to a judge in the Court below to obtain possession of property seized under the writ of *saisie revendication* issued in the cause, cannot be entertained. (Hamilton *vs.* Kelly, S. C.)..... .....

" :—*Vide* DISTRIBUTION.

" :— " WITNESS.

" :— " FAITS ET ARTICLES.

" :— " JURY TRIAL.

" :— " PEREMPTION.

" :—An action to annul or rescind a lease of moveable property cannot be brought in a summary manner under articles 887 *et seq.* of the Code of

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Civil Procedure, which apply only to leases of real estate. (Dwyer *vs.* Barlow, C. C.)..... 247

PRACTICE:—In an action against a public officer for a *saisie revendication* of goods seized, *preuve avant faire droit* will be ordered upon a demurrer alleging the omission of one month's notice. (Bathgate *vs.* Delisle, S. C.)..... 250

" :—*Vide* CERTIORARI.

" :—OPPOSITION *à fin d'annuller.*

" :—ARTICULATION OF FACTS.

" :—In proceedings, affecting Corporations or public officers, under articles 1002 and 1006, the defendants may set up against the information an *exception déclinatoire*, and, at the same time, pleas to the merits of the petition. (The Attorney General *pro regind*, and the Hon. J. H. Gray, defendant, C. of R.)..... 255

" :—*Vide* REVIEW.

" :— " ACTION POSSESSOIRE.

" :— " EVOCATION.

" :—A plea to the merits, in an action under $60, pleaded at the same time as a preliminary plea, is not subject to an additional charge by the clerk of the Court besides that payable on the preliminary plea. (Thibault *vs.* Coderre, C. C.)..... 330

" :—*Vide* ATTORNEY.

PRESCRIPTION:—Prior to the Code no prescription short of 30 years existed against the landlord's right of action against the tenant, for damages resulting from fire alleged to be caused by the negligence of the tenant or his servants. (Alis *vs.* Foster, C. of R.)..... 13

" :—The knowledge by a donee of the existence of a *hypothèque* on the property acquired, at the time of his acquisition, does not constitute him in bad faith, and he can therefore invoke the prescription of ten years, and, in the present case, the payment made by the donee, in part extinction of the *hypotheque*, did not interrupt the prescription. (Kaigle, appellant, and Pierce, respondent, Q. B.)..... 227

PRIVILEGE:—The master or captain of a vessel has no privilege on the vessel for his wages. (Delisle *vs.* Lécuyer et al., C. of R.)..... 252

" :—*Vide* PHYSICIAN.

" :—Funeral expenses are not privileged beyond what is consonant with the position in society and the fortune of the deceased, and the enregistration of the privilege may be legally effected while the property is under seizure. (Beaudry *vs.* Desjardins, and Desjardins *et vir*, opposants, and Thomas et al., contestants, C. of R.)..... 274

PRIVILEGED COMMUNICATION:—*Vide* TELEGRAMS.

PROHIBITION:—A writ of, addressed to a Corporation must be addressed to the Corporation by its corporate name, and not to the public officers who compose it. (Laundry, *fils*, appellant, and Mignault et al., respondents, Q. B.).. 65

PROMISE OF SALE:—A, containing an express covenant that until complete delivery of the quantity of coal stipulated as the price, the purchaser should have no right of property in the barge sold, the barge remains the property of the vendor, so much so that, if the barge be lost by *force majeure*, such loss will fall on the vendor, notwithstanding the use and occupation thereof by the purchaser and the delivery by him of 412 out of the 500 tons of coal stipulated to be delivered. (Beaudry *vs.* Janes, C. of R.)..... 118

" :—An incidental demand, in a case such as the above, for the recovery of the 412 tons of coal, will be maintained on due proof of the value of the coal, but such proof cannot be legally deduced from the allegation in the plaintiff's declaration that the coal was worth $5 a ton. (Do.)..... 118

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PROMISSORY NOTE:—A, obtained by threats, from the mother of A, that if she did not sign the note her son would be arrested for stealing the amount recovered by the note, is null and void, on the ground of violence and want of legal consideration, and the mother, sued by a *bonâ fide* holder of the note without notice, for the recovery of the note, may legally sue *en guarantie* the party who thus illegally extorted the note from her. (Macfarlane, appellant, and Dewey, respondent, Q. B.)..... 85

":—When a, is signed by procuration, proof of the due execution of such procuration must be made to entitle the plaintiff to recover judgment in an *exparte* suit on the note. (Ethier, appellant, and Thomas, respondent, Q. B.)..... 235

QUEBEC:—Powers of Legislature of—*Vide* MONTREAL, CORPORATION OF.

QUO WARRANTO:—A writ of, issued in term, cannot be proceeded on in vacation, but only in term. (Henderson *vs.* Loranger, S. C.)..... 143

":—*Vide* MONTREAL, CORPORATION OF.

RAPPORT:—*Vide* DONATION *entre vifs*.

REGISTRATION:—*Vide* PHYSICIAN.

RÉMÉRÉ:—*Vide* SALE.

REPARTITION:—A judgment dismissing an action against the defendant at the suit of the present plaintiffs, for the recovery of an instalment claimed as assessment for the building of a R. C. church, on the ground that the defendant was not a Roman Catholic, but a Baptist, was *chose jugée* between the parties, and could be so pleaded against a subsequent action, for another instalment, notwithstanding that the plaintiffs, in such subsequent action, allege and prove a confession of faith as a R. C. antecedent to the homologation of the report of the *syndics*. (Les Syndics de Lacolle *vs.* Duquette, C. C.)..... 304

RESILIATION DE BAIL:—*Vide* LESSEE.

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REVIEW:—No right of, exists in favor of the Crown when the right of appeal is denied by law. (The Attorney General *pro regind*, petitioner, and the Corporation of the county of Compton, respondent, C. of R.)..... 258

":—When the defendants in the original proceedings have pleaded separately, they are entitled to demand from the plaintiff reviewing a deposit of $40 on each issue. (Lacombe *vs.* Ste. Marie et al, C. of R.)..... 268

SAISIE ARRÊT:—Where a trading partnership obtained advances from a bank, under an agreement that the proceeds of sale of hemlock bark extract manufactured by the partnership should be paid into the bank in re-payment of the advances, and the partnership, while in a state of insolvency and largely indebted to the bank, contrary to the agreement, applied the proceeds of 174 barrels of bark extract to the general purposes of the business, without the knowledge or consent of the bank; such act (even in connection with evidence that the acts of partnership as regarded the bank were from first to last akin to fraud) did not amount to secretion with an intent to defraud, sufficient to sustain an attachment before judgment. (The Quebec Bank, appellant, and Steers et al., respondents, Q. B.)..... 155

":—The contestation of a writ of, before judgment, must be made with the contestation to the merits, and not by petition, when the debt is not due. (Métrisse dit Sansfaçon *vs.* Brière, and Guilbault, T. S., S. C.)..... 259

SALE:—Where a party sells a moveable to two different persons, the one of the two who has been put in actual possession is preferred, and remains owner of the thing, although his title be posterior in date, provided he be in good faith. (Macguire *vs.* Dackus et al., S. C.)..... 20

":—The, of an immoveable, after the institution of a personal action to recover a debt for the payment of which the property is charged and affected, is null and void *quoad* the creditor plaintiff in the suit, who is en-

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titled to seize and sell the property, notwithstanding such sale. (Hans. dit Chaussée *and ux. vs.* D'Odet dit D'Orsennens, and D'Odet dit D'Orsennens, opposant, C. of R.)..... 193

" :—When an article contracted for has been delivered, but not in proper order for the purpose intended, the purchaser is well founded in protesting and requiring the same to be put in proper order and in his offer to give back or allow the contractor to take it away. (Kinmond *vs.* Beaudry, C. of R.)..... 248

" :—The provisions of the Civil Code prohibiting agents and others from becoming buyers of the property which they are charged with the sale of, apply to subordinates. (Wicksteed *vs.* the Corporation of the Township of North Ham et al., C. of R.)..... 249

" :—*Vide* VICE REDHIBITOIRE.

" :—" INSOLVENCY.

" :—In the case of a, with *faculté de réméré, offres réelles* and *consignation préalable* are not necessary, but the *offres* may be irregular or verbal. (Dorion, appellant, and St. Germain, respondent, Q. B.)..... 316

SERVANT :—*Vide* LESSEE.

" :—A, who leaves the employ of his master before the expiration of his term of service is nevertheless entitled to wages already earned. (Nadon *vs.* Ollivon et al., C. C.)..... 280

SERVITUDE :—A, is sufficiently described, of a *coupe de bois*, which designates it as "la coupe de trois quarts d'arpent de bois de front sur la profondeur du bois, à prendre sur la terre des donateurs, au dit lieu du quatrième rang de St. Denis." (Archambeault *vs.* Archambeault, S. C.)..... 297

" :—A, such as above, although personal, is a real charge on the property, and is protected by registration and by annual use against a *tiers détenteur*. (Do.)..... 297

" :—A, such as above, cannot be prescribed by the lapse of 30 years from the date of the contract, but only by 30 years of non-user. (Do.)..... 297

TELEGRAMS :—It is not a misdemeanor in any operator or *employé* of a telegraph company to divulge the contents of a private despatch, in obedience to a *subpœna duces tecum*. (Leslie *vs.* Harvey, S. C.)..... 9

" :—Which have passed between a principal and his agent are not privileged communications in a suit in which that principal is a party. (Do.) 9

VICE REDHIBITOIRE :—No action for, in the case of a sale of a horse, will be maintained, unless brought within eight days after the sale. (Darte *vs.* Kennedy, C. C.)..... 280

VIOLENCE :—*Vide* PROMISSORY NOTE.

WILL :—Neither the cession of Canada, nor the introduction of enlarged power of bequest into Lower Canada, by 41 Geo. III, abrogated the declaration of 1743, but, under Article 869 of the Civil Code, taken in connection with ch. 72 of the Cons. Stat. of Canada, a testator may will his property to fiduciary legatees, or trustees, to be by them applied to the establishment of a public library and museum under the administration of a Corporation, to be formed for that purpose. (Fraser et al. *vs.* Abbott et al., S. C.)..... 147

" :—Aliments, whether by disposition of the law or of man are favored, and *insaisissables* by law. And therefore a testamentary allowance by a father to his children, until a time fixed by his will for the final partition of his estate, is valid. (Muir et al., appellants, and Muir, respondent, Q. B.)... 309

" :—The testamentary condition attached to the alimentary allowance in a will against seizure, mortgage or anticipation by the alimentary beneficiaries, and against its subjection, seizure, or other contingencies to which personal or other property is subject, frees it from compensation as

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respects debts due to the testator or his estate by the alimentary debtor. (Do)..... 309

" :—Testamentary quarterly [illegible] alimentary beneficiaries of the net annual revenue applicable [illegible], are not the legal equivalent of the final partition and distribution of the *corpus* of the estate at the time fixed by the will for its final partition. (Do)..... 309

WITNESSES :—The secretary of a telegraph company cannot refuse to produce telegrams in obedience to a *subpœna duces tecum*, on the pretence that his doing so would amount to a misdemeanor under sec. 16 of ch. 67 of Cons. Stat. of Canada. (Leslie *vs.* Hervey, S. C.)..... 9

" :—*Vide* EVIDENCE.

" :—A writ of protection for a witness, will be issued upon cause shown, to protect him from arrest upon civil process, during such time as the Court may decide to be reasonable to enable the witness to attend, give evidence, and return home. (Miller *vs.* Shaw et al., S. C.)..... 218