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## *THE LAW OF EVIDENCE RELATING TO STATEMENTS OF MURDERED PERSONS.*

A case of murder tried before the Lord Chief Justice, at Norwich, has created much interest, and been the subject of much discussion, in respect of the ruling of the judge as to the inadmissibility of a statement made by the murdered person just after the act causing death was done, and a short time before death. The Lord Chief Justice has had so much experience in criminal cases, and is so accomplished a master of the varied intricacies of the criminal law and procedure, that the objections taken to this ruling would hardly have given rise to so much comment, but for the fact that those who have questioned its accuracy have adduced strong arguments in support of this objection, and one of them is a gentleman well-known as the author of a standard work on the Law of Evidence. We propose, on account of the interest of the subject, to put, briefly summarized, before our readers the leading cases which have been decided upon the point, so that they may be in a position to estimate at a glance the merits of the discussion. But first of all we shall state briefly the facts of the present case, and the reasons given by the judge for rejecting the evidence proposed to be put in by the prosecution. The prisoner, a stonemason, and a married man, lived in the Woodbridge road, Ipswich, and the deceased, a widow was a laundress, living about half a mile off in the same road. The prisoner had been a friend of the husband, and had, during his illness, looked after his affairs for him, and after his death continued to look after the horse which the deceased used in her business, being allowed in return the use of it, when not required by her, and permission to keep pigs at her place It appeared that he wished her to let him have her horse and cart, which she, however, declined to do. He used to come twice a day to the house, and they called each other "Harry" and "Eliza." A witness spoke of several quarrels having taken place between prisoner and the deceased before the fatal day, which they afterwards made up, and stated that on one occasion there was a quarrel on account of the prisoner's wanting the horse and cart, and deceased refusing to let him have it, and that on the day previous to the murder, the 7th July, the deceased had sent away the pigs' food from her house. On the morning of the murder prisoner came in at half-past seven, the deceased being then at work washing, and her assistant, Mrs. Rodwell, being also there. The deceased went into the front room, prisoner followed her, and the door was shut. About ten minutes afterwards he came out of the room into the back room, where he went to the cupboard and took out a small bottle, with which he went out, and, as appeared, got some rum in it. Mrs. Rodwell went into the front room, found deceased in a faint on the floor, with her head on a hassock, as if it had been put by some one under her head. Deceased spoke and said "Oh dear, how bad I feel!" Mrs. Rodwell then went back to her work, and in about three or four minutes she was in the drying ground, where another assistant was, who said something to her, in consequence of which she went back to the house. On her way back she saw deceased coming out of the gate bleeding very much from the throat, and seeming very much frightened. Deceased said something to the witness, which, however, was excluded, and so was not stated, though its effect may be surmised from what the Lord Chief Justice said, that "if admitted, it might have a fatal effect." The prosecution tendered it in evidence, but the Lord Chief Justice in holding it not admissible said, "Anything that was uttered at the time—that is, that the woman uttered an exclamation, or pointed in a certain direction while the act was being done, or that she screamed, would be admissible as part of the *res gestæ*, but this was something said after all was over, and as it was said in the absence of the prisoner, was not admissible." He also observed "that he regretted that by the law of England any statement made should not be admissible." The case accordingly went to the jury with this statement excluded, but nevertheless they found the prisoner guilty.

Now, it has been contended that upon two grounds, the statement which the Lord Chief

Justice ruled to be inadmissible in evidence was admissible. The first is that the statement comes within the rule which (an exception to the rule rejecting hearsay evidence), under certain circumstances, allows the admission of dying declarations. The general principle on which this species of evidence is admitted was stated in *Woodcock's case*, by Lord Chief Baron Eyre, to be this: "That such declarations are made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice." But in order to make such a declaration admissible it is essential, and is a preliminary fact to be proved by the party offering it in evidence, that it was made under a sense of impending death. Any hope of recovery, however slight, existing in the mind at the time the declaration was made will render it inadmissible; and it is well settled that it ought not to be left to the jury to say whether the deceased thought he was dying or not; but that that must be decided by the judge before he receives the evidence: *John's case*, 1 East, P. C. 357. Consequently, whether a particular dying statement is admissible as being within the above rule, must depend upon the circumstances of each individual case, and upon the judge who has to decide upon its admissibility. When he has exercised his discretion and rejected it, that discretion can hardly be questioned upon a bare report of the trial which may not contain all the facts upon which the exercise of it was governed. The first ground of objection to the Lord Chief Justice's ruling may, therefore, be put aside at once, inasmuch as he in the exercise of his lawful discretion was of opinion that upon the facts the declaration of the deceased was not made under such circumstances as to bring it within the rule as to dying declarations. There remains, then, the second ground of objection to the ruling, and that is, that the statement was part of the *res gestæ*, and so admissible. Now, although the expression *res gestæ* is one that often conveys little meaning, and the argument put forward for the admissibility of a piece of evidence—that it forms part of the *res gestæ*—amounts often to nothing but mere words, it must be confessed that in the present case that argument has a considerable show of strength. The principal cases which have been put forward to show its applicability to the present case are *R.* v. *Foster*, 6 C. & P. 325, and *Thompson et Ux.* v. *Trevanion*, Skin. 402. In the former case, which was tried before three judges in 1834, the prisoner was charged with manslaughter in killing A. by driving a cabriolet over him. B. saw the cabriolet drive by, but did not see the accident, and immediately afterwards, on hearing A. groan, went up to him, when A. made a statement as to how the accident happened. It was held that this statement was receivable in evidence on the trial of the prisoner for the manslaughter of A. In the latter case, which was an action by husband and wife for wounding the wife, Lord Chief Justice Holt allowed what the wife said immediately after the hurt received, and before she had time to devise anything for her own advantage, to be received in evidence as part of the *res gestæ*.

We have not seen any English murder case cited in support where a similar statement has been held admissible, and we are not aware of there being any. An Irish case is that of *Reg.* v. *Hugh Lunny*, 6 Cox C. C. 477, tried in 1852, before Monahan, C.J., on the Irish Home Circuit. The deceased had died from the effects of a wound on his head inflicted by a stick. A girl in the neighborhood had heard a cry, and coming out had found the deceased standing with his cap in his hand and apparently weak and injured. The deceased did not survive more than a few hours. It was objected on prisoner's behalf that it could only be as a dying declaration that what the prisoner said to the witness could be evidence, and they had not shown that at this time the deceased knew he was dying. His Lordship ruled that what the deceased then said was evidence as part of the *res gestæ*, and upon the question being put, the witness said: "I asked him what was the matter with him. He said he was robbed by the man that walked with him from the cross roads." The prisoner was convicted of murder. It would be difficult to find a more parallel case to the one under discussion than that we have just cited, and the conclusion to be derived

from the two is that if Monahan, C.J., was right in the one case, the Lord Chief Justice is wrong in this, and *vice versa*. An American case of a similar kind is that of *The Commonwealth* v. *McPike*, 3 Cush. 181. There it was held that the declaration of a person who is wounded and bleeding that the defendant has stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go from her own room up stairs into another room, is admissible in evidence after her death as a part of the *res gestæ*. This case furnishes an *a fortiori* argument against the ruling of the Lord Chief Justice. On the other hand, it must not be forgotten that it is extremely difficult to lay down particularly any rules for determining whether such statements come within the *res gestæ*. Apart from the Irish case, which was only a circuit case, the English cases where such statements have been admitted, were not cases involving the punishment of death. If they had been, it is probable that the judges would have discussed the admissibility of the statements at much greater length than the reports represent them to have done. Further, it must be remembered that the rule is an exception to the general rule as to hearsay, and it is not always advisable to extend such exceptions too far. Mr. Greaves mentions a striking instance of the danger of trusting to statements made after a mortal wound has been inflicted as having been tried at Gloucester Summer Assizes, 1842. The prisoner, one Macarthy, was indicted for murder, and the deceased had been stabbed by the prisoner whilst he was pursuing him in order to give him into custody for an assault, and the deceased expressly stated that the prisoner had knocked him down, but two companions of the deceased, who were present during the whole time, distinctly proved that the deceased was not knocked down at all. This is, of course, no argument against the rule as to admitting statements forming part of the *res gestæ*, but it is one to cause judges to exercise with caution the discretion they are allowed to exercise in admitting such statements upon trial for murder.—The London *Law Times*.

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*Sunday*.—Picking and taking to market ripe melons, which would have spoiled if left on the vines, *held*, a work of necessity, the doing of which was not punishable under the Sunday law.—*Wilkinson* v. *The State*, 59 Ind., 416.

## NOTES OF CASES.

### COURT OF REVIEW.

MONTREAL, April 30, 1879.

LORANGER, MACKAY, TORRANCE, JJ.

DESAULTELS dit LAPOINTE v. SOCIÉTÉ DE CONSTRUCTION CANADIENNE DE MONTREAL.

[From S. C., Montreal.

*Action — Hypothecary creditor—Renunciation to personal recourse by suing hypothecarily.*

The judgment brought up for Review was rendered by the Superior Court, Montreal, JOHNSON, J., 31st January, 1879. See 2 Legal News, p. 47.

The Court reversed the judgment for the reasons which follow :—

« Considérant qu'en poursuivant son action hypothécaire pure et simple contre le défendeur, et en lui laissant l'option de délaisser l'immeuble décrit aux pièces de la procédure, la société demanderesse est censée avoir renoncé à l'action personnelle qu'elle avait contre lui soit comme exerçant les droits du débiteur de la dite demanderesse, le nommé Antoine Deslauriers, soit, en vertu de l'indication du paiement insérée à l'acte de vente par le dit Deslauriers au défendeur qui s'est chargé de payer la dite demanderesse à l'acquit du dit Deslauriers ;

« Considérant qu'en prenant la dite action hypothécaire, et en donnant ainsi aux défendeurs, l'option de délaisser, la dite demanderesse l'a mis dans la même situation juridique envers elle, que si le dit défendeur n'eut pas été tenu personnellement envers le dit Deslauriers, et envers elle-même ;

« Considérant que le tiers, non tenu personnellement qui délaisse, ce qu'a fait le défendeur, a le droit de réclamer ses impenses et améliorations utiles et nécessaires, faites sur l'immeuble délaissé, et que ce droit peut s'exercer par l'enlèvement de telles impenses et améliorations, si cet enlèvement peut se faire sans dégrader l'héritage, ce que dans l'espèce le défendeur a fait dans cette condition ;

« Considérant enfin qu'il résulte de ce que dessus que le demandeur était sans action contre le défendeur, et que dans le jugement qui a maintenu cette action il y a mal jugé ;

"Casse et infirme le dit jugement du 31 Janvier, 1879, et procédant à rendre le jugement que la Cour de première instance aurait dû rendre, déboute l'action de la demanderesse, avec dépens tant en première instance qu'en révision contre la demanderesse, *distraits*, etc."

*Beique & Choquet* for plaintiff.

*Bonin & Archambault* for defendant.

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## SUPERIOR COURT.

MONTREAL, Feb. 28, 1879.

SOCIÉTÉ PERMANENTE DE CONSTRUCTION JACQUES CARTIER v. LÉONARD et al.

*Delegation—Acceptance—Registration.*

PAPINEAU, J. La demanderesse allègue une obligation en sa faveur par le défendeur, M. Léonard, en date du 22 Juin 1874, pour $5,460, payable en vingt-huit versements de $195, à faire le premier mardi de chaque trimestre, en commençant en Août 1874, et portant hypothèque sur deux emplacements formant partie du No. 28, second rang, Canton de Shefford.

Une vente du 26 Mai 1875 de ces emplacements à l'autre défendeur, Robinson, qui s'obligea de payer à la demanderesse, à l'acquit de Léonard, $3,500 que celui-ci devait alors à la demanderesse, en vertu de l'obligation précitée.

Enregistrement de l'obligation et de la vente, cette dernière étant faite avec faculté de remérer jusqu'au 1er de Janvier 1867. Son enregistrement est du 31 mai 1876.

La demanderesse ajoute que le défendeur Léonard n'a pas exercé la faculté de remérer, et que l'enregistrement de l'acte de vente "*a rendu* "*parfaite la délégation de paiement faite au profit* "*de la demanderesse.*"

Que le 26 de Mars, elle fit signifier au défendeur Robinson son acceptation, en date du 17 du même mois, de la dite délégation de paiement.

Que par l'effet tant de l'enregistrement de l'acte de vente que la dite acceptation, Robinson est devenu débiteur personnel et des paiements à faire sur l'obligation devenue exigible en entier, et des amendes dues en vertu des stipulations de la dite obligation.

Et la demanderesse conclut à la condamnation conjointe et solidaire des deux défendeurs au paiement de $3,792.75.

Le défendeur Léonard a fait défaut, et doit être condamné au paiement de la somme demandée, et il l'est avec dépens.

Le défendeur Robinson conteste la demande par une défense en fait.

Et par une exception péremptoire dans laquelle il prétend :

Qu'il n'est jamais devenu débiteur personnel de la demanderesse ; qu'il n'avait acheté les propriétés hypothéquées que pour assurer le paiement de certaines avances qu'il avait faites à Léonard ; que ce dernier s'était réservé la faculté de remérer, et qu'il était resté en possession des propriétés jusqu'au moment où la demanderesse elle-même en est devenue adjudicataire, à la vente par décret, faite sur Léonard le 30 de Janvier 1877.

Que le 23 d'Août 1876, le défendeur Robinson avait rétrocédé les propriétés à Léonard, moyennant $1,950, alors dues à Robinson par Léonard.

Qu'il est vrai que l'acte de vente par Léonard à Robinson a été enregistré le 31 Mai 1875, de même que la rétrocession par Robinson à Léonard l'a été le 24 d'Août 1876, mais que Robinson n'est responsable personnellement envers la demanderesse ni par l'un ni par l'autre de ces deux documents, et enregistrements, et qu'il ne s'est jamais soumis aux Règles et Réglements de la Société demanderesse, non plus qu'au paiement de la dette ni des intérêts réclamés par l'action.

Que la prétendue signification d'acceptation de délégation n'a été faite au défendeur Robinson que le 26 Mars 1877, longtemps après la rétrocession.

La demanderesse répond par une dénégation, et allègue que le défendeur Robinson ne s'est pas déchargé par la rétrocession, et n'a pu se soustraire à l'effet de l'enregistrement du premier acte de vente de Léonard à lui, et de l'acceptation implicite par l'enregistrement, et de l'acceptation explicite de la demanderesse par l'acte du 17 Mars, signifié le 26 de Mars 1877.

Que d'ailleurs le défendeur s'est constitué débiteur personnel de la demanderesse en lui payant plusieurs des versements qu'il s'était obligé de lui payer, et en promettant de lui payer les autres ; et elle produit diverses lettres relatives aux paiements effectués.

En dehors des écrits produits, il n'y a pas de preuve de faits pouvant affecter notablement la décision des questions de droit soulevées en cette instance.

1o. L'enregistrement de l'acte de vente du défendeur Léonard au défendeur Robinson est-il, ou équivaut-il à une acceptation de la délégation imparfaite contenue dans cet acte, et consentie par les deux défendeurs au profit de la demanderesse.

2o. L'acceptation expresse, faite par la demanderesse dans l'acte du 17 Mars 1877, signifié au défendeur Robinson le 26 du même mois, a-t-elle été faite en temps utile, pour créer un lien de droit entre ce dernier et la demanderesse ?

L'allégation de la demanderesse relative à la première question est dans les termes mêmes du quatrième Considérant du jugement de la Cour d'Appel dans la cause célèbre de Patenaude et Lériger de Laplante, transcrit au 1er Vol. du L. C. Jurist, page 113, et la délégation contenue dans l'acte des défendeurs est une délégation simple et imparfaite dans cet acte comme dans l'acte de donation cité dans la cause de Patenaude et Lériger de Laplante. Il y a sous ce rapport, au moins, analogie parfaite entre les deux causes. Cependant, nous devons dire que la principale, pour ne pas dire, *l'unique* question dans la cause décidée par le tribunal d'Appel, était le droit du vendeur, non payé, de prendre l'action résolutoire. Cette question pouvait être décidée tout-à-fait indépendamment de l'acceptation de la délégation, et ce n'est que par surérogation que l'autre question se trouve comprise dans le jugement. Pareillement dans la cause de Ryan et Halpin, rapportée au 6ème Vol. des Décisions des Tribunaux, B. C., pages 61 et suivantes, la question de l'acceptation par voie de l'inscription du titre de l'hypothèque au bureau d'enregistrement, n'est que secondaire, puisque la Cour a formellement décidé que l'acceptation n'était pas nécessaire à la validité de l'acte de l'obligation consentie par un débiteur envers son créancier, l'acte n'étant que la preuve du contrat, ou l'obligation pré-existante. De plus, c'est à l'inscription prise par le créancier que la Cour d'Appel donne l'effet d'une acceptation. L'inscription en effet, présuppose chez le créancier qui la prend, un acte et une volonté de profiter de la stipulation contenue en sa faveur dans le titre dont il se prévaut.

Malgré le respect profond que j'ai pour la mémoire des juges éminents qui composaient alors le premier tribunal du pays, je ne puis accepter sans examen, leur décision sur la question de l'acceptation de la délégation au moyen de l'enregistrement de l'acte qui la contient. Elle ne me parait pas justifiée par les principes.

1o. Il n'y a pas de lien de droit formé entre deux parties sans le concours de leurs volontés, explicites ou implicites, résultant de leurs actes, ou sans une clause expresse de la loi créant tel lien.

2o. Il n'y a pas de délégation parfaite sans le concours de trois volontés, celle du délégant, celle du délégué, et celle du délégataire, et la délégation non acceptée par le délégataire, est toujours révocable par le concours des volontés du délégant et du délégué, 3 Larombière, p. 535. Sur l'article 1275, No. 1 et No. 3. Notre Code, Art. 1173; Pothier, *Obligations*, Nos. 600 et 605 ; Duvergier, *Vente*, No. 169 ; *Cassation*, 22 Avril 1807, Albout et Hayes, C. Bazin, C. J, ; Palais, (3ème édition, p. 40 et 41) ; 7 Toullier, No. 286; 12 Duranton, No. 321 ; Renusson, *Subrogation*, Chap. 2, Nos. 9 et 10, où il cite Loyseau, qui dit : " Si les trois parties n'y con- " sentent, la délégation est imparfaite, ou plutôt " il n'y a point de délégation ; ce sera une sim- " ple assignation ou destination, ou une cession " et transport."

3o. L'enregistrement d'un acte, dans notre législation, n'a pas pour but de faire acquérir, ni *créer* une obligation ou un droit, mais de *faire connaître* au public ce *droit*, et le *rang* qu'il doit avoir relativement à d'autres sur un même immeuble, et de le conserver en faveur de ceux qui sont diligents, préférablement à ceux qui négligent de remplir cette formalité prescrite par la loi. Ainsi l'Art. 2082 de notre Code Civil dit : " L'enregistrement des droits réels " leur donne effet et établit leur rang," ces termes signifient nullement que l'enregistrement fait acquérir un droit. L'art. 2083 ne statue également que sur l'effet, et non la *création* des droits ou leur acquisitioa. Il en est de même de tous les autres qui ont rapport à l'enregistrement.

L'Art. 2093 ne fournit pas un moyen d'acquérir des droits, mais dit simplement que " l'enregistrement a effet en faveur de toutes " les parties dont les droits *sont mentionnés* dans " le document présenté." Ces expressions ne veulent pas dire, que la personne en faveur de qui un avantage a été stipulé dans un titre, sera considéré avoir accepté cet avantage, et avoir

fait connaitre *évidemment* sa volonté de profiter et de décharger le débiteur délégant.

Pour rendre la délégation parfaite, d'après l'Art. 1173 de notre Code, il faut qu'il soit *évident* que le créancier entend décharger le débiteur qui fait la délégation ; or cette évidence ne peut venir que de la manifestation de la volonté du créancier délégataire.

Il serait peut-être possible de concevoir la manifestation de la volonté du créancier délégataire, dans le fait qu'il prendrait lui-même, ou ferait prendre en son nom, une inscription au bureau d'enregistrement du titre contenant une délégation à son profit. Encore cette conception s'évanouit devant la nécessité où est le créancier délégataire de faire connaitre son assentiment au débiteur délégué pour lier ce dernier, et même au créancier délégant, pour empêcher celui-ci de révoquer la délégation.

La simple inscription au bureau d'enregistrement, sans signification de telle inscription au délégant et au délégué, ne peut avoir cet effet. A plus forte raison, on ne peut pas inférer du fait de l'enregistrement d'un acte pour une personne quelconque, qu'un créancier délégataire nommé dans cet acte, aurait manifesté d'une manière *évidente* son intention et sa volonté d'accepter le débiteur délégué pour son propre débiteur.

C'est pourtant là que nous conduit nécessairement le 4ème Considérant du jugement *in re* Patenaude et Lériger de Laplante, et c'est ce qu'il faut admettre, pour maintenir la première prétention de la demanderesse.

Les jurisconsultes s'accordent à dire que la délégation, non acceptée par le délégataire, ne vaut pas plus qu'une cession ou un transport ; que le cessionnaire d'une créance se contente donc de faire enregistrer son acte de transport sans l'accepter et sans faire signifier son acceptation au débiteur de la créance, pourra-t-il prétendre avoir rendu ce transport irrévocable, de manière à empêcher le débiteur de payer à son créancier originaire, et d'en obtenir une quittance valable, ou le créancier de transporter la créance à un tiers ? Cela parait insoutenable.

Dans le cas présent, il n'y a rien qui nous fasse voir *une inscription prise par la demanderesse*, ni que la transcription de l'acte de vente de Léonard à Robinson ait été faite à *sa réquisition*, ni signification de l'enregistrement au défendeur Robinson ; comment pourrait-il être lié ?

En France, il a été jugé dans plusieurs causes, que *l'inscription* ne peut être considérée comme acceptation de délégation. Cour de *Cassation*, 21 Février 1810 ; 8 *Journal du Palais*, 3ème ed., p. 126 et 127, Sevin contre Créanciers Collet St. James ; *Cour Royale* de Metz, 24 Novembre 1820, Cartier contre créancier Brulé ; 16 *J. Palais* (1820) p. 203-204 ; *Cour Royale* d'Aix, 27 Juillet 1846, Dussuc contre Négrel, *J. Palais*, 3ème ed., pp. 609 et 610 ; Troplong, *Hypo.*, No. 368 ; Duvergier, *Vente*, Nos. 240-241.

L'acceptation faite par la demanderesse le 17 de Mars, et signifiée le 26 Mars 1877, a-t-elle été faite en temps utile pour la demanderesse ? Non ; parce que Robinson avait rétrocédé dès le 23 d'Août, par acte enregistré le 24 du même mois, les immeubles qu'il avait acheté de Léonard, et ce dernier avait repris la charge et obligation de payer à l'acquit de Robinson, le montant dû à la demanderesse, et en avait donné quittance à Robinson ; "and discharged " the said vendor of the payment of the same " for ever," suivant les termes mêmes de cet acte.

La demanderesse n'a pas pu prouver son allégué, que le défendeur Robinson s'était obligé et avait promis de lui payer les versements et amendes qu'elle réclame. Les lettres de lui, qu'elle produit, et les reçus des paiements qu'il a effectués, traitent toujours la dette en question comme celle de Léonard, et non la sienne, envers la demanderesse ; ce n'est pas sa dette que Robinson payait, mais celle de Léonard envers la demanderesse. Voyez Duvergier, *Vente* No. 242.

L'exception péremptoire du défendeur Robinson est bien fondée en fait et en droit. L'action de la demanderesse ne peut être maintenue contre lui, et elle est déboutée, quant à lui, avec dépens contre la demanderesse.

*Loranger, Loranger, Pelletier & Beaudin*, for plaintiff.

*A. & W. Robertson*, for defendant.

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MONTREAL, March 29, 1879.

EVANS v. PAIGE et al.

*Insolvent—Sale in contemplation of insolvency—Consideration.*

Action to annul a deed of sale from the insolvent, Bard P. Paige, to his daughter, Mar-

garet Ann Paige. The sale was made on the 18th May, 1875, and the insolvent made an assignment on the 6th November, 1875; it was sought to annul the deed under the Insolvent Act of 1869. 1st. Because the consideration of the deed was only nominal, and the deed sought to give Margaret Ann Paige a preference over the creditors of Bard P. Paige. 2nd. Because the deed was for a merely nominal consideration and without sufficient legal consideration, with intent on the part of Bard P. Paige to impede, obstruct and delay the creditors in their remedies against him, and with intent to defraud the creditors, and so done with the knowledge and connivance of Margaret Ann Paige; that such deed had the effect of impeding, obstructing and delaying the creditors, &c. 3rd. Because said sale was made by Bard P. Paige with intent to defraud the creditors in contemplation of insolvency, and with the further object of giving the said Margaret Ann Paige an unjust preference over the other creditors; that Bard P. Paige was insolvent when he gave said deed, and Margaret Ann Paige then knew it. The plea of Margaret Ann Paige said that the consideration was $10,000 United States currency, viz: cash, $2,209.49 and $6,780, equal to $6,000 Canada currency, payable to the Trust & Loan Company of Upper Canada, and the balance, $1,010.51, still due the vendor. Margaret Paige denied that she knew that Bard P. Paige was insolvent on the 18th May, 1875.

TORRANCE, J. The Court cannot look at the examination of Bard P. Paige as an insolvent as a piece of evidence to influence the decision in this cause. It can have no effect as against Margaret Ann Paige who had no opportunity of cross-examination. It is probable that Bard P. Paige was on the 18th May, 1875, insolvent, and I am not prepared to say that he did not know it; in fact, I am of opinion that he was insolvent and that he knew it, or ought to have known it; and on the other hand I cannot say that the purchaser, Margaret Ann Paige, knew it. Then as to the consideration of the deed, it certainly was not nominal. Part of the consideration was $6,000 to the Trust & Loan Company, another part was $2,209 due the purchaser, and $1,010 payable to the insolvent —altogether about $8,700. The property in 1873 was valued at about $12,500 for the loan by the Trust & Loan Company, and David Brown said it was worth in 1875 about $12,000 after a great inflation of prices, and in 1878 about $9,000. There is no evidence but that of the insolvent that his daughter was creditor in May, 1875, for $2,209, except the evidence of Mr. W. W. Robertson, advocate, that he had received from her shortly before certain notes of the insolvent as evidence of the indebtedness, and on the execution of the deed he had given them up to Bard P. Paige. I have had some hesitation in admitting this proof of the indebtedness of Bard P. Paige, but have decided to allow the burden of proof to be on the part of the plaintiff to disprove the indebtedness of Bard P. Paige, to his daughter. It is impossible, then, to say that the consideration for this sale did not exist, inasmuch as we here see a consideration of $10,000 American currency, including the payment to the purchaser of the notes for $2,209. We cannot, therefore, apply the 86th or 87th sections of the Insolvent Act of 1869. Section 88 enacts that all contracts made with intent to impede or defraud creditors with the knowledge of the purchaser are null and void; but I find no legal evidence of such knowledge by Margaret Ann Paige. The last section, 89, enacts that fraudulent preferential sales made by any person in contemplation of insolvency shall be null and void. Was there such contemplation of insolvency by Bard P. Paige on the 18th May, 1875? This is a question of evidence, and while I consider that there is a very substantial consideration for the sale given by the purchaser, I am not prepared to say on the evidence of record that Bard P. Paige did not make the sale in question on 18th May, 1825, in contemplation of insolvency. On the contrary, I have before me the relationship of the parties, father and daughter,—the fact of the sale being made for some $3,000 less than the then value of the land—that the vendor was insolvent on the 18th May, 1875, and by the sale his daughter received payment of the notes held by her against her father, the insolvent. There is also the evidence of a witness uncontradicted—a former partner of the insolvent, namely, Isaac H. Stearns—that from what he knew of the relations of Margaret Paige and her father, she could not be his creditor *bona fide* for $2,209. I think it therefore my duty to set aside the deed, but the facts well merit examination in another and higher Court.

*Macmaster & Co.*, for plaintiff.
*J. R. Gibb*, for defendant.

## *RECENT UNITED STATES DECISIONS.*

*School board.*—A child attending a public school was injured by reason of the defective and unsafe condition of the building in which the school was kept. *Held*, that she could maintain no action against the school-board of the city, incorporated for the care and management of the schools.—*Finch* v. *Toledo Board of Education*, 30 Ohio St., 37.

*Surety.*—A defendant appealed from a judgment against him, and gave bond with sureties to prosecute the appeal. Pending the appeal he became bankrupt, and his assignee was, on the plaintiff's motion, substituted as defendant. *Held*, that the sureties were discharged.—*Thomas* v. *Cole*, 10 Heisk. 411.

## *RECENT ENGLISH DECISIONS.*

*Action.*—A claim for goods lost by a common carrier, alleging a contract to carry the goods safely for hire, and a breach, was *held* to be an action "founded on contract," not on tort.—*Fleming* v. *The Manchester, Sheffield & Lincolnshire Railway Co.*, 4 Q. B. D., 81.

*Copyright.*—Two books, entirely different in contents and character, were published, each under the title "Trial and Triumph." *Held*, that a copyright in the title might be claimed, though the books were quite different.—*Weldon* v. *Dicks*, 10 Ch. D., 247.

*Corporation.*—By Act of Parliament it was provided that every contract involving above £50, made by a public corporation, like the defendant, should "be in writing and sealed with the Common Seal." The jury found that the defendant corporation verbally authorized its agent to order plans for offices of the plaintiff; that the plans were made, submitted and approved; that the offices were necessary, and the plans essential to their erection; but the offices were not built. *Held*, that the plaintiff could not recover. *Hunt* v. *The Wimbledon Local Board*, 4 C. P. D., 48; s. c. 3 C. P. D., 208.

*Director.*—Where a fraudulent and misleading prospectus is issued by the agent of a company or by directors, a director who did not authorize the fraud, or tacitly acquiesce in it, is not liable therefor. Per Fry, J., commenting on *Peek* v. *Gurney* (L. R. 6 H. L. 377), and *Weir* v. *Barnett* (3 Ex. D. 32), *Cargill* v. *Bower*, 10 Ch. D. 502.

*Easement.*—Two houses, belonging respectively to plaintiff and defendant, had stood adjoining each other, but without a party wall, for a hundred years. In 1849, the plaintiff turned his house into a coach factory, by taking out the inside and erecting a brick smoke-stack on the line of his land next the defendant's, and into which he caused to be inserted iron girders for the support of the upper stories of the factory. The lateral pressure on the soil under defendant's house was thus much increased. The owner did not object to the girders, but it did not appear that he understood the full character of the changes made in 1849. He had since then made no grant by deed of the right to support. More than 20 years after that date, the defendant contracted with one D. to take the house down and excavate the soil for a new building. D. employed N. to do the excavating. N. did it without negligence, but nevertheless, from the withdrawal of the support, the smoke-stack toppled over, dragging the factory along with it. *Held*, that the enjoyment of the support for twenty years raised a presumption that the plaintiff had it of right, but that the defendant was at liberty to rebut the presumption, either by showing (1) That the defendant did not know the character of the alterations made when the house was turned into a factory; or (2) that he had no capacity to make a grant. The defendant might be liable, though the work was actually done by a contractor empowered by him, and although he had given the contractor proper caution as to the dangerous character of the work.—*Angus* v. *Dalton*, 4 Q. B. D. 162; s. c. 3 Q. B. D. 85.

*Injunction.*—The plaintiffs alleged that their house had been called "Ashford Lodge" for upwards of half a century, and that a house adjoining had been during nearly all that time called and known as "Ashford Villa," and that the defendant had recently bought the latter house, and had proceeded to call it "Ashford Lodge," to the material damage of the plaintiffs and the confusion of their friends. No malice was alleged. The houses were the respective private residences of the plaintiffs and of the defendant. To the first belonged sixteen acres of land; to the second, nine. *Held*, that there was no ground for an injunction, and a demurrer was allowed.—*Day* v. *Brownrigg*, 10 Ch. D. 294.