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JURISPRUDENCE ANNOTÉE

CONTENANT

LES ARRETS DE PRINCIPES DE TOUS NOS TRIBUNAUX.

RÈDACTEUR :

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Auteur de "*The Jurisprudence of the Privy Council*", du *Répertoire de la Revue Légale*" et du "*Code civil annoté*".

AVEC LE CONCOURS DE PLUSIEURS COLLABORATEURS.

L'étude du droit élève l'âme de ceux qui s'y vouent, leur inspire un profond sentiment de la dignité humaine, et leur apprend la justice, c'est-à-dire le respect pour les droits de chacun.

(ESBACH, Etude du droit, p. 12).

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AVIS

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"Now it is alleged— and I think for the first time— in defendant's plea that the plaintiff agreed to realize upon the shares before calling upon the defendant to pay.

"If an agreement such as the defendant sets up had in fact been entered into, one of the first and principal things which one would expect to find in it would be a provision that the plaintiff or some nominee of the parties would sell these shares at the end of the period allowed to Lubin to redeem them or within some fixed period thereafter so as to ascertain what depreciation there would be if any.

"Nothing whatever of that sort is provided for in the deed and I find no word of testimony in the record to show that the plaintiff agreed to realize upon the snares or that it was agreed that anybody else should realize upon them. Yet, as we have seen, the defendant freely agreed to give his note with such protection as he considered that the deed afforded him— and that note was in fact made payable fourteen day's before Lubin's right to redeem would lapse.

"Besides what I have just said, there is the significant negative fact that, while a formal deed was drawn up and signed to establish how the shares were to be dealt with, it contains no recital that the note sued on was given as a further security. If that was the purpose which the note was to serve, why was it not so stated when the parties took the trouble to draw up a writing.

"Lubin did not redeem or sell the shares before the note fell due. At the date of the trial, the full period for redemption had expired and he had not redeemed them within that period.

"The learned judge who decided the case in the Superior Court in these circumstances decided it upon the state of facts then existing, and having found upon the testimony

of the defendant and Lubin that the object or purpose for which the note had been given was to serve as a guarantee against depreciation in the market price of the shares and that in view of the period for redemption having expired without the price having fallen below $2.80 per share (and consequently not below the price named in the deed), concluded thereupon that "as a consequence, the note given to the plaintiff by the defendant Thomas Jones has no longer any *raison d'être*, and had expended its object".

"With much deference, I consider that that inference is founded upon a misapprehension, and that the effect of what happened was the opposite of that indicated.

"We have seen that the plaintiff at the outset advanced approximately $4,000.00 more than he was willing to risk on these shares and took this note for the excess. Now it resulted from Lubin's failure to redeem or sell the shares that the deed took final effect upon them so that, without any further act on the plaintiff's part, they stand as having cost him $2.75 per share, namely, about $4,000.00 more than the $2.00 per share. That result instead of establishing that the note had spent its purpose, established the happening of the very thing which (even according to the defendant's pretensions) placed the defendant under obligation to pay the $4,000.00 and upon that footing this action would have had to be maintained even if it had been Bilsky who had been plaintiff.

"It is true that the defendant may not be committed to the consequences of this misapprehension — such as, with due deference, I consider it to be — because his plea was that the action — taken before expiry of the time for redemption was premature, and that plea would have been well founded if it had been proved that the note had been given only as security against a fall in the market price

of the shares and that such fall had not taken place. Taking the issue as presented by the plea, I, however, still find no satisfactory evidence of facts tending to prove that the plaintiff agreed to subject his recourse to fluctuations in the market price of the shares in the way pretended.

"Thus far, in considering the legal inference to be drawn from the facts and circumstances, I have assumed in favour of the defendant that Bilsky was the agent of the plaintiff. It cannot be said that proof of such agency has been satisfactorily made. What the real relation of the plaintiff to Bilsky was, and which one of them provided the balance of the money which went to pay off the brokers, are not clearly made out.

"It is however clear that the defendant gave the plaintiff his promissory note for Lubin's accommodation and received the plaintiff's cheque for the discount of it.

"Defendant's position towards the plaintiff is not helped by the fact that he at first was unwilling to take the cheque. He finally did accept and endorse it apparently relying on futile assurance of Bilsky or Lubin that there would be "no trouble". There would have been some plausibility in the defendant's contention if the plaintiff had paid over the money directly to Lubin, but instead of doing that he was careful to put it in the shape of a discount of the defendant's note and to obtain a voucher from the defendant establishing receipt by the latter of the proceeds of the discount.

"It appears to me that any plausibility of inference favourable to the defendant's pretension which could be asserted, could not extend beyond the inference that it was understood that if Lubin had redeemed or realized upon the shares before the note fell due so as to recoup

the plaintiff or Bilsky, the plaintiff should not in that event collect the $4000.00 from the defendant. That condition of affairs did not arise and I see no plausible ground to infer, from the facts and circumstances as proved, that the plaintiff agreed not to exact payment from the defendant when the note fell due without anything having been done.

"Taking the evidence of attendant "facts and circumstances", my conclusion is that, in view of them most favourable to the defendant, their effect is simply neutral, in other words they are as consistent with the conclusion that the defendant simply borrowed money from the plaintiff with which to help Lubin, and made himself liable as the maker of a promissory note ordinarily does, as they are with the conclusion that the note was given as a mere additional security in the way alleged by the defendant. In my view, instead of being neutral in result, they make in favour of the plaintiff.

"The effect of that conclusion is that the defendant's plea is without support other than the simple assertion of the defendant and Lubin, made in verbal testimony, to the effect that it was verbally agreed that the note was given only as additional security.

"For the reasons above stated, that assertion of a contemporaneous verbal agreement is one which, being in contradiction of the written agreement, could not be put forward in verbal testimony.

"I consider that it follows that the presumption, declared in section 41, that the making and delivery of this note were "valid and unconditional" has not been displaced.

"It would be quite destructive of that character of reality and commercial stability which should belong to bills

and notes if the right or a contract creditor were exposed to be explained away into nothing by such loose and vague testimony as that here put forward by the defendant and Lubin. A creditor who held a promissory note would be in much the same position as if he had none.

"This defendant, for example, interested in ridding himself of a contract obligation worded in due form, speak of having signed the note "as additional security "for certain mining stock which" etc. The expression "additional security" is made use of three times but the defendant seems powerless to say in what actual state of facts the "security" was to be effective beyond saying "provided the stock had not depreciated below the money put up by Vineberg there was no liability so far as I was concerned". In a sense every bill of exchange is a "security" and a contracting party who delivers such a security for value should stand ready to make it good in money at the appointed time unless he can make better and clearer evidence or some defence than has been made in this case.

"Lubin's expression is that the note was given "as ad-"ditional security against the depreciation of the stock "during the course of the transaction" a nebulous sort of statement when taken in view of the fact that no stipulation was made for disposal of the stock or ascertainment of any "depreciation".

"My conclusion therefore is that the appeal should succeed and that there should be judgment for the plaintiff.

"While, in making the foregoing detailed observations, I speak for myself only, I may add that it is my opinion that there was error in the admission of verbal testimony to show the making of a verbal agreement contemporaneous with the giving of the note and in contra-

diction of the purport of the note, and that the judgment should be reversed."

Jacobs, Hall and Couture, Attorneys for Appelant.

Fleet, Falconer, Phelan, Williams and Bovey, Attorneys for respondent.

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NOTES. — Outre les autorités citées dans les remarques de M. le Juge Cross, voyez:

"Where several persons mutually agree to give their endorsements on a bill or note, as co-sureties for the holder who wishes to discount it, they are entitled and liable to equal contribution inter se, irrespective of the order of their endorsements; and verbal evidence is admitted to establish the facts and circumstances which lead to that conclusion."

P. C. 1883, *Macdonald* vs. *Whitfield*, 6 *L. N.* 278; *L. R.* 8 *App. Cas.* 733.

"According to the laws of England parol evidence is admissible to show the real relationship of the parties to a bill of exchance or promissory note — *C. P.* 1891, ***Montreal, Northfield* vs. *Lawrence*, 21 *R. L., p.* 359.**

Lorsqu'un billet à ordre a été signé par deux personnes, dont l'une était commerçante, la preuve testimoniale est admissible pour prouver que ce billet avait été remplacé par un autre billet du même montant qui seul devait constituer un titre de créance contre les défendeurs.

***C. R.* 1894. *Montréal, Hamilton et al*, vs. *Perry et al*, *R.J.Q.* 5 *C. S.* 7.**

Les lettres de change, billets et chèques sont des titres commerciaux par eux-mêmes et à l'égard de toutes personnes, et toutes conventions ou transactions s'y rapportant sont matières commerciales. Partant celui qui allègue avoir remis un chèque à un tiers, comme garantie de l'obligation qu'il avait assumée vis-à-vis du détenteur de ce chèque de tenter de collecter le montant du dépôt de celui-ci dans une banque en liquidation, peut prouver son allégation par témoins.

C. R. 1901, *Ville de Maisonneuve* vs. *Chartier*, *R. J. Q.* 20, *C. S.* 518.

Le faiseur d'un billet à ordre est admis à prouver par témoins, à l'encontre du bénéficiaire qu'il l'a souscrit par complaisance.

C. R. 1911, *Montréal, Hébert* vs. *Poirier R. J. Q.*, 40 *C. S.*, p. 405.

Oral evidence may not be adduced to vary the terms of the instrument, but may be adduced to show that an apparently complete contract is not so in fact; and that the instrument was only delivered as an escrow or that it is not to take effect as a contract until some condition is fulfilled.—

Halsbbury's Laws of England, *Vol.* 2. *No.* 817.

It is a very wholesome rule that were parties have put the agreement between them into writing parol evidence is not admissible to vary, contradict or add to the terms of the written agreement.

New London Credit Syndicate vs. *Neale*, 1898, *Vol.* 2, *Q. B.* 487.

Under a plea traversing the endorsement of a bill of exchange, evidence that the alleged endorser wrote his name on the bill and delivered it to the alleged endorsee for the express purpose of retiring other bills and on the express condition that they should be retired forthwith and that such condition has not been complied with is admissible in support of a plea traversing the endorsement.

Bell vs. *Lord Ingestre*. 12 *Q. B. p.* 317.

Parol testimony is admissible to impeach the consideration of the contract. *McLaren Bills and Notes, p.* 47.

Storey on Promissory Notes — No. 479; *Chambers, on Bills of exchange, p.* 296; *Abreys* vs. *Crux L. R.* 5, *C. P.* 37.

"A mere oral condition (at least, if contemporaneous with the acceptance) is inadmissible in evidence to qualify the absolute written engagement, even between the original parties. 'This would be', says Lord Ellenborough, 'incorporating with a written contract an incongruous parol condition, which is contrary to first principles."

In *Bowerbank* vs. *Monteiro*, 4 *Taunt* 844.

"An agreement subjecting the object of the instrument to any condition or contingency, whether in time or otherwise, is ineffective, because the terms of a negotiable instrument are expressly unconditional."

Wigmore, on Evidence, Canadian Edition, vol. 4, paragraph 2444; *See Sect.* 2435 § 6.

An action by the drawer against the maker of bills payable in six and twelve months, an agreement that until the plaintiff should recover on a certain note, he should not require payment of the bills, was excluded because as Parke, B. said "You seek by a parol contemporaneous agreement to alter the absolute engagement entered into by the bills."

Adams vs. *Wordley*, § *N* & *W*. 374.

An action by the payee against the maker of a note payable fourteen days after date, parol evidence of an agreement that it should not be enforced in case the plaintiff's principal obtained a verdict against the defendant's brother-in-law, was excluded by Lord Abinger, who said:

"The maker of a note payable on a day certain, cannot be allowed to say "I only meant to pay you upon a contingency."

Foster vs *Jolly*, 1 C. M. & R. 703.

"Evidence of a contemporaneous oral agreement to renew a bill of exchange is inadmissible on the ground that its effect would be to contradict the terms of the written agreement.

New London Credit Syndicate vs. *Neale*, 1898, 2 *Q.B.*, 487.

COUR SUPERIEURE

Mari et femme. — Achat d'Immeuble. — Action paulienne. — Cession judiciaire de biens. — Curateur. — Nullité. — Ordre public.—

MONTREAL, 30 Novembre, 1912.

POULIOT, J.

S. ST-AMOUR *ès qual* vs. LALONDE *et vir.*

JUGÉ.—1o. Que les époux ne pouvant s'avantager entrevifs durant l'existence du mariage, le mari ne peut légalement, de ses propres deniers, acquitter, par pure libéralité, le prix d'acquisition d'un immeuble acquis par sa femme durant le mariage.

2o. Que cet acte du mari est entaché d'une nullité d'ordre public et peut être attaqué par l'action paulienne ou révocatoire par toute personne y ayant un intérêt, par l'époux donateur même ou par son procureur.

3o. Qu'un immeuble achetée par une femme, mais payé par le mari en fraude de la loi et de ses créanciers, peut être réclamé par le curateur à la cession judiciaire de biens de ce dernier comme lui appartenant.

Code civil, articles 770, 774, 1032, 1265, 1365, 1483, 1595, 1890, 1981.

Les notes de M. le juge Pouliot exposent les faits et les questions de droit, et sont suffisantes pour le rapport de cette cause:

Pouliot, J.— "Le mari peut-il, durant l'existence du mariage, payer de ses propres deniers, le prix d'acquisition d'un immeuble acheté, avec son autorisation par sa femme, séparée de biens ?

"A qui appartient l'immeuble ainsi acquis par la femme, durant le mariage, avec les deniers personnels du mari ?

"Telles sont les deux questions que soulève l'action paulienne prise par le demandeur en sa qualité de curateur à la faillite du défendeur Dépocas.

"Le défendeur Henri Arthur Dépocas, est, aux termes de son contrat de mariage, en date du 11 septembre 1892 séparée de biens de Dame Marie Louise Lalonde, son épouse. Celle-ci n'a rien apporté et aux termes du dit contrat de mariage, seuls les meubles meublants ornant le domicile des époux, les argenteries et meubles de ménage sont stipulés être la propriété de Dame Marie Louise Lalonde laquelle ne parait avoir acquis aucun bien, depuis son mariage avec le défendeur

"Le défendeur Dépocas désigné comme marchand au dit contrat a, le 26 février 1912, fait cession de tous ses biens pour le bénéfice de ses créanciers.

"Par son bilan il cède:

"1o.—Ses biens meubles, consistant en, fonds de magasin, etc.

2o.—Ses biens meubles, savoir, ses droits dans une promesse de vente de 5 lots de terre, situés dans la ville Emard.

"Antérieurement, le 7 avril 1910, l'épouse du défendeur Dépocas, assistée et autorisée de son mari, achète du mis en cause, J. B. A. Valois, un lot de terre non bâti de cent pieds de longueur sur deux cents de profon-

deur situé dans le village de Dorion et étant le lot No. 311 du cadastre de la paroisse de Vaudreuil.

"Sur $250.00 prix de vente de ce lot, une somme de $50.00 a été payée, dit l'acte, par l'acquéreur à la passation des présentes dont quittance. Quant à la balance de $200,00 elle est payable en quatre versements de $50.00 par année à commencer le 7 avril 1911, avec intérêt à 6% sur toute la balance du prix de vente.

"Une bâtisse a été subséquement construite sur ce lot laquelle a été habitée pendant la saison d'été par le défendeur Dépocas et sa famille.

"A l'enquête, les faits suivants ont été établis, d'une manière incontestable:

"Le défendeur Dépocas, avant l'acquisition par sa femme du lot en question, avait hérité de sa mère d'une somme d'argent environ $900.00.

"Il est admis par le défendeur que l'accompte de $50.00 payé comptant le 7 avril 1910, a été pris à même cette somme dont il avait ainsi héritée. La balance du prix d'acquisition de l'immeuble n'est pas encore payée.

"Ce qui restait de l'héritage touché par le défendeur Dépocas a été affecté au paiement de la main-d'oeuvre et de travaux de construction d'une maison qu'il a après l'acquisition par sa femme, érigée sur ce lot en question, A part ces argents une certaine quantité de matériaux qui ont servi à la construction de la maison a été fournie par le défendeur Dépocas à même son fonds de magasin. Il est en preuve que tous les paiements en rapport avec la construction de cette maison ont été faits par le défendeur lui-même sans que sa femme y ait contribué en aucune façon, soit en argent ou autrement.

"Le lot en question avec la maison sus-érigée, a d'après le défendeur Dépocas, une valeur actuelle de $3,000-

00 mais le montant exact des dépenses et déboursées encourus pour la construction de la maison n'a pas été déterminé à l'enquête.

"Il appert de plus que les taxes et cotisations affectant l'immeuble n'ont pas été payées depuis la date d'acquisition.

"Ces divers faits établis, toute la question se trouve renfermée dans le cadre des deux propositions mentionnées tout à l'heure et que nous allons maintenant étudier.

1o. "*Le conjoint peut-il valablement, pendant l'existence du mariage, acquitter une dette personnelle de sa femme séparée de biens.?*

"L'article 1265 du Code Civil consacre le principe de l'immutabilité des conventions matrimmoniales. Jusqu'à la célébration du mariage, il est loisible aux futurs époux de déterminer, en vue du mariage, les droits, avantages et privilèges dont ils jouiront. Mais une fois leur état civil fixé par le mariage, il ne leur est plus loisible, sous le droit canadien, d'y apporter aucun changement, pas même celui de don mutuel d'usufruit.

"Notre loi défend même aux époux de *s'avantager entrevifs*" les donations étant, sous notre droit à l'encontre du droit français, absolument irrêvocables. La loi n'autorise qu'un seul mode par lequel le mari puisse avantager sa femme pendant le mariage c'est au moyen de l'assurance sur sa vie au bénéfice de sa femme et de ses enfants.

"Cette prohibition s'étend-elle à d'autres avantages que ceux résultant d'une donation entrevifs? Sous le droit français (art. 1595) le contrat de *vente* entre époux est prohibé spécialement, *excepté dans trois cas,* et même dans ces cas spéciaux, les créanciers sont recevables à invoquer la nullité de la vente s'il y a un *avantage indirect*

accordé à un époux, au préjudice de leurs droits. Dans ce cas il y a ouverture à l'action paulienne.

"Si l'on réfère aux exceptions qu'autorise cet article 1595 du Code Napoléon, on verra qu'il s'agit alors plutôt d'une dation en paiement, de l'acquittement d'une dette antérieure ou découlant des obligations du contrat de mariage que d'une vente véritable.

"Dans notre droit, la prohibition est formelle et générale. 1483 C. C., *"Le contrat de vente ne peut avoir lieu entre le mari et la femme.'*

"Pour tout contrat, il faut avoir la capacité de contracter. La femme mariée bien qu'habile à contracter avec l'autorisation maritale est, dans certains cas, incapable de contracter, alors même qu'elle a cette autorisation. L'article 1483 décrète, *à l'égard de cette vente,* une prohibition absolue et d'ordre public, que posent les articles 770 et 1265 *à l'égard des donations* aux époux, durant le mariage.

"Pour empêcher la violation de cette loi prohibitive et d'ordre public le Code décrète (774 C. C.) que la disposition au profit d'un incapable est nulle, soit qu'on la déguise sous la forme d'un contrat onéreux, soit qu'on la fasse sous un nom de personne interposée. Pour éviter tout doute sur la signification de ces termes, elle mentionne nommément que *l'époux* de l'incapable sera reputé personne interposée.

"Un acte fait en contravention de cette prohibition comporte, dit *Huc* vol. 6, une nullité d'ordre public et en même temps une nullité de *forme,* qui peut être opposée par toutes personnes y ayant intérêt *même, par l'époux donateur."*

L'interposition de la personne peut être prouvée de

toute manière légale et elle constitue, dans certains cas, une présomption légale *juris et de jure.*

"Si donc la violation *directe* d'une prohibition de la loi, en matière de vente ou de donation entre époux, doit être civilement réprimée la violation *indirecte* résultant d'une simulation ne doit-elle pas l'être également?

"La loi (article 774) prévoit deux cas de simulation: lorsque la disposition est déguisée sous la forme d'un contrat onéreux, soit dans un contrat à titre gratuit par une personne interposée.

"Quand la loi est conçue en termes prohibitifs dit *Serpillon* elle emporte négatiinem petentiae."

"Perrin-Nullités — page 202 — "Code Legibus ou non Dubium— " Nullum factum, nullam conventionem, nullum contractum inter os videre superseeutum qui contrahunt *lege* contrahere prohibente.

"Quando lex prohibet aliquid fieri, etiam si non procedat ultra anullando, tamen actus est nullus."

"Si un acte en outre d'être nul d'une nullité absolue, est fait en fraude des droits des créanciers et leur porte préjudice, il y a ouverture à l'action dite paulienne.

"Est recevable à l'exercice, non seulement le créancier dont la créance a date certaine, antérieure à l'acte prohibé, mais même le créancier postérieur s'il prétend que l'acte argué de fraude a été réalisé *en vue de l'avenir* et pour lui enlever des garanties sur lesquelles il devait compter. Si l'acte est onéreux il lui faudra sans doute prouver la fraude des deux parties contractantes, mais si l'acte est à titre gratuit et constitue une pure libéralité, il suffira au créancier de prouver la fraude du donateur.

"Quel sera le bénéfice résultant à un créancier par l'annulation d'un tel acte sur action paulienne.

"Celui-ci ne sera pas annulé ni revoqué d'une manière absolue, mais seulement à l'égard du créancier. Le contrat ne laisse pas de subsister entre le tiers et le débiteur qui a traité avec lui. Mais le tiers est obligé de subir la reconstitution relative du gage, diminue par l'acte frauduleux du débiteur. Les droits de ce tiers, s'il en a, viendront en concours avec ceux des autres créanciers d'après l'ordre de son privilège, après la liquidation du gage commun.

"L'article 1032, qui autorise l'action paulienne reproduit, en prescrivant le mode de l'exercer, la disposition de l'Ordonnance de Commerce de 1673, laquelle, titre 2, article 4:—

"Déclarons nuls tous transports, cessions, ventes et donations de meubles ou immeubles, faits en fraude des créanciers, voulons qu'ils soient rapportés dans la masse commune des effets."

"Si donc les époux ne peuvent s'avantager entrevifs durant l'existence du mariage, le mari ne peut donc légalement de ses propres deniers, acquitter par pure libéralité, le prix d'acquisition d'un immeuble acquis par sa femme durant le mariage.

2o. "*Le conjoint, ayant nonobstant cette prohibition, payé de ses propres deniers l'immeuble acquis au nom de sa femme, à qui appartient cet immeuble?*

"Nous avons vu tout à l'heure que la vente entre mari et femme est absolument prohibée, comme d'ailleurs tout avantage entrevifs.

"L'acte de vente consenti par Valois à Dame Marie Louise Lalonde, dans l'espèce qui nous occupe, sera-t-il nul d'une nullité absolue, de manière à faire revenir sur la tête du vendeur, la propriété de l'immeuble en question.

"Etant donné le caractère de la prohibition, le donateur ou vendeur pourrait lui-même en demander la rescision. Les créanciers du débiteur peuvent donc de ce chef exercer les droits de leur débiteur et attaquer les actes faits en fraude de leurs droits. (1031 et 1032). Le pouvant, quelle est la nature du recours qu'ils peuvent exercer ?

"Et d'abord, à qui appartient véritablement l'immeuble en question ?

"Il est de principe que les biens d'un débiteur sont le gage commun de ses créanciers(1981 C. C.).

"Non seulement, tous les biens mobiliers et immobiliers du débiteur sont affectés par ce gage, mais même *ses biens présents et ceux à venir* (1890 C. C.). Cela est si vrai que le droit du créancier n'est pas épuisé par une première saisie, et il pourra exercer son recours, si le débiteur vient à acquérir de nouveaux biens.

"Il peut arriver que le gage commun des créanciers lequel s'étend à tout le patrimoine du débiteur, soit *imparfait*, lorsque tous les biens de ce débiteur ne sont pas dans son patrimoine *actuel*. C'est précisement pour reconstituer dans son intégrité le gage commun que l'action révocatoire est accordée aux créanciers.

"Dans l'espèce qui nous occupe il a été prouvé d'une manière absolument complète, que ce sont les biens et deniers du défendeur Dépocas qui ont exclusivement servi à l'acquisition du lot en question et à la construction de la bâtisse qui y a été érigée.

"Il est également établi qu'à la date de l'acquisition du lot et de l'érection de la bâtisse le défendeur Dépocas était débiteur envers la maison de commerce Wilson, d'une forte somme qu'il n'a pas encore soldée et qui figure dans le passif de sa faillite.

"Par conséquent, cet immeuble No 314 de Vaudreuil est véritablement la propriété du défendeur Dépocas, puisqu'il a été exclusivement acquis de ses deniers.

"Quelque soit le mode adopté pour parvenir à frauder les créanciers, la transaction est prohibée, car comme le dit *Marcadé*, 6 sur art. 1595 C. N.

"Permettre la vente aux époux entre eux c'eut été leur donner un moyen facile de frauder les créanciers en faisant passer les biens d'un débiteur à son conjoint."

"*Troplong* —Mariage—3 No. 2244 dit:"

"Que la présomption de donation déguisée doit être repoussée par la preuve que la femme avait des capitaux suffisants."

"*Roussille* — Traité de la dot, No. 1918 dit:

"A l'égard des biens dont la femme fait acquisition en son nom, durant le mariage, *ils appartiennent à celui-ci*, à moins qu'elle ne prouve avoir acquis de ses propres deniers, *sans que rien ne soit provenu des biens de son mari.*

"On trouve au *Digeste de* donationibus inter virum et uxorem 51 Quintus Nucium:

"Et verius et honestius est quod non demonstratur unde habeat existimari a viro, aut qui in potestate ejus esset ad eam prevenisso."

"*Bédarride*, au mot: Dol et fraude dit:

"804— Que la fraude existe toutes les fois que la propriété commune est abusivement appliquée au profit de l'un des époux."

"827— Le mari qui donne à une personne interposée en sa faveur se donne réellement à lui-même. L'interposition de personnes est un moyen de nullité de donation que les intéressés peuvent invoquer."

"*Beaudry Lacantinerie* — Vo. Obligation, Tome 1, 657 —.

"Il y a fraude du débiteur par cela seul qu'il connaissait le véritable état de ses affaires, au moment où il accomplit volontairement l'acte préjudiciable à ses créanciers."

"De cet exposé de doctrine il résulte donc que l'immeuble et la maison en question ayant été acquis exclusivement des deniers du défendeur Dépocas, *ils étaient et sont encore la propriété du défendeur et sont demeurés le gage commun de ses créanciers.*

"Peu importe, nous semble-t-il, que les argents du défendeur aient été convertis en immeubles! Cette transformation n'a pas eu pour effet de faire sortir des deniers de son patrimoine, quoiqu'il ait pris soin de les placer sous le couvert et le nom de sa femme.

"Le curateur représentant tous les créanciers du failli peut donc invoquer au bénéfice des créanciers l'illégalité de la convention intervenue le 7 avril 1910.

"La défenderesse ne cherche guère dans ses plaidoyers à justifier la légalité de l'acte du 7 avril 1910. Elle prend, s'autorisant sans doute d'une décision dans une cause offrant un peu d'analogie avec celle-ci une position toute spéciale et répond au demandeur es-qualité:

"Il se peut que je sois comptable envers la faillite des deniers ainsi payés par mon mari pour l'acquisition et l'amélioration de ma propriété durant l'existence du mariage, mais le *curateur ne peut de ce chef réclamer la propriété même.* Tout au plus pourrait-il exercer contre moi une action en restitution de deniers.

"Une analyse attentive de la nature de l'action instituée contre la défenderesse ne manquera pas de démontrer que l'action en cette cause n'est pas à vrai dire *une revendication* d'un bien sorti du patrimoine du débiteur (ce qui d'ordinaire fait l'objet de l'action pauliennne ou révocatoire). L'action en cette cause est d'une nature toute

spéciale, n'est pas en révocation d'un acte pour faire revenir dans le patrimoine du débiteur un bien qui en est sorti, ni aux fins de faire annuler à l'égard du défendeur et de son épouse l'acte du 7 avril 1910, dans lequel cas les créanciers n'en pourraient aucunement profiter, l'immeuble redevenant la propriété du mis en cause. Mais l'action prise par le demandeur es-qualité est d'une nature *essentiellement conservatoire et déclaratoire* ayant pour objet de faire reconnaitre et déclarer par le jugement à intervenir, qu'en dépit des manoeuvres et artifices du défendeur Dépocas, pour donner à croire qu'il y avait eu une *vente réelle et véritable* par le mis en cause Valois à son épouse le 17 Mai 1910, cet immeuble n'en a pas moins été acquis par lui, au nom de son épouse il est vrai, mais pour lui. Les conclusions de l'action sont à l'objet de faire déclarer par le tribunal que c'est le défendeur Dépocas qui en a de ses deniers payé partiellement le prix de vente, a pris possession du lot et y a érigé une maison et que *sous le nom d'emprunt de son épouse il est bel et bien resté le véritable propriétaire.*

"L'action en cette cause a donc un caractère éminemment *conservatoire* et, comme le fait voir parfaitement *Huc* Vol. 7 No. 230—. *La présente action a pour but, non pas la reconstitution relative du gage déterminé, mais la détermination de la consistance actuelle du gage commun des créanciers et la constatation que ce gage comprend certains biens que les manoeuvres du débiteur tendent à diminuer.*"

"Cette action conservatoire compète, non seulement aux créanciers antérieurs mais même aux créanciers postérieurs de même qu'aux créanciers conditionnels et le curateur a dans l'opinion de cette Cour le droit incontestable d'exercer ce recours d'une mesure conservatoire.

"Ainsi envisagée par cette Cour l'action du curateur doit donc être maintenue.

"La jurisprudence générale de nos tribunaux a toujours été de donner effet à la prohibition et d'annuler les actes faits durant le mariage par les époux, en violation de cette prohibition et en fraude des droits des créanciers de l'un d'eux.

"Qu'il me suffise de citer les causes suivantes:

Clarke & Lortis 42 *L. R.* 293 *Eddy, & Eddy,* 4 *R. J.* 78—; *Brais & Racette,* 3 *L. N.* 398— *Fonderie de Plessisville & Dubord* 17 *R. L.* 499 — *Carter & McCaffrey* 1 *B. R.* 102 —.

"Dans *Denis & Lafontaine* 18 *C. S.,* 438 — Il a été décidé qu'une femme mariée peut réclamer de la faillite un avantage matériel, inséré dans le contrat de marriage, en l'absence de preuve d'insolvabilité du mari à la date du contrat.

"Dans la cause de *Déry & Paradis* — 10 B. R. — 227 — La cour d'appel infirmant le jugement de la Cour de Révision a, il est vrai déclaré qu'alors même que l'acquisition d'un immeuble par une femme mariée serait simulé à l'égard des créanciers, l'action compétant à ceux-ci ne sera pas *en revendication de l'immeuble,* mais simplement en restitution de deniers.

"Malgré l'autorité des juges qui ont formulé cette décision elle ne parait pas faire jurisprudence et je crois devoir me rallier plutôt au sentiment unanime de la Cour de Révision en cette même cause de *Dery & Paradis* à savoir: que les biens d'une femme exclusivement acquis avec les deniers du mari et par pure libéralité envers elle pendant l'existence du mariage, ne laissent pas d'appartenir à celui-ci; et dans l'espèce qui nous est soumise que les créanciers présents du failli, notamment les créan-

ciers dont la créance remonte à la date de l'acte attaqué, peuvent invoquer la simulation et la nullité de l'acte, aux fins, non pas de revendiquer l'immeuble mais au seul objet de le *conserver* et d'en déterminer la constatation et la consistance actuelle. Tout en respectant, comme d'ailleurs le demandeur le déclare dans son action les droits incontestables du vendeur, mis en cause."

Décarie & Décarie, avocats du demandeur, ès-qual.

Archambault, Robillard, Julien & Bérard, avocats de la demanderesse.

COURT OF APPEAL (Criminal side).

Criminal law. — Murder. — Charge. — Admission.

MONTREAL, 30 Novembre 1912

ARCHAMBAULT, C. J., LAVERGNE, CROSS, CARROLL, GERVAIS, JJ.

THE KING vs FARDUTO.

HELD:—1o. That there is no misdirection, nor error in law, in the Judge's direction to the jury, where the presiding Judge says that, even if the prisoner, in handling to another man named Pardillo the knife which was used to kill the deceased, so handed the knife upon threat of the latter to kill the prisoner, if he did not give up the knife, it would still be murder on the part of the prisoner.

2o. That it is well established rule that while the matter of a confession should go as a whole to the jury, it is within the province of a jury to accept part of it and to reject part of it. Our law is in accord with English law on that point.

3o. That evidence of any confession is receivable, unless there has been some inducement held out by some person in authority, and that if a person not in any office as authority held out to the accused party an inducement to confess, this will not exclude a confession made to that party.

4o. That the judge in his direction, taken as a whole, may anticipate a particular verdict, provided that he confirms himself to proved facts and points out the solvent fact of the case, that he directs the jury as the law applicable and instruct them as to its application to the evidence adduced.

Criminal code, articles 20, 69.

This is a case of murder where the prisoner Farduto was found guilty. He obtained a reserved case on four questions which was submitted to the Court of King Bench (criminal side) which dismissed the motion and confirmed the verdict.

"Cross, J.— This is a motion by the defendant praying that five questions be reserved for the opinion and decision of this court. One of the questions was not insisted upon at the hearing. The first of the four questions which it is now argued should be reserved may be summarized as follows:

1st. Was there error of law in the judge's direction to the jury, that even if the prisoner, in handing to another man named Pardillo the knive which was used to kill the deceased, so handed the knive to Pardillo upon threat of the latter to kill the prisoner if he did not

give up the knive, it would still be murder on the part of the prisoner ?

"It is not alleged and it does not appear that any objection to the learned judge's summing up was made before verdict. The circumstance in respect of which the learned judge was speaking when he made the observations which are now said to constitute a misdirection came about in this way. Proof had been made of the finding of clothing belonging to Hotte (the man who was killed) in the prisoner's valise at his boarding place. In cross-examination of the constables who gave evidence to that effect, they were pressed to say who had told them that Hotte's clothes were in the prisoner's valise, and one of them gave the name of Batista, at the time a prisoner in the jail, as that of the person who told about the clothes. Battista was thereupon brought forward as a crown-witness and testified of conversations which he had in the jail corridor with the prisoner wherein the prisoner told him of having been in the company of a big Italian Pardillo, of Pardillo having asked him if he had a razor and of its being given to him to kill a man, and of Pardillo having thereupon in his presence knocked the man down and cut his throat with the razor, and of Pardillo having taken the dead man's valise, and told the prisoner to come later and take it to his boarding place. Thereupon, in cross-examination, the witness Batista, in answer to questions, testified that in asking for the razor, Pardillo told him that if he did not give it up he (Pardillo) would shoot him and that the revolver shot would make a noise and attract the police. He also testified that the prisoner said that Pardillo commanded him to take charge of Hotte's valise, saying that he Pardillo would come for it on the morrow. I

have made this reference to the facts merely to indicate in what relation the learned judge was speaking when he made use of the expression to which I shall presently refer. It is, of course, true that instructions to a jury upon matters of law must be free from error no matter what the particular facts may be, but it is equally true that the purport of particular words and sentences made use of by the judge must depend to some extent upon what he is speaking about. The observations made by the learned judge to which exception is now taken before this court followed upon certain comments upon the exculpatory matter found in the statements of the prisoner to Batista. The jury were told that it was for them to accept or discard this exculpatory matter if they found it to be plausible or not plausible. Thereupon the learned judge proceeded to say:

"Je vais plus loin que cela. Même si on prend l'histoire telle que racontée par le prisonnier à Batista, si c'est vrai que c'est un grand italien qui a coupé le cou de Hotte — le prisonnier, dans sa confession à Batista a dit qu'il avait donné le rasoir au grand italien ; après cela que le grand italien a dit : "C'est pour tuer de défunt Hotte — C'est-à-dire que le prisonnier à la barre, suivant sa confession faite à Batista, a donné son rasoir au grand italien, sachant que le grand italien allait commettre un meutre avec son rasoir. Il a fourni l'instrument de mort au grand italien suivant sa propre confession racontée à Batista. Il a fourni le rasoir lui-même, l'instrument qui a causé la mort.

"Celui qui aide à commettre un crime, celui qui fournit le couteau ou qui, sciemment, sachant qu'une personne qui va commettre le meurtre, est coupable, est responsable comme s'il l'avait fait lui-même.

"Même si nous acceptons l'histoire racontée par le prisonnier à Batista, le prisonnier à la barre est encore responsable du meurtre, suivant notre loi.

"L'article 69 de notre Code dit que celui qui est présent pour aider, pour encourager une personne à commettre un crime, il est coupable comme principal. S'il prend part dans le meurtre, il est responsable.

"Même si nous acceptons l'histoire racontée par le prisonnier comme vraie, le prisonnier est encore responsable du meurtre.

"C'est une question de droit, je crois. Vous êtes obligés d'accepter mon opinion; elle est basée sur notre loi. L'article 69 dit qu'une personne qui encourage quelqu'un dans un crime est elle-même responsable de ce crime-là. C'est cela que je dis au prisonnier.

"Si vous trouvez l'histoire du prisonnier invraisemblable—et c'est mon opinion—vous devez la mettre de côté. Si vous trouvez son histoire vraie, dans ce cas, le prisonnier a fourni un instrument pour commettre un meurtre.

"Quelle excuse a-t-il ? Pas d'excuse. Personne n'a le droit de commettre un meurtre, même s'il est menacé de mort par l'autre. Ce n'est pas une excuse.

"Pourquoi n'a-t-il pas défendu le défunt Hotte ? Pourquoi n'a-t-il pas dénoncé le grand italien, ce nommé Pardillo ? Il dit qu'il avait peur d'être tué par Pardillo. Vous jugerez s'il était en danger d'être tué ; même s'il était en danger d'être tué, il n'avait pas le droit de fournir le moyen de commettre un meurtre."

"Do these observations constitute misdirection ? At the outset, it is important to observe that the case is not presented as one of those cases of self-defence or repulse of force by force wherein the agressor has been

killed, cases much more frequently met with in practice. The question raised by this motion upon the judge's charge is whether or not the giving of a weapon to be used forthwith in the killing of a third person is in law murder if the weapon be given up in answer to the threat "if you do not give it to me I will shoot you and the noise of the shooting will attract the police." It is upon the answer to be given to that question that we have to decide whether there has been misdirection or not .

"Section 20 of the Code gives the rule as follows: "Except, as hereinafter provided, compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be excuse for the commission, by a person subject to such threats and who believes such threats will be executed . . . . of any offence other than treason as defined by this act, murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm and arson."

"That, in substance, is a rule which leaves it to be inferred that the killing of a man under compulsion of threats is murder. It is declared in section 69 that:

"Everyone is a party to and guilty of an offence who:—

"(a) Actually commits it; or,

"(b) Does or omits an act for the purpose of aiding any person to commit the offence."

"Upon the subjection of section 20, it is said in note A of the royal commissioners upon codification of the criminal law (p. 43) that:

"There can be no doubt that a man is entitled to preserve his own life and limb; and, on this ground, he may

justify much which would otherwise be punishable. The case of a person setting up as a defence that he was compelled to commit a crime is one of every day. There is no doubt on the authorities that compulsion is a defence when the crime is not one of a heinous character. But killing an innocent person, according to Lord Hale, can never be justified. He lays down the stern rule: "If a man be desperately assaulted and in peril of death, and cannot otherwise escape, unless to satisfy his assaillant's fury, he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself than kill an innocent man."

"The commissioners pointed out that that stern rule appeared to have been relaxed in the high treason cases in 1746, but they conclude by saying "We have framed section 23 of the draft code (66) to express what we think is the existing law, and what at all events we suggest ought to be the law."

"That must mean I take it, that the view of Lord Hale has received the approval of the high authority of the English commissioners upon whose report our code is based. Hence the rule of section 20. It does not follow that compulsion is never an excuse for killing, but the compulsion must be such as to make the accused person a mere inert physical instrument: Thus it is said in *Russell* (*Can Ed.*) p. 90:

"Persons are properly excused from those acts which are not done of their own free will, but subjection to the power of others. Actual physical force upon the person and present fear of death may in some cases excuse a criminal act . . . . Thus, if A. by force takes the arm

of B, in which is a weapon, and therewith kills C., A. is guilty of murder, but B. is not; but if it is only a moral force put upon B. as by threatening him with duress or imprisonment, or even by an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse . . . Sir J. Stephen expresses the opinion that in most, if not all cases, the fact of compulsion is matter of mitigation of punishment, and not matter of defence."

"The observation is repeated at p. 662 of the same work in the part treating of homicide. The same opinion in substance is to be found expressed in *"Laws of England" verbis "Criminal law Procedure" No.* 518.

"Now, bearing in mind that in the proof of the so-called confession which the learned judge and the jury had before them, the only ingredient of compulsion is what is brought out in the cross-examination to the effect that Pardillo said he would shoot the prisoner if he did not give up the razor and the qualification that the revolver shotl would make a noise and attract the police, it is clear that the trial judge could conclude that there was no case of such compulsion as could constitute an excuse, and thereupon was within the rule of section 20 of the code in saying in substance to the jury : "the prisoner could have resisted or could have run away, and taking his confession as it stands, my direction is it shows that prisoner is guilty of murder."

"There was therefore no misdirection in the sense asserted in the first question sought to be reserved.

"The next of the question proposed to be reserved is formulated thus:

"L'honorable juge n'a-t-il pas erré dans ses commentaire sur la confession du prisonnier à Batista?"

"In view of what I have felt it necessary to say of the purport of the confession and of the proceedings by which it came to be put in evidence at the trial as also of the fact that the subject will have to be again adverted to upon another of the questions, it is unnecessary to treat of this question further than to say that it is well established that while the matter of a confession should go as a whole to the jury it is within the province of the jury to accept part of it and to reject part of it. Our law is in accord with English law on that point. Reference may be made to *Archbold* (*23rd Ed.*) *p.* 238, and to the cases there cited. In this case, the jury were left free so to treat the confession.

"A third one of the four questions puts forward the contention that the confession made to Batista was not voluntary because of having been induced by a person in authority. The process of agument is that Batista in obtaining the confession was instigated by Detective Pusie, that the confession was in effect procured by Pusie and was consequently procured by a person in authority. It is not contended that this ground was taken at the trial, nor was the fact or any conversation between Battista and the detective anterior to the confession proved, but the affidavit of Battista in now placed before us and is to the effect that he consented, at the request of Constable Pusie, to try to procure the confession from Farduto; that Pusie promised in return to help to have him acquitted of the murder charged against him (Batista) and that he told Farduto to confess to an italian detective, namely, Pusie, and it would help him. He had testified at the trial that no promise or threat

had been made to him to induce him to testify. It appears that, after certain preliminary questions the witness Batista was asked what the prisoner had told him that he had been doing on the night of the 29th July, whereupon counsel for the prisoner said: "Je m'objecte à cette conversation-là et à tout le témoignage du present témoin comme illégal."

Par la Cour: "Je ne vois rien dans la loi qui empêche le témoin de donner son témoignage dans ces circonstances-là, je renvoie donc l'objection."

"Le procureur de l'accusé s'est objecté au témoignage du présent témoin en allèguant que vu que le dit témoin était à la prison de Montréal sous le coup d'une accusation grave, qu'il ne pouvait pas dans ces circonstances, rendre un témoignage dans la présente cause en rapportant une conversation qu'il prétend avoir eue avec l'accusé."

"L'objection du Procureur de l'accusé étant renvoyée, M. Lafortune continue à interroger le témoin comme suit:"

"No further objection was made and in answer to questions apparently in the first directed towards proving that the prisoner had told the witness about Hotte's clothing being in his (the prisoner's) valise, the witness went on to tell (through an interpreter) what turned out to have been a confession by the prisoner.

"The matter having been led up to in that way, it is easy to understand why nothing in the nature of preliminary proof of the admission having been made voluntarily was addressed to the judge. The evidence was brought out just as any statement by a prisoner or suspected person to another private person would be proved by making the latter a witness at the trial. He (Batista) told in evidence of having repeatedly conversed with the

defendant in jail. He also made the some-what peculiar statement that the defendant after having made the disclosure to him told him that he desire him to be a witness for him at his trial, a statement from which it is difficult to draw any inference. It is said in Archbold: *Pleading and Practice* (*23rd Ed*) p. 332, that:

"It has, however, been long settled that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority, and that if a person not in any office or authority held out to the accused party an inducement to confess, this will not exclude a confession made to that party."

"This, indeed appears not to be disputed by counsel for the defendant, but it is sought to be shown by the affidavit produced with the application to this court that detective Pusie procured Batista to get the defendant to confess and to say to him that he should confess to an Italian detective (Pusie) and that that would help him. We are asked to say that the trial judge erred in admitting evidence of the confession. But how can we say that, when it is only after verdict and sentence that it is sought to show that the confession was induced by a person in authority? Irrespective of that difficulty, however, it appears to me that the argument is not sound. While it is accurate to say that: "It is immaterial whether the inducement is held out by the person in authority or in his presence without his dissent by a third person,, *ib. p.* 332, the rule is not the same if no person in authority be present, and it is laid down that : "It is no objection to the admissibility of a confession that it was made under a mistaken supposition that some of the defendant's accomplices were in custody, even though it were created by artifice with a view to obtain the confession," *ib. p* 334.

"The case of *Hope Young* (10 *Can. Cr. Cas., p.* 466) which was cited to us, is one of an admission made to a Crown officer after the making of it has been suggested by a peace officer and the admission was properly held not receivable in evidence. In *Choney's case* (13 *Can. Cr. Cas.* 389), also cited for the defendant, the question was one of confidential communication to a legal adviser and had to be decided by application of different principles, but, in the reporter's notes, cases ar ereferred to which go to support the view that confessions may be given in evidence even if brought by stratagem.

"Upon this question we consider that the learned trial judge could rightly conclude that the admissions made to Batista were voluntarily made and were admissible in evidence.

The remaining question sought to be raised involves the contention that the instructions of the learned judge, taken as a whole, were such as to anticipate a particular verdict and to exclude from the consideration of the jury another verdict which could have been rendered. It is admitted by counsel for the defendant, and is in fact shown by the charge, that the jurymen were told that they need not accept the opinions of the judge upon questions of fact, but it is argued that the effect of that statement was destroyed by what the learned judge subsequently said and that the effect upon the jury was to lead them to take such a view of the facts as to bring out a verdict of guilty of murder. In so far as there in anything specific about it, the contention is that it was not left open to the jury to find a verdict of guilty of manslaughter. An objection of this nature, made to the charge as a whole, makes it opportune to refer to the trial-proceedings at greater length than was necessary in treating of the other questions proposed

by the motion and already considered. It is conceivable that cases may arise wherein it may not be possible for the defendant to make a well-founded specific objection to the directions or charge of the trial judge, but wherein it would nevertheless be right for an appelate court to order a new trial if viewing the charge as a whole, it was not satisfied that justice had been done.

"The circumstances of this case may accordingly be looked at in order to see if the charge is such as leaves it open to that general objection, as to exclusion of consideration of the case as one of manslaughter, is well founded or not. In this case, until after about twenty eight witnesses had been examined, the cross-examination of the Crown witnesses tended to show that the reliance of the defence was upon the absence of any evidence sufficient to connect the prisoner with the death of Hotte had committed suicide while in a state of alcoholic delirium. It was towards the close of the case for the prosecution that the enquiry was started by counsel for the prisoner in cross-examination of two detectives, as to who had told about Hotte's clothes being in the prisoner's valise. Batista being indicated as the source of this information, it was for the crown to bring out all the materials facts whether favorable to its case or not. Hence the examination of Batista as a witness, and the statements of the prisoner disclosed in his testimony as above pointed out. This occurence, which developed in the closing stages of the enquete, at one and the same time seriously affected the grounds of defence till then relied upon, and introduced the subject of admissions or confessions. The case for the prosecution having been rested, no witnesses were brought forward on the prisoner's behalf.

"Now turning to the learned judge's charge, it is seem to

have proceeded as follows: At the outset, it is pointed out to the jury that they are the judges of the facts, but must accept the judge's views as to the law. Next, the jurors are told that they must not rest upon doubtful evidence, but are to give the prisoner the benefit of any reasonable doubt. Next, there is a definition of murder and a distinction between muder, manslaughter and excusable homicide, in the course of which it is said: "S'il a tué un homme sans provocation suffisante, il doit être trouvé coupable du crime de manslughter ou d'homicide involontaire, dans cette cette cause je ne crois pas qu'il soit question d'homicide involontaire. Le prisonnier est ou coupable de meurtre ou il n'est pas coupable du tout. Vous devez décider cette question-là suivant la preuve. Quelle est la preuve ? Le seule question est celle de savoir s'il y a eu meurtre de commis et si le prisonnier est responsable de ce meurtre."

"Next, it is pointed out that the case was clearly not one of suicide, but that Hotte was killed by somebody other than himself, and the proof made by the surgeons and the prisoner's statements to Batista are referred to in proof. Next, there is a discussion upon the question whether Hotte was killed by the prisoner or by a stranger, and comment is made upon the confession and, as already pointed out, the jury are told that they may accept part and discard part of the confession, accept what they consider to be the truth and discard falsehood. Next, there is comment upon the improbality if the story that it was a stranger, un gros italien — Pardillo — who killed Hotte, and upon the fact that nobody appears to have seen the "gros italien" and that no witness has come forward to say anything about him. Next, there is the passage already quoted about the responsability of the prisoner in the case of it being admitted that his rozor was used by another to kill Hotte.

Next, it is pointed out how strikingly the details narrated by Batista fit in with facts testified to by other witnesses in relation to such facts as the locality, the time, the buying of bottles of beer and the disposal of Hotte's clothing. Concluding the learned judge reminds the jurors that they have hear the proof that he need not review it at length, but has not referred to what he regarded as important in it, that though Batista is himself under a capital charge his testimony may be believed and that it seems to him that, no matter what view they take of the whole story, the prisoner is responsible, but that if they have reasonable doubts in the matter, if they think it possible, that the prisoner may be innocent, it is their duty and their right to acquit him. As to what a judge should or should not say to a jury in summing up, it is not praticable to state rules. It would appear that long ago there was a practice of judges taking up the evidence of one witness after another following their notes and repeating or commenting upon it to the jury. Modern practice is different. It is even said that in *R. vs Mayor*, tried in England in 1909, the judge's charge to the jury consisted of the words: "On these facts, gentlemen, I ask you to find a verdict of guilty." (*L. J. Weekly*, (1909), *p* 395.). In the work of *Bowen-Rowlands* "proceedings on Indictment," etc. (*2nd Ed.*)*at p.* 256 it is said:

"It is the duty of a judge in summing up to point out to the jury the salient facts of the case, and he must be careful to confine himself to proved facts, for, if he treats as proved facts, which have not been proved, a resulting conviction will be quashed on appeal. He must direct the jury as to the law applicable to the case and instruct them properly as to its application to the proved facts. If he fails to do so a resulting conviction will be set aside, provided that the misdirection has caused a substantial mis-

carriage of justice. If however there has been a misdirection without consequence substantial miscarriage of justice, that is, where the proved facts are consistent only with guilt the conviction will be upheld." As authority for these propositions the writter cites: *R. vs Stodleman*, 72. *p.* 425; *R. vs Joyce*, 72 *J. p.* 483; *R. vs Stod dart.* 73 *J. p.* 348; *R. vs Cohen* 73 *J.* 352; *R. vs Dyson.* (1908). 2. *K. B.* 454.

"It may be added that whether it is or is not necessary that the judge should give direction upon a matter of law, may depend upon whether the defence has been so conducted as to make that matter an important one to the defence or merely a recindary issue and in the latter case a direction upon it is unnecessary, Rex vs May, 29 T.L.R., 24.

"In the present case, the learned judge and the jury had before them a narrative of an admission, the exculpatory part of which was incredible and could not hold with the incriminating part. In the circumstances he was warranted in law in saying to the jury in effect: "In my view this is not a case of manslaughter, but a case of murder or nothing. The prisoner is either guilty of murder or is not guilty of anything". I consider that taking the charge as a whole, the learned judge did not go as far as that, because he explained that there might be a verdict of murder or one of manslaughter or a verdict of not guilty.

"Then, as to the general purport of the charge, it is true that the remarks of the learned judge upon the subject of defence of compulsion and these upon the bearing of section 69 gave the case an aspect unfavorable to the defendant, but we have already seen that in these respects his deductions and directions were warranted by

the law. We do not overlook the fact that at all that is before us at present is a motion for leave to appeal and to have the questions reserved, but, as has been seen, three of the suggested questions turn upon the judge's summing up and the other one relates to the admissibility of evidence of a confession.

"Upon all the questions, we have before us the same materials which would come before us if the questions were to be reserved. We, therefore, express our opinion and decisions now it is our unanimous conclusion that the defendant does not make out a case to obtain leave to appeal. The motion is dismissed."

Alban Germain, for petitioner, appellant;

J. C. Walsh, K. C. for the Crown.

COURT OF REVIEW

Responsability. — City of Montreal. — Arrestation. — Constable. — Négligence. — Damages.

MONTREAL, 31 st. October 1912.

TELLIER, DE LORIMIER, GREENSHIELDS, JJ.

DAME P. DUBE vs THE CITY OF MONTREAL.

HELD:—1o. That if constables of the City of Montreal take charge of a drunken man and put him under arrest, it is their duty to protect him against the danger to which this act exposes him. Therefore, if they convey him

down a narrow and steeps stairway, at the bottom of which was an iron door with an iron bar across it and a cement floor, and if they allow the prisoner to fell down and kill himself, the City of Montreal is responsible in damages.

2o. That, under those circumstances, the mother of the deceased, having a pecuniary interest in the life of her son, although he was not his sole support, has a legal right to obtain an indemnity from the City of Montreal.

Civil code, article 1058.

On the 20th of August, 1909, between three and four o'clock, a young man, Ernest Racine, the son of plaintiff, 25 years of age, was brought in a patrol waggon to one of the police stations and in charge of the city. The charge against him was entered as drunkeness. On arriving at the station Racine was brought in and received by Constable Lemieux. He was brought to the wicket and searched and it was decided to take him down stairs to the cells. To reach the cells it was necessary to descend a narrow, steep stairway of eight steps. Half-way down the stairway was a wooden door, and at the bottom of the stairway was an iron door, with an iron bar, giving entrance to the cell proper. The prisoner offered no resistance of any kind, but was perfectly quite. He was in such an advanced state of drunkeness that he could scarcely speak. Brown, another constable, present with Lemieux, took him by the left arm, and was about to start down the stairway with him, when Lemieux said to him: "I am going to get my keys" and turned into the office of the lieutenant for that purpose, Brown started down the stairway with Racine, and arriving near the wooden door, four steps down, Racine made a movement as if to catch the top of the door, either

to stop his descent or to steady his movements. His hand missed the door, his right foot missed the step, he fell sideways, his weight carried Constable Brown with him, Brown s shoulder struck the side of the door, he lost his hold off Racine, and the later fell sideways and struck the back of his head, or the side of his head, against the iron bar or cement floor at the bottom of the steps. Death resulted.

The plaintiff, the mother of the deceased, sues the city in damages for the sum of $1,999.00, and after alleging the facts as above set forth, alleges that the death of her son was due to the negligence of the constables, employees of the defendant, who failed to exercise prudent care in conducting the deceased to the cell in question. She alleges that he was unmarried and contributed to her support, and that she suffered the damages alleged.

The defendant pleads, denying the essential allegations of the plaintiff's declaration, and alleges that the city contributed neither directly nor indirectly to the death of Ernest Racine; that it was beyond its power to prevent the accident which resulted in his death and that his was due entirely to his own fault: that, if the plaintiff received any money from the deceased, it was pure gratuity, and he was under no obligation to pay the same.

The action was dismissed by the Superior Court on the ground that the plaintiff totally failed to prove that the death of Ernest Racine was due to the negligence of any of the city's employees or constables; that, on the contrary, the said constables seemed to have employed all necessary prudence; that the defendant did not contribute, directly or indirectly, to the death of the said Ernest Racine, and that appears that his death was due to

his own fault and to the condition in which he was taken to the police station for protection.

The court of Review reversed this judgment and maintained plaintiff action for $400.00.

Greenshields, J. — A careful examination of the proof leaves no doubt whatever in my mind, that Racine was in such a condition of intoxication when brought to the station, and when placed in charge of the two constables, Lemieux and Brown, that the greatest care should have been exercised in conveying him down a narrow and steep stairway, at the bottom of which was an iron door with an iron bar across it and a cement floor. It should have been known, and must have been known to the constables, that if, Racine in the condition in which he was, missed a step and fell, that the consequences would be serious.

"The immediate cause of the death of Racine was that, being in a condition of drunkeness, and while in charge and under the care of the defendant's employees, he was allowed to fall down a steep stairway and meet with injuries resulting in his death. Taking the only version of the accident, that given by the constables, who naturally make it as favorable as possible to the defendant, the deceased fell because he missed his hold and his step, and Brown, who alone was in charge of him, was not sufficiently strong, or had not a sufficiently firm grip on him to prevent, him falling. This, in my opinion, creates a presumption of imprudence and negligence which can be only rebutted or destroyed by positive proof that the accident resulted from something beyond the control of the defendant's employees, or was due to a fortuitous event of irresistible force. This, in my opinion, the defendant has failed entirely to prove.

"The learned trial judge in finding the deceased, Racine, to be at fault, apparently, finds that fault in the condition to which he brough himself by his excesses. But the drunkenness of Racine was not the immediate cause of his death. It is true that he had not become intoxicated, the probability is that he would not have been in the police station. It is equally true that if he had not been intoxicated, he wouldn't have fallen down the stair way. It is equally true that with the men and means at the the disposal of the city, he would not have fallen, had he been carefully and prudently, and wisely conducted a dangerous stairway.

"The immediate cause of his death was the imprudence of one man attempting to conduct a practically helpless drunken man down a dangerous way. Racine was perfectly quiet—offered no resistence, and did only what might be expected from a man in his drunken and helpless condition. This constables, and both of them, were cautioned to the handling of drunken men, and they should have foreseen the possibility of the happening of that which actually took place. It would be useless to argue that what the constables decided to do with Racine viz; to place him in a cell, could not have been done with perfect safety to themselves and to the deceased in the condition in which he was.

"If the constables of the city take charge of a drunken man and place him in a position of danger, it is their duty to protect him against the danger to which their act has exposed him. I find against the defendant upon the proof. I find it an act of imprudence and negligence on the part of Brown and Lemieux to allow Brown alone, unaided, to attempt to take Racine where he was being taken when he met with the accident.

"It has been held in our courts that a railway company undertaking the transportation of a passenger while in a state of drunkeness owes to that passenger protection and it is a fault if the employees of the company, knowing of the state of intoxication of the passenger allows him to stand upon the plateform and allows the train to start while he is on the platform and damage results. See *Ducharme* vs. *Canadian Pacific Railway Company* 16*Revue de Jurisprudence, p.* 27. As to the American jurisprudence, see *American* and*English Railroad Cases Annotated, Vol,* 39 *N. S. p.* 634. In the case of *Price vs* the *St-Louis Railway Company,* it was clearly stated that if a conductor of a train accepted a person as a passenger whom he knows to be unattended, and knows to be insensible from intoxication, and thereby unable to protect himself from danger and injury, the company owes him the duty to exercise such care as may be reasonably necessary for his safety. While the company is not an insurer of the person of one who has been received as a passenger in such condition being cognizant thereof, it is bound to exercise such care as may be reasonably necessary for his safety. While the company is not an insurer of the person of one who has been received as a passenger such condition being cognizant thereof, it is bound to exercise all the care that a reasonable prudent man would to protect one in such insensible and helpless condition from the danger incident to his surroundings and mode of travel.

"In the present case the constable knew of the condition of Racine; he was taken in charge because he was in that condition. The constables knew the danger to which he was exposed by being taken down this stairway while in that condition, and is was their duty to exercise the greatest care in his conduct. This principle is well

recognized by the English courts: "Further the mere fact of an injured person being of unsound mind, or drunk, or blind or deaf does not of itself deprive the right to recover in the event of injury.

"While deafness or blindness or any similar infirmity does not put the sufferer under civil disability,. neither does it confer greater rights unless the existence of it is known to the injuring person. If, however, he comes to knowledge that the person in front of him is deaf, blind or lame, he must regulated his conduct accordingly. Knowledge engenders a greater duty. ' See *Beven, Law of Negligence, 3rd, Ed. .Vol.* 1, *p.* 161.

"Applying this to the case under consideration, certainly Racine was suffering from an infirmity, temporary though it may have been. The constables had full knowledge of its existence. He was taken in charge just because of his temporary infirmity, and, as already stated, knowing his infirm, helpless condition, they placed him in a place of extreme danger, and they failed properly to protect him. I find negligence proven.

"As to the responsibility of the city the learned trial judge found that if negligence was proven the city could not escape responsibility. In this I agree with the judgment. In fact, the learned counsel for the city practically abandoned that defence at the hearing. The constables at the time of the act were clearly acting within the scope of their authority as employees of the city were acting in virtue of a by-law passed by the city and the city is responsible fortheir negligent act of omission or commission.

"As to the damages, this young man was not the sole support of his mother in fact, she admits that her present husband is quite able to support her. Nevertheless, in my

opinion, she is entitled to compensation. She has a pecuniary interest in the life of her son; if the occasion arises when his support is required, she has a legal right to enforce it. I find no contributory negligence on the part of the deceased. After he was taken in charge by the constables, he did nothing that he should not have done to bring about the resulting conditions. I would assess the damages at $400.

Geoffrion, Geoffrion & Cusson, attorneys for plaintiff.

Archambault, Lavallée, Jarry, Butler & Damphouse, attorneys for defendant.

* * *

NOTES.—Une compagnie de chemin de fer qui entreprend de transporter une personne absolument ivre, lui doit protection et en conséquence, c'est une faute, pour les employés qui savent qu'une personne, en cet état, se tient sur la plateforme, de faire partir le convoi.

Dans l'évaluation des dommages, la Cour tiendra compte de l'état d'ivresse du demandeur.

C. S. Demers, J., 1909, *Ducharme vs. The Canadian Pacific Railway Co.*, 16 *R. J.*, 27.

Lorsque le concours d'un cas fortuit et d'un quasi-délit produit un accident, le recours de la victime, ou de ses représentants, n'en est pas moins ouvert contre l'auteur du quasi-délit; mais le tribunal doit arbitrer les dommages en tenant compte de ce concours de cause, comme dans le cas de faute commune.

C. S., Demers, J., 1908, *Parker vs La corporation du Canton de Hatley*, *R. J. Q.*, 33, *C. S.*, 52.

COUR D'APPEL

Billet promissoire. — Endossement. — Radiation. — Banque. — Officier autorisé. — Renouvellement.—

MONTREAL, 23 janvier 1913.

ARCHAMBAULT, J. C., TRENHOLME, LAVERGNE, CARROLL, GERVAIS, JJ.

LEWIS A. HART et al. vs THE BANK OF BRITISH NORTH AMERICA.

JUGE.—1o. Que dans le cas où la signature d'un endosseur sur le dos d'un billet qui est renouvelé est radiée par un officier de la banque qui a escompté ce billet, cet endosseur est déchargé.

2o. Que le non paiement d'un billet renouvelé n'a l'effet de faire revivre l'ancien billet que sujet aux radiations et changements que le porteur lui a fait subir au moment du renouvellement.

Acte des Lettres de change 61, 62, 63.

Les faits de la cause peuvent être résumés comme suit: Les appelants avaient escompté plusieurs billets à la banque intimée et avaient opéré plusieurs renouvellements de

ces billets, Claude B. Hart comme faiseur, et Lewis A. Hart, comme endosseur. L'un des billets étant devenu dû le 20 Septembre 1909, Lewis A. Hart remit à la banque, en renouvellement, un autre billet, daté du 24 janvier 1910, à quatre mois portant la même signature et endossement que le précédent. La banque accepta et radia l'endossement de Lewis A. Hart sur le billet du 20 Septembre 1909. La banque ensuite remit le nouveau billet à Claude B. Hart et ce dernier, à la demande de la banque, changea le billet, par ses seules initiales, de quatre mois à deux mois, sans avertir l'endosseur.

La poursuite; fut prise sur le billet du 20 Septembre 1909 vû que l'endosseur niait sa responsabilité sur le dernier billet changé matériellement sans son consentement, la banque alléguant qu'elle avait été induite en erreur en renouvelant le billet.

Lewis A. Hart plaida entr'autres moyens que son endossement sur le billet du 20 Septembre 1909, sur lequel l'action était basée avait été radié par la banque.

L'autre défendeur plaida paiement.

La Cour Supérieure (St. Pierre, J.) a condamné les appelants conjointement et solidairement au paiement du billet de $2500,00, sur le principe que le renouvellement du billet n'avait pas opéré novation, et que le défaut de paiement du dernier billet avait fait revivre l'ancien; que la radiation de l'endossement de l'endosseur avait été faite par erreur et par une personne non autorisée, la banque ne s'étant pas dépossédée du billet?

La cour d'appel a confirmé le jugement de la Cour Supérieure contre le faiseur, mais elle a renversé le jugement contre l'endosseur Lewis A. Hart avec dépens.

Lavergne J.—"Les appelants ont été poursuivis par l'intimée pour une somme de $2,500.00 et condamnés

conjointement et solidairement au paiement de cette somme par jugement de la Cour Supérieure rendu le 7 mai dernier (1912).

"Les deux appelants, défendeurs en cour inférieures, appellent du dit jugement.

"L'action était basée sur un billet promissoire pour la somme de $2,500.00, en date du 20 septembre 1909, payable à quatre mois de date à l'ordre de l'appelant Claude B. Hart.

"Ce billet porte l'endossement de l'autre appelant Lewis A. Hart, mais cet endossement a été radié (cancelled).

"Ce billet était le quatrième d'une série de billets de $2,500.00 chaque, payables à quatre mois de date, le premier du 10 décembre 1908, renouvelé le 13 de janvier 1909 et le 17 de mai de la même année.

"Lors de l'échéance du billet du 20 septembre 1909, l'appelant alla voir le gérant de la banque intimée et lui remit un cinquième billet daté du 24 janvier 1910, à quatre mois, signé par l'appelant Claude B. Hart et endossé par lui le dit L. A. Hart.

"Le gérant de la banque reçut le dit billet et le transmit à Claude B. Hart lui requérant de le mettre payable à deux mois et d'approuver ce changement par ses initiales.

"L'appelant Claude B. Hart se conforma à cette demande et renvoya le billet ainsi changé à l'intimée qui l'accepta sans s'occuper de l'endosseur L. A. Hart et sans lui demander de ratifier le changement en question.

"A sa maturité le billet fut protesté pour non paiement. L. A. Hart nie sa responsabilité quant à ce billet qui a été ainsi changé sans son approbation.

"L'intimé, sur ce, poursuivit les appelants leur offrant de leur remettre le billet du 24 janvier, prétendant qu'il avait été accepté en renouvellement par erreur, et bâsant son action sur le billet du 20 septembre 1909, lequel est encore valide.

"Les appelants ont plaidé par défenses séparées.

"L'appelant Lewis A. Hart plaide en premier lieu qu'il n'était qu'un prête-nom pour la banque dans la transaction en question et qu'il n'avait jamais eu aucune responsabilité à l'égard des billets en question. Il n'a pas tenté d'établir ce moyen. Son principal moyen de défense est que l'intimée en acceptant le billet du 24 janvier en renouvellement du billet du 20 septembre précédent, l'avait libéré, lui, le dit L. A. Hart de toute responsabilité comme endosseur sur le billet poursuivi en radiant son endossement sur le dit billet.

"Les deux appelants plaident également que le billet sur lequel est basé l'action a été dûment payé par l'appelant Claude B. Hart, par son chèque du 31 janvier 1910.

"Ce dernier plaidoyer n'est pas établi et, sans autres commentaires, je peux dire que l'appelant Claude B. Hart est encore responsable pour le paiement du billet en question qu'il a renouvelé par un billet à deux mois, lequel billet il n'a pas payé et que la banque lui remet.

"Quant à L. A. Hart, l'intimée a renoncé à tout recours contre lui pour le paiement du billet dont il s'agit dans la présente cause, en rayant son nom dans son endossement sur le dit billet.

"L. A. Hart ne parait pas avoir ratifié le changement fait sur le dernier billet que la banque offre de remettre avec son action La banque prétend que le dit L. A. Hart aurait eu connaissance du changement et y était consentant.

Quebec Practice Reports

TEN YEARS INDEX

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