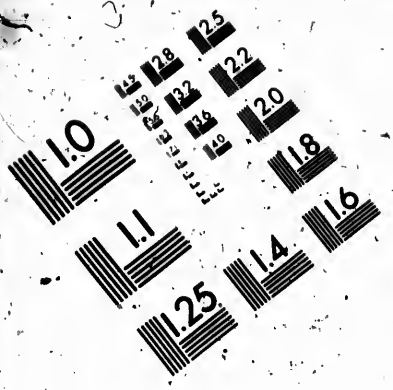

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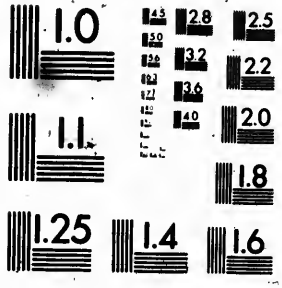

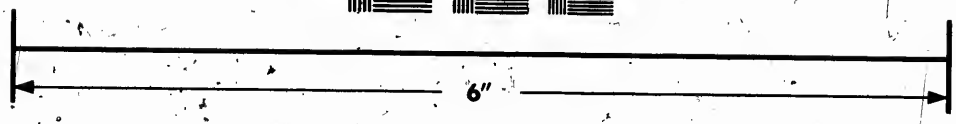

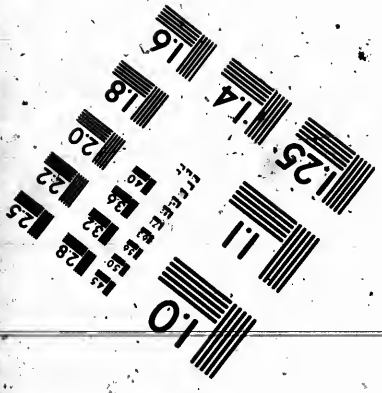

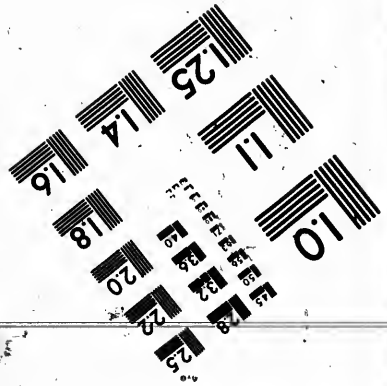

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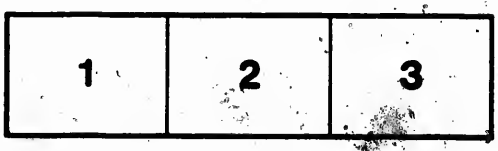

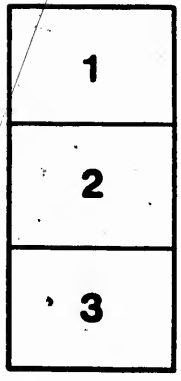

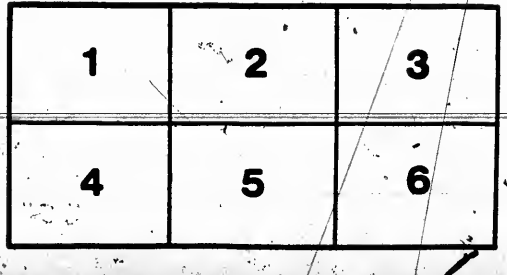

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THE

LOWER CANADA

Jurist.

COLLECTION DE DECISIONS

DU

BAS-CANADA.

VOL. XVII.

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Errata:—At page 197, in the list of Judges present, read "*Pollette*, J." instead of "*Stuart*, J." The opinion of *Stuart*, J., embodied in the report, was delivered in the Superior Court.

At page 227, in "Roy *vs.* Gauthier," for "sans réserves" read "sous réserves;" and "elles" for "elle."

THE

LOWER CANADA

Jurist.

COURT OF REVIEW, 1872.

MONTREAL, 31st MAY, 1872.

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

No. 487.

Atwater et al. vs. *The Grand Trunk Railway Company:*

An Ocean Steamship Company, by its bill of lading, having undertaken to carry goods from Liverpool to Portland, and there deliver them to the Grand Trunk Railway Company, to be by them carried to Montreal, and the latter Company having received and carried the goods;

Held:—1st. The said Grand Trunk Railway Company are responsible for damage to the goods caused by their negligence, and cannot invoke the conditions of the Ocean Steamship Company's bill of lading.

2nd.—To establish that goods were damaged when in a carrier's custody it is sufficient to shew that the Company received the goods in apparent good order and delivered them in bad order.

3rd.—Negligence on the part of the carrier will be held proved if it be established, in evidence that the goods carried could not have been broken in the way that they were by any ordinary handling in the usual course of transportation.

The plaintiffs' action was at first dismissed by his Honor Mr. Justice Mondelet, which decision was reversed by the Court of Review.

The facts of the case fully appear by the respective factums of plaintiffs and defendant.

Dorman for plaintiffs:—The plaintiffs ask a revision of the judgment, by which their action was dismissed with costs.

The action was brought to recover $575, value of a case of plate glass, received by the defendant in good order at Portland to be carried and delivered to plaintiffs at Montreal, and which was delivered to plaintiffs in a broken and utterly worthless condition.

The plaintiffs allege in their declaration that in the month of January, 1871, at Liverpool in England, they shipped in good order and condition, by the Steamship Scandinavian, belonging to the Montreal Ocean Steamship Company, three cases of plate glass, which the said Steamship Company undertook to carry

Atwater et al. vs. The Grand T. R.

on board of said steamship from Liverpool to Portland, in the State of Maine, and there to deliver the same in good order and condition to the defendant, to be by the defendant carried thence by railway to Montreal and there delivered to the plaintiffs or their assigns, in consideration of the freights therein mentioned.

That the said Montreal Ocean Steamship Company, as they had agreed to do, conveyed the said goods from Liverpool to Portland, where, on or about the sixth of February of the same year, they delivered the same to defendant to be carried and delivered to the plaintiffs at Montreal; that the defendant received the said three cases of plate glass from the said Steamship Company at Portland in good order and condition, and undertook, and agreed, and were bound to carry the same thence to Montreal, and there deliver the same in like good order and condition to the plaintiffs; that defendant failed to fulfil its said obligations, but that in the course of the transportation of said goods, and while the same were in defendant's possession, by and through the want of care, negligence and fault of the defendant, its agents and servants, one of said cases of plate glass, and all the plate glass contained in it, were broken, crushed and entirely destroyed.

That plaintiffs were the owners of the said goods, and that the value of the case of plate glass so broken and destroyed was $575,00. and prayed that defendants be condemned to pay that sum to plaintiffs.

The defendant pleaded:—

1. The general issue.

2. That the defendant, about the date mentioned in plaintiffs' declaration, received from the Montreal Ocean Steamship Company, at Portland, three cases of plate glass, and undertook to carry the same to Montreal, and there to deliver them to the plaintiffs. That defendant, according to its undertaking, carried the said goods from Portland to Montreal, and delivered them to plaintiffs in the same order and condition in which it had received them at Portland. That defendant used all possible care, and was not guilty of negligence in the transportation.

That one of the principal conditions on which defendant carries merchandize like that in question is, that defendant is not responsible for any damage that may happen to such merchandize; that defendant received said goods from the said Steamship Company under that special condition, which is a usage of commerce, and was well known to the said Steamship Company as well as to the plaintiffs.

That defendant, having never contracted with plaintiffs is not responsible towards them, and by reason of a special contract with the Ocean Steamship Company, the defendant is not responsible towards that Company for any damage such as alleged in plaintiffs' declaration.

The plaintiffs in answer to this plea, deny that defendant undertaking to carry the goods in question from Portland to Montreal was qualified by any condition or stipulation, which limited or could by law limit the responsibility of defendant as a common carrier, or which could relieve defendant from liability or damage caused by its fault or negligence, and say that defendant contracted

and undertook, and were bound to carry and deliver the goods as alleged in plaintiffs' declaration.

The plaintiffs proved that they shipped the goods on board the Scandinavian at Liverpool the 9th of January, 1871, under bill of lading, plaintiffs' Exhibit No. One, whereby the Montreal Ocean Steamship Company undertook to convey said goods to Portland, and there deliver them in good order and condition to the defendant, to be by it forwarded thence to Montreal and delivered to plaintiffs.

That the Steamship Company did carry the goods to Portland and deliver them to the defendant, to be by it carried and delivered to plaintiffs at Montreal, as appears by the Exhibit X, produced by witness McFeat, and by which defendant acknowledges to have received from the Montreal Ocean Steamship Company the goods in question in apparent good order and condition.

That on their arrival at Montreal one case of said plate glass was proved to be so crushed and broken as to totally destroy all the glass contained in it.

That the glass was plaintiffs' property, and its value was $575.

The only evidence adduced by defendant was the testimony of the conductors of the train which brought the goods from Portland to Montreal, and who say that no accident occurred on the way, which could account for the breakage; and that of the freight receiver at Montreal, who proves that he discovered that the case was broken on its arrival at Montreal.

At the argument it was contended on behalf of defendant:

1. That there was no contract between it and plaintiffs in respect to the carrying of the goods in question, and hence no liability for the loss of the goods.

2. If there be a contract it is subject to the conditions of the bill of lading given by the Montreal Ocean Steamship Company to the plaintiffs, and that one of its conditions was that the carrier should not be responsible for breakage.

3. That defendant's liability was limited to damage resulting from its fault and negligence, and that no fault or negligence had been proved in this case.

The judgment under review assigns, as reasons for dismissing plaintiffs' action:

1. "That it is not proved that there is or has been between plaintiffs and "defendant any direct expressed or presumed contract to deliver to them the case "of plate glass in question in this cause."

2. "That there is in the cause no evidence of any act of negligence or want "of care, nor of any fault, which in fact and law can be attributable to defen- "dant, with respect to the breakage of the said plate glass."

As to the first ground the plaintiffs submit that they have proved beyond all doubt that defendant as a common carrier received their goods at Portland, in good order, and undertook to carry and deliver them to plaintiffs at Montreal in like good order.

The Ocean Steamship Company, by its bill of lading, undertook to carry the goods from Liverpool to Portland, and there deliver them to the defendant, stipulating that the Steamship Company's responsibility should cease on delivery of the goods to defendant at Portland.

It appears that the Steamship Company fulfilled its contract, carried the goods to Portland and delivered them in good order to defendant.

Atwater et al. vs. The Grand T. R.

The plaintiffs then, by the agency of the Steamship Company, delivered the goods to the defendant at Portland to be carried to Montreal and delivered to plaintiffs. The defendant gave a receipt for the goods, acknowledging to have received them in apparent good order, and undertook to carry and deliver them to plaintiffs in Montreal. The defendant's receipt was in fact a clean bill of lading in favor of plaintiffs, without any condition limiting its liability as a common carrier, and having delivered the goods in bad order it is responsible for the damage; and it was not necessary to prove any special act of negligence, it was quite enough to shew that defendant received the goods in good order and delivered them in a damaged condition.

The defendant having failed to prove the allegations of its plea in respect to a special contract or condition exempting it from responsibility for damage, contended at the argument that the clause "not responsible for breakage," written on the bill of lading given by the Ocean Steamship Company, was available to defendant, and limited its liability. It is submitted that whatever might be the effect of this clause between the Ocean Steamship Company and plaintiffs, it forms no part of the contract, express or implied, between the plaintiffs and defendant.

But the plaintiffs submit that, even supposing defendant to have received and carried the goods subject to the stipulation " not responsible for breakage," it would then be liable for damage resulting from its fault or negligence, and the facts proved establish conclusively that the case of plate glass in question was broken and destroyed by the negligence or want of care of defendant.

Defendant's own receipt is conclusive that it received the case of glass in good order at Portland, the receipt says in "apparent good order." When it arrived in Montreal it was in apparent bad order. The case was so crushed and broken that the damage was apparent to every one. All the witnesses agree that the case could not have been so crushed and broken by any ordinary handling in the usual course of transportation ; that it must have been subjected to a force equivalent to several tons weight.

This must have been the result of negligence and want of care, or of a *force majeure*, and if the damage was caused by *force majeure* it was incumbent on defendant to prove it.

The defendant has attempted to prove that nothing occurred to cause the damage after the goods were loaded on the cars at Portland till they arrived at Montreal, but not a witness has been examined to shew that nothing happened to the goods while in defendant's possession at Portland before they were loaded on the cars and started for Montreal.

Defendant would have the Court infer that the breakage occurred before it received the goods from the Steamship Company. But this is contradicted by the defendant's receipt, which declares that the goods were in apparent *good order*.

The damage was so apparent that it was at once perceived at Montreal before the goods were unloaded from the car, and if the goods had been in the same damaged condition when received from the Steamship Company at Portland, the defendant's agents who received and loaded the goods at Portland must have

discovered it, and could have proved it. And it is a significant fact that not one of defendant's agents or servants who had the receiving, checking, care, handling and loading of the goods at Portland has been examined to support the defendant's pretension that the goods were in fact delivered at Montreal in the same condition as when received at Portland.

The plaintiffs submit that the judgment under review is erroneous in every respect and ought to be reversed, and defendant condemned to pay the plaintiffs $575, the value of the glass destroyed, with costs.

Authorities :—
Code Civil, Art. 1675 and 1674.
Code Civil, Art. 1676.
Troplong, Louage No. 942.
Vanhuffel, Louage, pp. 90, 91.
Harris vs. Edmondstone *et al.* 4. L.C. Jurist, p. 40.
The G.T.R. Co., vs. Mountain, 6 L.C. Jurist, p. 173.

Pominville, Q.C., for Defendants.—Cinq questions ont été soumises en cette cause devant la Cour Supérieure, présidée par son Honneur Mr. le Juge Mondelet, par la Défenderesse, et ont été jugées en sa faveur par le jugement dont se plaignent les Demandeurs.

1°. Il n'est pas intervenu de contrat entre les Demandeurs et la Défenderesse pour le transport, de Portland à Montréal, des caisses de *Plate glass* dont il est question, et les Demandeurs n'ont aucun droit d'action contre la Défenderesse.

2°. S'il y a eu contrat, le transport de ces effets a été fait aux termes et conditions mentionnés à la lettre de voiture *Bill of lading*, exhibit No. 1 des Demandeurs.

3°. Les voituriers, *common carriers*, peuvent limiter leur responsabilité dans le transport des marchandises qui leur sont confiées.

4°. La responsabilité du voiturier étant limitée par le contrat, le fardeau de la preuve de négligence du voiturier tombe sur l'expéditeur ou consignataire des effets, et non sur le voiturier.

5°. Dans cette cause, les Demandeurs n'ont fait aucune preuve de négligence contre la Défenderesse, au contraire il est établi que les effets en question ont été transportés par la Défenderesse, de Portland à Montréal, avec tout le soin possible.

Les Demandeurs dans leur déclaration alléguent :

Que le ou vers le neuf Janvier mil huit cent soixante onze, ils ont mis à bord du *Scandinavian* à Liverpool, en bon ordre et condition, trois caisses de *Plate glass* que la Compagnie "The Montreal Ocean Steamship Company" s'est obligée de transporter et délivrer aux Demandeurs, en bon ordre et condition. Voir *connaissement*, *Bill of lading*, Exhibit No. 1 des Demandeurs.

Que les effets ont été transportés par "The Montreal Ocean Steamship Company" de Liverpool à Portland, et ont été livrés là à la Défenderesse en bon ordre, et que cette dernière s'est chargée de les transporter à Montréal; que la Défenderesse n'a pas rempli son contrat, et que, par la faute et négligence de cette dernière et de ses employés, une des caisses a été complètement brisée, et les vitres, *Plate glass*, qu'elle contenait.

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Les Demandeurs demandent une condamnation pour la valeur.

Au soutien de leur action, les Demandeurs ont produit la lettre de voiture *Bill of Lading*, c'est leur exhibit No. 1.

C'est un *Through bill of lading* de Liverpool à Montréal, donné par la Compagnie "The Ocean Steamship Company." La Défenderesse n'est pas intervenue à ce contrat.

Tout le fret de Liverpool à Montréal a été payé à la Compagnie "The Ocean Steamship Company," savoir la somme de trente deux louis, seize shellings et cinq deniers sterling. Les conditions de transport sont imprimées et écrites sur le "Bill of lading," et on y trouve entre autres conditions la suivante: "Not accountable for breakage from any cause whatever."

Il n'apparait pas, par ce *Bill of Lading*, que ce sont les Demandeurs qui ont expédié de Liverpool les dites caisses, ainsi qu'ils l'allèguent dans leur déclaration; la preuve testimoniale au dossier établit le contraire.

La Défenderesse a rencontré cette action par deux exceptions.

Dans la première, elle allégue *qu'elle n'a pas contracté avec les Demandeurs*, ni entrepris de transporter pour elle, de Portland à Montréal, les effets en question.

Que les Demandeurs n'ont pas expédié les dits effets d'Angleterre, tel qu'allégué par eux, et la Défenderesse n'a pas contracté aucune obligation vis-à-vis d'eux au sujet du transport des dits effets.

Dans sa seconde exception, la Défenderesse allégue: qu'à la date mentionnée en la déclaration, elle a reçu, à Portland de "The Montreal Ocean Steamship Company" trois caisses *Plate glass* qu'elle, dite Défenderesse, entreprit de transporter pour la dite Compagnie "The Montreal Ocean Steamship Company," à Montréal *sujet à certaines conditions* et là les livrer à Messieurs E. Atwater & Co. Qu'elle a transporté les dites caisses avec tout le soin possible, et les a livrées dans l'ordre et l'état qu'elle les avait reçues à Portland: qu'une des conditions, sur le *Bill of lading* auxquelles la dite Défenderesse transporte des effets de la nature de ceux en question, était que la Défenderesse ne serait pas tenue responsable des accidents, qui arriveraient aux dits effets et du dommage qui en résulterait; que la Défenderesse n'était pas responsable du dommage allégué: qu'il n'y avait eu aucune négligence de sa part et que n'ayant pas contracté avec les Demandeurs au sujet du transport des dits effets, n'a encouru aucune responsabilité vis-à-vis d'eux, et ils n'ont aucun recours contre elle.

Huit témoins ont été entendus de la part des Demandeurs. Quelques-uns pour constater les dommages causés à la caisse et aux vitres *Plate glass*, mais aucun n'a pu prouver de négligence ou manque de soin de la part de la Compagnie, et de fait il était impossible pour les Demandeurs de faire une telle preuve, le contraire ayant été établi. Michel Laurent, un des témoins des Demandeurs, à la douzième page de sa déposition, dit:

With ordinary and reasonable care in the transportation of said glass from Portland to Montreal by Rail, I do not think it possible that the said case of plate glass could have been damaged in the way it was when I saw it.

Sur le verso de la seconde page, il dit: I think such damage to the case in question could have been caused in a Steamship as well as elsewhere.

De la part de la Défense tous les conducteurs qui ont été en charge du train dans lequel se trouvaient les caisses en question et autres employés de la Défenderesse dans le département du frêt, ont été examinés, et tous témoignent que tout le soin possible a été donné, de Portland à Montréal, qu'elles ont été livrées ici telle qu'elles avaient été expédiées de Portland, sans avarie ni accident.

La Défenderesse réfère aux dépositions données par Monsieur Stratton, agent du fret, par laquelle il apparait que d'après l'investigation qu'il a faite, la caisse de vitre en question a été reçue par la Défenderesse à Portland de "The Montreal Ocean Steamship Company," dans le même état et condition qu'elle a été livrée ici aux Demandeurs.

Au soutien de la première question soumise, la Défenderesse réfère aux autorités suivantes.

8 Meeson & Welsby, page 421. Muschamp vs. The Lancaster and Preston Junction Railway Company.

8 Exchequer, page 340, Scothorn et al vs. The South Staffordshire Railway Company.

2 Exchequer, page 415. Machie vs. The London and South Western Railway Company.

36 English Law and Equity Reports, page 482.

Collins vs. The Bristol and Exeter Railway Company.

Court of Exchequer. Il y a eu appel de ce jugement de la Court of Exchequer to the Exchequer Chamber, et le jugement a été renversé, voir English Jurist vol. 3, partie I. 1857. Mais devant le Chambre des Lords sur Appel, le premier jugement a été confirmé, voir English Jurist, vol. 5, part. I, 1859.

House of Lords cases, Index, page 273 & 289.

Gutman vs. Grand Trunk, jugé en appel en Septembre 1871.

Gordon vs. Grand Trunk, cause analogue à celle-ci pour effets consignés de la même manière et expédiés de Portland dans le Haut Canada, jugé dans le même sens que celle-ci. La cause n'est pas rapportée.

2*nd* & 3*rd* Questions.

Code Civil du Bas-Canada, art. 1676.

Rebel, Leg. chemin de fer, page 282, No. 506.

2 Troplong, Contrat louage No. 926 & 942.

2 Duvergier " " No. 324 & 325.

Persil & Croissant, Commissionnaires, pages 185 & 186.

Pardessus, Droit Commercial, No. 528, 539 & 576.

Vanhufel, traité contrat de louage, pages 66, 72, & 73.

Angell, Law of Carriers, Sections 247, 248, 249, 251, 330.

Story on Bailments, Ed. 1863. No. 541, 549, 556, 557, 558.

Parsons on Contracts, Ed. 1864, vol. 2, Sec. 15, page 233.

Redfield, Railways, Ed. 1869, vol. 2, page 88, Sec. 177 et suivantes.

6 L. C. J., page 190, Torrance et al. vs Allan, Gelinas et Grand Trunk, jugé en appel, 9 Septembre 1863.

4e. Question, quant au fardeau de la preuve.

Troplong, Louage, vol. 3, No. 942.

Vanhufel, Contrat de Louage, page 91.

Atwater et al. vs. The Grand T. R.

Rebel, Leg. chemin de fer, page 299, No. 530.
Angell, Law of Carriers, Sec. 247, 276.
Story, Bailments, Sec. 573.
Greenleaf on evidence, vol. II. pages 211, § 218.

Par toutes les raisons ci-dessus, la Défenderesse soumet respectueusement que le jugement, qui a débouté l'action des Demandeurs, a été rendu conformément à la loi, à la preuve, et à la justice, et elle en demande avec confiance la confirmation avec dépens.

MACKAY, J.—Atwater & Co. sue the Grand Trunk Railroad Company for $575 damages, owing to the breaking of one of three cases of plate glass while being carried on the railroad from Portland to Montreal, in February, 1871. The breakage is alleged in plaintiffs' declaration to have been caused by defendants' gross negligence and want of proper care. Plaintiffs' declaration states the contract between plaintiffs and the M. O. S. S. Company in Liverpool, by which the latter was to carry to Portland and there deliver to defendants to be delivered to plaintiffs, and afterwards contract in Portland between the M.O.S.S. Company and the defendants; but this is not expressly alleged to have been by the S. S. Company as agents of plaintiffs; nor is promise by defendants towards plaintiffs alleged. The declaration states that at Portland the defendants received the three cases from the S. S. Company, and undertook to carry them to Montreal, there to deliver them to plaintiff. Undertaking is not stated to any one in particular. Half a dozen of words might have been added to the declaration with advantage. The plaintiffs have suffered from want of them partly. The judgment *a quo* shows it. The Grand Trunk Company pleaded the absence of contract between it and the plaintiffs, and set up that the only contract about those three cases of glass was between the M. O. S. S. Company and it; that the carriage was upon certain terms and conditions, one being that it (the Grand Trunk) was not to be liable for any damages, or accidents to cases of such goods; that as it received the goods from the S. S. Company, so, in like condition, it delivered them to the plaintiffs, in Montreal; that it did not damage them, and if they have been found damaged it is only "*résultat d'accidents auxquels sont exposés les articles de cette espèce durant le transport.*" This plea is by the judgment *a quo* found good, and well proved, and Mr. Atwater's action has been dismissed. The question now is as to the correctness of that judgment. The bill of lading, dated Liverpool, 9th January, 1871, states the three cases as received on board the *Scandinavian*, "to be delivered from the ship's deck at Portland, where the ship's responsibility shall cease, to the Grand Trunk Railway Company, by them to be forwarded thence, per railway, and at Montreal delivered to plaintiffs;" "any damage for which the carrier is liable must be claimed against the party only in whose possession the goods were when the damage was done." "Goods at risk of consignees from the ship's tackles." Across the bill is written, "Not accountable for breakage from any cause whatever." This is printed also in the body of the bill. On arrival of the *Scandinavian* at Portland, the Grand Trunk Company took, we may say, all her cargo, to carry it over their railroad to points in Canada. They received the three cases of glass in question "in apparent good order and condition," so their

receipt to the ship reads. One receipt was given for all the goods of the ship's manifest. Some are said to be received in apparent good order, but others in bad; no notices or conditions are stated. A condition of the receipts and printed waybills used commonly by the Grand Trunk Company is that it shall not be responsible for damage to glass, &c. From the Liverpool bill of lading two obligations fall upon the Ocean Steamship Company, one to carry the cases of glass to Portland, the other to deliver them in Portland to the Grand Trunk Company to be carried to Montreal, for plaintiffs. Under this second obligation the O. S. S. Co. were forwarding agents. There was another contract afterwards, in Portland, namely, upon the O. S. S. Co.'s delivering the cases to the G. T. Co., and the G. T. accepting them, to be carried to plaintiffs. The O. S. S. Co. were not to be held carriers for the whole distance to Montreal; so they expressly stipulate that they are not to be bound after delivery to the Grand Trunk from the ship's tackles, and, a little further on, that any damage "must be claimed against the party only in whose possession the goods were when the damage was done." As to the reception by the O. S. S. Co. of one sum of money to pay the freight all the way to Montreal, that ought not to be fatal to plaintiffs nor bind them to look only to the S. S. Co., particularly seeing the express stipulations just read contained in the bill of lading. The money was received as it was for convenience of all parties. It was convenient to the consignor to make a block payment, and thus to know what the entire transport would cost; it was convenient to the Grand Trunk, we may presume, else it would not have received the goods, except upon other terms for itself. The O. S. S. Co. agreed, in Liverpool, to save the consignor the trouble of attending at Portland to re-book or re-ship the goods; it agreed to save him forwarding agency charges at Portland; it bound itself to pay and satisfy the Grand Trunk, and to get it to accept the goods and carry them to and for plaintiff. The damages complained of have, evidently, been caused by fault of the defendants, and 1676 of our C.C. fixes responsibility upon them; notwithstanding all they say. There remains the question: whether plaintiffs can maintain their action against the defendants, as upon contract express or implied. The Judge *a quo* upon this found against plaintiffs; we think that judgment wrong. The Grand Trunk Company authorized the Ocean Steamship Company to receive even the railroad freight, and so it delivered the glass in Montreal free to Atwater. Atwater clearly has no grievance against the Ocean Steamship Company. He can't say that they had no right to do what they did, in any particular. Had it delivered to other carrier than the Grand Trunk it would have been different. The goods arrived in Montreal in February, one of the cases was in dreadfully bad order; the case and all the glass in it broken to pieces. This is the case in respect of which the present suit is. Atwater refused to accept it, and wrote and claimed damages from defendants, who, on 4th March, answer him thus:—"Looking at the nature of the Liverpool bill of Lading, and the endorsation on it; 'not accountable for breakage from any cause whatever,' the legal advisers of the Company hold that it is not responsible for this breakage complained of." Carriers who contract with the agent of the owner of goods for their transportation are, of course, none the less liable as common carriers to the owner. Thus, &c., &c.; and "it makes no difference whether the name of the owner is disclosed by the agent to the carrier" (*en*

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second) "or not." § 98 Angell on Carriers; also see his § 466. The Ocean Steamship Company was appointed to substitute for part of the transportation the Grand Trunk Railway Company. In such case, says our Civil Code, 1711, the *mandator* (as Atwater) has direct action against the carrier substituted. Atwater adopts the agency of the steamship company for him by bringing this action. It would have been fitting for plaintiffs, in their declaration, to have inserted the words "acting for plaintiffs" after the statement that at Portland the defendants received the three cases from the Ocean Steamship Company, &c.; but the necessary substance is in the declaration. We may deduce from the total allegations that the Ocean Steamship Company, as agents for plaintiffs, delivered to the defendants property known to be the plaintiffs', and that defendants accepted, to carry to plaintiffs. In their letter of the 4th of March, the defendants did not, in it, take the position which they do in their p eas, that they never contracted, or *quasi* contracted, with plaintiffs.

The Court of Review rendered judgment in terms following, to wit: Considering, &c.

That there is error in the said judgment, to wit, in holding defendants not responsible towards plaintiffs, and that no evidence is of any negligence or want of care by defendants, nor of any fault by them in or about the carriage of the plate glass referred to in the pleadings, and in maintaining defendants' exception and dismissing the plaintiffs' action doth, revising said judgment, reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises; considering that defendants received in apparent good order from the plaintiffs acting by the Montreal Ocean Steamship Company in February, 1871, at Portland, three cases of plate glass, property of plaintiffs, to be carried by defendants to Montreal, and there delivered to plaintiff in like good order; that the defendants did carry said cases to Montreal, but that, by the fault of defendants, one of the said cases was broken and damaged, while in possession of defendants, whereby the said case and its contents, of the value of $575 currency, were, when afterwards delivered to the plaintiffs in February, 1871, in Montreal, of no value, but lost to plaintiffs, to the plaintiffs' damage of $575.00 currency;

Considering that plaintiffs have proved the material allegations of their declaration; that defendants' exceptions are unfounded; and that defendants are liable to pay plaintiffs the value of said case of plate glass damaged and lost, as mentioned in plaintiffs' declaration, by and through defendant's fault and negligence, doth condemn the defendants to pay to plaintiffs the sum of $575 currency, the value of the case of plate glass lost to plaintiffs by and through the fault of defendants, as alleged in plaintiffs' declaration, with interest on said sum from service of process till perfect payment, with costs in the said Superior Court against said defendants, in favor of said plaintiffs, and with costs of this Court of Revision against said defendants in favor of said plaintiffs, distraction of which costs is granted to S. W. Dorman, Esq., attorney of said plaintiffs, and it is ordered that the record be remitted to the Superior Court, Montreal.

S. W. Dorman, for plaintiffs.
Cartier & Pominville, for defendants.
(J. L. M.)

Judgment reversed.

COURT OF QUEEN'S BENCH, 1872.

MONTREAL, 22ND JANUARY, 1872.

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

No. 6.

THOMAS dit TRANCHEMONTAGNE,

(*Defendant in Court below,*)

APPELLANT;

AND

MARTIN,

(*Plaintiff in Court below,*)

RESPONDENT.

HELD:—That a petition by an insolvent to stay proceedings under the Insolvent Act of 1869, made after the expiration of five days from the demand of an assignment, on the ground that the insolvent has executed a deed of assignment to an official assignee, is too late.

This was an appeal from the judgment of the Court of Review, at Montreal, reported in the 15th volume of the *Jurist*, pp. 236 and 237.

BADGLEY, J., *dissentiens*:—This case comes up upon proceedings in insolvency. It is a contest between a voluntary assignment and a demand for compulsory liquidation. In September, 1869, a demand of assignment was made upon the appellant under the Act of 1869. No answer was made by the debtor to this application during the five days limited by the statute, and consequently the writ issued for compulsory liquidation, on the 29th of September, 1869. Upon the same day, the debtor had made a voluntary assignment to an official assignee. That voluntary assignment vested all the property of the debtor in the hands of the assignee. The debtor resided some distance up the Ottawa, where there was no official assignee, and was obliged to come down fifty or sixty miles to St. Andrews, that being the place where the nearest official assignee was situated, to make his voluntary assignment. While he was absent for this purpose, the compulsory writ was issued at Aylmer upon the same day that he made the voluntary assignment at St. Andrews. The question is simply, which of these proceedings is the preferable one. In my opinion the voluntary assignment is the preferable proceeding, and for this reason: The voluntary assignment at once vests the estate in the assignee. The compulsory writ does not do so. Certain acts are required to be done by the seizing officer so as to make the seizure good. More than that, after the writ of attachment is issued, the debtor has still three days to contest the writ of attachment. It must also be borne in mind that both these proceedings were simply proceedings to put the estate into insolvency, that is, to investigate and manage the affairs of the debtor for the benefit of his creditors. The proceeding that does that immediately is certainly preferable to one that requires time. The voluntary assignment, therefore, being made, and vesting by operation of law all the estate and effects of the debtor in the hands of the assignee, the debtor had nothing further to be operated upon; the sheriff had nothing to seize. Then, there is another circumstance: It is said that the five days' limit is absolute—that they are conclusive upon the debtor. They

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are conclusive so far: they were for the purpose of enabling him to arrange with his creditors, or for showing that he was not insolvent. If he did not use the five days' time to take advantage of irregularities, he had three days after the return of the writ in which to do the same thing; and until the expiration of the three days he was not an insolvent, but a mere debtor. Under these circumstances it seems to me that the estate being vested in the assignee under the voluntary assignment, the writ in compulsory liquidation was useless, except to make expenses. Although adverse to maintaining the compulsory writ, I consider that the seizing creditor being in good faith, and not knowing that a voluntary assignment had been made, should be allowed all the first expenses of the writ.

MONK, J., also *dissentiens*:—I quite concur in believing that there was no occasion for taking the compulsory writ, seeing that there was a voluntary assignment. I therefore think that the judgment at Aylmer, maintaining the petition of the debtor, was right, and that the Court of Revision was wrong in setting aside the petition. It has been stated that the debtor had no right to petition to set aside the compulsory writ after making an assignment. The Court of Appeals has held precisely the reverse of this. Until the proceedings in compulsory liquidation had taken legal effect by the expiration of the three days, the debtor was still in time to make a voluntary assignment. Besides this, voluntary assignments are viewed more favorably than proceedings in compulsory liquidation. I agree also with Judge Badgley, that the seizing creditor should get the costs of the seizure from the estate.

DRUMMOND, J.:—I consider that the Court was precluded from granting the petition of the debtor by a rigorous enactment which could not be got over. I would refer to sec. 14 and 15, of the Insolvent Act of 1869, which set out if a debtor fails to meet his liabilities as they become due, a claimant for a sum exceeding $500 may make a demand upon him requiring him to make an assignment. Then, if the debtor contends that the demand was not made in conformity with the Act, &c., he may present a petition to the Judge praying that no further proceedings be taken, "but only within five days from such demand." Here are words of the most strictly limitative character. But pass on to sec. 17: "If such petition be rejected, etc., or if no such petition be presented within the aforesaid time, and the insolvent neglects to make an assignment of his estate, his estate shall become subject to compulsory liquidation." These provisions, in my opinion, leave the Court no alternative but to maintain the writ in compulsory liquidation. We, therefore, confirm the judgment appealed from, and, in doing so, adopt the second *considérant* of the Court of Review, being the one referring to the five days.

DUVAL, CH. J.:—We must consult the interests of creditors as well as the interests of debtors. I cannot hesitate in forming my opinion when I find that the law has stated what is to be done, in the most positive terms. It must be admitted that the proceedings of the creditor were correctly taken. Then, I ask, how can the creditor be deprived of a vested right by an act of his debtor, done after the time prescribed by law? Even without the positive language of the law, I would say that the delay is not in the discretion of the Court. The

proceedings in the Insolvency Court are of a summary character. A summary jurisdiction is vested in the Court. The delays prescribed must therefore be strictly conformed to. It is said the debtor used all the diligence he could. But the right to issue the writ became vested in the creditor, and of that right he could not be divested by any act of his debtor. John McMillan, and Dame Janet Buchanan.

The written judgment was as follows: "La Cour..... adoptant le second motif du jugement dont est appel, (savoir le jugement .....), et considérant qu'il n'y a pas d'erreur quant au dispositif, cette Cour confirme, &c., &c."

Judgment of Court of Review confirmed.

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

Walsh & Rouleau, for respondent.

J. A. Perkins, counsel.

(S. B.)

COURT OF QUEEN'S BENCH, 1872.

MONTREAL, 20th JUNE, 1872.

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

No. 84.

JOHN McMILLAN,

APPELLANT;

AND

DAME JANET BUCHANAN *et al.*,

RESPONDENTS:

HELD:—1st. Under Article 159 of the Code of Civil Procedure, a bailiff's return of service may be contested on motion, without an improbation, unless the Court otherwise orders.

2nd. An *exception à la forme* will be rejected upon motion, and held to be not served, if the copy left with the Plaintiff bears a different number from, and is not an exact copy of the original fyled.

This appeal was from a judgment rejecting an *exception à la forme*, fyled by the appellant.

The judgment was rendered on the following motion: "Motion on the part "of the plaintiffs, that inasmuch as a pleading styled '*Exception à la forme*,' "was fyled in this cause by the defendant, John McMillan, on the 22nd of "November, 1869, and inasmuch as no true and certified copy thereof has been "served upon the plaintiffs or their attorney of record, and inasmuch as the "bailiff's return (which the plaintiffs hereby declare that they contest), endorsed "on said *exception à la forme*, to the effect that on said last-mentioned day he "served a true and certified copy thereof on the plaintiff's attorney, is false and "untrue, the said *exception à la forme* and the said bailiff's return be rejected, "set aside, and hence dismissed with costs, &c."

On the 30th November, 1869, his Honor Mr. Justice Mackay ordered *preuve avant faire droit* upon the motion.

An *enquête* was duly made, and it was proved by the bailiff and another witness that no copy of the said *exception à la forme* had been served on respon-

John McMillan, and Dame Janet Buchanan.

dents, the bailiff admitting that he only served a copy of an *exception à la forme* in another cause, No. 41, Buchanan vs. McMillan, the present case being number 34. The written parts of the documents also differed in many respects; for instance in the exception fyled, at the top of the first page appeared the words

"Canada"

"Province of Quebec"

"District of Montreal"

which were not to be found in the copy. And on the same page of the *exception* fyled, at the top are the words and figures "Montreal 1869" which did not occur in the copy.

On the first line of the conclusion or prayer of said pretended copy occurred the words "John McMillan," which did not appear in the original fyled; and on the third line of the last page of the copy were the words "John McMillan," which were not in the *exception* fyled.

There are also some other smaller differences of a similar nature.

On the 17th January, 1870, the Hon. Mr. Justice Beaudry rendered the judgment appealed from as follows:

"The Court having heard the parties by their Counsel, upon the inscription "of plaintiffs for hearing on the merits of the motion by them made and fyled "on the twenty-sixth November last past, to the effect that the *exception à la* "*forme* placed in the record in this cause by defendant, John McMillan, and "bailiff's return of service thereof, be rejected, set aside and dismissed with costs, "having examined the proceedings and deliberated, considering that the said "plea cannot be received in this cause, inasmuch as no true copy thereof was "over served upon the said plaintiffs, and that the pretended copy left by the "bailiff bears a different number from that of this cause, to wit, bears No. 41 "instead of No. 34, and moreover, differs in several parts from the *exception* "*à la forme* fyled in this cause, doth grant the said motion, and in consequence "doth, for the causes and reasons set forth in said motion, reject, dismiss and set "aside said *exception à la forme*, and said bailiff's return of service thereof, "with costs, &c."

In contesting the bailiff's return of service by [illegible] respondents relied upon Article 159 of the Code of Civil Procedure [illegible] English version, is as follows:

"Nevertheless as regards simple service of summons, or of notice, the return "may be contested on motion without improbation, unless the Court otherwise "orders."

And in the French version: "Néanmoins lorsqu'il s'agit d'un simple rapport "d'assignation ou de signification, la contestation peut s'en faire sur requête "sommaire sans recourir à l'inscription en faux, à moins que le tribunal n'en "ordonne autrement."

Perkins, J.C., for appellant, arguing against the motion contended in his factum:—"The Court below ordered (without any demand whatever) *preuve avant faire droit* upon this motion. Strange to say, respondents have forgotten that our law does not allow return in like cases to be contested by motion, or without

improbation, *inscription de faux.* The *exception à la forme* is not a summons nor a notice. It is by *Code de Procédure*, Article No. 159, allowed *only* to contest "simple service of *summons* or of notice," on motion without an improbation, unless the Court otherwise orders. This cause and the plea fyled do not come within this article at all. But then some party must pray to contest without improbation. In this case no one at all has demanded, and the Court had no right to order what was never demanded."

The respondent's counsel in answer pointed out that if there was any obscurity as to the meaning of the word "notice" in the English version of the Article 159, it was removed by comparison with the French version, where the corresponding word was "signification" or service. The real meaning of the Article was, therefore, as regards a simple return of service of summons, (or of service, of any document whatever) the return may be contested on motion.

The following is the judgment of the Court of Appeal:—"The Court, &c. Considering that there is no error in the judgment appealed from, to wit, the interlocutory judgment rendered by the Superior Court for Lower Canada, sitting at Montreal, in the District of Montreal, on the 22nd day of February, 1870, doth affirm the same with costs to the respondents against the said appellant. The Honorable Chief Justice Duval and Mr. Justice Drummond dissenting.

Judgment of S. C. confirmed.

J. A. Perkins, for appellant.
Thos. W. Ritchie, Q.C., for respondents.
Hon. J. J. C. Abbott, Q.C., counsel for respondents.
(J. L. M.)

SUPERIOR COURT, 1870.

MONTREAL, 31st JANUARY, 1870.

IN REVIEW.

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

No. 36.

Beard et al. vs. *Brown*, & *Brown*, Incidental Plaintiff; & *Beard et al.*, Incidental Defendants.

HELD:—The master of a vessel cannot exact payment of freight before delivery of goods upon the wharf.

The plaintiffs by this action revendicated about 155 tons of coal, which they alleged the defendant, master of the barge Orleans, agreed to carry from Newburg, in the State of New York, and deliver to plaintiffs in Montreal, plaintiffs paying freight at the rate of $2.50 per gross ton, in gold, a bill of lading to that effect being signed.

Plaintiffs also alleged that at the time of the shipment of the coal plaintiffs, by their agent, paid to defendant a sum equal to $74.50 in gold, on account of the freight, leaving a balance due on delivery of the coal of $314.75.

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The barge having arrived in Montreal about the 26th of October, 1868, plaintiffs immediately notified defendant of their readiness to receive the coal, and offered to pay the freight on delivery of the coal upon the wharf, and also offered to receive the coal at the rate of forty tons per day, and to pay the proportion of freight for the same so soon as delivered. They even offered to pay the defendant the whole of the freight before delivery, if defendant would give security for the delivery, leaving to Brown the option of adopting any one of the offers made to him.

But defendant after delivering only fifteen tons insisted upon payment of the whole balance of freight before the coal should be taken out of the barge, and refused plaintiffs' offers.

Defendant then notified plaintiffs that he would sell the coal by public auction to meet his claim for freight.

Plaintiffs deposited in Court $318.25 to meet the freight, and seized the coal by *saisie revendication*.

Defendant pleaded in effect denying plaintiffs' allegations and maintaining that he was not bound to deliver before payment of freight, and averred that he had a *lien* and *droit de rétention* upon the coal for the payment of his freight and charges. He also fyled an incidental demand claiming damages.

The plaintiffs proved the allegations of their declaration, and his Honor Mr. Justice Berthelot rendered judgment on the 30th of June, 1869, in favor of plaintiffs, as follows :—

"The Court, &c., &c., having examined the proceedings, proof of record and the evidence adduced, seen the admissions made and fyled by said parties respectively, and having on the whole duly deliberated: Seeing the interlocutory judgment already rendered in this suit on the 4th of November last, and the deposit by the plaintiffs of the sum of $318.25 on the 4th November last as a balance of freight by them due to the defendant E. G. Brown, as per bill of lading of the 12th October, 1868, executed at Newburg, as stated in the declaration, for the carrying of one hundred and fifty-five tons of coal by defendant from Newburg to the port of Montreal, in October last: Seeing the security bond under which the plaintiffs have got possession of the quantity of coals seized and attached under and by the writ of *saisie revendication* issued in this cause : Seeing that the bill of lading of the 12th of October, 1868, is general in its tenor: Seeing that the rights of plaintiffs and defendant Edgar G. Brown, under the Articles 2428 and 2453 of the Civil Code of Lower Canada, are concomitant: Seeing that it is in evidence that the defendant E. G. Brown has wrongfully and illegally refused to deliver any part or portion of his freight without first having been paid by plaintiffs of the whole freight, which he had no right by law;

Considering that the *lien* and privilege of defendant Edgar G. Brown over the goods carried would not have been impaired or diminished should the plaintiffs have continued to have possession of the same on false or frivolous promises of payment;

Considering that the defendant Edgar G. Brown had no right by law to cause the said goods or coals carried by him to be advertised for sale, as he has done after the offer and readiness of plaintiffs to pay his freight or any part or portion

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of the same so soon as he would have the delivery of said goods or coal, or of any portion of the same;

Considering that for all these reasons defendant and incidental plaintiff is wrong in his pretensions as set forth in his pleas and his incidental demand for damages, doth dismiss the same with costs *distraits* to John J. C. Abbott, Esq., attorney for plaintiffs and incidental defendants, and proceeding to adjudicate on the principal demand doth declare the *saisie revendication*, caused to be made by said plaintiffs in this cause under the writ of *saisie revendication* therein issued, good and valid, with costs against the said Edgar G. Brown on both demands; and it is further ordered that the *depot* of the sum of $318.15, deposited by said plaintiffs, be paid over to said Edgar G. Brown, by the prothonotary of this Court."

This judgment was confirmed unanimously by the Court of Review on the 31st of January, 1870.

Judgment for plaintiffs confirmed.

J. J. C. Abbott, Q.C., attorney for plaintiffs.
J. A. Perkins, for defendant Brown.
(J. L. M.)

SUPERIOR COURT, 1872.

MONTREAL, 9TH JULY, 1872.

IN CHAMBERS.

Coram TORRANCE, J.

EX parte *Marcel Gauthier*, Petitioner.

HELD:—1o. That a judge in the District of Montreal has no jurisdiction to take cognisance of an *avis* of relatives taken in the District of Iberville, for the election of a tutor and sub-tutor to minors whose domicile is at Montreal.
2o. That the election must take place at Montreal.

The petitioner, described as of the city of Montreal, represented that he had (13 May, 1872) taken the advice of relatives at St. Remi, in the District of Iberville, for the election of a tutor and sub-tutor to his minor children, issue of his marriage with his deceased wife, Dame Marguerite Vasseur. The relatives at St. Remi had elected the tutor and sub-tutor.

Dugas, for petitioner, prayed the judge in Chambers, at Montreal, to homologate the proceedings, citing C. C. 249—254, 261.

The judge held that the election must take place at Montreal.

Petition rejected.

Dugas, for petitioner.
(J.K.)

SUPERIOR COURT, 1872.

MONTREAL, 4TH OCTOBER, 1872.

ENQUETE SITTINGS.

Coram TORRANCE, J.

No. 1508.

Cox vs. *Patton*.

HELD:—That a plaintiff who has produced a witness for examination, and has examined him a certain length when further examination was stopped in order to take the opinion of the Court on the admissibility of questions put, will be held to produce the witness for cross-examination and *clôture* of the deposition on the demand of defendant.

Perkins & Monk, for plaintiff.
Monk & Butler, for defendant.
(J.K.)

CIRCUIT COURT, 1872.

MONTREAL, 7TH OCTOBER, 1872.

Coram TORRANCE, J.

No. 4521.

Berlinguette vs. *Judah*.

HELD:—That a servant cannot recover for a portion of a month's wages, where she has left before the end of the month without the employer's consent, and without the usual notice.

The action was to recover $3, portion of a month's wages. The plea charged that the plaintiff had left without leave, without terminating a month, and without the usual notice or the consent of her employer.

The defendant examined by the plaintiff stated that the plaintiff's month terminated on the 12th September, and that she had left on the 9th September without notice, and without his consent.

Virginie Ladurantaie, a witness for plaintiff, proved that plaintiff, in May, gave defendant's wife notice that she would leave the employ in June.

PER CURIAM.—The notice in May did not justify plaintiff in leaving in September. Her leaving in September was a desertion of her service, and until she had earned a month's wages, she could not claim any portion of the month.

* Action dismissed.

McCoy & Lefebvre, for plaintiff.
J. S. Archibald, for defendant.
(J. K.)

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* Several judgments like the above have been of late rendered by *Mackay* and *Beaudry*, JJ. The case of *Nadon* vs. *Ollivon* & al., 15 L. C. J. 280, is different in this, that there the wages had been earned and were due and payable, and the question was whether they had been forfeited by subsequent desertion. The defendant there did not claim or prove damages as an offset or compensation.

SUPERIOR COURT, 1872.

MONTREAL, 21st JUNE, 1872.

Coram MACKAY, J.

No. 658.

Lusk et al. vs. *Hope et al.*

HELD:—1st. That the writing required by Art. 1235 of the Civil Code to be signed by the party sought to be bound, is held to be so signed, in the case of a contract of bargain and sale of goods, evidenced by the bought and sold notes, signed by the broker who negotiates the sale.

2nd. That the broker may prove, by parol evidence, his authority to act for the parties, and that the retention by the parties of the contract notes so signed is evidence of the authority of the broker to bind them in the form therein stated.

This was an action to recover $1060 cy., as damages, for breach of a contract of bargain and sale.

The contract was alleged in the declaration to have been negotiated and completed between the plaintiffs and defendants through the intervention of Mr. Porteous, a broker, acting as their mutual agent, and by bought and sold notes signed by the broker and delivered to the parties respectively.

The defendants, by their pleas, denied that any such contract as that alleged had ever been perfected, and alleged that Porteous was in reality the broker of the plaintiffs, in the transaction in question, and had no authority to act for or bind the defendants.

With their declaration the plaintiffs produced their bought note, and with their pleas the defendants produced the sold note.

At *Enquête* Porteous attested that he had authority from defendants to make the contract in question, and was, in reality, employed by them in the first instance to effect the sale of the iron mentioned in the contract, instead of being originally employed by the plaintiffs, as alleged in the pleas.

At the hearing on the merits *Terrill*, for defendants, contended (*inter alia*), that, according to the terms of Article 1235 of the Civil Code, the contract, in a case like the present, required to be actually signed by the defendants themselves; that this provision of the Code was really an amendment of the Statute of Frauds, which allowed of the contract being signed by the agent of the party sought to be bound; and that it was not competent for Porteous, under any circumstances, to prove his authority to bind plaintiffs, by parol evidence.

Bethune, Q.C., for plaintiffs, argued, that the absence of the words "or his agent" in the article of the Code referred to made no difference, and did not prevent the party sought to be bound from being so bound by the act of his agent, otherwise the Court must hold, that the universally recognised rule of law, "*qui facit per alium facit per se*," has been abrogated; that moreover the legislature, in omitting those words, never intended in reality to amend the existing law, as is apparent by the reference, in the Commissioners' Report, to the Cons. Stat. of L. C., ch. 67, sec. 8, and to the Statute of Frauds itself, and to the remarks of the Commissioners, wherein they state, that the only change in the existing law which they suggested was the substitution of $50, for the £10 stg., mentioned in the Statute of Frauds. He further argued, that Art. 1735 of the Code distinctly recognizes the office of broker, as that of a person "who exercises the trade and calling of *negotiating between parties* the business of *buying and selling*," and declares, that he may be the *manda-*

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tary of both parties, *and bind both by his acts*, in the business for which he is engaged by them." Then as to the legality of the parol evidence of the broker, as to his authority to act for and bind the defendants, there could be no question, in a commercial case such as the present. And, at all events, the retention by the defendants of the sold note and its production by them with their pleas were conclusive evidence of the authority of the broker to bind the defendants.

The following was the judgment of the Court:—

"The Court, having heard the parties by their counsel as well upon the motion of defendants of the 18th May last, to reject certain portions of the evidence of Thomas Porteous, a witness examined in this cause on behalf of plaintiffs, as on the merits; having examined the proceedings, proofs of record and evidence adduced, and maturely deliberated: First, passing on defendants' said motion, rejects it with costs: then, on the merits;

"Considering that plaintiffs have proved their material allegations against defendants, to wit, the sale alleged, defendants' refusal to deliver the iron bought by plaintiffs, though put *en demeure*, and the damages alleged, and that defendants' allegations have not been proved, but many of the more important of them have been disproved, for instance, the one denying that the broker had authority, the one alleging that on the sold note being delivered to defendants' they refused to accept it, the one alleging an agreement between the defendants and the broker that the former were not to be prejudiced by the sold note being left with them, and finally the one denying that a sale was, on 31st January;

"Considering that the defendants' retention of the sold note referred to, instead of repudiating it and returning it to the broker Porteous, is against defendants' pretensions contained in their pleas;

"Considering that defendants' letter of 1st February to plaintiffs, ought to have repudiated unqualifiedly the sale alleged and the broker's authority to bind defendants by it, if the broker had no authority, but did not do so; and that this circumstance, with the parol proofs of record, are also against defendants' pretensions contained in their pleas;

"Considering that on the 31st January, 1872, defendants sold to plaintiff, five hundred and thirty tons of pig iron at $29 a ton, payable as alleged in plaintiffs' declaration;

"That defendants were afterwards duly put *en demeure* by plaintiffs to deliver said iron, plaintiffs expressing readiness to fulfil their obligations as vendees under said sale, but that defendants unjustly refused to deliver said iron according to the terms of said sale; that, under the circumstances, defendants are liable by law, particularly by Art. 1073 *Code Civil*, in damages towards plaintiffs, to wit, in damages which the Court liquidates and fixes at $1060, the sum sued for;

"Doth condemn the said defendants, jointly and severally, to pay and satisfy to plaintiffs the said sum of $1060, with interest thereon from this day, and costs of suit.

Bethune & Bethune, for plaintiffs.
Abbott, Tait & Wotherspoon, for defendants.
(S. B.)

Judgment for plaintiffs.

COUR DU BANC DE LA REINE.

EN APPEL.

MONTREAL, 20 JUIN, 1872.

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

JEAN-BAPTISTE PIGEON, PERE,

(*Demandeur en Cour Inférieure,*)

APPELANT;

et

JEAN-BAPTISTE DAGENAIS,

(*Défendeur en Cour Inférieure,*)

INTIME.

JUGE :—Que les billets notariés, en brevêt, ne sont pas des billets auxquels la prescription de cinq ans est applicable. [1]

Par son action, le demandeur réclamait $200, montant d'un acte de reconnaissance ou Billet passé en brevêt à Montréal, le 22 Janvier 1858, Mtre. J. Belle et son confrère Notaires, et laquelle somme le défendeur devait lui payer à son ordre et à demande.

Le défendeur plaida la prescription de cinq ans,—Sec. 86 du Chapitre 83 St. Ref. du B. C.

La Cour Supérieure à Montréal, (Beaudry, J.) a maintenu l'exception de prescription, et a déclaré le billet prescrit.

Ce jugement est motivé comme suit :

" La Cour, après avoir entendu les parties par leurs avocats sur le mérite de " la contestation en cette cause, examiné la procédure, les pièces produites et la " preuve, et sur le tout mûrement délibéré, considérant que le billet sur lequel " la présente action est basée, est payable à l'ordre du Demandeur à demande, " et quoique notarié est susceptible de transport par endossement et sujet à la " prescription de cinq ans en vertu des dispositions exprimées dans le chapitre 64 " des Statuts Refondus pour le Bas-Canada, que nulle action n'a été portée sur " ce billet dans les cinq années de sa date et que conséquemment ce billet est " prescrit; maintient l'exception en premier lieu plaidée par le dit Défendeur et " déboute l'action du dit Demandeur avec dépens.

Le Demandeur ayant interjetté appel de ce jugement, la Cour du Banc de la Reine a renversé ce jugement en donnant les observations suivantes :

DRUMMOND, J., dissenting, held that according to our law and the Code the document was a promissory note, and subject to the five years' prescription. His Honour referred to a former decision in appeal, in which a contrary doctrine had been laid down. That decision, however, he believed to be incorrect in principle.

BADGLEY, J., felt that this was an awkward case from the circumstance of the judgment rendered by this Court in Seguin and Bergevin in 1865. The action was on a note *en brevêt*, being the common form of a promissory note before two

[1] Vide,—15 L. C. Reports, p. 438. 7 L. C. Jurist pp. 289 and 339. 3 L. C. J. p. 257. 6 L. C. J. p. 257. 9 L. C. Rep. p. 418.

J. Bte. Pigeon, et J. B. Dagenais.

notaries, but containing nothing more or less than an agreement to pay a sum of money. It contained the substance of an English promissory note, but in another form. The difficulty in the case was this: We have a law of prescription applying to promissory notes which says that if no action be brought within five years the claim is lost. A case similar to the present came before this Court in 1865, and was decided by Justices Duval, Aylwin, Meredith, Drummond and Mondelet, and they hold that prescription did not apply to a document such as this, and they reversed the judgment of the Court below. He, Mr. Justice Badgley, must say that his own opinion was in favor of applying the law of prescription to these promissory notes, until the precedent referred to was established. He had no doubt that many cases had occurred since that decision and the jurisprudence then settled by the Court of Appeals had been acted upon. The judgment of the Court of Appeals stated on that occasion most distinctly that this was not a form of promissory note to which our Statute of Limitations applied at all. He considered it better to follow the old rule—*stare super vias antiquas*—than to make a new rule now. The case of 1865 and this case were precisely similar in every respect. If there was anything wrong in the rule then laid down, the Legislature might interpose and correct it. He was, therefore, for confirming the judgment.

CARON, J., concurred with Badgley, J., in holding the precedent binding, and believed the case referred to had been correctly decided.

MONK, J., said the only question was whether the prescription of five years applied. He was inclined to think it did; but the judges were brought face to face with a decision of this Court holding the reverse. It was a little embarrassing to find one of the judges who sat on that occasion taking a different view now. And although one decision if it were utterly unfounded or erroneous did not make a jurisprudence, yet that was not the case here, for some of the learned judges who sat in the case of 1865, were still strongly of opinion that that judgment was correct. This was quite enough to make him, Mr. Justice Monk, hesitate in departing from their views, and to incline him to abide by the former decision, and more specially as there was a great deal to be said on both sides.

Le jugement de la Cour d'Appel est motivé en ces termes:

" La Cour, considérant que le document sur lequel repose l'action du demandeur en Cour de première instance, n'est pas un billet dans le sens de la loi de ce pays, à l'égard duquel la prescription invoquée en cette cause puisse s'appliquer.

" Considérant par conséquent, qu'il y a erreur dans le jugement rendu par la Cour Supérieure à Montréal le 1er Juin 1870, en autant qu'il maintient la première exception du dit défendeur intimé, dans et par laquelle ce dernier invoquait la prescription de cinq ans applicable aux billets promissoires, et déboute le demandeur de son action, cette Cour casse, et met de coté le dit jugement et procédant à rendre le jugement que la dite Cour de première instance eut dû rendre, déboute le défendeur intimé de son exception de prescription, et maintenant l'action du demandeur condamne le dit défendeur."

L'Honorable juge en Chef Duval, se trouvant absent, a transmis par écrit son concours dans ce jugement.

Dissentiente, l'Honorable juge Drummond.

Autorité du demandeur appelant.

Le jugement rendu par la Cour d'Appel, le 7 Mars 1865 dans la cause de Séguin dit Lassalle et Bergevin dit Langevin rapportée au 15ème volume des Lower-Canada Reports, page 438, ainsi que les autorités citées dans la même cause. La Cour présidée par les honorables juges Duval, Aylwin, Meredith, Drummond et Mondelet, a formellement décidé que les billets promissoires notariés (en brevêt) ne sont pas des billets promissoires selon le statut concernant les lettres de change et les billets auxquels la prescription de cinq ans est applicable, renversant ainsi le jugement de la Cour Inférieure (Smith juge).

Jugement renversé.

Belanger & Desnoyers, Avocats de l'Appelant.
Dorion, Dorion & Geoffrion, Avocats de l'Intimé.
(P.R.L.)

SUPERIOR COURT, 1872.

MONTREAL, 31st OCTOBER, 1872.

Coram TORRANCE, J.

No. 507.

In re *Pierre Gravel*, Insolvent, *and A. B. Stewart*, Assignee, *and C. A. Vilbon*, Petitioner.

HELD :—That a petition calling in question the validity of an assignment under the Insolvent Act of 1869, to an official assignee, must be served upon the insolvent as well as upon the assignee.

The petitioner complained that the insolvent living at Hochelaga, in the county of Hochelaga, on the 14th October, 1872, made an assignment under the Insolvent Act, 1869, to A. B. Stewart, official assignee, resident in the City of Montreal, whereas petitioner was the only resident official assignee at Hochelaga, and under the Insolvent Act, 1869, s. 2, the assignment in question was an absolute nullity.

The prayer of the petition was that A. B. Stewart be prohibited from acting or proceeding on the assignment.

The Court was about to reject the petition quant à present, on the ground that notice should have been given to Pierre Gravel, the insolvent, which had not been done, but on the application of petitioner with the acquiescence of the assignee Stewart, leave was given to Gravel to appear, which he did.

Girouard & Dugas, for petitioner.
F. Ca sidy, Q.C., for assignee.
(J.K.)

SUPERIOR COURT, 1872.

MONTREAL, 31st OCTOBER, 1872.

Coram TORRANCE, J.

No. 1498.

Contant vs. *Lamontagne et al.*

HELD:—That plaintiff will not be allowed to amend his declaration by adding allegations having reference to matters occurring subsequent to the institution of the action.

The action was instituted in August, 1871. On the 17th October, 1872, the plaintiff made a motion to amend his declaration "puis darein continuans" (*sic*) in adding at 14th line of the 3rd page, as an additional paragraph, the following words: "que de fait le vingt septembre dernier, (1872) le demandeur "poursuivi par la Corporation de Montréal, comme susdit sous No. 1157 des "dossiers do cette Cour, aurait été condamné à payer la somme de quatre cent "soixante et quatorze piastres et quarante-sept centins, etc."

The Court held that such an amendment could not be made.

Motion rejected.

J. Doutre, Q.C., for plaintiff.
Bondy, for defendant.
(J.K.)

SUPERIOR COURT, 1872.

MONTREAL, 31ST OCTOBER, 1872.

Coram TORRANCE, J.

No. 1521.

Dubois et vir vs. *Stoll.*

HELD:—That an allegation in a *defense en droit* denying the allegations of the plaintiffs' declaration is irregular, and must be struck out.

The defendant fyled a *défense au fond en droit* to the action, and alleged "que les allégations fussent-elles vraies ce que le défendeur nie, sont insuffisantes en loi," &c.

The plaintiffs moved the Court to reject the *défense en droit* as containing allegations of fact.

The Court sustained the motion, but allowed defendant to amend the *défense* by striking out the objectionable words, citing *Addison* vs. *Bergeron*, 1 L. C. J. 196, defendant to pay costs of motion, and leave given him to move to amend *défense*.

Jetté & Archambault, for plaintiffs.
Longpré & Houle, for defendant.
(J. K.)

SUPERIOR COURT, 1872.

MONTREAL, 29TH FEBRUARY, 1872.

Coram MACKAY, J.

No. 1430.

Ogilvy et al. vs. *Jones.*

HELD:—In the case of an enquête, on a petition to quash a capias, if no articulation of facts be fyled the party adducing evidence must bear the costs occasioned thereby, under Article 215 of the Code of Civil Procedure.

In this case the defendant, being arrested under a writ of *capias ad respondendum*, petitioned to quash proceedings. Answers and replications were fyled, but no articulation of facts upon either side. The parties then went to *enquête*. The defendant having succeeded in getting the *capias* quashed, proceeded to have his bill of costs taxed. The Prothonotary refused to allow the sum of $54.88, being costs incurred by defendant at enquête, upon the ground that no articulation of facts had been fyled.

Defendant moved to revise, contending that in summary matters, such as the petition in question, and proceedings thereon, no articulations of facts were required or contemplated by law, and that the Article 215 did not apply.

Motion to revise rejected.

George Macrae, for plaintiff.
L. N. Benjamin, for defendant.
(J. L. M.)

COURT OF QUEEN'S BENCH, 1872.

(APPEAL SIDE.)

MONTREAL, SEPTEMBER, 1872.

IN CHAMBERS.

Coram MONK, J.

No. 59.

OGILVY ET AL. APPELLANTS;

AND

JONES, RESPONDENT.

HELD:—A party is entitled to have his costs for printing in appeal taxed at the rate of two dollars per page, even although he may have paid a less sum per page to his printer.

In this case, the clerk of appeals having taxed the respondent's bill allowing him at the rate of two dollars per page for his factum, the appellant petitioned to revise, asking that the sum of $92.00, allowed for "printer's bill," be reduced to $69.00, being the amount paid by respondent to his printer, as proved by an affidavit produced with the petition.

Petition rejected.

George Macrae, for appellant and petitioner.
L. N. Benjamin, for respondent.
(J. L. M.)

COUR SUPERIEURE, 1872.

MONTRÉAL, 19 AVRIL, 1872.

Coram MACKAY, J.

No. 1494.

Eutrope Chartier et al., vs. La Compagnie du Grand Tronc de Chemin de Fer du Canada.

JUGE:—Qu'une Compagnie de chemin de fer n'est pas responsable pour la perte des effets ou marchandises qu'elle a entrepris de transporter, lorsque ces effets ou marchandises ont été égarés sur un parcours étranger à sa ligne et hors les limites de sa dernière station.

2o. Qu'une lettre de voiture, sur le dos de laquelle se trouve une clause conditionnelle limitant de cette manière la responsabilité d'une Compagnie de chemin de fer, a pour effet de lier l'expéditeur si ce dernier a signé sans réserve la lettre de voiture.

Eutrope Chartier et Davino Aluisi, statuaires de la Cité de Montréal, demandeurs en cette cause, achètent de J. & J. Nardini, marchands de statues, du même lieu, le fond de magasin de ces derniers et leur succédant dans tous leurs droits et actions.

Dans le courant de janvier (1871) les demandeurs vendent à Patrick Corrigan, Curé de la ville de Jersey-City, dans l'Etat de New Jersey, E. U., deux statues en plâtre de la valeur de $45.00.

Dans le courant de février (1871) ces deux statues sont déposées à la station de la défenderesse, à Montréal, pour être, par cette dernière, expédiées au lieu de leur destination. Le reçu constatant le départ des dites deux statues, porte, par inadvertance de la part des employés des demandeurs, la signature de "J. Nardini." Mais il est spécialement allégué que les demandeurs en sont les seuls et véritables propriétaires.

Après les délais convenables, il est constaté que les deux statues déposées au dépôt de la défenderesse ne sont pas parvenues à leur destination, et les demandeurs en concluent qu'elles ont été égarées. Les demandeurs, par leur action, réclament donc de la défenderesse: 1o. le prix de deux statues, soit: $45; 2o. la somme de $55.00 comme compensation des dommages résultant de l'imprévoyance et la négligence des employés de la défenderesse.

La défenderesse a répondu à l'action des demandeurs par une Exception et Défense alléguant: "que les dites deux boîtes (*two boxes plaster statutes*) ont été transportées régulièrement et avec diligence dans les délais convenables, à la ville de St. Jean, dernière station de la défenderesse, sur son chemin de fer, *viâ* St. Albans, et que là, elles furent remises en bon ordre et condition, et en temps convenable à la Compagnie de chemin de fer connue comme: "*The Vermont Central Railway Company*," laquelle les a de suite, et en temps convenable, transportées en bon ordre et condition jusqu'à New York, le point le plus rapproché de Jersey-City."

La contestation étant liée, les demandeurs prouvèrent à leur enquête, par la production de la lettre de voiture et par l'audition de plusieurs témoins, la réception des statues, et l'engagement pris par la défenderesse de transporter ou faire transporter les dites statues jusqu'à Jersey-City. Mais sur le dos de ce *bill of lading* se trouvent plusieurs clauses spéciales limitant la responsabilité de la

Compagnie, celle-ci entre autres: "The Company will not be responsible for any goods mis-sent, unless they are consigned to a station on their Railway." La plupart de ces *notices spéciales* sont exorbitantes du droit commun, ayant pour effet de limiter ou restreindre la responsabilité et les obligations imposées par la loi aux voituriers tant par eau que par terre. Ajoutons qu'elles sont imprimées en très-petit caractère et qu'elles remplissent un large espace, ce qui rend assez difficile la tâche prudente incombant à l'expéditeur, souvent illettré ou souvent trop pressé pour lire ces commentaires spéciaux au bas desquels il met sa signature sans connaître toute la portée de l'engagement auquel il s'astreint.

Les principaux points de droit soulevés lors de l'audition de cette cause sont les suivants:

1o. Le voiturier peut-il, par des conventions particulières, limiter sa responsabilité pour le transport des effets qui lui sont confiés?

Autorités citées par la défenderesse:

Code Civil du B. C., Art. 1676.
Rebel. Lég. des Chemins de fer, p. 282, No. 506.
Troplong III, Nos. 926, 942.
Duvergier II, Louage, No. 324, 325.
Persil & Croissant, Commissionnaires, pp. 185, 186.
Pardessus. Droit Com. II, No. 538.

2o. Les parties sont-elles libres de régler les conditions auxquelles doit être effectué le transport dont l'une se charge envers l'autre?

Pardessus. Droit Com. Nos. 539, 576.
Vanhufel. Traité, Contrat, Louage, pp. 66, 72, 73.
Dalloz. Dicti. Juris. Vo. Commissionnaires, No. 178, p. 429.
Angell. Law of Carriers. Sec. 247, 248, 249, 251, 330.
Story. On Bailments. Ed. 863, §§ 541, 549, 556, 557, 558 et suiv.
Parsons. On Contracts. Ed. 1864 II. Sec. 15, p. 223.
Redfield. Law of Railways. Ed. 1869, II, 88, sec. 177 et suiv.
VI. L. C. Jurist p. 170. Torrance et al, vs. Allan.
Gelinas vs. le Grand Tronc, jugé en Appel, 9 sept. 1869.
Gutman vs. le Grand Tronc, jugé en Appel 8 sept. 1871.

3o. La responsabilité du voiturier étant limitée par convention particulière, le fardeau de la preuve de négligence contre le voiturier, tombe-il sur l'expéditeur ou consignataire des effets?

Troplong. Louage, III, No. 942.
Bourjon. Droit Com. de la France, II, 494.
Vanhufel. Contrat de Louage, p. 91.
Rebel. Leg. Chemin de fer, p. 299, No. 530.
Angell. Law of Carriers, sec. 247, 276.
Story. On Bailments, § 573.
Greenleaf. On Evidence II, p. 211, § 215.

4o. Les Compagnies de chemin de fer sont-elles responsables des effets qui leur sont confiés pour être transportés au-delà des limites de leur chemin, sur tout s'il existe une convention spéciale à cet effet?

Redfield. On Railways II, 112, § 180.

Simpson et al. vs. Bowie et al.

Parsons. On contracts II, 212, Book 3, ch. II.
7 Exchequer. Fowles vs. Great Western R. R. Co., rapporté aussi dans 16 English L. & E. Naph. p. 340.
Carr vs. Lancashire & Yorkshire R. R.
Autorités citées par les demandeurs :
Code Civil B. C. Art. 1676.
Huston vs. La Cie du Grand Tronc. L. C. Jurist III, 269.
Harris vs. Edmonstone. L. C. Jurist, IV, 40.
Le Grand Tronc vs. Mountain. L. C. Jurist, IV, 173.
Samuel vs. Edmonstone. L. C. Jurist, I, 89.
Troplong. Echange et Louage III, § 155. Ed. franc.
Le même, p. 155, § 121.
Pardessus. Droit. Com. II, 461.
Chitty. On Carriers, pp. 124, 130, 137, 144, 148 et suiv.
Le même, p. 150, s'exprime ainsi :

" Where Railway Companies hold themselves out as carriers, and receive goods to be carried to places beyond the limits of their own line, and even beyond the realm, they are responsible for a loss of, or injury to the goods, although the same may not have happened on their own line of railway."

Le jugement est formulé en ces termes :

" Considering that, if plaintiffs have the right of Nardini, these do not amount to any thing to warrant a condemnation of defendants, who are proved to have done all they promised towards said Nardini ; that the statues referred to were, by defendants, at the end of their railway line, delivered duly, for further carriage to the Vermont Central Railway Company for whose misdoings or wrongs defendants cannot be held responsible ; in the delivering of said statues to the said Vermont Central Railway Company, the defendants having acted merely as *mandataires* of said Nardini, under their contract with him and the condition, particular, of it in this respect ;

Considering that defendants have proved their first Plea or Exception to extent sufficient to distroy plaintiffs' action, doth dismiss said action, &c.

E. Larcau, avocat des demandeurs.
Cartier & Paminville, avocats de la défenderesse.
(E.L.)

SUPERIOR COURT, 1872.

MONTREAL, 31ST OCTOBER, 1872.

Coram TORRANCE, J.

No. 2018.

Simpson et al., vs. *Bowie et al.*

HELD :—That the option of a party that the case shall be inscribed at the same time for proof and for final hearing on the merits immediately after proof, in the terms of C.C. P. 243, is sufficiently made by service on the opposite party of an inscription of the cause upon the role de droit for Enquête and hearing on the merits at the same time.

F. J. Keller, for plaintiffs.
Kelly & Dorion, for defendants.

NOTE.—A similar decision was given at the same time in No. 1829, The Trust & Loan Co, vs. Drummond, & Drummond, [oppt. It was intimated at the same time that Mackay and Beaudry, JJ. concurred.
(J.K.)

SUPERIOR COURT, 1872.

BEAUHARNOIS, 19TH MARCH, 1872.

Coram DUNKIN, J.

No. 641.

A. V. Delaporte et al., vs. *John Madden.*

HELD:—That a postmaster is responsible for a registered letter lost through his neglect or that of his minor son, employed by him as his assistant, in leaving it in an exposed place in his office, contrary to the regulations of the Post Office Department.

This suit was issued, after notice of a month to the defendant as a public officer, to recover $575, the amount said to have been enclosed in a letter mailed and registered in the Valleyfield Post Office, of which defendant was postmaster, on the 30th of September, 1870, by the firm of J. & A. Anderson, of Valleyfield, and addressed to A. V. Delaporte & Co., of Toronto. The declaration sets out these facts, and alleges that the letter was regularly mailed, 18 cents paid for postage, and 2 cents for registration, and a receipt duly given, but that defendant neglected to forward it by the mail as he was bound to do, and was guilty of such carelessness and negligence that the letter with its contents was wholly lost. A second count follows in which the same facts are stated, but formal mention is made of William Madden, defendant's minor son, and his assistant in the post office, as acting for him in this matter, and charging the carelessness and negligence on both of them. A third count charges him with receiving the letter, and the 20 cents for taking care of it and mailing it, without saying anything about his being postmaster.

The defendant by his pleas, besides a general denial, specially denied that the letter contained money, or was so represented to him, and maintained that he had given to the letter all necessary care, and that as postmaster he was answerable only to Her Majesty, and not to plaintiffs.

The plaintiffs examined the defendant, his minor son, Mr. King the post office inspector, and the two Andersons. The defendant examined no witnesses. The case is fully set out in the judgment rendered by His Honor Mr. Justice Dunkin. The following are the authorities cited by the plaintiffs' counsel;

Civil Code, Arts. 1053 and 1054.
Statutes of Canada, 31 Vict. cap. 10, sec. 39.
Campbell vs. *McPherson*, 6 Upper Canada Reports (O. S.) 34.
Lane vs. *Cotton* et al., 1 Lord Raymond, 646, and 1 Salkeld, 17.
Whitefield vs. *Lord LeDespencer* et al., Cowper, 765.
Carey vs. *Bawless*, 13 Upper Canada B. R., 285.
Addison on Torts (3rd Edition) 1870, 15 and 16.
Shearman & Redfield on Negligence (1869), sec. 180, pp. 211 and 212.
Ford vs. *Parker*, 4 Ohio State, 576.
Angell on Carriers, (4th Ed.) sec. 119.
Dunlop vs. *Munro*, 7 Cranch, 242.
Bolan vs. *Williamson*, 2 Bay, 551.
Schroyer vs. *Lynch*, 8 Watts, 453.
Smith on Law of Reparations (1864), chap. 7, pp. 175 and 179.

Dinsmore et al. vs. John Madden.

DUNKIN, J., (after setting out the facts and pleadings):—It is in evidence that by the rules of the Post Office Department, known to the defendant, postmasters were bound, whenever not required to have their office in a separate room, to keep mailed letters in a safe place and under key; and further, whenever an office might be kept in a store or other place accessible to the public, to suffer no courier or unauthorized person to come near enough to the mails to be able to handle or examine their contents in any way; in a word, to allow no one whatever, under any circumstances, except himself or his sworn assistant, to have access to letters or journals in the office, or the key of the mail bag; that the defendant, solely on his own responsibility, had for some time employed his son, then in his 19th year, as his assistant, leaving to him nearly all the work of the office; that the case of pigeon holes for letters, &c., had been moved, again on his own sole responsibility, from the least exposed corner of his store to a place more convenient to himself and his son, but most exposed to access of all parties frequenting the store; that close to this case, and belonging to it, there was a shallow, open box, in which registered letters were kept until they were mailed; that about noon of the day alleged Arthur Anderson delivered the letter in question, containing $575 in notes, addressed to the plaintiffs, to William Madden, desiring him to weigh and register it; that it was found to weigh between 2½ and 3 ounces, and accordingly six rates of postage, being 18 cents, together with the registration fee of 2 cents more (one third of such 20 cents forming the defendant's allowance, as postmaster, thereon), were paid on it, and it was duly registered, stamped and entered in the Registered Letter Book, and a certificate of registry in the usual form was given; that William Madden put it into the exposed box, and soon after, by the defendant's direction, went away for dinner, leaving two persons in the store, and his father either in the store or about the doorway; that the defendant did not stay in the store until his son's return; that there was nothing to hinder any one coming in, from seeing and taking the letter; that the son on his return soon after set himself to make up the mail and at once missed the letter; that it was earnestly searched for but not found; that the defendant instantly telegraphed for the post office inspector who went up immediately, and made all further inquiries in his power; that directly after the telegram was sent, it being then about two in the afternoon, Wm. Madden went to the Andersons to tell them; inquired how much was in the letter, and was told by them the amount as now sued on, and that the letter was never found, nor the party abstracting it detected.

At the argument no case was cited as having ever come before a Court of Law in this Province involving the question of a postmaster's liability for a lost letter, nor is the Court aware that any ever has been.

In the first English case bearing on the subject, that of Lane vs. Cotton et al. (1 Raymond, 64), action was brought against the postmaster general, whose office was then (A.D. 1699) of recent creation, to recover the value of eight exchequer bills enclosed in a mailed letter; no mention to the party who personally took the letter at the post office, of its containing money value being alleged. No objection seems to have been raised on this account. Chief Justice

Holt was for giving judgment against defendants. But the other three judges decided the case otherwise, holding them in fact as high public functionaries not liable for a failure which was not traced personally to themselves.

In the next and ruling case on the subject, that of Whitefield *vs.* Le Despencer et al. (Cowper 754), A.D., 1778, suit was brought to recover again from the postmaster general £100, the amount of a note enclosed in a letter that had been stolen by a letter sorter who had been hanged for the felony. The Court unanimously adhered to the precedent of the former case. In delivering judgment Lord Mansfield used these remarkable works: "As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury is liable in an action for the injury sustained. If a man who receives a penny to carry the letters to the post office loses any of them he is answerable; so is the sorter in his department: and so is the postmaster for any fault of his own."

Upon the strength of these two cases it has ever since been admitted in England that the postmaster general is not liable for loss of a letter, unless indeed it were (as it is hard to imagine it could be) from fault of his own; and on the other hand, that every post office employé is answerable for whatever may result from his own fault though for nothing more.

The same doctrine has been emphatically held by the Courts of that part of the late Province of Canada, formerly Upper Canada and now Ontario. In Campbell *vs* McPherson (6 U. C. Q. B. O. S., p. 34) the sender of a lost letter containing £12 10*s.* and marked "money," sued the receiving post master as guilty of personal laches and was met by a demurrer on the sole ground of want of averment or presumption that the letter was the plaintiff's property, all parties admitting the liability otherwise. In Carey *vs.* Lawless (13 U. C. Q. B., p. 285) the party to whom the lost letter was addressed, the same containing £17 18 1½, and no averment being made of its having been marked "money," or the fact of its containing money, the action was again based on alleged laches of defendant, and upon demurrer the Court held the suit well brought. In rendering this judgment, Judge (since C. J.) Draper, after citing Lord Mansfield's expression above quoted said:—"If this be law, and I never heard it questioned, it seems difficult to sustain the causes of demurrer. If a letter being sent to the post office can be lost or destroyed by the negligence of the postmaster under circumstances not amounting to felony, I do not understand why the postmaster is not to answer for it in damages to the party injured."

It was contended at the argument that a postmaster being the mandatory of the Government, which is not and cannot be held liable for lost letters, must share its privilege in this respect. To this the sufficient answer is that acting within the bounds of his mandate (C. C., 1715, 1727 cited) he does so. Government, on obvious grounds of public policy, assumes no liability as insuring letters, and cannot in any case be liable as for laches, by reason of the presumption *juris et de jure* that the Crown can do no wrong. Post office employés are no more liable as insuring letters than the Government is; and unless for personal laches cannot be made liable. But they one and all may fail of duty; and whenever they do so fail, they are beyond the bounds of their mandate, and so become

Delaporte et al vs John Madden.

liable. Even the precautionary enactment of the Post Office Act (3 Vic. c. 10, sec. 39) that the "postmaster general shall not be liable to any party for the loss of any letter, packet or other thing sent by post," cannot any more than the old ruling of the English Courts, which it merely reproduces, be regarded as meant to cover the all but impossible case of such loss having occurred from personal fault on his own part.

Attempt was made to show that the plaintiffs are not in this case the parties having interest. But by sec. 39 of the Post Office Act it is expressly enacted, as indeed was the legal presumption before, that from the time any letter or thing is mailed it is the property of the party to whom it is addressed.

The parties mailing this letter have been examined in this case, and nothing they say at all shakes the presumption of property thus established by statute (as well for this purpose as for others) in behalf of the plaintiffs.

It was also urged that upon the principle laid down by Article 1677 of the Civil Code in favor of carriers, a postman ought not to be held liable for the contents of a lost letter, under whatever circumstances, unless he has been distinctly informed beforehand of their amount, and that in this instance the defendant was not so informed. But the cases are not parallel. The carrier is to become liable as an insurer, and must establish the fortuitous event or irresistible force in order to clear himself of that liability, The postmaster is not liable as an insurer and can only be called to account on proof made against him of personal fault. No matter what the value of any letter is, if only he keeps clear of proven negligence and failure of duty, he is clear of liability. In the cases above cited, accordingly, notice to the postmaster of the contents of the letter has been regarded as immaterial. Not to say that in this case the proof made as to the weight of the letter, its registration, the knowledge of the postmaster and his son of the parties sending and addressed, and in respect of former letters of the same sort, and the attendant circumstances generally, shew that the post master (through his minor son, for whom he is responsible) was very sufficiently advertised of the care he ought to have taken of this letter, and unfortunately for himself failed to take.

The defendant's honesty is not impeached, but the loss of this letter containing the amount demanded by this action and the plaintiff's property is clearly traced back to negligence and default of duty, for which the defendant is in law liable: in great part by reason of his own acts and omissions, and for the remainder as liable for his minor son acting under his orders.

The judgment is *motivé* as follows:—"Considering that it is established in evidence that the letter in the plaintiff's declaration in this cause mentioned, containing a value of $575 in notes, as in and by the said declaration is set forth, was duly mailed to the address of the plaintiffs on the 20th day of September, 1870, at the Post Office at Valleyfield, the defendant then and there being the postmaster thereof; that the said letter then and there being with such contents thereof the property of the plaintiffs, was with such contents, on the said 30th day of September, 1870, wholly lost, through gross neglect, carelessness, and violation of the known orders of the Post Office Department on the part of the said defendant, and for which he was and is by law answerable in damages

towards the said plaintiffs; and that neither the said letter nor such money contents thereof have since been found; and considering that the plaintiffs have suffered by such wrong doing and default for which the said defendant is so answerable to them in damage to the said amount of $575, doth condemn, etc.

Judgment for plaiotiff.

John J. Maclaren, for plaintiffs.
Branchaud & Cayley, for defendant.
(J. J. MCL.)

COURT OF REVIEW, 1872.

MONTREAL, 28th JUNE, 1872.

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

No. 1317.

Bethune vs. *Chapleau & al. & Fraser*, oppt. & *Thomas*, Int. party.

HELD:—1o That a party claiming lands under seizure cannot do so by means of an Intervention, during the dependency of proceedings on an oppositon *afin de distraire* fyled by another party. 2o. That an Intervention fyled under such circumstances, on a provisional order of a judge will be rejected on a motion made to that effect.

This was a hearing in Review of a judgment of the Superior Court, at Montreal, rendered on the 30th of March, 1872, by TORRANCE, J., under the circumstances disclosed in the remarks of counsel.

Laflamme, Q. C., for intervening party:

Le 15 février 1870, le demandeur fit émaner un bref de *fieri facias de terris* contre le défendeur en cette cause, en satisfaction d'un jugement qu'il avait obtenu contre lui conjointement avec J. A. Chapleau, écuier, le 19 juin 1869; certains immeubles furent saisis et la vente en fut fixée et annoncée pour le 28 juin 1869.

Cette vente fut arrêtée par une opposition afin d'annuler, produite par le dit Alexandre Fraser le 4 juin 1869.

L'opposant allégnait un certain acte de vente de John Fraser à lui en date du 15 septembre 1863 de certains immeubles dans lesquels se trouvent comprises les rentes constituées dont l'oppossant rèclamait la propriété, demandant à en être déclaré propriétaire.

L'opposition fut contestée par le demandeur et elle était encore pendante quand le dit John Fraser intenta devant cette Cour sous le No. 920 des dossiers de cette dite Cour une action pour résilier l'acte de vente du 15 septembre 1863 par lui consentit à l'opposant. Henry Thomas intervint dans la dite cause No. 920 demandant la résiliation du dit acte du 15 septembre 1863 en sa faveur et à ce qu'il fut déclaré propriétaire des immeubles mentionnés au dit acte du 15 septembre 1863, alléguant un acte de transport du dit John Fraser à lui dit intervenant en date du 21 juin 1865.

Bethune vs. Chapleau et al

Le 29 décembre 1871 jugement intervint dans la dite cause No. 920 résiliant acte du 15 septembre 1863, et faisant droit sur l'intervention produite dans la dite cause, la maintint et déclara propriétaire des immeubles y désignés le dit Henry Thomas, l'intervenant.

Le 5 février 1872 le dit Henry Thomas intervint dans la présente cause pour s'opposer à la vente des rentes constituées saisies par le bref *de fieri facias de terris* du 15 février 1870, et allégua à l'appui de son intervention l'acte de transport à lui consentit par le dit John Thomas le 21 juin 1865, ainsi que le jugement rendu dans la cause No. 920 sur son intervention.

Le 18 mars 1872 le demandeur dans la présente cause fit motion que l'intervention du dit Henry Thomas fut rejetée avec frais, attendu que la dite intervention était en réalité une opposition à la saisie et à la vente des immeubles saisis en cette cause et annoncés pour être vendus le 28 juin 1870, et qu'elle aurait dû être produite au moins quinze jours avant la dite vente.

Le 30 mars, jugement fut rendu sur la dite motion, renvoyant la dite intervention avec frais. C'est de ce jugement que l'intervenant appelle.

L'intervenant prétend que ce jugement est erroné.

Les parties, demandeur et opposant, étaient engagés dans une contestation relativement au titre de la propriété saisie; une opposition avait été faite et produite régulièrement demandant la nullité de la saisie, attendu que l'opposant se prétendait propriétaire et alléguait un titre; de son côté le demandeur prétendait que la saisie était bonne et que la propriété appartenait au défendeur saisi. Dans cette contestation le dit intervenant, qui avait seul droit à la propriété, avait assurément le droit d'intervenir pour repousser les prétentitons des parties en contestation et faire constater son droit exclusif à la propriété, et, par suite faire renvoyer les prétentions de l'opposant et du demandeur. L'intervention fut allouée par son honneur le juge Mackay.

Cette intervention une fois admise ne pourrait être rejetée que d'après la procédure ordinaire sur le mérite.

L'intervenant avait certainement le droit de voir à ce que le jugement ne fut pas rendu, adjugeant sa propriété à l'opposant ou au défendeur, et il ne pouvait le faire que par intervention. Cette intervention ne pouvait être renvoyée qu'après une contestation et non pas sur une simple motion.

Bétournay for Plaintiffs:—L'intervenant, Henry Thomas, demande la révision du jugement rendu en cette cause le 30 mars dernier sur la motion du demandeur. Voici quels sont les faits en la présente instance:

Le demandeur ayant obtenu un jugement contre les défendeurs, fit d'abord exécuter son jugement contre les meubles des défendeurs, mais il ne s'en trouve aucun: ceci appert par son retour de carence.

Le demandeur fit alors émaner un bref d'exécution de terris en vertu duquel les rentes constituées représentant les cens, rentes et autres droits seigneuriaux des seigneuries de St. Marc, de Cournoyer et Contre-Cœur furent saisies sur l'honorable John Fraser un des défendeurs. Par la loi ces rentes sont immeubles et pour en faire faire la vente par autorité de justice, il faut suivre les règles indiquées et données pour la vente des biens immeubles.

La vente fut fixée pour le 28 juin 1869, mais elle ne put avoir lieu par suite d'une opposition afin d'annuler faite et produite par Alexandre-Fraser.

Après la production de cette opposition, le demandeur la contesta, et la cause fut inscrite pour enquête et mérite, et les parties entendues le sept février dernier, son honneur M. le juge Beaudry sur le banc. Le huit, savoir le lendemain du jour que cette cause avait été entendue et prise en délibéré, l'intervenant fit signifier à l'avocat du demandeur une requête en intervention, et la dite intervention fut introduite au dossier, et la cause rayée du rôle des délibérés.

Comme on le voit, les immeubles saisis sur le défendeur Fraser devaient être vendus le 28 juin 1869.

Or par son intervention produite dans la cause le huit février 1872, Henry Thomas se porte réellement opposant. Il y prend les conclusions suivantes :

"Pourquoi le dit requérant conclut à ce que vos honneurs lui permettent d'in-
"tervenir dans la présente cause et à s'opposer à la vente des rentes constituées
"saisies et à être vendues en cette cause en vertu du bref de *fieri facias de terris*
"émané en icelle, à ce que la saisie pratiquée en cette cause soit déclarée nulle et
"de nul effet; à ce que lui seul dit requérant soit déclaré être le seul et vrai
"propriétaire des dites rentes constituées ainsi saisies, le tout avec dépens."

Il vient donc dans la cause, sous la fausse couleur d'une intervention, pour opposer la vente des immeubles saisis sur un des défendeurs, et ce en contravention directe à l'article 652 du Code de Procédure qui statue que toute opposition à la saisie, ou à la vente des immeubles ou rente "doit être produite au plus "tard le quinzième jour avant celui fixé pour la vente."

"L'opposition produite après ce terme ne peut arrêter la vente."……

Pour ces causes le demandeur s'est adressé à la Cour par motion ou requête sommaire, et a demandé le renvoi de la dite intervention comme ayant été filée irrégulièrement, illégalement et contrairement à la loi : cette motion fut accordée par jugement en date du trente mars dernier, et c'est de ce jugement que Henry Thomas demande la Révision.

Le demandeur soumet que ce jugement est juste, équitable et suivant la loi.

D'abord l'article susdité 652 de notre Code de Procédure est positif; il n'y a rien de plus formel. Si donc le jugement dont est appel allait être infirmé, sous prétexte que toute personne intéressée dans l'issue d'un procès pendant, a droit d'y être reçue partie intervenante, afin d'y faire valoir ses intérêts, (art. 154, C. P. C.) il s'en suivrait que l'exécution des jugements deviendrait impossible. Il est un fait bien notoire qu'une moitié des oppositions afin d'annuler n'est produite, nonobstant la déposition sous serment qui y est attachée, que pour retarder la procédure et faire obtenir du délai. Or si la Cour soutenait les prétentions de l'intervenant, la conséquence serait que, au moment ou une opposition devrait être déboutée, un tiers interviendrait pour se substituer au lieu et place de l'opposant dont l'opposition serait sur le point d'être déboutée. Il arriverait ainsi dans la cause en dehors de tous les délais fixés, sans produire l'affidavit requis à l'opposition pour démontrer sa bonne foi et son droit d'opposer. Il est vrai qu'après avoir retardé les procédés pendant quatre à cinq mois, son intervention serait déboutée; mais alors un autre viendrait par un semblable procédé, et interventions sur interventions pourraient ainsi être introduites

Michel Girard vs. Louis Bélanger.

dans une cause. Toutes les règles et lois de Procédure deviendraient une lettre morte, et pas un créancier ne pourrait jamais réussir à faire et exécuter un jugement contre un débiteur frauduleux. Si d'un côté, un tiers peut intervenir dans une cause où il peut avoir des droits à protéger, d'un autre côté il y a des lois et des règles de Procédure qui régissent le mode d'opposer une vente, et aucune vente d'immeubles ne peut être suspendue en contravention à telles lois et règles. D'ailleurs il ne peut pas y avoir préjudice; l'article 652 du Code de Procédure déjà cité prévoit à la protection des intérêts de la partie qui a négligé de se pourvoir en temps opportun.

Sur le tout le demandeur soumet respectueusement que le jugement du trente mars dernier doit être confirmé avec dépens contre l'appelant.

The Court of Review unanimously confirmed the judgment complained of.

Judgment of the S. C. confirmed.

Louis Bétournay, for plaintiff.

Laflamme, Huntington & Laflamme, for intervening party.

(S.B.)

COUR SUPERIEURE, 1871.

ST. HYACINTHE, NOVEMBRE 1871.

Coram SICOTTE, J.

Michel Girard, vs. Louis Bélanger, et al.

JUGE:—1o. Que les prescriptions de l'ordonnance de 1667 sont encore en force, pour les actions en complainte et dénonciation de nouvel œuvre, et que l'ordonnance n'a en vue que le jugement définitif pour maintenir en possession la partie qui a le mieux justifié être en possession. 2o. Que sur les débats contradictoires quant à la possession de chaque partie, le défendeur niant les faits de trouble, l'action dégénère en une simple action de dommages qui est personnelle, *ex delicto*, qui s'instruit et se juge comme toute action ordinaire.

SICOTTE, J.—La question importante et nouvelle qu'il s'agit de décider, découle de l'action possessoire. Ce n'est pas la complainte elle-même toutefois, qui est soumise, elle n'est pas encore mûre pour l'adjudication. Mais le demandeur sollicite une ordonnance préliminaire pour contraindre à la suppression de travaux qu'il dénonce comme constituant les faits du trouble à sa possession. Il demande cette ordonnance, parce qu'il prétend qu'il est exposé à un tort grave, immédiat et irréparable, sans cette injonction. Il a obtenu la concession d'un privilège d'un droit de pont et de péages sur la Rivière Yamaska.

Plusieurs personnes paraissent s'être associées pour construire un pont sur la même rivière, pour leur utilité personnelle, en dedans des limites où, par la concession du demandeur, il est défendu de construire un pont ou maintenir toute autre voie de passage, et ont commencé les travaux.

Le demandeur se plaint de ces travaux, comme étant un trouble à sa possession dans ses droits, et exerce sa complainte en dénonciation de nouvel œuvre.

De là, se plaignant que nonobstant sa dénonciation, les défendeurs continuent leurs travaux, sa requête pour obtenir une prohibition préalable de suspension des travaux, jusqu'à jugement définitif sur la complainte.

Cette demande est repoussée comme n'étant pas justifiée par les faits ni promise par la nature du droit de la partie.

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Notre législation n'a rien statué sur les pouvoirs des juges et des tribunaux, relativement aux faits et actes des citoyens, dans l'exploitation de leur richesse, de leur industrie, de manière à diriger d'une manière spéciale l'action du pouvoir judiciaire, quand on solliciterait des ordonnances de prohibition contre l'exercice de cette exploitation.

Le Code a une disposition empruntée du Statut, qui édicte que dans le cas où il n'y aurait aucune disposition pour faire valoir ou maintenir un droit particulier ou une juste réclamation, toute procédure qui n'est pas incompatible avec la loi devra être accueillie et valoir.

Notre Code n'a que trois articles sur la matière des actions possessoires. Le premier est dans ces termes, art. 946: "Le possesseur d'un héritage ou droit réel, à titre autre que celui de fermier ou de précaire, troublé dans sa possession, a l'action en complainte contre celui qui l'empêche de jouir, afin de faire cesser ce trouble et d'être maintenu dans sa possession."

Le Code ne contient aucune disposition sur la procédure à suivre dans les actions possessoires. La procédure prescrite avant sa promulgation est donc encore en force, telle qu'on la trouve dans l'ordonnance de 1667.

L'ordonnance, au titre 18, par son premier article, donnait l'action dont parle le Code dans l'article que nous venons de citer. L'article 3 est en ces termes: "Si le défendeur en complainte dénie la possession du demandeur, ou de l'avoir troublé, ou qu'il articule possession contraire, le juge appointera les parties à former."

L'article 5 du titre 171 considère et réputé matières sommaires les demandes en complaintes, et toutes choses où il peut y avoir du péril en la demeure, pourvu qu'elles n'excèdent pas la somme ou la valeur de mille livres.

Les jugements rendus en matières sommaires et sur demande en complainte sont exécutés par provision, en laissant caution, nonobstant l'appel.

Notre action possessoire est celle de l'ordonnance. Le but en est le même; faire cesser le trouble et être maintenu dans sa possession.

Pothier, qui a parfaitement résumé toute la procédure sur ces incidents, dit: "Le juge, par son jugement, maintient en possession la partie qui a le mieux justifié être en possession pendant l'année, et fait défense à l'autre partie de l'y troubler à l'avenir. Ce jugement peut aussi contenir une condamnation de dommages-intérêts."

Ni l'ordonnance, ni les commentaires, soit de Pothier, soit de Jousse, parlent d'ordonnances provisoires, mais font simplement mention du jugement définitif.

Dans la procédure romaine on ne faisait que déclarer la maintenue par le jugement définitif sur l'action *Interdictum ut possidetis*.

L'ordonnance qu'on sollicite donnerait au demandeur un avantage exorbitant. Il suffirait de se plaindre, pour être traité comme si on avait décidé toute la cause et adjugé sur le droit réclamé et contesté. Comme le remarque justement Pigeau: "L'autorité de la justice n'étant interposée que pour rendre à chacun ce qui lui appartient, les parties doivent, jusqu'à ce que la réclamation soit payée, rester dans l'état où elles se trouvaient au moment qu'elle est formée; s'il suffisait de demander pour s'emparer, tout homme de mauvaise foi pourrait

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vexer un homme juste, en réclamant contre celui-ci, une chose qu'il soutiendrait lui appartenir, et sur laquelle il n'aurait peut-être aucun droit, pour la posséder, au moins jusqu'à la fin du procès."

Le demandeur serait trop maître ; de fait, c'est lui qui ferait la loi et prononcerait jugement en sa faveur.

On a vu durant les quatre dernières années, les résultats de ce syatème dans les Etats-Unis. Les grandes corporations luttent à coup d'interdits prohibitoires et restitutoires. C'est une course au clocher à qui commencera. On assiège les juges, leurs maisons, chaque intérêt a un juge dans son camp.

Quelle injustice peut résulter du refus d'accorder l'injonction dans le cas de dénonciation de nouvel œuvre, autre que celle qui résulte de tout retard dans l'adjudication des différends ordinaires ?

Si le demandeur est bien fondé dans sa dénonciation, le jugement sera défense de le troubler à l'avenir, maintenue dans sa possession, condamnation aux dommages. Est-ce que la frustration des droits du demandeur n'est pas la même que celle accordée à tout plaideur dans toute demande ? où est le texte de loi, ou la règle d'équité, qui permette au demandeur d'obtenir une ordonnance provisoire, accordant tout, sur sa seule demande, avant que son droit soit complètement reconnu ?

Mais le demandeur prétend que son droit est en péril imminent, que si l'interdit prohibitoire lui est refusé, il souffrira un tort considérable et irréparable, et que l'autorité doit le protéger.

Le seul tort possible est une perte plus ou moins considérable de revenus, le demandeur percevra peut-être moins de péages. C'est là tout le litige, c'est là aussi le litige dans toute action *ex malificiis*.

Le demandeur, en dirigeant son action contre les défendeurs actuels, n'a pas dû choisir les plus pauvres, d'entre les cinq cents personnes qu'il représente comme associées pour faire une construction considérable ; et jusqu'à preuve du contraire, la présomption est que le droit du demandeur ne peut périclite par le danger de ne pouvoir être payé des condamnations qui peuvent être prononcées contre les défendeurs.

Il n'y a nul péril dans la demande, et par conséquent nulle raison d'intervenir d'une manière extraordinaire pour accorder un droit exorbitant.

Papineau & Sicotte, avocats du demandeur.
Chagnon & Sicotte, }
Bouryeois & Bertrand, } avocats des défendeurs.
(H.W.C.)

COUR SUPERIEURE, 1872.

MONTREAL, 27 JUIN 1872.

Coram BEAUDRY, *J.*

No. 1020.

Lalonde vs. Lynch.

JUGE:—Que dans l'espèce, l'action hypothécaire est mal fondée, comme n'étant pas dirigée contre le véritable détenteur, indépendamment de l'omission de l'enregistement de ses titres.

Le défendeur ayant été poursuivi en déclaration d'hypothèque, plaida que le 19 mars 1870, il avait vendu l'immeuble hypothéqué et au sujet duquel il était

ainsi poursuivi, par acte notarié reçu en la ville de Beauharnois pardevant Mtre Brossoit, Notaire et qu'il n'était pas le propriétaire, lors de l'institution de l'action.

Le demandeur répondit spécialement que l'acte de vente par le défendeur de cet immeuble qu'il avait acheté de Moïse Lalonde, en mai 1869, et qu'il avait revendu le 19 mars 1870 à son père, n'avait pas été enregistré ni suivi de tradition.

Le demandeur, par une action spéciale, ayant mis en cause cet acquéreur pour voir dire et déclarer le jugement qui serait rendu contre le défendeur commun avec lui, ce dernier acquéreur n'a invoqué aucun moyen contre l'action principale. Il se contenta de plaider à l'action en déclaration de jugement commun, contre laquelle il invoqua divers moyens de défense.

Le demandeur disait qu'il est prouvé que le défendeur est toujours resté détenteur, et que son frère qui demeure dans le Haut-Canada ne s'était jamais fait connaître, et qu'il n'avait pas enregistré son titre.

De plus, Owen Lynch n'a pas enregistré son titre savoir : son acte d'acquisition de cette propriété acquise dans le cours de mai 1869, de Moïse Lalonde. Par conséquent la vente qu'il a faite à son frère est sans effet. C. C., art 2058, art. 2098, dernier alinéa.

Troplong, Priv. et Hyp. No. 784, 5 al. 2.

Le tiers détenteur, disait le demandeur, dont parle ici la loi, est celui qui est propriétaire de la chose sur laquelle est assise l'hypothèque et *qui peut l'aliéner*, etc., or, Messire Lynch ne pouvait pas aliéner la chose, tant que son titre n'était pas enregistré.

Le demandeur disait enfin que l'action en déclaration de jugement commun est également bien fondé.

Chaque fois qu'un tiers a un intérêt dans une action, on a le droit de l'y appeler pour que la procédure lui soit commune.

Ce droit est particulièrement reconnu à l'égard des actions hypothécaires. C.C. art. 2059. Aussitôt que le défendeur a indiqué au demandeur qu'un tiers avait un intérêt dans la propriété, il lui a dénoncé l'action et l'a mis en cause pour lui donner l'occasion de le contester.

Pothier, hyp. Nos. 71, 72, 73.

Les parties ayant procédé à leur preuve respective, aucun des actes n'apparaissant avoir été enregistré, et ayant été entendues au mérite, le jugement de la Cour a renvoyé l'action, et il est motivé comme suit :—

La Cour Supérieure à Montréal a maintenu la défense, et a débouté le demandeur de son action. Son jugement est motivé comme suit :—

" La Cour *** considérant que le demandeur n'a pas prouvé que le défendeur était à l'époque de l'assignation en cette cause détenteur à titre de " propriétaire de l'immeuble décrit en la déclaration en cette cause. Considérant " de plus, que le défendeur a prouvé qu'à l'époque de l'assignation en cette cause, " il avait cessé d'être propriétaire du dit immeuble, l'ayant vendu au Révé- " rend Messire Michael Lynch, par acte reçu à Beauharnois, devant J. Brossoit, " Notaire, le 19 de mai 1870, et considérant qu'il n'y a aucune preuve que cette " vente ait été simulée tel qu'allégué par le dit demandeur, déboute l'action " du dit demandeur avec dépens."

Burn et al., vs. Fontaine.

Sur l'action en déclaration de jugement commun, le défendeur a plaidé une défense en droit et une exception au mérite de cette action.

Le 27 juin 1872, la Cour Supérieure, (Beaudry, J.,) a débouté le demandeur de cette action, après audition des parties au mérite, et le jugement est motivé comme suit :—

"La Cour, après avoir entendu les parties par leurs avocats, examiné la procédure et les pièces produites et sur le tout mûrement délibéré; considérant que "le demandeur n'a aucunement prouvé les allégations de sa déclaration et que "sa demande est mal fondée en droit, la déboute avec dépens."

Dorion, Dorion & Geoffrion, avocats du demandeur.

Laflamme, Huntington & Laflamme, avocats du défendeur.

(P.R.L.

COUR SUPERIEURE, 1872.

MONTREAL, 1er MAI 1872.

Coram TORRANCE, J.

No 66.

Burn et al. vs. *Fontaine.*

JUGE :—1o Que le mariage qui est annulable en loi, est valable tant que les tribunaux ne l'ont pas déclaré nul.

2o Qu'aucun des conjoints ne peut contracter un second mariage, avant la dissolution du premier.

La demanderesse, qui était mineure lors de l'institution de cette demande en nullité du mariage qu'elle avait contracté avec le défendeur à Chicago le 1er août 1867, assisté d'un curateur, concluait à la nullité de ce mariage, attendu que le défendeur était dans les liens d'un mariage antérieur et encore existant.

Le défendeur plaida plusieurs exceptions et entr'autres choses : que son premier mariage était nul : que si au contraire tel mariage est légal, la présente demande en nullité n'était pas nécessaire ; que la première femme devait être mise en cause ; que la nomination d'un curateur au lieu d'un tuteur est illégale.

Autorités citées par le défendeur :—

Revue Légale, vol. 3, p. 250.

Art. 135 C. C. et art. 128.

Pothier, mariage, 355.

11 L. C. J. pp. 53, 305.

Duranton, vol. 2, arts. 338, 341 et 344.

1 Allemand, mariage, p. 338, No. 312.

Autorités citées par les demandeurs.

C. C. art. 1220 § 4, art. 135, et art. 7, art. 314, art. 338.

1 Allemand, mariage No. 34. No. 36.

Le jugement de la Cour Supérieure a cassé ce dernier mariage et il est motivé comme suit :

"La Cour ***attendu qu'il est en preuve que le 1er août 1867, le défendeur "aurait épousé la demanderesse à Chicago, dans l'Etat d'Illinois, l'un des Etats-

"Unis d'Amérique; attendu que le dit défendeur lorsqu'il a ainsi prétendu "épouser la demanderesse était dans les liens d'un mariage antérieur et encore "existant, le dit défendeur ayant épousé Julie Marcheterre à Montréal le 29 "octobre 1857, attendu que le dit curateur en cette cause a été bien et dument "élu comme tel à la demanderesse:

"Cette Cour rejette les défenses du défendeur, déclare le mariage intervenu "entre le défendeur et la demanderesse nul et sans aucune valeur légale, et cette "dernière libre et affranchie de tous liens résultant de la célébration d'icelui "comme si tel mariage n'avait jamais eu lieu, le tout avec dépens."

Doutre, Doutre & Doutre, avocats des demandeurs.

Perkins, Monk & Foran, avocats du défendeur.

(P. B. L.)

COUR SUPERIEURE, 1872.

MONTREAL, 28 JUIN 1872.

Coram MACKAY, J.

No. 1119.

Larocque vs. *Lajoie.*

JUGE:—Que le syndic à une faillite poursuivi par une demande en saisie-revendication, est bien fondé à repousser cette action par une défense au fond en droit, en autant qu'en vertu de l'acte de faillite, aucune demande en saisie-revendication ne peut être portée. (1)

A l'action du demandeur pour saisir-revendiquer des meubles sujets à son privilège de bailleur,

Le défendeur plaida une défense en droit alléguant "qu'il appert par les allé-"gations de la dite déclaration que le défendeur est poursuivi et assigné devant "cette Cour en sa qualité de syndic à la faillite etc., et qu'en vertu de l'acte de "faillite de 1869, et ses amendements, le dit demandeur n'a aucun droit d'action "en saisie-revendication contre le défendeur ès qualité."

"Que les faits allégués par le demandeur ne lui donnent aucun droit d'action "contre le défendeur ès qualité, mais qu'en vertu et par suite des dites allégations "le demandeur n'a droit de procéder contre le défendeur que par une requête "sommaire présentée à l'un des juges de cette honorable Cour."

Les parties ayant été entendues en droit, la Cour a maintenu la défense en droit et a débouté le demandeur de son action avec dépens. Ce jugement est comme suit.

"The Court having heard the parties by their counsel upon the *défense en "droit* of defendant to plaintiff's action and demande, having examined the "proceedings, proof of record and deliberated, considering the reasons of said "*défense* good, doth, adopting the same, maintain the said *défense en droit* and "dismiss the plaintiff's action with costs."

Pagnuelo, avocats du demandeur.

Duhamel, Rainville et Rinfret, avocat du défendeur.

(P. B. L.)

(1) 32 et 33 Vic. ch. 16.

COUR DE CIRCUIT, 1872.

MONTREAL, 13 MARS 1872.

Coram BEAUDRY, J.

No. 5161.

Depuis vs. *Marsan.*

Jugé:—1. Qu'un billet promissoire au dessous de $50, fait à ordre, peut être valablement transporté, pour valeur reçue, par celui à l'ordre duquel il est fait, sans être endossé par ce dernier.
2. Que la preuve de tel transport peut se faire par témoin.

Le demandeur en cette cause réclamait du défendeur la somme de $35.00, montant d'un billet fait par ce dernier, à l'ordre d'un tiers (W. Marsan) qui avait, avant son échéance, transporté le dit billet au demandeur, en lui en faisant simplement la remise, sans vouloir l'endosser.

Le défendeur plaida à cette action par une défense en droit, prétendant, en s'appuyant sur l'art: 2286, C. C., B. C. qu'un billet fait à ordre, ne peut être valablement transporté sans endossement.

PER CURIAM:—La défense en droit est rejetée avec dépens en cette cause; car l'art. 2286 C. C., B. C. cité par le défendeur, dit: qu'un billet promissoire, fait à ordre, peut être transporté au moyen d'un endossement, mais ne limite pas que tel transport ne puisse se faire autrement.

Défense en droit rejetée, et preuve du transport du dit billet par simple délivrance admise.

Le Piché, avocat du demandeur.

J. N. Pauzé, avocat du défendeur.

(C. T.)

COUR SUPERIEURE, 1872.

EN REVISION.

MONTREAL, 31 MAI 1872.

Coram BERTHELOT, J., MACKAY, J., TORRANCE, J.

No. 2191.

DOUTRE et al., *vs.* BRADLEY et al., et divers opposants, et DAME JANE ALLISON, et vir.,

REQUERANTS SUR REQUETE CIVILE

ET

J. BTE. DORION.

REPONDANT.

Jugé:—Que sur une requête civile, une partie qui allègue du dol dans la procédure, adoptée pour obtenir l'homologation d'un jugement de distribution, en sera relevée, et il lui sera permis de contester les collocations.

Par son jugement rendu à Montréal, le 29 février 1872, la Cour Supérieure, (Beaudry, J.,) accorda une requête civile présentée par Dame Jane Allison et vir, pour faire mettre de côté un jugement de distribution homologué le 25 mai 1871. Ce jugement est motivé comme suit:

"La Cour, après avoir entendu le dit Jean Baptiste Théophile Dorion et les "dits Jane Allison et son époux, par leurs avocats respectifs, sur la requête civile

"produite par le dite Jane Allison et son mari, examiné la procédure et la "preuve faite et sur le tout mûrement délibéré ; considérant qu'il y a lieu, sous "les circonstances prouvées à relever la dite requérante et lui permettre de con-"tester la dite collocation du dit Jean Baptiste T. Dorion ; met au néant le "jugement rendu en cette cause le 26 mai 1871, homologuant l'ordre de distri-"bution préparé par le protonotaire, et remet les parties susdites au même et "semblable état qu'elles étaient le 23 de mai 1871, le tout sans frais."

L'opposant Dorion porta ce jugement en Cour de Révision et prétendit par son factum qu'aucune preuve de dol ne justifiait l'octroi de cette requête civile, et quoique la Cour Supérieure avait dit qu'il y avait une irrégularité dans les procédés, que le rapport de collocation avait été homologué avant l'expiration des délais ; néanmoins le dit opposant prétendait qu'il avait été homologué après l'expiration de onze jours.

Dans son factum, la dite dame Jane Allison s'appuyait sur le dol par elle allégué en sa requête civile, et citait les articles 505 et 761 du Code de Procédure Civile.

Le jugement de la Cour Supérieure siégeant en Révision à Montréal a confirmé le jugement avec tous les dépens.

PER CURIAM.—Requête civile par Mme. Allison contre un jugement de distribution colloquant à son préjudice Dorion, créancier hypothécaire. Outre les motifs allégués dans la requête et fondés sur une entente entre les avocats des parties pour une prolongation des délais de contestation, la Cour trouve qu'il y a une autre raison pour accorder la requête c'est que le greffier n'ayant pas affiché au greffe l'avis de quatre jours que requiert le Code, le jugement a été homologué trop tôt. La motion signée par certaines parties demandant l'homologation de consentement ne peut lier que ceux qui l'ont signée, et comme il apparaît, au certificat du régistrateur, d'autres intéressés ayant droit à l'avis, la motion est sans effet, quant à eux.

Le jugement de la Cour Inférieure accueillant la requête civile est confirmé.

Ce jugement est motivé comme suit: "La Cour Supérieure, siégeant à Mont-"réal, présentement comme Cour de Révision, ayant entendu les requérants et le "répondant par leurs avocats respectifs, sur le jugement rendu dans et par la "Cour Supérieure du district de Montréal le 29 février 1872, ayant examiné "le dossier et la procédure dans la cause et mûrement délibéré; considérant, "qu'il n'y a point d'erreur dans le susdit jugement du 29 février 1872, con-"firme par les présentes le dit jugement pour les motifs qui y sont donnés et en "outre parce que le jugement rendu par le protonotaire le 26 mai 1871, a été "rendu sans que les délais pour son homologation aient été observés, et sans "qu'il apparaisse de consentement des créanciers inscrit au certificat d'hypo-"thèques produit avec le rapport du shérif, avec les frais tant de la dite Cour "Supérieure, que de cette Cour de Révision."

Jetté, avocat des requérants sur requête civile.
Kelly & Dorion, avocats du répondant.

(P.B.L.)

COUR SUPERIEURE, 1872.

En Chambre.

MONTREAL, 8 JUILLET 1872.

Coram TORRANCE, J.

Ex parte FRANCOIS CHALUT ET AL., REQUERANTS

ET

PIERRE PERSILIER DIT LACHAPELLE, REPONDANT.

JUGE:—Que les dispositions de l'article 924 du Code Civil, au subjet de la nomination d'un administrateur testamentaire pour remplacer ceux qui ont cessé d'exercer leurs pouvoirs, ne s'appliquent pas aux cas qui peuvent se présenter sous les dispositions d'un testament fait antérieurement à la promulgation du Code Civil. [1]

Les requérants grevés de substitution par le testament de feu Paschal Persilier dit Lachapelle, père, exécuté le 8 avril 1871, Mtre Decelles, N. P., présentèrent une requête au juge, en Chambre, à Montréal, alléguant que tous les exécuteurs et administrateurs testamentaires avaient cessé d'exercer leurs fonctions depuis quelques années, soit par décès, soit par résignation fondée sur les infirmités de l'âge.

Le répondant s'objecta à cette nomination et prétendit que les dispositions de l'article du Code Civil 924, ne s'appliquent qu'aux testaments faits et exécutés avant la promulgation de ce Code.

Ces parties ayant été entendues et ayant cité toutes leurs autorités de part et d'autre le jugement fut rendu par le juge qui avait entendu cette requête en Chambre, et elle fut renvoyée après délibéré.

TORRANCE, J.—This is an application by Chalut and others of the nomination of an administrator to take the place of the administrators of the late Lachapelle, these administrators having resigned their office. The intervening party opposed this demand, alleging that under the old law—the will in this case being made before the Code came into force—in the event of the administrators appointed by the testator refusing to act, the execution of the will is left to the legatees themselves. Under the old law there was no power in the Courts to nominate an executor, where from any cause the executor appointed by the will did not act. The petition is therefore rejected. A decision on the same point was rendered in the case of ex parte Masson, in which Mr. Justice Mackay two years ago decided as I am deciding to-day—that with regard to these old wills the Courts have no jurisdiction in the matter.

Le jugement est comme suit:

Having heard the Petitioners and the *Répondant* by their counsel respectively upon the petition of François Chalut and others, praying for the appointment of an administrator to the estate and succession of the late Paschal Persilier dit Lachapelle, *père;* having examined the proceedings and the documents produced and fyled in support of said petition and deliberated;

[C.S.] Art. 924, C.

Considering that the matter in question can only be governed by the law anterior to the coming into force of the Civil Code, and that such anterior law does not justify the granting of the petition of the petitioners; the said petition is rejected without costs.

La Frenaye, avocat des requérants.

Bélanger, avocat du répondant.

(P.R.L.)

COUR SUPERIEURE, 1872.

MONTREAL, 29 FEVRIER 1872.

Coram MACKAY, J.

No. 390.

Hudon vs. *Champagne*.

JUGE:—Que sur un billet daté à Montréal, quoique réellement fait et signé par le défendeur dans un autre district, une action en recouvrement du montant du billet contre le faiseur, peut être attaquée par une exception déclinatoire sans être accompagnée d'un affidavit conformément à l'article 145, du Code de Procédure Civile. [1]

Le demandeur réclamait du défendeur, résidant dans les limites du district de Richelieu et assigné dans les limites de tel district, le montant d'un billet promissoire souscrit par le défendeur et signé par lui, à Sorel, mais daté comme étant fait à Montréal.

Le défendeur plaida une exception déclinatoire et à l'appui d'icelle il alléguait ce qui suit: "Que le défendeur est du district de Richelieu et non de celui de Montréal; que la cause d'action n'a pas originé dans le district de Montréal et que le billet qui en fait la base, bien que daté à Montréal, a été signé par le défendeur dans le district de Richelieu et ce, à la connaissance des demandeurs."

Le 23 février 1872, le demandeur fit motion pour faire rejeter cette exception déclinatoire, sur le principe qu'elle n'était pas accompagnée d'un affidavit, en conformité aux dispositions de l'article 145, du Code de Procédure Civile.

Le demandeur prétendait qu'en supposant que le billet aurait été signé dans le district de Richelieu, le seul fait que le défendeur a signé le billet comme étant fait et souscrit à Montréal, établit de la part de ce dernier un consentement formel de devenir justiciable du district de Montréal, à l'égard du dit billet et de la transaction qui en est la considération; que le dit billet est un contrat volontaire qui lie le défendeur et ce contrat, à lui seul, forme toute la cause de la présente action, et d'après ce dit contrat, il résulte que le défendeur a voulu et a consenti que la présente action prit naissance dans le district de Montréal.

Les parties ayant été entendues sur cette motion, la Cour la rejeta avec dépens.

Cartier, Pominville & Bétournay, avocats du demandeur.

Robidoux & Béique, avocats du défendeur.

(P.R.L.)

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[1] *Vide* 6 L. C. Jurist, p. 130. Décision contraire, à Sorel, district de Richelieu, en la cause de Beauchemin vs. Brodeur, Ramsay, J., le 10 janvier 1872.

COUR SUPERIEURE, 1871.

MONTREAL, 30 SEPTEMBRE 1871.

Coram BEAUDRY, J.

No. 823.

Brown vs. *le Maire, les Echevins et les Citoyens de la Cité de Montréal.*

JUGE:—1o. Qu'une corporation civile est responsable d'un libelle qui lui est imputé par le demandeur
2o. Que telle corporation est régie en matières civiles par le droit commun et est soumise aux dispositions de l'article 356 du Code Civil.

Le demandeur poursuivait les défendeurs pour $20,000 de dommages-intérêts résultant d'un libelle qu'il alléguait avoir été fait contre lui par suite d'une résolution des défendeurs passée le 7 août 1868, blâmant la conduite du demandeur dans l'accomplissement de ses devoirs comme commissaire pour les fins d'une expropriation: laquelle résolution injurieuse avait été publiée dans les journaux, et par le fait de la présentation d'une requête devant le juge le 18 août 1868, appuyée sur cette résolution et faisant suspecter son impartialité.

Les défendeurs opposèrent une défense au fond en droit à cette action.

Ils alléguaient que les défendeurs comme corporation municipale, ne sont pas responsables de tels dommages; que la résolution du 7 août 1868 était de la part des défendeurs un acte de législation et l'exercice d'une fonction judiciaire qu'elle avait par la loi autorité d'accomplir.

Les parties ayant été entendues en droit, la Cour renvoya la défense en droit.

BEAUDRY, J.—Les défendeurs prétendent que leurs actes ont été faits comme corps légiférant, tandis que cette corporation n'agissait que comme corps administratif soutenant un litige.

L'article 356 du Code Civil déclare que les corporations politiques sont sujettes aux lois civiles dans leurs rapports avec les citoyens sous certains rapports et sont soumises aux même lois que les citoyens.

Comme corporation politique, elle a le droit de promulguer des règlements ou lois de police; et comme corporation civile, elle a le droit d'administrer les intérêts des habitants, acquérir des biens et sous ce rapport elle est soumise au droit commun.

Les allégations de la déclaration seraient suffisantes pour établir un droit d'action contre un particulier et les défendeurs n'ont cité aucune autorité en leur faveur pour se soustraire à la responsabilité.

Les corporations sont passibles de poursuite pour délits. Grant, p. 168,283-4, and p. 164; Phil. Washing. & Balt. R.R. Co., and Patrick Quigley; Howard's, Rep. vol. 21, p. 202. *Secus*, Stevens *vs.* Midland Counties R.R. Co. *vs.* Lander, 10 Exch. Rep. 352 Hurlston & Gordon.

Le jugement de la Cour est motivé comme suit:—

The Court having heard the parties by their counsel respectively on the demurrer fyled by defendant to plaintiff's declaration, having examined the said plaintiff's declaration, and on the whole maturely deliberated; considering that the grounds of the said demurrer are insufficient, and that the plaintiff's alle-

gations in his declaration are sufficient to support the conclusions thereof, doth dismiss the said demurrer with costs.

Défense en droit renvoyée.

Barnard, avocat du demandeur.

Rouër Roy & B. Devlin, avocats des défendeurs.

(P. B. L.)

SUPERIOR COURT, 1872.

MONTREAL, 3RD DECEMBER, 1872.

ENQUETE SITTINGS.

Coram TORRANCE, J.

No. 1145.

Courtney v. *Bowie et qual.*

HELD:—That a witness cannot be contradicted as to collateral matters.

The action was on a note which the defendants averred had been stolen. A witness, Henry Bowie, was examined for the plaintiff, and stated, in cross-examination, that a charge of perjury, which had been brought against him, fell to the ground. The defendants, in rebuttal, offered to prove against the credibility of Henry Bowie, that the statement that the charge of perjury fell to the ground was untrue.

The presiding Judge held that the witness could not be contradicted as to a collateral matter.

The following authorities were referred to:—

Best:—Evidence, pp. 799, 800, 4th edn.

Queen *v.* Holmes & Furness, 1 Law Rep. Crown Cases Reserved, 334.

1 Greenleaf on Evidence, § 449; Harris *v.* Tippet, 4 Camp. 637; 2 Taylor Ev. § 1324, 5th edn.

Keller for plaintiff.

Kelly for defendant.

(J. K.)

SUPERIOR COURT, 1872.

MONTREAL, 19TH NOVEMBER, 1872.

IN INSOLVENCY.

Coram TORRANCE, J.

No. 217.

In re Lusk et al., Insolvents, and *William Foote*, Petitioner.

HELD:—1o. That an order, for the examination of witnesses in insolvency, made on the day of the voluntary assignment, under the Insolvent Act of 1869, of a partnership estate, by two out of three partners of whom the firm consisted, is irregular.

2o. That the petition for such examination should set forth satisfactory reasons for the order. (32 and 33 Vic., cap. 16, ss. 110, 112.)

Semble.—Two partners of a partnership of three are without power to make a voluntary assignment of the partnership to an interim assignee.

J. A. Perkins, for petitioner.

(J. K.)

COUR SUPERIEURE, 1871.

En Revision.

MONTREAL, 29 DECEMBRE 1871.

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

No. 1255.

Breault vs. Barbeau et al; et Breault, tuteur *ad hoc*, Intervenant.

Jugé:—Que le décès de la femme qui ayant enfants a convolé en secondes noces, et avec laquelle son second mari survivant avait été élu en justice tuteur-conjoint, à tels enfants, entraine la déchéance de la tutelle-conjointe, ou co-tutelle du mari lui survivant. [1]

Le défendeur Vital Barbeault étant poursuivi par le demandeur comme tuteur-conjoint ou co-tuteur aux enfants mineurs de sa femme décédée et veuve en premières noces, plaida une défense au fond en droit, par laquelle il prétendait que l'action était mal fondée quant à lui, en autant qu'ayant été nommé tuteur conjoint avec la mère des mineurs, sa défunte femme, il avait cessé aux yeux de la loi, d'être leur tuteur par le décès de leur mère.

Cette défense en droit fut renvoyée par le Cour Supérieure siégeant à St. Hyacinthe, Sicotte, J., le 22 avril 1871.

Le défendeur Vital Barbeault ayant porté cette cause en Révision à Montréal, cette décision fut renversée.

MONDELET, J.—Je ne vois rien autre chose à examiner que la question de savoir si, sur la défense en droit, la Cour Supérieure de St. Hyacinthe, devait débouter l'action d'après les allégués de la déclaration du demandeur. Je ne puis avoir le plus léger doute à cet égard. Le demandeur alléguant lui-même le décès de la tutrice nommée conjointement avec le défendeur, à la tutelle des mineurs, il est évident que lorsqu'il allègue qu'il, le défendeur, est tuteur, il allègue ce qui n'est pas vrai puisque, par la loi, il a cessé de l'être. La défense en droit est bien plaidée et elle aurait dû être maintenue, et l'action aurait dû être déboutée, car après la mort de sa femme, le défendeur seul n'était pas passible de l'action telle qu'intentée contre lui, quelques soient les responsabilités auxquelles par la loi il était soumis. Je ne cite pas d'autorités pour établir un principe élémentaire.

Le jugement doit être infirmé.

Le jugement de la Cour de Révision est comme suit: "La Cour considérant "que la défense en droit plaidée en cette cause par le défendeur Vital Barbeault "aurait dû être maintenue et l'action du demandeur déboutée en conséquence; "attendu que le défendeur d'après les allégués mêmes de sa déclaration, n'était "pas après la mort de sa femme tuteur aux yeux de la loi, de manière à le "rendre passible de la présente action telle qu'intenté contre lui, considérant "qu'il y a erreur, cette Cour infirme le dit jugement, maintient la défense en "droit et déboute l'action du demandeur."

Bourgeois & Bachand, avocats du demandeur.

Papineau & Morrison, avocats du défendeur Vital Barbeault.

(P. B. L.)

Vide: Demolombe, vol. 7, livr 1, tit. 10, part. 1, ch. 11, page 81, No. 138 et No. 139.

[1] Vide 3 vol. Revue Légale, page 384.

COUR SUPERIEURE, 1872.

MONTREAL, 30 JANVIER 1872.

Coram BERTHELOT, J.

No. 869.

Ex Parte Dévôyau dit Laframboise,
ET
REQUERANT;

Le Révérend Père Félix Véniard,
INTIME.

JUGE :—Que sur une requête pour la rectification d'un acte de naissance dans les régistres d'une paroisse, la Cour, avant faire droit, peut ordonner que la délimitation de cette paroisse soit constatée et établie par un arpenteur, suivant son érection civile. [1]

Le 24 septembre 1870, le requérant présenta une requête devant la Cour Supérieure à Montréal, pour la rectification d'un acte de naissance dans les régistres de la paroisse de St. Laurent, dans le district de Montréal, se plaignant que le répondant, le curé de la paroisse de St. Laurent, avait désigné erronément dans l'acte de naissance qu'il avait rédigé dans les régistres de sa paroisse, le requérant comme paroissien de la paroisse de Lachine, d'après un décret canonique de l'administrateur du diocèse de Montréal, en date du 12 mai 1870, malgré les protestations du requérant, et qu'il en avait fait ainsi du parrain et de la marraine, et que partant ils ont été dans la nécessité de refuser de signer l'acte de naissance.

Le 4 juin 1870, le requérant a notifié le curé par un acte notarié, de rectifier cette erreur.

Le requérant alléguait encore dans sa requête que ce décret canonique est nul qu'il n'a jamais été soumis aux commissaires civils ni ratifié et confirmé par eux. Le requérant concluait à ce que le curé fut tenu de faire l'entrée aux régistres de la paroisse, du domicile véritable des parties intéressées et concluait à la rectification de ces régistres.

Le répondant contesta cette requête.

Les parties procédèrent à la preuve et furent ensuite entendue au mérite.

La Cour Supérieure rendit un jugement interlocutoire comme suit:

"La Cour après avoir entendu les parties par leurs avocats, avoir examiné la "procédure et la preuve et sur le tout avoir délibéré. Attendu que par la loi "ou l'édit de 1722, fixant les limites des paroisses de St. Laurent, de Lachine et "la circonscription des dites deux paroisses est donnée comme suit, etc., etc.

Attendu qu'il est opportun de constater la continuité de territoire de la circonscription de chacune de ces paroisses avant d'adjuger. Attendu qu'il résulte des désignations et descriptions ci-dessus qu'une partie de la Côte de Notre Dame des Vertus, est comprise dans la circonscription de la paroisse de St. Laurent, tandisque l'autre l'est dans celle de Lachine, vû que le décret canonique du 12 mai 1981, n'a pas encore été reconnu par aucune proclamation de l'autorité civile, la

(1) Code civil, arts. 75 à 78 ; Edits et Ord. : 1 vol. Ed. de 1803, p. 403, arrêt du conseil d'Etat du 2 Mars 1722.

De Beaujeu vs. McNamee.

Cour avant faire droit, ordonne que par H. Maurice Perrault, arpenteur de la cité de Montréal, il soit procédé à faire un plan des dites deux côtes de Notre Dame des Vertus et de Liesse et indiquant la situation de la terre ou immeuble occupée par le requérant et de constater, s'il lui est possible, qu'était l'étendue des dites deux côtes en 1722 et des terres alors concédées en icelle et aussi la limite dans la dite Côte de Notre Dame des Vertus séparant les dites deux paroisses de St. Laurent et de Lachine.

Lequel arpenteur procédera après serment prêté, à entendre les parties, dument notifiées et à faire sur le tout son rapport à cette Cour, le ou avant le 17 mai prochain ou plus tôt si faire se peut, dépens réservés.

Bondy, avocat du demandeur.

Laflamme, avocat du défendeur.

(P. R. L.)

SUPERIOR COURT, 1872.

MONTREAL, 20TH NOVEMBER, 1872.

Coram MACKAY, J.

No. 163.

De Beaujeu & ux v. *McNamee.*

HELD:—In a non-appealable cause returnable out of term, that a defendant may evoke at any time before plaintiff has obtained an *acte* of foreclosure,

The plaintiffs, on the 12th September, 1872, instituted an action of damages for $90 against the defendant, for alleged quarrying without their consent, on the Isle d'Assigny, also alleged to be their property.

The action was returned on the 30th September. The defendant on the 9th of October, fyled a declaration in writing, that he evoked the case, the land belonging to the Crown and not to plaintiffs. He said he intended to quarry there in the future.

Doutre, Q. C., for defendant, cited C.C.P. 1058, and applied to the Court to decide summarily whether the evocation was well founded.

Bondy, for plaintiffs, said that the defendant had been foreclosed from pleading, and could not evoke after foreclosure.

Doutre, in reply. It is true that the five days for pleading had expired, but plaintiffs had taken no proceedings since.

PER CURIAM. The plaintiffs have not obtained the foreclosure required by C. C. P. 1099, and meanwhile the application of the defendant is in time.

Evocation allowed.

Bondy, for plaintiffs.

Doutre, Q.C., for defendant.

(J. K.)

COUR SUPERIEURE, 1871.

MONTREAL, 30 DECEMBRE 1871.

Coram BEAUDRY, J.

No. 683.

C. Brunet dit Letang et al., vs. *E. Brunet dit Letang.*

JUGE:—Que dans le cas où une partie se plaint devant des Praticiens et Experts, etc., lors de leur opération, qu'un document produit devant eux par la partie adverse est faux ; il a droit de contester devant la Cour, sur requête sommaire, ce document ainsi que le rapport des Praticiens et Experts, en autant qu'il concerne tel document.

Les parties en cette cause, sur une demande en partage de succession ayant été renvoyés devant des praticiens pour opérer à la liquidation de cette succession ; le défendeur produisit devant les praticiens, un reçu daté du 9 septembre 1862. Les demandeurs contestèrent la sincérité de ce document alors produit devant les praticiens que la majorité d'entre eux adopta.

Les demandeurs firent motion en Cour pour contester ce document et le rapport.

Le jugement de la Cour, qui a donné gain de cause aux demandeurs, est comme suit:

" La Cour, ayant entendu les parties par leurs avocats sur la requête sommaire des demandeurs du 20 décembre courant, qu'attendu que le défendeur " a produit devant les praticiens et experts nommés en cette cause lors de leur " opération, un document qu'il a prétendu être un reçu que lui aurait donné " son père, feu Eustache Brunet dit Letang, en date du 9 septembre 1862, " d'une somme de 11500 livres ancien cours, en déduction du prix de la vente " d'une propriété qu'il lui aurait consentie le 9 septembre 1851, que ce reçu " a été contesté par les demandeurs qui on prétendu qu'il était faux et forgé, et " n'avait jamais été écrit et signé par le dit feu Eustache Brunet dit Letang, " leur père, et que néanmoins la majorité des dits praticiens et experts a cru " devoir admettre le dit reçu et de donner crédit d'autant au défendeur, il soit " donné acte aux dits demandeurs de ce qu'ils contestent le dit reçu et le rap- " port même des dits praticiens et experts, en autant qu'il concerne le dit reçu et " que les intérêts des parts en sont affectés, et ce pour les raisons mentionnées " en la dite contestation, ayant examiné la procédure et délibéré, accorde la dite " requête sommaire, donne acte aux dits demandeurs de ce qu'ils contestent le " dit reçu et le rapport même des praticiens et experts concernant icelui, permet " aux dits demandeurs de produire les moyens de contestation à cet effet— et il " est ordonné et enjoint au défendeur de répondre à la dite contestation dans " les délais ordinaires pour ensuite être procédé ainsi que de droit."

Dorion, Dorion & Geoffrion, avocats des demandeurs.

Cartier, Pominville & Betournay, avocats du défendeur.

(P.R.L.)

COUR SUPERIEURE, 1872.

Coram SICOTTE, J.

ST. HYACINTHE, 25 NOVEMBRE, 1872.

Pierre L. Larose vs. *Thomas Patton.*

JUGE:—1o. Qu'un contrat, fait par deux personnes, par lequel elle s'obligent de fournir à une compagnie de chemin de fer une certaine quantité de *ties* ou liens, pour un prix convenu de tant par mille *ties*, à être partagé entr'elles, constitue entre ces deux personnes une société commerciale dans le sens des Statuts Refondus B.-C., ch. 65, et de l'article 1834 du Code Civil, requérant l'enregistrement d'une déclaration de la formation de telle société, aux endroits désignés par la loi.

2o. Qu'une telle société n'est tenue d'enregistrer une déclaration de la formation d'icelle, qu'au Bureau d'Enregistrement des Comtés, et au Bureau du Protonotaire des Districts, ou elle a des bureaux d'affaires et des maisons ou établissements de commerce, et qu'elle n'est pas obligée de faire tel enregistrement dans les comtés ou districts où elle ne fait que des actes isolés de commerce.

Les faits de la cause sont les suivants :—

Thomas Patton, le défendeur, et un nommé Daniel Shannon, ont conjointement fait un contrat avec la Compagnie du Grand Tronc, par lequel il se sont obligés de lui fournir dans un délai spécifié la quantité de cent mille *ties* ou liens livrables le long de sa voie ferrée depuis Montréal jusqu'à Kingston, depuis Montréal jusqu'à la Rivière du Loup, et depuis Montréal jusqu'à Island Pond.

En exécution de leur contract, le défendeur et le dit Shannon ont donné des sous contrats à divers contracteurs, qui ont livré une assez grande quantité de *ties* à différents endroits le long de la voie ferrée du Grand Tronc, et spécialement une certaine quantité à St. Ephrem d'Upton, dans le comté de Bagot, district de St. Hyacinthe.

Une déclaration, constatant la formation de leur société pour les fins susdites, n'a jamais été enregistrée dans le Bureau d'Enregistrement du comté de Bagot, non plus qu'au bureau du Protonotaire du district de St. Hyacinthe.

D'où Larose, le demandeur, poursuit le défendeur Patton, pour l'amende de deux cents dollars, pour n'avoir pas enregistré telle déclaration au Bureau d'Enregistrement de Bagot, et au Bureau du Protonotaire de St. Hyacinthe.

Le défendeur plaide entr'autres moyens, que le seul bureau d'affaires de cette prétendue société entre Patton et Shannon a toujours été à Montréal; que c'est à ce bureau d'affaires que tous les sous-contrats ont été donnés, faits et signés, et que le prix de ces contrats a été payé; que cette prétendue société n'a jamais eu, ailleurs qu'à Montréal, aucun bureau d'affaires, ni maison ou établissement de commerce; que cette société n'ayant jamais eu d'établissement ou maison de commerce ailleurs qu'à Montréal, n'était tenu d'enregistrer qu'à Montréal, et nullement à Bagot et St. Hyacinthe, où elle n'a fait que des actes isolées de commerce; que la présente action réclamant la pénalité parceque le défendeur Patton n'a pas enrégistré telle déclaration à Bagot et St. Hyacinthe, doit en conséquence être renvoyée.

Le défendeur plaide en outre que cette prétendue société n'ayant été formée que pour les fins mentionnées dans le contrat fait avec la Compagnie du Grand Tronc, savoir, pour la fourniture de *ties* à cette dernière, n'est pas une société

commerciale dont il est requis d'enregistrer une déclaration par écrit en vertu des Statuts Refondus B. C., chapitre 65, et en vertu de l'article 1834, du Code Civil.

La preuve a constaté que cette prétendue société n'avait qu'un bureau d'affaires et établissement commercial où toutes les affaires relatives au dit contrat, étaient traitées, savoir en la cité de Montréal mais elle constate aussi que des *ties* ont été délivrées par des sous-contracteurs, le long de la voie ferrée à St. Ephrem d'Upton, comté de Bagot, district de St. Hyacinthe.

Ci-suit le jugement rendu :

La Cour *** considérant que la société entre le défendeur et Shannon avait son bureau et siége d'affaires à Montréal, où était également le domicile des parties ; considérant que pour les fins de leur entreprise de fourniture de bois, avec la Compagnie du Grand Tronc, ils n'ont fait à Upton, dans le comté de Bagot, que quelques achats de bois par un de leurs employés, sans y avoir jamais tenu bureau ou établissement ;

Considérant que la société faisait ses affaires à Montréal, et n'a pas fait d'affaires dans le comté de Bagot, dans le sens prévu et indiqué dans le chapitre 65 des Statuts Refondus du Bas-Canada, et partant qu'il n'y avait pas obligation de donner publicité à cette société par l'enregistrement et dépôt chez le Protonotaire de la Cour Supérieure du district de St. Hyacinthe et chez le régistrateur du comté de Bagot, d'une déclaration par écrit tel que prescrit par cet acte ;

Considérant que le défendeur n'a pas encouru la pénalité pour laquelle il est poursuivi, et que le demandeur n'a pas droit de réclamer comme il l'a fait par son action, le déboute d'icelle avec dépens distraits aux avocats du défendeur.

Action déboutée.

R. C. Fontaine, avocat du demandeur.
Chagnon & Sicotte, avocats du défendeur.
(R. W. C.)

COUR SUPERIEURE, 1872.

En Revision.

Coram Mackay, J., Torrance, J., Beaudry, J.

MONTREAL, 21 DECEMBRE 1872

McLaren, Requérant et *La Corporation du Township de Buckingham*, Intimé.

Jugé.—1o. Qu'une inscription pour Révision par la Cour Supérieure, est suffisante et qu'il n'est pas nécessaire de dire " par trois juges de la Cour Supérieure."
2o. Qu'un jugement rendu par la Cour de Circuit sous les dispositions du Code Municipal, art. 698 et suivants, est subject à appel et que par conséquent il y a lieu à la Révision.
3o. Que dans ce cas un dépôt de $20 est suffisant.

Le requérant demanda et avait obtenu devant la Cour de Circuit, la cassation d'un Rôle d'Evaluation d'une municipalité locale.

Rapin vs. McKinnon.

L'intimé a inscrit la cause pour Révision de ce jugement par la Cour Supérieure à Montréal, et n'a accompagné cette inscription, que d'un dépôt de $20.00.

Le requérant fit alors motion pour rejeter l'inscription pour entr'autres raisons les trois suivantes :—

1o. Parce que la Cour Supérieure n'avait pas de juridiction pour reviser les jugements des autres Cours.

2o. Que cette cause n'était pas de sa nature une cause appelable.

3o. Parce que le dépôt de $20 était insuffisant, le rôle faisant voir que le montant en litige excédait de beaucoup $400.00.

La Cour a renvoyé la motion sur les trois raisons.

McLeod, pour le requérant.

Burroughs, pour l'intimé.

(v. p. w. d.)

COUR SUPERIEURE, 1872.

EN REVISION.

MONTREAL, 30 MARS 1872.

Coram MONDELET, J., MACKAY, J., BEAUDRY, J.

No. 281.

Rapin vs. *McKinnon.*

JUGE :—Que conformément aux disposition de l'article 1629 du Code Civil, la présomption légale doit disposer la Cour à déclarer qu'un incendie arrivé dans les lieux loués a été causé par la faute du locataire, à moins qu'il ne prouve le contraire.

Par bail du 8 février 1864, le demandeur a pris à bail du défendeur, une maison sise rue St. Joseph à Montréal avec la cour en arrière et les bâtisses érigées dans cette cour, et le passage en commun, et ce pour y tenir un hôtel. Pendant l'existence de ce bail, le demandeur a pris à bail un terrain adjoignant et il y a érigé quelques remises et y a fait une communication avec le terrain et bâtisses ainsi par lui érigées.

Vers le 25 septembre 1868, une remise en arrière de l'hôtel et les écuries adjoignant le terrain que le demandeur avait loué du voisin, furent en partie détruites par un incendie, et le demandeur se trouvait à être privé de 14 ou 15 places d'écuries, et d'une partie de la remise, et il les a lui-même fait réparer.

Le demandeur porta son action en justice contre le défendeur, son bailleur, sur l'allégation que cet incendie n'avait pas eu lieu par sa faute, mais était dû au fait d'un incendiaire, et il a réclamé une déduction sur le loyer payé depuis l'époque de l'incendie, à venir à la date de son action, tant comme *quantum meruit* qu'à titre de dommages et intérêts, savoir, $48.56c.

Le défendeur a contesté cette action sur le principe que par les faits ci-dessus exposés le demandeur avait mis les lieux loués plus en danger d'incendie, que lorsqu'ils lui avait été loués par le défendeur.

La Cour de Circuit pour le district de Montréal le 30 juin 1871, (Torrance, J.,) a débouté le demandeur de son action, et ce jugement est motivé comme suit :—

"The Court *** considering that the fire on account of which plaintiff claims a

"reduction of rent occurred in the premises in the occupation of plaintiff, and "there is in law a presumption of negligence on his part as to the cause of said "fire, which presumption has not been rebutted by the evidence of record;

"Considering further, that the plaintiff paid to defendant without reserve the "rent, portion of which he seeks to recover back by the present action, and in "the circumstances of this cause, the *demande* of the plaintiff is unfounded in "law and in fact;

"Doth dismiss plaintiff's action and *demande* with costs."

Ce Jugement de la Cour de Circuit fut porté en Révision à Montréal par le demandeur.

Après l'audition des parties, la Cour de Révision a confirmé le jugement pour les mêmes motifs que ceux exprimés au dit jugement de la Cour de Circuit.

MACKAY, J.:—The original plaintiff Rapin was now the plaintiff in revision. The suit was instituted in the Circuit Court but was evoked. The declaration alleged a lease from plaintiff to defendant of a hotel at an annual rent of £150. The lease, of date 6th March, 1868, was for five years from 1st May, 1868. The premises consisted of a hotel, brick stable and other buildings, and the declaration set up that all these were required by Rapin for his business. That a fire happened through no fault of the plaintiff but by the act of an incendiary; that the injury so caused, the defendant would never repair; that plaintiff caused an *expertise* to be made, in which defendant refused to join, and that the damage was estimated to diminish the annual value of the buildings to an extent equal to one-ninth of the rent and the plaintiff sought to recover back this amount. The plea set up that if the fire happened it was from want of proper care by the plaintiff. The act of incendiarism could not exonerate the plaintiff, for it was his duty to keep a watch. Upon the pleadings and the evidence judgment went dismissing Rapin's action on the ground, first, that he had not removed by proof the presumption of negligence; and secondly, that the plaintiff had always paid his rent since the fire, a portion of which rent he now sought to recover back. His honor cited Art. 1629 of the Civil Code—"When loss by fire occurs in the "premises leased, there is a legal presumption in favor of the lessor, that it was "caused by the fault of the lessee or of the persons for whom he is responsible; "and unless he proves the contrary, he is answerable to the lessor for such loss."

The evidence was far from showing no negligence on the part of the plaintiff. At the time of the fire there was an exhibition of poultry in his premises, and Rapin should have been looking after the safety of his stables where three valuable horses had been destroyed. Who the incendiary was had not been discovered. The question in the Court below was this: Had Rapin shown himself to be without fault? The Court below thought he had not, and the majority of this Court saw no reason to disturb that judgment.

Judgment confirmed.

M. le juge Mondelet ne concourant pas dans ce jugement.

Leblanc, Cassidy & Lacoste, advocats du demandeur.

Day & Day, advocats du défendeur.

(P.R.L.)

COUR DE CIRCUIT, 1871.

MONTREAL, 2 MARS 1871.

Coram BERTHELOT, J.

Trudel vs. *Desautels et al.*, Intervenants, *Hubert et al.*, mis en cause.

JUGE :—Qu'un jugement interlocutoire condamnant aux *frais du jour* une partie qui n'est pas prête à procéder, est exécutoire avant la reddition du jugement final.

Dans cette cause, les intervenants, n'étant pas prêts à procéder le jour fixé pour la preuve, avaient demandé à continuer la cause au terme suivant. Le tribunal avait accordé leur application *en payant les frais du jour*. Quinze jours après, le demandeur fila un *fiat* pour un bref d'Exécution contre les intervenants pour le montant des dits *frais du jour* taxés à la somme de $16.05 Le Greffier refusa de lui octroyer ce bref invoquant pour raison qu'il ne pouvait accorder une éxecution avant le jugement final.

Le demandeur fit motion pour Rglé *Nisi* aux fins de faire enjoindre au Greffier de préparer le bref d'Execution demandé. R. A. R. Hubert, un des greffier conjoints, comparait en personne pour répondre à la motion qui fut accordée, mais sans frais.

Brunet & Bertrand, advocats du demandeur.

(J.B.)

SUPERIOR COURT, 1871.

MONTREAL, 30TH DECEMBER, 1871.

Coram TORRANCE, J.

No 1901.

Starke vs. *Massey*.

HELD :—That in a case *en separation de corps et de biens* the contents of a letter alleged to have been written by defendant, and the destruction of which has been sworn to may be established by parol evidence.

PER CURIAM :—This is a motion to revise the ruling at *enquête* of His Honor Mr. Justice Berthelot. The action is one *en séparation de corps et de biens*, and certain questions were put to the plaintiff's mother, examined as a witness on the part of the plaintiff, tending to prove the contents of a letter said to be written by the defendant, and which has been destroyed. I assume as a matter of fact that the letter has been destroyed, and applying, therefore, the rule of law in such a case, I must hold that the questions ought to be answered. My brother Judge maintained the objections which were made to these questions, on the ground that parol evidence could not be adduced under the circumstances. As I think otherwise, I must set aside his ruling and grant the plaintiff's motion.

Motion to revise ruling at *enquête* granted.

A. & W. Robertson, for plaintiff.

Devlin & Power, for defendant.

(S B.)

SUPERIOR COURT, 1872.

MONTREAL, 30th NOVEMBER, 1872.

Coram TORRANCE, J.

No. 1607.

The Trust and Loan Company of Upper Canada vs. *Monk & qual.*, and divers opposants, and *Gédéon Ouimet*, Attorney General pro Regina, opposant collocated, and *G. H. Monk*, contestant of collocation.

HELD:—1o. That a bond for a sum of money in favor of the Queen of date A. D. 1845, duly registered, gave a *hypothèque* on the property present and future of her debtors.

2o. That, the Attorney General for Lower Canada could prosecute the payment of such bonds made to secure obligations incurred in Lower Canada.

TORRANCE, J.:—This case comes before the Court on the merits of a collocation made by the prothonotary in favour of the Attorney General pro Regina for $6002.09.

The opposition of the Attorney General set forth the appointment of Messrs. Monk, Coffin and Papineau prothonotary of the Court of Queen's Bench, District of Montreal, on the [illegible] July, 1844; that they held that office till May, 1850, from which time they were prothonotary of the Superior Court, t Montreal, by statute; that they were appointed clerk of the Circuit Court on the 24th December, 1849; that they fulfilled these duties till 12th March, 1865; that as prothonotary of the Superior Court, they received $2959.73, under 12 Vic., c. 112, and as clerk of the Circuit Court $1215.96 under the same statute; that as prothonotary of the Superior Court from 10 Sept., 1850, to 12 March, 1865, they received $1751.09, and as clerk of the Circuit Court during the same period, they received $57.38 under 13 and 14 Vic., c. 37, making $5984.16 in all; that Samuel Wentworth Monk, one of the said prothonotaries, died on the 12th March, 1865; that the property sold in this cause had been long before his nomination as prothonotary and had been since his property and liable for his debts and for the debts of the prothonotary to Her Majesty. The opposant therefore prayed that Her Majesty might be paid out of the proceeds of said property $5984.16, &c.

By a supplementary *moyen*, fyled 5 Oct., 1867, the opposant set forth a bond by MM. Monk, Coffin and Papineau, of date 26 September, 1844, for £2000, registered in the registry office for Montreal on 7th March, 1845.

By item 8 of the report of distribution, Her Majesty was collocated as follows:

To our Sovereign Lady the Queen under her privilege and under the bond entered into by the said Samuel Wentworth Monk, William C. H. Coffin, Louis J. A. Papineau, John Pangman, and Samuel Cornwallis Monk, for the penal sum of £2000 for security of the due and faithful fulfilment by the said Monk, Coffin and Papineau of the duties of the office of prothonotary of the Superior Court, amount due Her Majesty for moneys received in and for her behalf, by the said Monk, Coffin and Papineau, as set forth in the opposition of the said Honorable Gédéon Ouimet..... $5984.16

Costs of opposition..... 15.93

Fee to prothonotary..... 2.00

$6002.09

The Trust and Loan Co. of Upper Canada vs. Monk et qual.

The contestant, George Henry Monk, contested the collocation, alleging by his contestation that at the date of the registration of his mortgage on 3rd Sept., 1859, no privilege could attach in favour of Her Majesty; that at that date Monk, Coffin and Papineau did not owe the Government anything; that the bond of date 26 Sept., 1844, was not descriptive of any lands, and the claim of Her Majesty must go after the registered claim of George Henry Monk; that said bond did not cover any such claim as that now collocated in favour of the Attorney General; that the bond was only available to third persons; "That "the said item 8 of the judgment of distribution in this cause is unfounded "and illegal in withholding from the said George Henry Monk the $1977.91 "mentioned in it, and the Queen's claim embracing the sum was and is "unfounded in fact and in law, and said sum in any, the worst event, for him "George Henry Monk, ought to be disallowed to Her Majesty, and added to "the sum awarded to him George Henry Monk by the last item of the said "judgment of distribution." Further that the claim for Her Majesty could not be made by the Attorney General for the Province of Quebec, but by the Dominion of Canada.

Conclusions, &c.

The answer of the Attorney General was that by the registration of the bond the Queen acquired a *hypothèque*.

The condition of the bond was in these words: "Now the condition of the "bond is such that if the said Samuel Wentworth Monk, William Craigie "Holmes Coffin, and Louis Joseph Amédée Papineau shall well and truly "demean themselves in the execution of all and every the duties of the said office "of joint prothonotary and clerk of Her Majesty's Court of Queen's Bench "aforesaid in civil matters, and shall truly pay over all money to be levied or "received by them as such joint prothonotary and clerk as aforesaid to all and "every the person and persons lawfully entitled to receive the same, then and in "such case the above written bond shall be void and of no effect, &c."

The opposition by the Attorney General for Lower Canada appears to be justified by 30 Vic., c. 3, s. 135. The rule laid down C. C. 1899 cannot apply to the joint occupants of the office of prothonotary. The chief question is whether the Crown has a privilege under the bond of 26 Sept., 1844, registered 7 March, 1845. The ordinance 4 Vic., c. 30, required registration of bonds and obligations among other things, but legal hypothecs of which this bond was one, when registered, existed without description of land to be charged until Sept. 1, 1860, when they were placed on the same footing as judgments. Before that time, they differed from judgments in this that they affected future as well as present property, whereas the operation of judgments had been limited by 4 Vic., c. 30, s. 30, to lands at the time of registration in the possession of the debtor. Mr. Ramsay, for the contestant, ably contends that the ordinance of 1669, which created the privilege in favour of the Crown (*fisc*) in customary France was not operative in Canada from want of registration in the *Conseil Supérieur* at Quebec. That may be, but there were certain ordinances which were not so registered, but which nevertheless were always looked upon as if law in Canada. The ordinance of 1669 may be in that pos-

tion. Mr. Bonner in his treatise on the Registry Laws, pp. 80, 81, assumes that it and the *dicta* of Pothier, Basnage and Domat, based on the ordinance, were law in this country. At any rate, there is the jurisprudence of the Courts which for nearly 100 years have given the Crown the privilege of pre-payment out of the moneys of its debtors. The English public law gives the Crown the privilege. 3 Comyn Dig. Vo. Debt to the King, G. 8. p. 397, 399; Chitty—Prerogative, p. 381. 3 Burge Colonial Law, 318. Broom's Maxims, p. [49]. Chalmer's Opinions, p. 362! Our code has laid down its rules on this matter, C. C. 2032, 2027, 2028.

The judgment is *motivé* as follows:

"The Court having heard the Attorney General and the contestant G. H. Monk *par reprise d'instance* on the merits of the contestation by George H. Monk, fyled 15th Oct., 1867, of the collocation in favour of the Attorney General *pro Regina*, having examined the procedure of record and duly deliberated;

"Considering that at and before the registration of the mortgage, hypotheque, in favour of said G. H. Monk, registered 3 Sept., 1859, there was a hypotheque and privilege by the jurisprudence of the country in favour of our Sovereign Lady the Queen under the bond of date the 26th Sept., 1844, registered on the 7th March, 1845, on the property present and future of her debtors; considering that such bond covered claims of the nature of those for which the Attorney General was collocated; considering that the opposition and claim of the Crown was rightly made by the Attorney General for the Province of Quebec, and that therefore, under the circumstances of this case, the contestation of the said G. H. Monk and of contestants *par reprise d'instance* is unfounded in law,

"Doth dismiss said contestation with costs, &c."

Contestation dismissed.

St. Pierre, for the Attorney General.
R. A. Ramsay, for G. H. Monk.

(J. K.)

SUPERIOR COURT, 1872.

MONTREAL, 30th DECEMBER, 1872.

Coram JOHNSON, J.

No. 851.

Close vs. *Dixon et al.*

HELD:—That when a person is once plainly proved to have been insane, the existence of a lucid interval requires the most conclusive testimony to establish it; and the validity of a will made during an alleged lucid interval will not be presumed in the absence of such testimony.

JOHNSON, J.—This action is brought in the special form of a *demande en faux*. The plaintiff is James Close, the brother of the person who is said to have made, on the 23rd December, 1870, the instrument in the form of a will which is attacked by the present proceeding; and it is directed against six defendants, viz.:—1. Margaret Dixon, the mother of the deceased Bernard Close. 2. James Mullin. 3. Jos. E. O. Labadie, N.P. 4. George Weekes, N.P. 5. The Directors of the St. Patrick's Orphan Asylum. 6. Les Directeurs et Syndics de la Maison de Refuge de Ste. Brigitte de Montréal.

Close vs. Dixon.

The object of the present proceeding is, 1. To have it adjudged and declared that the instrument impugned is null and void and of no effect, the said Bernard Close having been, at the time it was made, deprived of reason, memory, and judgment, and incapable of declaring it to be his will. 2. That Bernard Close be therefore declared to have died intestate, and having left only his mother and brother as his representatives, that the plaintiff be declared to have inherited by law one-half of his property. 3. That the two corporations who are defendants have no right in the succession or property of the deceased. 4. That Margaret Dixon, being entitled only to her half, be condemned to pay back to the plaintiff one-half of what she has received. 5. That the defendants, Mullins, Labadie and Weekes, be jointly and severally condemned to pay back to the plaintiff all they have received, the whole with costs. All the defendants have fyled appearances, and three of them—Margaret Dixon and the two corporations—have pleaded. They admit the making of the instrument impugned in its apparent form, but allege that it is in no respect invalid, the testator having been, although dangerously ill, yet not deprived of his reason at the moment he made it, though after having done so he relapsed into his previous condition of sickness, and continued in that state until his death. The plea admits that Bernard Close was interdicted on the 10th January, three days before his death; but affirms the validity of the will on every ground on which it is sought to attack it. All the forms and requirements incident to this special form of proceeding have been carefully observed, and nothing is even suggested by those who are interested in maintaining this will against the exact fulfilment, on that score, of all the requirements of the law.

Notwithstanding the immense volume of this record, and the importance of the case to the parties concerned, there are in reality only two points to be considered. The first is a question of fact, the second one of law. The question of fact is this: Was the testator of sound and disposing mind when he made this will? I say this is really the only question of fact, depending of course for its solution upon a multitude of other facts and considerations, all of them, however, to be weighed with reference to this simple enquiry: "*Did Bernard Close know what he was about?*" Because if he did, the mere zeal and officiousness of those who surrounded him, will not go for much to invalidate a free expression of his will; but if *he did not*, their conduct assumes a very different complexion. No better objects could perhaps be selected as the recipients of his bounty than the two charities to which on the face of the instrument they are bequeathed; but then it must be *he* who is to be allowed to select them. If he does so freely, it will matter little that it is done in favour of those who most wished it, or most sought it, or most strove for it; —but *that is the whole question*. The plaintiffs say that when this instrument was made, Bernard Close had only the failing form and the lost mental powers of a man dying of a well defined form of madness. The defendants contend that his mind was serene, though his bodily strength was failing; and that this instrument is the plain and uncontrolled expression of his wishes. The question of law is a very simple one indeed, and need only be stated to be decided. On the one hand, if Bernard Close made a free, intelligent and uncontrolled declaration of his will—the present action must be dismissed. If, on the contrary, this is not his will; but a mere form and pre-

tence wickedly contrived to have the appearance of what it is not in reality—the conclusions of the declaration must be granted.

In investigating the facts of this case, I have had to examine with attention seventy-one written depositions taken at *enquête*, to criticise and analyse both examination and cross-examination, and very often re-examination, to weigh contradictory statements; to consider the bias of interest, position, feeling, and the complex various other motives that influence human testimony; to read a great variety of written instruments; to verify a series of dates, and understand a conflicting mass of villainous calligraphy, requiring in some instances the skill of an expert, and upon the whole to exercise in my single person, and by my unaided discrimination, the collective power of twelve jurymen as a preliminary. Such a task when it has once been accomplished is far too uninviting to be renewed without necessity here. If, in addition to the duty of a judge, the law of this country casts upon me, in every case, the labour of twelve jurymen, I will exercise it as a jury does by declaring that I find upon the facts, either for the plaintiff or for the defendant. I am not bound, in addition to the labour of arriving at a verdict, to give an essay upon the facts in support of it. It is no part of the office of a judge to convince or to persuade; though it is to expound and to decide.

Upon the facts of this case, then, I shall only say that the so-called last will and testament of Bernard Close is that of a madman, incontestably proved so to have been for a considerable time previous to its alleged execution. It cannot be even plausibly denied that the condition of this man from the 10th of December, 1870, to the time of his death, was other than a condition of "dementia," constant in its duration, though of variable severity. It is not, as I gathered from the argument of the defendant's counsel, in effect denied that such was the case; but what is contended for is, that although he cannot be said to have been from the 10th of December in a sound condition of mind, yet, that there did, in point of fact, occur a lucid interval, plain in its character and of sufficient duration, at the moment when the instrument was executed. That is the extent of the defendant's pretension, and it is no doubt sufficient if it is true.

Now, the rule of law on this subject is, so to say, reversed; it is different from the general rule on the subject of insanity. The law generally presumes all persons to be sane, and that presumption only disappears upon conclusive proof to the contrary; but when a person is once plainly proved to be insane, as this man was, the existence of a lucid interval requires the most conclusive testimony to establish it. Upon this point the authorities are numerous and conclusive. In dealing with the subject of the state of mind of the testator, I do not attach much importance to a very great deal of the evidence of record. I have followed the rule laid down in Taylor's Medical Jurisprudence, and also in Wharton & Stille's work, § 33—"Testimony to establish lucid intervals, or partial or general insanity, must possess two characteristics: 1st—It should come from persons of general capacity, skill, and experience, in regard to the whole subject in all its bearings and relations; 2d—If should come, as far as practicable, from those persons who have had extensive opportunities to observe the conduct, habits, and mental peculiarities of the person whose capacity is brought in question, extending over a considerable period of time, and reaching

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back to a period anterior to the date of the malady." I find the evidence of dementia clear, authoritative and uncontradicted. I find the proof of a lucid interval vague, contradictory, interested, and, to me, incredible. I consider the evidence of Dr. McCallum more valuable upon these points than all the other depositions taken together. His acquaintance with the patient, and with his malady and its history, the plain and cogent reasons given for his conclusions, his obvious good faith and total absence of all interest in the suit—all these considerations give his evidence a weight with me that I find irresistible, and which, indeed, is not the least disturbed by the speculative opinions of another doctor, speaking from a *description* of symptoms, instead of a view of the symptoms themselves, and still less by the statements of other less educated or competent witnesses; all more or less in contradiction with themselves and each other. I find it also impossible to close my mind against the strong impression made by the fact that the patient, who was a zealous Roman Catholic, died without confession, and without receiving the last sacraments which are usual in his church, and I cannot help asking myself, after reading all the evidence of the efficacy of these rights as believed in by those of his faith, whether he would have incurred what to him must have appeared the tremendous responsibility of facing death without being a partaker of them, if he had had the possession of his faculties? I am persuaded therefore that this instrument was not the expression of the testator's will at all, that those who in official or unofficial character procured or participated in its execution have acted from a mistaken view of duty in certifying it to be what it was not. I do not notice the fact of interdiction in this case which, though it took place after the date of the will, took place, I have no doubt, for causes existing at the time the will was made, and therefore by law may have an influence upon it, because I deem it unnecessary to go beyond the facts which to my mind conclusively prove that Close was incapable of making a will, and that being so incapable the Court is not bound to go beyond the consideration that in reality he died intestate. As to the influences under which this pretended will was made, as I understand the case, they cannot strictly be made a ground of judgment against the instrument itself. It was said by Chief Justice Shaw in the case of Woodbury vs. Obear, that "evidence tending to show that the testator was of feeble mind and believed in ghosts and supernatural influences had some tendency to show unsoundness of mind, and that weakness of mind which would be easily imposed upon by the exertion of undue influence. There is no inconsistency in the verdict which finds both that the testator was of unsound mind, and that he executed his will under undue influence." That may no doubt be very good doctrine in cases of partial insanity; or of ability more or less questionable in a testator to understand what he was about. But in the present case I am far from satisfied that Bernard Close ever executed a will at all, unless the mere mechanical act of signing, that itself being even doubtful, can be called executing this instrument. In my opinion, it can hardly be called *his act at all*—it was the *act of those who surrounded him.* It is not a question of *influence* in getting him to do a thing which he more or less understood the nature of, but of wickedness in pretending that he participated in any sufficient

sense in a thing done altogether by others? I do not say, therefore, that this so-called will was made by Bernard Close acting under undue influences; I say that he never acted intelligently at all, and that others acted for him, though I am far from thinking that the conduct of those who are responsible for this shameful proceeding is any less blameable on that account. I find it very difficult to understand how Labadie and Mullins can consider themselves justified in acting as they did. As regards poor old Mrs. Dixon, aged 90 years, and Mr. Weekes, whose deplorable condition is evident and admitted, they are more objects of pity than of censure. If the two former considered themselves to be promoting a work of piety and charity by what they did I can only inform them that such notions of piety are not conformable to the law of the land.

Under all these circumstances the plaintiff might have asked perhaps more than I understood to be his pretension at the hearing. He might have expected that Labadie and Mullins should have been condemned to pay costs at the least; but he has contented himself with asking a condemnation only against those who have contested the action—Mrs. Dixon and the two corporations—and against them the judgment must go according to the conclusions of the declaration with costs. Whilst against Labadie, Weekes and Mullins, it will be dismissed, but without giving them costs against the plaintiff who had the best reasons for including them in his action.

Doutre, Doutre & Doutre, for the plaintiff.
Leblanc, Cassidy & Lacoste, for the defendants.
(J. K.)

SUPERIOR COURT, 1872.

MONTREAL, 30th DECEMBER, 1872.

Coram JOHNSON, J.

No. 1561.

Vallée es qualités vs. The New City Gas Company.

CONTRIBUTORY NEGLIGENCE.

Held:—That where a Gas Company has introduced pipes into a house and an escape of gas occurs at a point for which the Company are responsible, the widow of a person killed by an explosion of the gas cannot recover damages against the Company if it appears that the deceased contributed to the accident by his negligence in going to the place with a light in his hand.

JOHNSON, J.—The plaintiff is the widow of the late Mr. Theodore Beaudry, who perished by an explosion of coal gas in his dwelling, on the night of the 11th Feb., 1872, and brings the present action as well in her own behalf as such widow, as in her quality of tutrix to her four minor children, issue of her marriage with her deceased husband.

The family had been inconvenienced for some time by an escape of gas in the cellar, and had complained to the Company who neglected to repair it. Whether they were bound to do so or not is a question which I will not examine now in detail. Its decision would depend upon a reasonable construction of what the Company undertook to do by their contract with the consumer; upon which the Company cannot complain if their own regulations are invoked for an

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explanation. Nos. 6 and 8 of those regulations are as follows: "6. All service pipes will be laid by the Company to the inside of walls separating the [illegible] of streets at their own expense; but any extra length will be at the expense of the applicant. 8. The tubings and fittings for the conveyance of gas *after* it has passed the metre may be put up by any gas fitter employed by the consumer or proprietor of the premises, the whole, however, subject to the approval and inspection of the Company's inspector. The exact place at which this gas escaped is proved to have been at a point in the service pipe occurring before it had reached the metre; and though this is not the point upon which the case turns, I feel bound to say that the only rational view of the Company's obligation in this respect, and one which is in entire accordance with the terms published by them as those on which they carry on their trade, seems to me that the Company [illegible] having exclusive right and control of that part of the service pipe which [illegible] proceeds, or occurs before it reaches, the metre; and that they could not carry on their business at all unless the metre could be depended on to perform its office, which, of course, it could not do if the pipe that supplies it is to be at the mercy of the consumer. I think it right, therefore, to say in view of the great risks to which gas consumers are liable, that the view I should be disposed to take of this part of the case would be against the defendants.

The broad principle, however, upon which this case turns is that of contributory negligence. The Company having introduced the pipes for the supply of gas, and the escape being proved to be at a point for which they were responsible, they are liable for all direct consequences of their negligence, which may arise without any material contribution on the part of the plaintiffs. By their negligence, instead of furnishing as safe a supply of gas as they might have done through a good pipe, they serve a noxious supply through a defective pipe. They fill the plaintiff's house not with a safe means of illuminating it, which was what they were paid for; but with something intolerable to smell, injurious to health and dangerous to life in ordinary circumstances of any household, for it can hardly be said that if, as in the present case, there is sickness in a family and a night light in a bed room, the patient would be responsible as a contributor to an injurious explosion of coal gas with which the Company might by their own negligence have filled his bedroom.

Whatever difficulties such a case might present do not arise here. In the present case, the unfortunate deceased knew where the leak was, he had complained of it. He had been warned by the very terms of the regulations of the Company that supplied him with gas, that in such [illegible] he must not go near the source of danger with a light. Nevertheless, [illegible] all this, and probably thinking himself safe, inasmuch as a servant [illegible] preceded him with a light near the [illegible] spot, and had escaped with [illegible], he unfortunately goes with a lighted lamp or candle in his hand—the [illegible]ion occurs, and he is killed. The law may be generally stated to be, that [illegible] parties are to blame neither can recover. Its application in the present [illegible] will be severely felt by the innocent widow and children of this unfortuna[illegible]man; but I am afraid that it is quite plain (at least it is so to my [illegible]) that if any explosive substance or fluid be supplied by the negligence of a company or person—they

will only be responsible for the consequences that may flow exclusively from their own negligence, and not for those that are contributed by the sufferer. In the case of gunpowder, or coal gas, which is proved to be explosive in combination with certain proportions of atmospheric air, when a light is applied to it, I think that the party who should supply the spark to the one, or the flame to the other, is an essential contributor to the explosion, and that being the case here, the innocent and deeply to be commiserated representatives of the deceased, who derive their right from the circumstances attending the injury to the deceased, have I think no right of action.

I may add that the case of Tuff *v.* Warman in the 5th volume of the Common Bench Reports, N.S., page 573, contains a review of all that has ever been said in leading cases in England on the subject of contributory negligence. That case was an appeal under the 35th Sec. of the English Common Law Procedure Act of 1854, 17 and 18 Vict., chap. 125. It was argued on 10th May, 1858, before Justices Wightman, Erle, and Crompton; and Barons Watson, Bramwell, and Channell, six English Judges. It is there said by Justice Wightman, "The law is laid down with perfect correctness in the case of "Butterfield vs. Forrester, and that rule is, that although there may "have been negligence on the part of the plaintiff, yet, unless he "might, by the exercise of ordinary care, have avoided the consequences "of the defendant's negligence, he is entitled to recover. If by ordinary care he "might have avoided them, he is the author of his own wrong." That was followed by Davies & Mann, 10 M. and W. 546, where the same learned judge says: "It appears to me that the correct rule concerning negligence is laid down in "Bridge vs. The G. June. R. Co., viz., that the negligence which is to preclude "a plaintiff from recovering in an action of this nature must be such as that he "could, by ordinary care, have avoided the consequences of the defendant's "negligence."

This rule of law, if it has ever been apparently relaxed according to circumstances of peculiar cases, has never been departed from. On the contrary, in the case of Tuff vs. Warman, that I have just cited, and in all the text books on the subject of torts, the doctrine is mentioned that "the defendant is not "excused merely because the plaintiff knew that some danger existed through "the defendant's neglect and voluntarily incurred such danger." This is said on the authority of Clayards vs. Dethick, 12 Q. B. 439; and as it seemed to come nearer the present case in point of principle than any other that I have seen, I examined it by itself. "That was a case where the plaintiff's horse was killed by falling into a trench which the defendants had made and insufficiently guarded." Pattersen, J., in that case said: "The defendants had clearly no right "to leave a trench open in the passage to his mews, and to tell the plaintiff you "shall keep your horse in the stable, until we tell you you may remove him, but "whether or not the plaintiff contributed to the mischief that happened, by want "of ordinary caution, is a question of degree. If the danger was so great that "no sensible man would have incurred it the verdict must be for the defendants "and the case was rightly put to the jury as depending on this question." The plaintiff here [illegible] safely in the afternoon over the place where the accident

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happened. According to the evidence for the defendant he was told, on attempting to pass in the evening, that he could not do it without incurring danger to himself and the men below. The jury, however, did not believe this statement. The whole question was whether the danger was so obvious that the plaintiff could not with common prudence make the attempt. Coleridge, J., said:—"The question is not only whether the defendants did an improper act; but also whether the injury to the plaintiff may legally be deemed the consequence of it. The defendants say that the injury was the result of his own strong headedness in attempting to pass when he was told it could not be done without risk. Then was the question on this point properly left to the jury? I understand the Lord Chief Justice to have expressed himself strongly against the view taken by the defendants' counsel, but to have put the question in a manner that appears correct, namely, whether the plaintiff acted as a man of ordinary prudence would have done, or rashly and in defiance of warning." So that this case of Clayards vs. Dethick very clearly confirms the rule of law that I have applied; and in the case of Tuff vs. Warman, that I noticed at first, it is also stated as part of the judgment of Mr. Justice Wightman that the rule of law was affirmed in Clayards vs. Dethick—the difference between that case and the one now before me being in point of form merely. There it was held that what was the amount of danger, and the circumstances which led the plaintiff to incur it are questions for the jury. Here unfortunately, they are for the judge, and I find that under the circumstances, to use the language of Patterson, J., in Clayards vs. Dethick, "the danger was so great that no sensible man, especially when expressly warned by the conditions of his contract not to do so, ought to have incurred it." The action is dismissed, but without costs, as each party contributed to the accident.

Action dismissed.

Doutre, Doutre & Doutre, for the plaintiff.
Leblanc, Cassidy & Lacoste, for the defendants.
(J. K.)

SUPERIOR COURT, 1872.

MONTREAL, 19TH DECEMBER, 1872.

Coram TORRANCE, J.

No. 16.

Mitchell v. *Gaucher* et al.

LESSORS AND LESSEES.

HELD:—That in cases instituted under the provisions of the Code of Civil Procedure between Lessors and Lessees, articulations of facts are not allowable.

Roy, Q.C., for defendants *en garantie*, made a motion to reject articulation of facts which had been fyled by the plaintiff, citing C. C. P. 211, 220, 234, 235, 894 and cause No. 2278, *Comte* v. *Roy* in 1861, decided 17 Sept., 1861 (Berthelot, J.)

E. C. Monk, è contra.

Motion granted.

The Court granted the motion.

Perkins & Monk, for plaintiffs.
Doutre, Doutre & Doutre, for defendants.
R. Roy, Q.C., for defendants *en garantie*.
(J.K.)

SUPERIOR COURT, 1873.

MONTREAL, 28TH FEBRUARY, 1873.

Coram TORRANCE, J.

No. 1858.

Mathison et vir vs. *Whitlock.*

HELD:—That a rule for interrogatories *sur faits et articles* should not be held good as against a plaintiff who is in the cause merely to authorise his wife, the real plaintiff, separated from him as to property.

PER CURIAM:—A rule was taken out in the ordinary form requiring the plaintiffs to answer interrogatories *sur faits et articles*. The female plaintiff appeared and answered. The male plaintiff, William Cole Whitlock, made default. The plaintiffs now make a motion to have the rule as regards the male plaintiff declared of no effect, inasmuch as he is the husband of the female plaintiff and cannot by law be examined for or against his wife, and because he is not a party to the cause as required and meant by the law in order to entitle the defendant to examine him on *faits et articles*. The plaintiffs are separated as to property. The defendant has cited in support of the rule, C. C. P. 221 and the Quebec Act of 1871, 35 Vic., chap. 6, s. 9. The Court holds that the male plaintiff here is not properly party to the writ, so as to enable the defendant to invoke C. C. P. 221, and as to the provision of the Quebec Act, wise and remedial as it is, it is an innovation upon the common law and must be limited to the case provided for, namely, the examination of husband or wife as a witness against the other, with the ordinary right of cross-examination.

Motion granted.

Abbott, Tait & Wotherspoon, for plaintiffs.
D. D. Bondy, for defendant.
(J. K.)

SUPERIOR COURT, 1873.

MONTREAL, 28TH FEBRUARY, 1873.

Coram TORRANCE, J.

No. 570.

Mousseau et al. v. *Picard* et al.

HELD:—That the Court will not entertain a motion to revise a ruling at *Enquete* sittings in a case where the ruling admits the evidence objected to.

PER CURIAM:—This was a motion by the defendant, Michel Laforce, to set aside an interlocutory judgment of Mackay, J., admitting certain questions objected to by the defendant. The invariable practice of the Court was only to entertain a motion to revise a ruling where the ruling excluded testimony. Where the ruling admitted the testimony, the course of the party opposing the admission was to make a motion at the final hearing to revise the ruling.

Motion rejected.

Mousseau & David, for plaintiff.
Moreau & Quimet, for defendant.
(J.K.)

COURT OF QUEEN'S BENCH, 1872.

MONTREAL, 19TH SEPTEMBER, 1872.

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

No. 9.

Cox, Appellant, and *Patton*, Respondent.

HELD:—1° That the sale of a horse by a party styled in the declaration a "merchant," to a party styled in the declaration an "Esquire," may be proved by parol evidence, when it is established that the alleged purchaser has had possession of the animal.

2° That in an *assumpsit* action, in which the only bill of particulars fyled was "To amount of account rendered, $120.00," to which the general issue has been pleaded, it is competent to the plaintiff to prove that the account was really for the price of a sale of a horse.

This was an appeal from certain interlocutory judgments of the Superior Court at Montreal, maintaining objections made by the respondent at *Enquête* to certain questions tending to prove a sale of a horse by the appellant to the respondent.

The action was in *assumpsit*, accompanied by a bill of particulars containing only the following:—To amount of account rendered."—And the plea was the general issue.

At *Enquête* the respondent admitted that he had had possession of a horse which he received from the appellant, by driving him from Montreal to Lachine, keeping him there over night and tendering him back to appellant next morning; but he contended that he had only taken him on trial. The appellant then attempted to prove the sale of the horse to the respondent by parol evidence, and respondent objected, on the ground that the contract was not susceptible of proof by verbal testimony, and these objections were eventually sustained by the Court.

On the appeal, the respondent urged, in addition to the illegal character of the testimony, that under the peculiar state of the pleadings the appellant had no right to prove a special contract of sale.

The judges in appeal (BADGLEY, J., *dubitante*) held, that the question raised, as to the informality arising from the peculiar state of the pleadings, could not arise, inasmuch as the respondent had limited his objections, on the face of the depositions, to the inadmissibility of parol evidence. And they unanimously held that the sale could be legally proved under the circumstances, by parol evidence; CARON, J., [illegible] that the 5th paragraph of Art. 2260 of the Civil Code made sales of moveable effects, between traders and non-traders, commercial matters.

The Court, therefore, reversed the interlocutory judgments and overruled the objections (BADGLEY, J., dissenting as to costs in appeal), assigning the following reason:—"Considering that the questions propounded by the plaintiff at *Enquête* to witnesses produced on his part, and objected to by the respondent, were admissible and ought not to have been rejected."

Judgment of S. C. reversed.

Perkins, Monk & Foran, for appellant.

Monk & Butler, for respondent.

(S. B.)

COURT OF QUEEN'S BENCH, 1872.

MONTREAL, 19TH SEPTEMBER, 1872.

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

No. 15.

Terrill, Appellant, and *Haldane*, et al., Respondents.

HELD:—That a requisition by plaintiff for process to examine defendants *sur faits et articles*, fyled on the same day that service is made of the defendant's motion for *péremption*, is a *procedure utile*, and will operate as an interruption of *péremption*.

This was an appeal from the judgment of the Superior Court at Montreal, granting a motion for *péremption d'instance*, reported in the 15th vol. of the Jurist, p. 245.

The Court were unanimously of opinion that the judgment should be reversed, and the motion for *péremption* dismissed with costs, and the appeal was consequently maintained with costs; the Court assigning the following reason:—"Considering that the requisition made and fyled in this cause in the Superior Court by the appellant, plaintiff below, for process to the defendants and each of them for their appearance before the Superior Court to answer interrogatories on articulated facts (*faits et articles*), was a *procédure utile*, useful proceeding, in the said cause, according to law and the procedure in force in this Province. Considering that the said proceeding was taken in time to cover the *péremption* of the said cause moved for therein by the said James Haldane, one of the said defendants, respondent here, and that the said motion of the said James Haldane was irregular and should have been rejected."

Judgment of the S. C. reversed.

Ritchie, Morris & Rose, for appellant.

Dorion, Dorion & Sénécal, for respondents.

(S.B.)

COUR DE CIRCUIT, 1872.

MONTREAL, 16 MAI, 1872.

Coram MACKAY, J.

No. 16.

Louis Bourbonnais et al., Requérants; *et La Corporation du Comté de Soulanges*, Intéressée.

FRAIS DANS LES AFFAIRES MUNICIPALES.

JUGE:—Que les frais dans une demande, par voie de Requête en cassation de Règlement municipal, doivent être taxés, comme dans une cause de première classe, *non appelable*, de la Cour de Circuit.

Le tarif, fait antérieurement au Code Municipal, ne contenant pas de dispositions applicables à une cause en nullité de règlement, non par voie d'appel mais par Requête en cassation sous l'opération de l'art. 698 et suivants, l'Hon. Juge a inséré dans son jugement le règlement suivant: "La Cour déclare que la taxe doit être la même que dans les causes de 1ère classe de la Cour de Circuit, *non appelables*."

Doutre, Doutre, & Doutre, pour les requérants.

D. D. Bondy, pour la Corporation.

(J. D.)

COUR DU BANC DE LA REINE, 1872.

EN APPEL.

QUEBEC, 6 MARS, 1872.

Coram CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J., et BOSSE, J., *ad hoc.*

No. 43.

LOUIS ÉDOUARD PACAUD,

APPELANT,

ET

OCTAVE BEAUCHENE ET AL,

INTIMÉS.

JUGE:—Que le transport d'une créance hypothecaire, donne au cessionnaire la possession utile de la dette, par l'enrégistrement du transport avec signification d'une copie enregistrée au tiers détenteur.

Moyse Beauchêne, cultivateur, du township de Somerset Sud, avait consenti deux billets promissoires, payables à l'ordre de Joseph St. Hilaire, à Plessisville, le 7 mai 1866, montant en capital et intérêt, le 2 juillet 1868, à $101: Joseph St. Hilaire endossa et transporta ces deux billets à François Larivière, marchand, de St. Norbert d'Arthabaska, qui a poursuivi Moyse Beauchêne sur le montant de ces deux billets, devant la Cour de Circuit, pour le district d'Arthabaska, et jugement fut rendu, le 16 septembre 1868, pour les $101, avec intérêt et dépens. François Larivière fit enrégistrer ce jugement, le 29 janvier 1869, avec une hypothèque spéciale sur la terre de Beauchêne:

François Larivière transporta ce jugement pour valeur reçue, à l'appelant, par acte sous seing privé, le 6 décembre 1869; le transport fut enrégistré le 11 décembre 1869, et copie enrégistrée du transport fut signifié à Joseph Provancher, cadet, le 15 décembre 1869, qui était devenu depuis l'enrégistrement du jugement l'acquéreur de la terre hypothéquée; l'appelant poursuivit Provancher en déclaration d'hypothèque comme tiers détenteur; Provancher appela les Intimés en garantie, qui plaidèrent à l'action principale par une défense *au fond* en fait.

L'appelant prouva que Provancher était détenteur de la terre hypothéquée depuis le 30 janvier 1869, et que Moyse Beauchêne en avait été le propriétaire et en avait toujours eu la possession publique, paisible et non interrompue depuis au delà de trente ans.

Après avoir clos son Enquête, les intimés produisirent les titres en vertu desquels ils se prétendaient les propriétaires. Ces titres étaient:

1. Acte de vente de la susdite terre, par Moyse Beauchêne, et François Beauchêne, son frère, devant Mtre. O. Cormier, notaire, le 16 juillet 1859 et enrégistré le 25 juillet 1859, avec la faculté de réméré pendant dix ans.

2o. Vente du susdit droit de réméré par Moyse Beauchêne aux intimés ses deux fils, par acte devant Mtre. Larue, notaire, le 8 Octobre 1868, et enrégistré le 5 Novembre 1868.

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3o. Rétrocession de la susdite terre aux Intimés qui avaient exercé le droit de réméré, par le dit François Beauchêne, devant Mtre. O. Cormier, notaire, le 26 décembre 1868, et enrégistré le 22 janvier 1869.

4o. Vente de la dite terre par les dits intimés au dit Joseph Provancher, cadet, devant Mtre. Larue, notaire, le 30 janvier 1869, enrégistré le 2 février 1869.

Les intimés ne firent nulle preuve pour combattre celle du demandeur appelant.

Lors de l'audition de la cause au mérite, l'appelant fit motion pour faire rejetter ces susdits exhibits, comme n'ayant pas été produits avec les défenses parce qu'ils avaient été produits sans la permission de la Cour. Cette motion fut rejettée avec les dépens, mais M. le juge Polette, par jugement du 12 mai 1871, accorda au demandeur les conclusions de son action avec les dépens; déclarant que la signification du transport enrégistré au tiers détenteur donnait la possession utile au cessionnaire, le demandeur, pour intenter *l'action en déclaration* d'hypothèque;

Et faisant droit sur la demande principale, immeuble suivant, &c., affecté et hypothéqué en faveur du demandeur principal Louis Edouard Pacaud, écuyer, au paiement de la somme de cent une piastres, montant en capital d'un jugement obtenu devant cette Cour, le seize de septembre 1868, par François Larivière contre Moïse Beauchêne, avec intérêt sur icelle à compter du 3 juillet 1868, et enrégistré au long au Bureau d'Enrégistrement dans et pour le Comté de Mégantic, le 29 janvier 1869, avec avis aussi enrégistré, désignant et hypothéquant l'immeuble ci-dessus désigné, lequel jugement a été transporté, quant au capital intérêt par le dit François Larivière, au demandeur principal, pour valeur reçue, par acte sous seing privé, fait en présence de témoins, à St. Norbert d'Arthabaska, le six décembre 1869, et enrégistré au dit Bureau d'Enrégistrement, le 11 du même mois de décembre, et lequel transport avec certificat d'enrégistrement ont été signifiés; condamne, etc., etc.

Ce jugement fut porté en Révision par les intimés, et la Cour Supérieure, siégeant à Québec, composée des honorables M. le juge en chef Meredith, MM. Stuart et Taschereau, par son jugement du 28 juin 1871, infirma à l'unanimité, le jugement de l'honorable M. le juge Polette, donnant pour raisons:

"That the buyer of a debt has no possession available against third persons "until signification of the act of sale has been made, and a copy of its delivery "to the debtor.

"Seeing that although signification appears to have been made of the act of sale, "dated 6th December, 1869, upon which the action is founded, to Joseph Provancher, cadet, who was not the debtor of the debt sold by the said act of sale, yet "that no signification of the said act of sale was made to the said Moyse Beauchêne, who was and is the debtor of the said debt sold by the said act aforesaid; this Court doth reverse, etc."

Le demandeur interjetta appel de ce jugement et à l'appui de ses prétentions il disait:

Les arts. 1570, 1573 et 2127 du Code Civil sont applicables à l'instance et non les arts. 1571 et 1572 comme l'a prétendu la Cour Supérieure, en Révision.

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Moyse Beauchène avait souscrit deux billets promissoires, payables à l'ordre de Joseph Hilaire, qui les avait endossés et transportés; ces billets étaient alors payables au porteur, (art. 2286, 2346 C. C.) François Larivière, comme porteur d'iceux, poursuivit et obtint jugement contre le faiseur, Moyse Beauchêne; ce jugement ne donnait qu'un caractère exécutoire à la dette, sans altérer ni changer sa nature commerciale. Larivière fit ensuite enrégistrer ce jugement avec une hypothèque spéciale sur l'immeuble du faiseur, Moyse Beauchêne, pour sureté du paiement de la dette, (art. 2121, 2133, 2139, 2145, 2034 Code Civil); les parties ne sont-elles pas dans la même position que si les dits billets, faits en brevet, devant notaire, avaient été consentis et signés à l'ordre de Joseph St. Hilaire avec une hypothèque spéciale sur la terre? est-ce que par endossement ces billets n'auraient pas été payables au porteur?

Est-ce que le montant de l'hypothèque n'aurait pas été payable au porteur qui aurait fait signifier au tiers détenteur copie du transport enrégistré?

2 Troplong, Vente No. 906, dit: "le billet promissoire garanti par une hypothèque spéciale était négotiable, et l'endossement transmettait aussi la garantie hypothécaire qui faisait les suretés du créancier...Le tiers détenteur n'a de relation à nouer qu'avec le créancier désigné dans l'inscription et quand le tiers détenteur a payé les inscriptions, il a satisfait à ses obligations, l'immeuble est libéré. Les billets conserveront toujours les privilèges que le droit commercial a attachés à leur nature commerciale." Ainsi comme dette commerciale, il n'était pas obligatoire de signifier le transport à Moyse Beauchêne, c'est le cas prévû par l'art. 1573; mais ce transport doit être signifié au tiers détenteur de l'immeuble.

"Le transport d'une créance privilégiée sur des fonds qui se trouvent entre les mains d'un tiers autre que le débiteur, est valablement signifié, *non au débiteur*, mais au détenteur du fonds: cette signification saisit le cessionnaire à l'égard des tiers."

Devilleneuve et Gilbert, verbo cession, page 372, No. 37 1842. Journal du Palais, page 706, arrêt du 17 novembre 1841, Cassation, Paillet et Lecompte et al. 1043, Do. page 161, arrêt 14 janvier 1842, Limoges, Cères et Rogues de Fursar 1844. Do. page 143, arrêt 8 mai 1844, Cassation, Lépan et Fontenat.

Les arts. 1570 et 2127, C. C. arts; 699, 700, 727, C. P. C. ont introduit un droit nouveau dans notre Code.

Dans l'ancien droit, l'art. 108 de la Coutume de Paris, statuait sur la signification du transport au débiteur, pour saisir le cessionnaire à l'encontre de cessionnaire subséquent, que la dette fut personnelle, prévilégiée ou hypothécaire; il ne faisait pas de distinction; mais cet art. de la coutume a été subdivisée par les art. 1570, 1571, 1572, 1573 et 2127, et notre Code civil a fait des distinctions qu'on ne peut passer inapperçus, et quant au transport des dettes *hypothecaires et privilegiées*, cette distinction ne pouvait être faite par l'art. de la Coutume puisqu'alors il n'y avait pas de bureau d'Enrégistrement. Ainsi nous maintenons que la signification du transport au débiteur n'est pas nécessaire pour avoir la *possession utile* de la dette; il suffit de faire enrégistrer le transport.

1o. Parceque dans l'art. 2127, le législateur n'a pas reproduit le dispositif

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" L'acheteur n'a pas de possession utile à l'encontre des tiers" de l'art. 1571; *Expressio unius est exclusio alterius.*

2o. Le Code n'indique pas le mode de signification dans le cas du débiteur absent; mais il indique bien la manière de l'assigner; art. 68 C. P.-C.

3o. Il n'oblige pas à l'enrégistrement de la signification du transport, pour constater, qu'il, le cessionnaire, a *la possession utile.*

4o. L'art. 2127 n'exige pas la signification du transport : il dit " un double " du certificat de l'enrégistrement doit être *fourni* au débiteur avec la copie du " transport." Or *fournir ou signifier* un acte à quelqu'un sont deux choses bien différentes; *fournir* un acte, est le remettre d'une main à l'autre, sans en dresser d'acte; mais signifier un acte comporte l'obligation de ne faire cette *signification* ni *avant* ni *après* telle heure du jour; mais dans un temps déterminé, avec certains délais et sous certaines conditions et dont il faut dresser *procès verbal* par écrit pour en faire la preuve; le mot *fournir* n'est employé que dans cette circonstance, par les deux codes; ils se sont toujours servis du mot *signification*, quand il s'est agi de faire connaitre un acte ou procédé à quelqu'un.

5o. Le tiers détenteur pouvait utilement payer au cessionnaire et être subrogé à ses droits; art. 1156, 2070, 2072, 2073.

6o. Si la dette avait été payée au cédant avant d'avoir été transportée au cessionnaire, par l'enrégistrement du transport de la signification, comme dans le cas actuel, l'action du tiers détenteur aurait été utilement dirigée contre le cessionnaire, art. 2148, 2149, 2150.

7o. Si le Tiers détenteur avait payé au cessionnaire, après signification du transport enrégistré, comme dans le cas actuel, il aurait été légalement déchargé.

8o. Tant que l'inscription de l'hypothèque n'a pas été déchargée par sa radiation dans les Registres du Régistrateur, elle est censée due, art: 700 C.P.C.; sa *signification* sous l'empire de l'art. 108 de la Coutume *est remplacée* par l'inscription et l'enrégistrement du transport, qui étaient alors inconnus.

9o. Si l'immeuble avait été vendu par autorité de justice, le montant de la créance aurait été payée au cessionnaire (art. 700 C. P. C.) qui aurait nié ce droit au cessionnaire faute de signification du transport.

D'après la doctrine de la Cour Supérieure en Revision, la loi du pays ne pourrait pas reconnaitre au cessionnaire la *possession utile d'une dette* due par un absent, puisque la signification du transport ne pourrait pas en être faite.

Depuis cet appel, l'acte de la 35 Vict: chap 6, sect. 3, indicte le mode de signification du transport en vertu de l'art. 1571, au débiteur absent; ainsi l'interprétation de l'art. 2127, a dû être faite dans le même sens, par la majorité de la Cour d'appel et par notre Législature.

La Cour du Banc de la Reine a maintenu la position prise par l'appelant ainsi qu'elle l'exprime par son jugement du 6 mars 1872, dont suit les considérations.

Considering that there is no error in the judgment rendered in this cause en première instance, on the 12th May 1871, by the Circuit Court, sitting in the district of Arthabaska, and that the grounds and motifs set out in the said judgment are sufficient in law to sustain the same, doth confirm the said judgment,

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and doth, in consequence, reverse and set aside the judgment rendered in this cause by the Court of Review, at Quebec, on the 28th June, 1871, with costs.

Dissentientibus : Honorable Mr. justice Caron, Honorable Mr. justice Bossé.

Jugement renversé.

G. L. Pacaud, pour l'appelant.

Felton & Honan, pour les intimés.

(E. L. P.)

SUPERIOR COURT, 1870.

MONTREAL, NOVEMBER, 1870.

Coram TORRANCE, J.

No. 586.

Ex parte on application of *Jerome Cayen*, Petitioner for writ of *Certiorari*, and *The Mayor et al.*, Prosecutors, and *John P. Sexton*, Recorder.

Held :—1st. That it was not competent to a defendant questioning the summary jurisdiction of justices of the peace to set up *jus tertii*.

2nd. That the Court could not here try the question of jurisdiction, the Recorder of Montreal being exempted from taking evidence in writing.

PER CURIAM.—This case is before the Court on a motion of the petitioner, Jerome Cayen, to quash a conviction of the recorder, John P. Sexton, and on a motion of the prosecutors, the Corporation of Montreal, to quash a writ of certiorari. A complaint on the 19th June last was lodged against the petitioner before the Recorder's Court, that he had on the 17th June obstructed St. Léon street, in the City of Montreal, by depositing firewood on the street without having previously obtained the permission of the City Inspector. The defendant pleaded to the complaint that the Corporation had never been proprietors or in possession of the pretended street called St. Léon street, which had never been inscribed on the register of streets of the City nor homologated; that the Board of Public Works alone has the control of the piece of land in question which is not a public street; and the defendant is not guilty in the manner and form as complained.

The defendant was fined $20 and costs.

Duhamel, for the petitioner, contended that from the moment that the question of property was raised, the Recorder was ousted of his jurisdiction, and that the C. S. C. chap. 91, s. 46, should apply.

Devlin, for the Corporation, cited 1 L. C. Jur. 162, In re Ira Gould.

PER CURIAM.—It has always been held as a maxim, that where the title to property is in question, the exercise of a summary jurisdiction by justices of the peace is ousted. Paley on Convictions, p. 137. But the claim of title must be on behalf of the defendant or those through whom he claims, and he cannot set up a *jus tertii*. Cornwell v. Sanders, 3 B. & S., 206. Further, as has been laid down in re Ira Gould, 1 L. C. J., 162, the Court cannot enter into the question of jurisdiction from the Recorder being specially exempted by statute from the obligation of taking evidence in writing. The motion of the petitioner will therefore fail, and the motion to quash the certiorari must be granted.

Duhamel & Rainville, for petitioner.

R. Roy, Q.C., }
B. Devlin, } for the prosecutors.

(J. K.)

SUPERIOR COURT, 1870.

MONTREAL, 24TH DECEMBER, 1870.

Coram TORRANCE, J.

No. 2362.

Leory & vir vs. *Plamondon* et al.

HELD.—1° That a defendant has no interest to disavow or right to question the power or authority of the attorney *ad litem* of the plaintiff to bring an action.

2° That when a writ and declaration allege that the female plaintiff is duly authorized by her husband, party to the action, it is not competent to the defendant by an exception *à la forme* to question such authorization.

PER CURIAM.—The defendants met the action by an exception *à la forme*, which alleged *inter alia* that the female plaintiff was commune en biens with her husband, but had instituted the action without his authorization although such authorization was alleged in the declaration and in the writ of summons. The plaintiffs have demurred to the exception *à la forme*:

1. Because it appears by the writ of summons, that the female plaintiff was authorized to bring the action.

2. Because in law the defendants have no interest and are not admissible to disavow the attorneys *ad litem* of the female plaintiff authorized by her husband, and of the said husband for the purpose of authorizing his said wife.

The Court was with the plaintiff, and maintained the *défense en droit* "considering that it appears by the pleadings in this cause and by the said exception, "and it is alleged by said exception, that the writ of summons and declaration "do aver that the female plaintiff was authorized by her said husband to bring "the present action;" and "considering that the defendants are without interest to disavow the attorneys *ad litem* of the plaintiffs, and have no power to "question the power or authority of the said attorneys *ad litem*." *McKercher & Simpson*, 6 L. C. R., 311.

Exception dismissed.

Duhamel & Rainville, for plaintiffs.
J. G. D'Amour, for defendants.
(J. K.)

SUPERIOR COURT, 1870.

MONTREAL, 18TH NOVEMBER, 1870.

Coram TORRANCE, J.

No. 2185.

Tremblay vs. *Bigault d'Aubreville*, defendant, and the same opposant.

HELD:—That at least eight days notice of an inscription must be given for *enquête* and hearing at the same time.

Mirault, for the opposant, asked that the inscription for enquête and hearing on the merits be discharged.

Duhamel, e contra.

The Court discharged the inscription on the ground that sufficient notice had not been given, C. C. P. 235 requiring 8 days, citing Shuter v. Guyon, 5 L. C. Jur. 43.

Duhamel & Rainville, for plaintiff.
G. Mirault, for opposant.
(J. K.)

SUPERIOR COURT, 1870.

MONTREAL, 31ST OCTOBER, 1870.

Coram TORRANCE, J.

No. 2242.

Whyte es qualité vs. *Lynch* et al.

REAL ACTION—JURISDICTION.

HELD:—That though a real action is only to be brought in the District where the immoveable in dispute is situated, C. C. P. 38, yet an appearance by a defendant, without pleading, or pleading to the merits of the action, is a waiver of an exception to the jurisdiction.

PER CURIAM.—This is an action by John Whyte in his quality of assignee to the insolvent estate of William Cairns of Ormstown, in the District of Beauharnois. The conclusion of the declaration prays that certain deeds of sale set forth in the declaration be annulled and set aside as simulated and fraudulent, and the immoveable described therein be declared to be vested in the plaintiff in his said capacity, to be by him dealt with according to law. The first question submitted to the Court is a question of jurisdiction. There are four defendants in the Writ of Summons. Robert V. Lynch and William Emberson, both of New York, John Cunningham of the village of Huntingdon in the District of Beauharnois, and Thomas Phillips of the village of Durham in the same District. John Cunningham was served with the Writ of Summons in the District of Montreal.

The defendants, Robert V. Lynch, William Emberson and Thomas Phillips were not served, but were called in by advertisements. The defendants, Robert V. Lynch and John Cunningham appeared by their several attorneys. The land in question is in the District of Beauharnois. Robert V. Lynch pleaded to the merits of the action that he was ignorant of the facts stated in the declaration, and that William Emberson had no property in the Province of Quebec, and also an additional plea that the plaintiff was not the assignee of the residence of William Cairns, and that the assignment to him was null.

John Cunningham did not plead to the action. It was argued for the defendants on the merits that this Court had no jurisdiction by C. C. P. 37, 38. Art. 37 says: "In every real or mixed action the defendant may be summoned before the Court of his domicile or before that of the place where the object in dispute is situated."

Art. 38 says: "In real actions they should all be summoned before the Court of the place where the object in dispute is situated."

"In mixed actions before the Court of the place where the object in dispute is situated, or before the Court of the domicile of one of the defendants." The service in Montreal would only be good in a personal action. The action should have been instituted in the District of Beauharnois where the land was.

The plaintiff denied that this was a real action. As to Lynch, the question was waived by his pleading to the merits. The Court could not pronounce upon this question of jurisdiction. It had been waived. The rule of the code was not *à peine de nullité*.

Is the present action real? The Ancient Denisart Vo. Action says: "Les actions réelles sont celles par le moyen desquelles on poursuit immédiatement des droits sur les choses."

Ortolan Comm. on the Institutes of Justinian, Vol. 2, p. 457, says: "L'action réelle, en général, est celle par laquelle le demandeur soutient qu'il a, abstraction faite de toute autre personne, la faculté de disposer d'une chose, corporelle ou incorporelle, ou d'en tirer plus ou moins largement profit. * * *

Si nous avons besoin d'intenter l'action, c'est parceque notre droit est méconnue, que quelqu'un y met obstacle, et qu'il faut recourir à la justice pour faire lever cet obstacle."

It is impossible for the Court to come to any conclusion but that the present action is a real action.

Has the objection been waived by the appearance of the two defendants, Robert V. Lynch and John Cunningham, without their fyling a declinatory exception?

The rule may be stated, as follows: The consent of parties cannot give jurisdiction when wanting *ratione materiæ*. It can only confer it when mere personal rights are involved, or where a defendant is sued before another judge than the one of his domicile, and he nevertheless appears and pleads to the merits; or does not plead at all. When jurisdiction is wanting *ratione materiæ* the court is bound *ex officio* to notice it. Now, is the Superior Court at Montreal incompetent *ratione materiæ* to take cognizance of an action claiming real estate in the District of Beauharnois? The Court here is competent to take cognizance of real actions generally, and is therefore competent, *ratione materiæ*, to take cognizance of the present action claiming an immoveable in the District of Beauharnois. The authors would appear to be of opinion that the solution of the difficulty is in the solution of the question, whether the tribunal is either relatively or absolutely incompetent. If this Court be only relatively incompetent, the objection has been waived; if it be absolutely incompetent, then no acquiescence or waiver of parties could give jurisdiction.

Thomine Des Mazures in his commentary on Art. 170 of the C. C. P. of France, says: "Mais comment déterminer si un tribunal est incompétent à raison de la matière, ou si l'incompétence n'est que relative? Ce n'est pas toujours une question facile à résoudre. Nous estimons que la solution dépend du point de savoir si l'attribution de l'affaire a été faite principalement dans l'intérêt des parties, auquel cas l'incompétence n'est que relative, ou si elle tient principalement à des intérêts généraux ou à l'ordre hiérarchique des pouvoirs, auxquels cas l'incompétence est à raison de la matière et absolue." Tom. 1. p. 322.

Rogron, in his Commentary on the Code of Procédure in France, Art. 170, Tom. 1, p. 565, says: "Il y a incompétence à raison de la personne, *ratione personæ*, lorsque le défendeur est cité devant un autre tribunal que celui qui doit connaître de la cause, bien que les causes de la même nature soient placées dans les attributions de ce tribunal: ainsi, un tribunal de première instance peut connaître de toutes les affaires civiles, mais si l'affaire est personnelle, elle doit être portée devant le tribunal du domicile du défendeur; si elle est réelle, elle doit être portée devant le tribunal du lieu où l'objet litigieux est situé; si elle est mixte, devant le tribunal du domicile du défendeur ou de la situation de l'objet litigieux. Si donc, dans ces trois cas, le défendeur est cité devant un autre tribunal que celui indiqué par la loi, il pourra proposer

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le déclinatoire ; mais comme cette indication est toute dans son intérêt, il devra le faire *in limine litis*, c'est-à-dire avant toutes exceptions et défenses."

Rogron is plainly of opinion that in a case like the present, the defendant should have fyled a declinatory exception within the delays if he wished to avoid a contestation at Montreal, and not having done so, it is a waiver of the objection.

Judgment for plaintiff.

J. J. C. Abbott, for plaintiff.
W. H. Kerr, for defendant Lynch.
J. A. Perkins, for defendant Cunningham.
(J. K.)

CIRCUIT COURT, 1871.

MONTREAL, 28 FEBRUARY, 1871.

Coram TORRANCE, J.

No. 416.

McLennan vs. *Martin*, & *Martin* Plff. en faux vs. *McLennan* Deft. en faux.

HELD :—That it is necessary to serve upon a debtor a copy of the acte of signification of transfer by his creditor to a third party.

The defendant was sued upon a deed of lease made by him in favor of André Herault dit Dominique, and by the latter transferred to the plaintiff by deed of transfer of date 27th October, 1869 (P. E. Normandeau, N.P.) The plaintiff by his declaration alleged that a copy of the deed of transfer was duly signified upon the defendant on the 3rd November, 1869. In proof of this allegation, the plaintiff produced a copy of the transfer and *acte* of signification. The defendant inscribed *en faux* against this document, alleging by his *moyens de faux* "that portion of the said pretended signification of transfer in which it is stated by the said notary P. E. Normandeau that he served the said Joseph Martin with a copy of the signification of said transfer is false, namely the words in the original and authentic copy of said signification, 'and also a copy of these presents,' are false, the said Notary not having served the said Joseph Martin with a copy of the said signification of said transfer, as he falsely states in said pretended signification that he did, and that the said deed of signification of transfer is untrue and false in that respect."

The defendant *en faux* demurred to the *moyen de faux* "because by law, supposing said *moyens de faux* to be true, it was not necessary to serve upon said plaintiff *en faux* a copy of the deed of signification of the said transfer. Because the word impugned as false constitutes a mere surplusage."

Dugas in support of demurrer cited C. C. 1571. Troplong Vente, n. 109. A. Denisart vo. faux principal, p. 452.

McCord, for plaintiff *en faux*, cited 2 Gr. Coût. Art. 108, n. 29 : p. 132.

The Court dismissed the answer in law.

D. McCord, for plaintiff *en faux*.
Girouard & Dugas, for defendant *en faux*.

Note. The parties went to proof subsequently, but the plaintiff *en faux* failed to make out his case, which was dismissed, Mackay, J., 31st March, 1871.
(J. K.)

COUR DU BANC DE LA REINE, 1870.

EN APPEL.

MONTREAL, 10 SEPTEMBRE 1870.

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

No. 9.

PIERRE ETHIER,
(*Défendeur en Cour Inférieure,*)
ET
HENRY THOMAS, APPELANT ;
(*Demandeur en Cour Inférieure.*)
INTIMÉ.

JUGE :—1o. Que suivant les dispositions de l'article 89 du Code de Procédure Civile, il faut, dans une cause fondée sur un billet signé par un procureur ; où le défendeur est en défaut de comparaître ou de plaider ; que la procuration soit prouvée.
2o. Que cet article ne dispense pas le demandeur de prouver l'existence légale de celle procuration, sans quoi, son action sera renvoyée, sauf à se pourvoir (1).

L'action fut portée sur un billet promissoire, consenti par le Défendeur appelant, à l'ordre de J. B. Labelle, qui l'a endossé et transporté à l'intimé. L'appelant ne sachant pas signer, le billet a été signé pour lui par son procureur, A. Germain, constitué tel par une procuration qui est produite (Pièce No. 3 du dossier). Cette procuration a été consentie en brevet, par l'appelant, devant un Notaire et un témoin du nom de Michel Gervais. L'appelant a apposé sa marque et consenti la procuration devant le témoin qui, après la lecture faite a signé, comme tel témoin, la procuration en question, devant le notaire qui la recevait et l'appelant qui venait d'y apposer sa marque et y donner son approbation. Mais singulièrement, le notaire qui recevait cette procuration a oublié de la signer et voilà tout ce qui fit la difficulté dans cette cause. Le procureur, autorisé par cette procuration, a signé le billet qui fait la bâse de la présente action et qui a été lancé dans la circulation par J. B. Labelle, à l'ordre de qui il était fait.

La procuration et le billet s'étant faits et signés au même moment, personne ne s'est aperçu de cette lacune qui n'a été connue qu'après l'institution de l'action.

Le défendeur appelant, poursuivi sur ce billet, a comparu par procureur, mais n'a pas plaidé, bien que demande de plaidoyer lui ait été faite. L'appelant, s'il eut plaidé devait, suivant le demandeur intimé, en vertu de l'article 145 du Code de Procédure Civile, nier sous serment la vérité du billet et de la procuration, et c'était trop fort pour l'appelant de jurer qu'il n'avait pas consenti la procuration en question, et le billet qui fait la bâse de cette action. Après sa comparution, l'appelant s'était pourvu, par une enquête, contre la forme de l'assignation, et le

(1) Art. 89 C. P. C. : "Dans toute action fondée sur lettre de change, billet négociable, cédule, "chèque, écrit ou acte sous seing privé, si le défendeur est en défaut de comparaître ou de plaider, "jugement peut être rendu hors du terme, sur une demande par écrit du demandeur à cet effet et pan" qu'il soit nécessaire de prouver les signatures apposées sur tels documents, (ou de faire aucune preu" ve.") Cette dernière partie de l'article entre crochets a été ajoutée par les résolutions contenan les amendements, pages 4, No. 9.

Ethier et Thomas.

18 janvier, veille du jugement, il s'est désisté volontairement de cette exception contre la forme, et a signé, par ses procureurs, l'inscription pour le jugement le lendemain, le 19 janvier. Ce dernier jour, ses procureurs n'ont pas comparu à l'appel de la cause, qui a été jugée comme une cause par défaut ordinaire.

Le jugement rendu par la Cour Supérieure, le dix-neuf janvier dernier, (1870) à Sorel, Loranger, J., est comme suit :—

" La Cour, ayant entendu le demandeur par son avocat, le défendeur ayant " comparu, mais n'ayant pas plaidé dans les délais et ayant discontinué sa " Requête produite à l'encontre du rapport de l'huissier écrit au dos du Bref " d'assignation en cette cause, condamne le défendeur à payer au demandeur la " somme de $317.54 montant en capital, intérêts et frais de Protêt du Billet du " dit défendeur daté " *Montréal*, 18 *Février* 1869," avec intérêts sur $375.00 du " 21 juin dernier et sur la balance du 2 décembre dernier et les dépens distraits " à M. Germain, Procureur du demandeur."

L'appelant exposait ainsi sa cause dans son factum :—

1o. La procuration donnée par l'appelant à Adolphe Germain qui a signé le billet pour l'appelant, n'étant pas valable comme *acte notarié* ou *acte authentique*, l'est comme acte sous seing privé, vu qu'elle a été consentie devant un témoin ; que l'appelant y a apposé sa marque et que le témoin devant qui elle a été consentie l'a signée en présence de l'appelant. (*Article* 1221 *du Code Civil.*)

2o. Le billet et la procuration en question, étant opposés à l'appelant, et servant de base à la présente action, l'appelant était tenu de les *désavouer formellement*, de la manière réglée par le Code de Procédure Civile (article 145 C. P. C.) Ne le faisant pas, ces écrits doivent être tenus pour reconnus. (Article 1223 du Code Civil.)

3o. Or l'article 145 du Code de Procédure Civile, exige, pour le *désaveu formel* d'un billet ou autre écrit sous seing privé, faisant la base d'une action, que le défendeur produise un plaidoyer de dénégation, accompagné d'une déposition sous serment, déclarant que le *document impugné, ou une partie d'icelui n'est pas vrai ;* qu'il n'a pas consenti tel écrit et que sa signature ou celles des personnes qui l'ont signé *sont contrefaites.*

Si le défendeur ne produit pas tel plaidoyer, accompagné de telle déposition, le billet ou l'écrit est reconnu pour vrai en vertu de l'article 1223 du Code Civil et les articles 89 et 143 du Code de Procédure. En vertu de ces deux derniers articles, le demandeur n'est tenu de faire *aucune preuve quelconque* pour prendre jugement, lorsque l'action est fondée sur un billet.

4o. Or, dans le cas actuel, l'appelant ayant comparu mais n'ayant pas *désavoué* suivant la loi, les écrits sous seing privés, sur lesquels il est poursuivi, et ayant fait prendre jugement sans mot dire, a reconnu la dette réclamée ; conséquemment il a été condamné justement et ne peut pas, par le moyen d'un appel, remplacer les procédures indiquées par la loi pour *désavouer formellement* les écrits qui font la base de la présente action.

L'intimé exposait ainsi sa cause dans son factum :—

Le billet qui fait la base de l'article n'est pas signé du défendeur, qui, apparemment, ne sait ni lire ni écrire. Il est signé par M. Germain, " fondé de

Procuration spéciale à cet effet," suivant l'allégué de l'intimé, pour et au nom de l'appelant. Et il n'y a pas de telle procuration spéciale existant dans le dossier! Car on ne peut appeler de ce nom le document annexé au billet, qui n'est qu'un blanc de procuration notariée, sous la signature du Notaire mais non pas de l'appelant, et auquel ne se trouve apposé qu'un prétendu nom de prétendu témoin dont on n'a pas même prouvé la signature.

Le jugement de la Cour Inférieure est donc irrégulier, illégal et nul, et doit être infirmé et cassé.

1o. Parce que le demandeur n'a pas prouvé qu'il ait droit au payment du susdit Bref.

2o. Parce que le billet en question n'a jamais été signé par l'appelant, ni par personne le représentant légalement.

3o. Parce que le dit jugement a été rendu sans aucune preuve des allégués de la déclaration et demande de l'intimé.

La Cour d'Appel ayant entendu les parties sur le mérite de la cause en appel, a renversé le jugement final de la Cour de première instance comme suit :—

The Court *** considering that the procuration in the Respondent's declaration mentioned, by virtue whereof the promissory note sued upon in this cause was signed for the said Appellant by A. Germain, as attorney, for that effect for the said Appellant as averred and alleged in the said declaration, has not been proved, and the authority of said A. Germain in that behalf for the said Appellant has not been established in evidence.

Considering that the said statutory presumption of the validity of the signature to promissory notes, does not extend to the procuration or power of attorney by virtue thereof, such attorney is authorised to sign promissory notes for the alleged makers thereof. And considering therefore that in the judgment rendered in this cause by the Superior Court, sitting at Sorel in the District of Richelieu, on the 19th of January, 1870, there is error; doth reverse and set aside the said judgment. And dismiss the plaintiff's action with costs of both courts, *sauf à se pourvoir*.

The Honorable Mr. Justice Caron dissenting.

Barthe, Mousseau & Brassard, avocats de l'appelant.

Germain, avocat de l'intimé.

(P.S.E.)

SUPERIOR COURT, 1872.

MONTREAL, 21ST DECEMBER, 1872.

IN REVIEW.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 2200.

Lenoir dit Rolland v. [illegible]*is* et vir.

HELD:—That an inscription under C. C. P. 497, may be [illegible] on the ninth day after judgment when the *eighth* day falls on a Sunday.

Dugas, for plaintiff, moved inasmuch as the judgment of which a review was sought had been rendered on the 30th Novemb[illegible], and the inscription

Duchesnay vs. Vienne.

in review was only fyled on the 9th December instant, that the inscription in review be declared null and void as not having been produced within the eight days after the judgment. *Vide* C. C. P. 497.

Taillon, for defendants, *è contra*, cited C. C. P. 3, 24; and *Scatcherd* v. *Allan*, 10 L. C. Jur., 201.

PER CURIAM:—The case of *Scatcherd* v. *Allan* furnishes the rule, and the motion is dismissed with costs.

Motion dismissed.

Girouard & Dugas, for plaintiff.
Trudel & Demontigny, for defendants.
(J.K.)

SUPERIOR COURT, 1872.

MONTREAL, 29TH FEBRUARY, 1872.

Coram BEAUDRY, J.

No. 1228.

Duchesnay et al. vs. *Vienne & Vienne*, oppt.

That an alteration of the return day of a writ of *Vend. Exp. de Terris*, made after the sheriff has commenced the execution of the writ, by publishing his proceedings in a newspaper, is fatal, and all proceedings on such writ will be set aside, without the necessity of an *inscription en faux*.

This was an opposition *afin d'annuller*, complaining that after the sheriff had commenced his proceedings under the writ of *Vend. Exp. de Terris*, by publication in a certain newspaper, the return day of the writ had been altered by the Prothonotary.

The parties admitted (to save cost of examining the sheriff,) that were the sheriff examined as a witness he would attest, that the alteration was so made, but that the newspaper having ceased to be published after the first advertisement, he had sent back the writ to the Prothonotary, who extended the return day and then returned it to the sheriff, and that after the writ was so amended he made the necessary publications in another newspaper. And the admission was given in this form, under the express reservation of urging the necessity of an inscription *en faux*.

The plaintiffs contended, that the alteration itself did not nullify the writ or the proceedings thereon, and, under any circumstances, that without an inscription *en faux* the writ and proceedings could not be set aside.

The Court thought otherwise, and maintained the opposition, and quashed the writ and all proceedings thereunder.

Opposition maintained.

Dorion, Dorion & Geoffrion, for plaintiffs.
Cartier, Pominville & Bétournay, for opposants.
(S. B.)

COUR DE CIRCUIT, 1873.

MONTRÉAL, 12 FÉVRIER 1873.

Coram Be[illegible]

Alexis Laurence v[illegible]

Jugé 1° Que d'après les dispositions des Arts. [illegible] en rapport avec la forme donnée au No. 35 de l'Appendice [illegible] nécessaire ni requis, que les brefs de sommation émanant de la Cour de [illegible] adressés au Shérif ou à un huissier.

2° Que dans le cas où les dits brefs de sommation, doivent être signifiés dans un autre district que celui d'où ils émanent, il n'est pas non plus nécessaire ni requis par la loi, qu'ils soient adressés au Shérif ou à un huissier de ce dernier district; mais ils peuvent en ce cas, être signifiés valablement, par un huissier du district d'où ils émanent; lequel cependant n'a pas droit à plus de frais que si la signification était faite par l'huissier le plus proche de la résidence du défendeur.—Art. 1068 C.P.C.

3° Que la forme No. 35 de l'Appendice, donnée comme étant en rapport avec l'Art. 1065 C.P.C., ne s'applique qu'à la Cour de Circuit et qu'elle s'écarte, par exception, de celle indiquée par l'Art. 48 qui n'a trait qu'à la Cour Supérieure.

Le défendeur en cette cause réside dans le district de Joliette et est assigné à comparaître devant la Cour de Circuit du District de Montréal.

Le bref de sommation lui a été signifié dans le District de Joliette par un huissier immatriculé dans celui de Montréal, et n'était adressé ni au Shérif ni à aucun huissier.

Le défendeur se croyant mal assigné, a produit une Exception péremptoire à la forme, dont voici les principaux allégués:

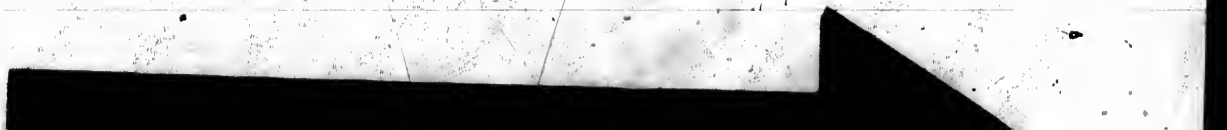
"Que l'huissier qui a signifié la dite action, a été nommé pour le District de Montréal et y pratique comme tel et n'avait aucun droit de signifier la dite action dans le District de Joliette.

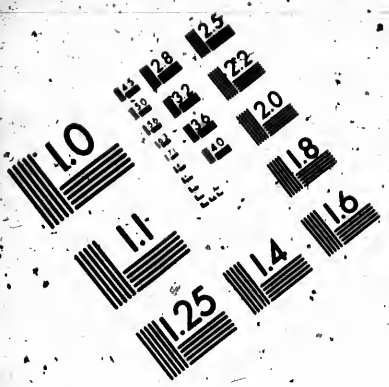
"Que le dit bref n'est pas adressé à un huissier du District de Montréal ou à un huissier de Joliette.

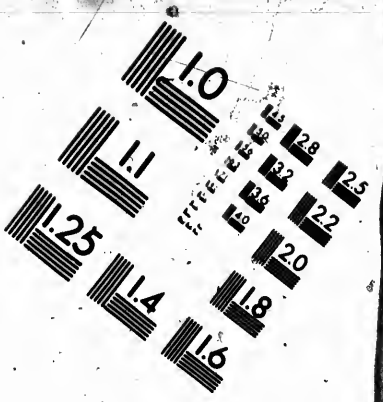
"Que le dit bref de sommation ne pouvait être signifié que par un huissier de Joliette."

Lors de l'audition, *J. G. D'Amour* pour le demandeur, prétendit que la loi permet aux huissiers du District d'où émane un bref de sommation devant être signifié dans un autre District, de le signifier valablement dans ce dernier District, que la forme du bref était parfaitement légale et inattaquable, et à l'appui de sa prétention, référera la Cour au No. 35 de l'Appendice du C.P.C. et à l'Art. 1359 du même Code, qui pourvoit à ce que les formes contenues dans l'Appendix, puissent être employées dans les cas pour lesquels elles sont proposées.

PER CURIAM:—Suivant les dispositions des Articles 1065 et 1359 du C.P.C., mises en rapport avec la forme donnée au No. 35 de l'Appendice, il n'est pas nécessaire ni requis que les brefs de sommation émanant de la Cour de Circuit, soient adressés au Shérif ou à un huissier. Il n'est pas non plus nécessaire ni requis par la loi, qu'ils soient adressés au Shérif ou à un huissier, lorsqu'ils doivent être signifiés dans un autre District que celui d'où ils émanent; mais ils peuvent en ce cas, être valablement signifiés par un huissier de ce dernier District, lequel n'a pas droit à plus de frais que l'huissier le plus proche







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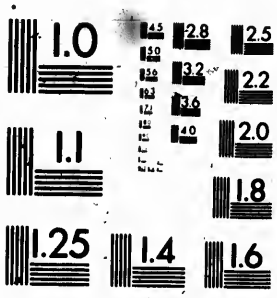

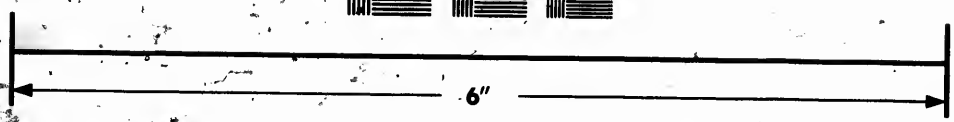

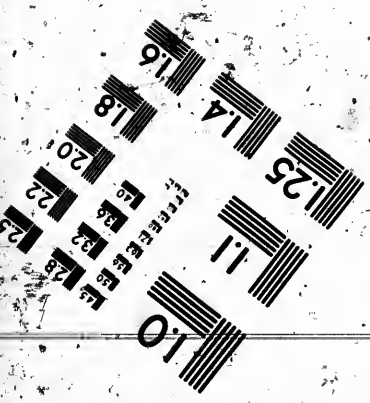

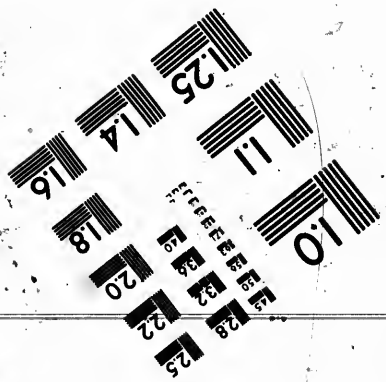

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In re Leger dit Parisien,

de la résidence du Défendeur. Il est bien vrai que l'Art. 48 C.P.C. porte que *sauf les cas particuliers d'exception*, le bref d'assignation est adressé à tout huissier, &c. Mais la forme 35 donnée en rapport avec l'Art. 1065, s'écarte de celle indiquée par l'art. 48. Il y a donc ainsi, lorsqu'il s'agit de la Cour de Circuit, *cas particulier d'exception* à l'art. 48 et pour toutes ces raisons, la Cour est d'opinion que l'exception à la forme est mal fondée, et la renvoie avec dépens.

Exception à la forme renvoyée.

D'Amour et Bertrand, pour le Demandeur.
P. N. Pauzé, pour le Défendeur.*

(J. G. D.)

SUPERIOR COURT, 1872.

MONTREAL, 30TH JANUARY, 1872.

Coram MACKAY, J.

No. 163.

In the matter of *Charles Leger* dit *Parisien*, insolvent, and *Andrew B. Stewart*, assignee; and *John G. Reither*, petitioner.

HELD:—That when an assignee improperly refuses a bid for real property offered by him for sale under the Ins. Act of 1869, and adjudges the property to the previous bidder, the judge will set aside the adjudication and order the property to be adjudged to the party whose bid was rejected.

PER CURIAM:—This is a petition to set aside an adjudication of an immoveable by an assignee under the Insolvent Act.

The assignee having obtained leave to sell the property of the insolvent, the conditions of the sale were fixed. The terms were one-fourth cash, that is, on the passing of the deed, so that fifteen days were allowed, in fact, for the production of the cash. Two lots had been adjudged to the petitioner, and he had bid for another lot when he was told that his bid would not be received unless he paid one hundred dollars down, and when the man represented that he had no money with him not having expected to be called upon to pay immediately, the assignee adjudged the property to the next neighbour. I see here improper conduct on the part f the assignee. He had no right to advertise that fifteen days would be allowed and then demand cash, and I shall therefore set aside the adjudication to Mr. Cardinal, the petitioner's neighbour, under costs against the assignee personally.

The judgment was rendered accordingly, and the assignee ordered to pass a deed of the property in due form to the petitioner.

Petition to set aside adjudication granted.

J. E. Bureau, for petitioner.
Jetté, Archambault & Christin, for Cardinal, *adjudicataire*.

(S. B.)

* Un Jugement analogue a été rendu le 15 Nov. 1871, par Son Honneur le Juge Beandry, dans une cause de la Cour de Circuit de Montréal, No. 3717, Joseph M. Dufresne et al., vs. Charles E. McAllister *Contra*.—Reeves vs. Archambault, 15 L. C. J., p. 83.

COUR DE CIRCUIT, 1873.

MONTREAL, 22 JANVIER 1873.

EN CHAMBRE.

Coram MACKAY, J.

No. 6173.

D'Amour et al. vs. Bourdon.

JUGE :—1o. Que l'affidavit produit au greffe, pour obtenir jugement dans les causes par défaut ou exparte, équivaut à la déposition d'un témoin en cour ; et que tel affidavit tient également lieu d'enquête ou de preuve.

2o. Que dans toute cause où jugement aura ainsi été obtenu sur affidavit, l'honoraire de l'avocat sera le même que si tel jugement eût été rendu sur la déposition d'un témoin en Cour.

Les avocats des demandeurs en cette cause, après avoir obtenu jugement sur affidavit, firent taxer leur mémoire de frais par le greffier qui refusa de leur accorder l'honoraire d'une cause par défaut au *exparte*, mais avec enquête.

Se trouvant lésés, ils présentèrent une Requête à son Honneur le Juge Mackay, par laquelle ils demandaient la révision de leur mémoire de manière à ce que l'honoraire d'une cause réglée après enquête, leur fût accordée, prétendant que l'affidavit en question tenait lieu d'enquête, et ils concluaient à ce que leur mémoire fût révisé en conséquence et qu'il fût ordonné et déclaré qu'à l'avenir, l'honoraire de l'avocat, dans les causes par défaut ou *exparte* dans lesquelles jugement serait rendu *sur affidavit*, fût le même que si tel jugement eût été rendu sur la déposition d'un témoin en Cour.

Les autres Juges présents partagèrent l'avis de son Honneur le Juge Mackay, et la Requête fût accordée.

D'Amour & Bertrand, pour les demandeurs.

(J.G.D.)

SUPERIOR COURT, 1870.

MONTREAL, 30th NOVEMBER, 1870.

Coram TORRANCE, J.

No. 1629.

Pattenaude v. *Charron.*

HELD, in action *en bornage*, that where a division fence had existed for upwards of thirty years between the properties to be *bornées*, and one of the parties had enjoyed his possession "franchement, publiquement et sans inquiétation" for that period, he had a right to demand that the boundary be drawn according to this line.

PER CURIAM.—This is an action *en bornage* by which the plaintiff prays that it be ordered that *bornes* be planted between the land of the plaintiff and that of the defendant according to law and the titles of the parties.

The defendant meets the action by a first plea alleging that he held his land described in the plea by donation from his father by deed of date the 20th April, 1864, and that the land adjoined the plaintiff's; that for more than 30 years before the institution of the present action the defendant has, as well by himself as by his *auteurs* and predecessors, possessed the land in question *franchement, publiquement*, continually and without interruption, peaceably and *à titre de propriétaire entre présens, âgés et non privilégiés*, and that he has in consequence acquired the proprietorship by prescription of 30 years against all persons; that there is a division fence between the land of the plaintiff and that

Pattenaude vs. Charron.

of the defendant, and that this fence and those there previously in the same lien have always served as a line of division between the said lands for more than 30 years before the institution of this action, and that the defendant, his *auteurs* and predecessors have always possessed the land within the limits fixed by the said fence.

The prayer of the plea was that it be ordered that the *bornage* be made conformable to the possession which the defendant, his *auteurs* and predecessors have had as aforesaid of the land described in the plea and within the limits of said possession.

The second plea, in similar terms invoked the ten years' prescription. The third plea was a *défense en fait*.

The plaintiff's answers were general, and the parties went to evidence.

The defendant has proved his possession for thirty years and upwards with a boundary for a division fence such as described in his pleas.

The principal question submitted to the Court is whether the *bornage* is to be ordered simply according to the titles or according to the division fence separating the properties. The case of *Ricard*, appellant, and *La Fabrique de la paroisse St. Jeanne Françoise de Chantal*, decided in appeal at Montreal on the 9th June, 1868, has been cited by the defendant as in his favour. It is so, and the Court gives an order in the terms of the order given in that case by the Court of Queen's Bench. (1).

The judgment was *motivé* as follows:

La Cour, après avoir entendu les parties par leurs avocats sur le mérite, examiné le dossier de la procédure et sur le tout mûrement délibéré;

Considérant que le défendeur, au temps de l'institution de l'action, était propriétaire de l'immeuble décrit comme suit, savoir: "une terre [redacted] et située "dans la dite Paroisse de Longueuil fief Tremblay, de la contenance de trois "arpens de front sur trente-deux arpens de profondeur, plus ou moins, tant en "front qu'en profondeur, tenant par devant au fleuve Saint Laurent, par "derrière à Charles Pattenaude, d'un côté au Nord-Est à Toussaint Daignon et "de l'autre côté au dit donateur."

Considérant que l'appelant tant par lui-même que par ses auteurs et ses prédécesseurs, a possédé le dit immeuble tel qu'il était actuellement enclos pour plus de trente ans avant l'institution de la présente action, franchement, publiquement et sans inquiétation, et qu'il en avait par là acquis la prescription contre et à l'égard de toutes personnes quelconques et même à l'encontre du demandeur, propriétaire du terrain contigu au dit immeuble.

Considérant qu'il est établi en preuve qu'il existait une clôture de division entre le dit terrain du demandeur et celui du défendeur, laquelle clôture et celle qui existait auparavant dans la même ligne ont toujours servi de ligne de division entre les terres des parties en cette cause depuis au delà des dits trente ans avant

(1) Authorities cited by appellant in *Ricard & La Fabrique*.
Pothier, Société n, 233.
Troplong, Prescription, n. 119.
Duranton, Tom. 5, n. 260.
Millet, Bornage, p. 383.

l'action et que le dit défendeur a toujours possédé sa dite terre suivant les limites désignées par les dites clôtures.

Pattenaude vs. Charron.

Considérant que le défendeur a droit de requérir que le dit bornage entre les dites parties soit fait dans la dite ligne de division et des dites clôtures, telles qu'elles existent entre les dites terres contigues des parties;

Ordonne que par arpenteurs à être nommés par les dites parties ou par un arpenteur si les parties en conviennent, sinon d'office par la dite Cour Supérieure il sera procédé suivant la loi et d'après la pratique usitée en justice au bornage et délimitation des terres des parties en suivant la ligne de division et la dite clôture maintenant existante entre les dits héritages, le dit bornage a être fait et le rapport d'icelui a être rapporté devant la dite Cour Supérieure sans délai pour sur icelui être ordonné ce que de droit, et vû que le défendeur a nié tous les allégués de la déclaration du demandeur par sa défense au fond en fait et que le demandeur a nié tous les allégués des plaidoyers écrits du défendeur, la Cour ordonne que chaque partie paie ses frais de l'action et que les frais du bornage soit divisés entre les parties.

Bornage ordered.

Duhamel & Rainville, for plaintiff.
Moreau, Ouimet & Lacoste, for defendant.
(J.K.)

COUR SUPERIEURE, 1871.

En Révision.

MONTREAL, 29 DECEMBRE 1871.

Coram MACKAY, TORRANCE, BEAUDRY, J. J.

No. 257.

La Société Permanente de Construction du District de Montréal, vs. *Larose.*

JUGE:—Que la stipulation faite dans un acte de vente par l'acquéreur qu'il paiera à l'acquit du vendeur avec la réserve de déguerpir et de délaisser la propriété acquise par lui au cas où il jugerait à propos ou à son avantage de le faire, ne le rend pas responsable *personnellement* au paiement de la dette, quoique cette indication de paiement ait été ensuite acceptée par le créancier et signifiée à l'acquéreur.

Par l'acte de vente consenti par H. Lanctot au défendeur, le 26 février 1868, le défendeur a acheté les terrains y décrits, et il fut stipulé qu'il paierait à la demanderesse l'obligation consentie en sa faveur, par le dit Lanctot en date du 15 janvier 1867, ainsi que toutes autres dettes hypothécaires grêvant légalement les terrains, le défendeur se réservant le droit qu'il avait par la loi de déguerpir et délaisser.

Le 16 octobre 1869, la demanderesse accepta cette indication de paiement, qui fut signifiée au défendeur, le 22 novembre 1869.

La demanderesse poursuivit le défendeur *personnellement* pour le recouvrement de cette créance.

Le défendeur plaida qu'il n'était pas obligé *personnellement* à payer la créance de la demanderesse.

La Cour Supérieure à Montréal, (Mondelet, J.,) maintint l'action de la demanderesse, le 30 janvier 1871.

La Société Permanente de Construction du District de Montréal, vs. Larose.

Ce jugement est motivé comme suit: "La Cour, après avoir entendu les "parties par leurs avocats sur le mérite de cette cause, examiné la procédure, "pièces produites et preuve, et sur le tout avoir délibéré; considérant que la "demanderesse a fait preuve des allégations de sa déclaration et nommément que "le défendeur lui doit, et est tenu *personnellement* pour les causes et raisons en "la dite déclaration, de payer la somme de £445 5.10, etc.;

"Considérant que le défendeur n'a point prouvé les allégations de son excep-"tion péremptoire, laquelle est mal fondée en droit et en fait, cette Cour la dé-"boute et condamne le défendeur à payer."

Le défendeur inscrivit cette cause pour Révision devant trois juges à Montréal, et ce jugement fut renversé et il est motivé comme suit:—

"La Cour Supérieure siégeant à Montréal présentement comme Cour de "Révision, ayant entendu les parties par leurs avocats respectifs sur le juge-"ment rendu par la Cour Supérieure dans et pour le district de Montréal, le 30 "de janvier 1871;

"Considérant, que par l'acte de vente consenti par Hypolite Lanctot, au "défendeur, devant P. Mathieu, Notaire, le 26 de février 1868, le dit défendeur "a acheté les terrains y décrits pour le prix et somme de $3200, sur et en déduc-"tion duquel prix il est stipulé au dit acte qu'il sera payé pour et à l'acquit du "vendeur qui y consent à la Société Permanente de Construction du district de "Montréal, (savoir, la demanderesse) l'obligation consentie en sa faveur par le dit "Hypolite Lanctot, devant Mtre. C. F. Papineau, Notaire, en date du 15 janvier "1867, ainsi que toutes autres dettes hypothécaires grêvant légalement les dits "emplacements et légalement constitués et payables, et la balance qui resterait "serait payée au vendeur au à son ordre, à demande, et que l'acquéreur se "réserva néanmoins le droit qu'il a par la loi, de déguerpir et de délaisser les "dits emplacements ci-dessus construits au cas où il le jugerait à propos ou à son "avantage de le faire;

"Considérant, que l'accepetation que la demanderesse a faite de cette indica-"tion de paiement par acte du 16 octobre 1869, reçu devant Mtre. L. N. "Dumouchel, Notaire, ne pouvait être faite qu'avec la réserve portée au dit acte "du 15 janvier 1867, et ne peut priver le défendeur du droit qu'il s'est réservé "comme susdit, que cette réserve est incompatible avec le bien direct et per-"sonnel que la demanderesse prétend exister de la part du défendeur à son "égard, que la demanderesse ne pouvait en conséquence se pourvoir ainsi qu'elle "l'a fait, par une action personelle contre le dit défendeur;

"Considérant, que la Cour Supérieure siégeant en première instance, a erré "en maintenant le dite action par son jugement du 30 janvier 1861, renverse "le dit jugement avec dépens, et procédant à rendre le jugement que la Cour "Supérieure aurait dû rendre, la Cour ici présente déboute la dite action de la "demanderesse avec dépens.

Action renvoyée, TORRANCE, J., différant.

Bondy, avocat de la demanderesse.

Maillet, avocat du défendeur.

Autorités de la demanderesse.

Troplong, Priv. et Hyp. No. 344, *in fine*, et p. 813, C. C., art. 1029.

Sur le droit que le défendeur pouvait délaisser quant aux autres hypothèques, mais non pas quant à celle de la demanderesse spécialement désignée dans l'acte et que le défendeur n'a jamais offert de délaisser.

Code Civil, arts. 1013, 1014, 1015 et 1018.

La Société Permanente de Construction du District de Montréal, vs. Larose.

COURT OF QUEEN'S BENCH, 1871.

(APPEAL SIDE.)

MONTREAL, 7TH SEPTEMBER, 1871.

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

No 2.

DAME HENRIETTE BROWN,

AND APPELLANT;

LES CURÉ ET MARGUILLIERS DE L'ŒUVRE ET DE LA FABRIQUE DE LA PAROISSE DE MONTREAL,

RESPONDENTS.

HELD:—By DUVAL, C.J. and CARON, J., that a petition for a writ of *mandamus* addressed to the defendants, "*Les curé et marguilliers de l'œuvre et fabrique de la Paroisse de Montreal,*" directing them to inter in the Roman Catholic Cemetery the body of one Guibord according to usage and law, and to insert in the register of burials the certificate of such interment, and an ordinary writ of summons issued on such petition referring to the "petition annexed," was an irregular and informal proceeding.

By DRUMMOND, J., that the proceedings were regular, but the jurisdiction, power and authority vested in Civil Courts of Old and New France to adjudicate in certain cases affecting spiritual rights and duties have ceased to be enjoyed by any of the civil tribunal of Canada since the Cession.

By BADGLEY, J., that the joinder in the writ and mandate of two separate and different duties enjoined for performance by the defendants, and for one only of which they could be held liable, was illegal.

By MONK, J., that the proceedings were regular, but the defendants' offer was sufficient.

The facts of this litigation being referred to at length in the opinions of the honourable judges in appeal, a very brief statement of the facts and pleadings, and the judgment appealed from, will suffice for introduction.

The judgment submitted to the Court of Appeals was rendered on the 10th of September, 1870, by the Court of Review at Montreal, Justices BERTHELOT, MACKAY and TORRANCE. This judgment reversed that which had been rendered in the Court of first instance by Mr. Justice Mondelet.

The proceedings were commenced by a petition, *requête libellée*, in which the plaintiff, Madame Guibord, now appellant, set out that Joseph Guibord, her husband, Roman Catholic, died on the 18th November, 1869, at Montreal; and that the defendants, respondents, administrators and guardians of the only cemetery provided for the sepulture of persons of that religion, refused to inter the remains of deceased in the cemeters common to all catholics of the city and parish of Montreal.

The petition concluded as follows:—

A ces causes votre requérante conclut à ce que, vû les affidavits produits avec les présentes, il émane un Bref de *Mandamus*, adressé aux dits défendeurs, et qu'il soit ordonné et enjoint aux dits défendeurs, sur paiement par la requérante des frais ou honoraires d'usage, d'inhumer ou faire inhumer, sous huit jours du

Dame Henriette Brown, and Les curé et marguilliers de l'œuvre et de la Fabrique de la paroisse de Montréal.

jugement à intervenir, dans le cimetière catholique romain de la Côte des Neiges, sous le contrôle et administration des dits défendeurs, le corps du dit feu Joseph Guibord, conformément aux usages et à la loi, et qu'il soit de plus enjoint et ordonné aux dits défendeurs d'insérer sur les régistres de l'état civil par eux tenus, le certificat de telle inhumation du dit Joseph Guibord aussi conformément aux usages et à la loi, et sous telles peines que de droit, en cas de résistance aux ordres de cette honorable Cour, le tout avec dépens des présentes contre les dits défendeurs, desquels dépens le soussigné demande distraction, la requérante se réservant tout recours que de droit, pour les dommages occasionnés par l'injuste refus des dits désendeurs.

The writ annexed to this petition was an ordinary writ of summons referring to the "requête annexée." The action was returned on the 30th November, 1869, and on the same day the respondents appeared by attorney. On the 10th Dec., 1869, the respondents fyled simultaneously the following pleadings:—

1. Une Requête pour faire casser et annuler le Bref vu son insuffisance. Le bref de *Mandamus* doit en effet contenir la mention de l'acte requis, le refus de l'officier y obligé de l'accomplir, et l'injonction de l'exécuter; et le bref émané dans l'espèce ne contient rien de tout cela.

2. Une première exception fondée sur les moyens invoqués dans la Requête.

3. Une seconde exception, alléguant que la sépulture demandée n'a pas été refusée, mais offerte, au contraire, dans les conditions ordinaires, et refusée par l'appelante, qui a ensuite envoyé porter le cadavre de son mari au cimetière, sans notifier le curé ni les intimés de s'y trouver à *une heure convenue*.

Que par suite les intimés n'ont pas été regulièrement mis en demeure, et que s'ils l'eussent été, ils se seraient rendus au cimetière à une heure convenable et auraient accordé au défunt telle inhumation que de droit, et auraient constaté son décès sur les régistres.

4. Une troisième exception que nous croyons devoir rapporter ici en entier:

Et les dits défendeurs, sans préjudice aux moyens de défense par eux ci-dessus invoqués, dont ils se réservent tout le bénéfice et avantage, et sans préjudice aussi à la requête qu'ils ont fait signifier, ce jour, à la demanderesse, pour faire casser et annuler le Bref émané en cette cause, et sans admettre, mais niant au contraire la vérité des faits énoncés dans la requête libellée, annexée au bref émané en cette cause, sauf ce qu'ils en ont déjà admis et ce qu'ils admettront ci-après, pour autre exception péremptoire en droit à l'encontre du dit bref et de la requête libellée en cette cause disent:

Qu'en vertu des traités, des franchises constitutionnelles et du droit public du pays, le culte de la religion catholique romaine en Canada, est et a toujours été reconnu comme libre et autorisé par la loi, et ayant droit au libre exercice de ses cérémonies religieuses de quelque nature que ce soit, sans immixtion et en dehors de tout contrôle civil ou municipal quelconque.

Qu'aux fins d'assurer à cette religion tel exercice libre de son culte, la loi reconnait et a toujours reconnu les défendeurs comme propriétaires de l'Eglise paroissiale catholique romaine de la paroisse de Montréal, destinée et consacrée à l'usage de ce culte, ainsi que de tous presbytères, cimetières et autres dépendances quelconques de la dite Eglise, et que de fait les dits défendeurs ont toujours été et sont propriétaires de la dite Eglise, presbytère, cimetières et dépendances, qui

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sont tous et ont toujours été, à toutes fins que de droit, propriété catholique romaine, affectée à l'usage et exercice exclusif du dit culte, et sujette au contrôle et à l'administration des défendeurs et de l'autorité supérieure ecclésiastique catholique romaine seuls.

Que depuis plus de dix ans, les défendeurs en leur qualité susdite sont propriétaires et en possession du cimetière catholique romain mentionné en la requête libellée en cette cause, et que comme tels ils sont et ont toujours été autorisés, par la loi, à désigner et indiquer dans le dit cimetière l'endroit particulier où doit se faire chaque inhumation.

Qu'en outre de leur qualité sus-établie, les défendeurs sont encore dans une certaine limite fixée par la loi, officiers civils, ayant à remplir en certains cas, des devoirs civils que la loi a définis et indiqués et comme tels et dans cette sphère seulement responsables à qui de droit.

Que les défendeurs en leur double qualité susdite sont préposés par l'autorité religieuse catholique romaine, et par la loi, à l'inhumation des personnes de dénomination catholique romaine, mourant dans la dite paroisse de Montréal, et comme tels responsables à l'autorité religieuse pour tout ce qui, dans la dite fonction, est du ressort spirituel et religieux, et à l'autorité civile pour ce qui est du ressort de cette autorité, dans la limite des devoirs civils des défendeurs tels que définis et indiqués par la loi.

Que les défendeurs pour la due exécution et accomplissement de leur double devoir sus-indiqué, dans le cas d'inhumation, ont, il y a plus de dix ans, savoir lors de l'établissement du cimetière sus-mentionné, en vertu de l'autorité qui leur est et leur a toujours été reconnue, tant en droit, que par la coutume immémoriale dans toute les paroisses catholiques romaines de tout le pays, assigné et attribué dans le dit cimetière, une partie d'icelui à l'inhumation des personnes de dénomination et croyance catholique inhumées avec les cérémonies religieuses catholiques romaines, et une autre à l'inhumation de celles qui sont au contraire privées de la sépulture ecclésiastique.

Que le dix-huit novembre dernier, le nommé Joseph Guibord, mentionné en la requête libellée en cette cause, est décédé en la dite paroisse de Montréal.

Que lors de son décès et pendant au moins douze ans avant, la dit Guibord était et avait été membre d'une certaine société littéraire connue et incorporée sous le nom de l'*Institut Canadien*, existant en la cité de Montréal, dans le dite paroisse de Montréal, et que cette société est la seule de ce nom qui ait jamais existé en la cite dité de Montréal.

Que lors de son décès, le dit Joseph Guibord était comme membre du dit Institut, et avait été pendant environ les dix années qui ont immédiatement précédé son dit décès, soumis notoirement et publiquement à des peines canoniques, résultant de sa dite qualité de membre du dit Institut, lesquelles peines canoniques comportaient entr'autres résultats la privation de la sépulture ecclésiastique.

Qu'aussitôt après le décès du dit Joseph Guibord, savoir, le jour même, dix-huit novembre dernier, le Révérend Messire Victor Rousselot, prêtre catholique romain et curé de la dite paroisse de Montréal, ayant été informé de ce décès et du fait que le dit Joseph Guibord était membre de la dite société, appelée

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" l'Institut Canadien," soumit par une lettre, en date du dit jour, la question de l'inhumation religieuse du dit feu Joseph Guibord, à son supérieur ecclésiastique, savoir au Rév. Alexis Frédéric Truteau, prêtre, Vicaire Général du diocèse ecclésiastique catholique romain de Montréal, dans lequel se trouve située la dite paroisse de Montréal, doyen du chapitre des chanoines de la cathédrale catholique romaine du dit diocèse, et alors et depuis longtemps administrateur du dit diocèse catholique romain de Montréal, en l'absence de Sa Grandeur Monseigneur Ignace Bourget, évêque catholique romain du dit diocèse, par et en vertu d'un rescrit apostolique accordé par Sa Sainteté Pie IX, Pape, chef de la dite Eglise catholique romaine, en date du quatre octobre, mil huit cent soixante et huit, ayant, le dit administrateur, l'autorité suprême ecclésiastique dans le dit diocèse, en l'absence du dit évêque, pour savoir s'il devait ou non, accorder aux restes du dit Joseph Guibord, la sépulture ecclésiastique, et que le même jour, dix huit novembre dernier, le dit Rév. Alexis Frédéric Truteau, fit et rendit en sa dite qualité d'administrateur du diocèse, un ordre ou decrêt qu'il adressa et transmit au dit Messire Rousselot, déclarant que vû que le dit Joseph Guibord était membre du dit Institut Canadien, lors de son décès, la sépulture ecclésiastique en pouvait lui être accordée et lui était en conséquence refusée.

Que subséquement, savoir le dix-neuf novembre dernier, la demanderesse, par ses agents ou représentants, ayant requis le dit Messire Rousselot et les défendeurs de donner au corps du dit Joseph Guibord la sépulture religieuse et civile, dans le dit cimitière sus-mentionné, le dit curé leur fit alors connaître l'ordre ou décrêt sus-mentionné de l'administrateur du dit diocèse et les informa qu'en conséquence la sépulture ecclésiastique ne pouvait être accordée et était refusée au dit Joseph Guibord; mais qu'il leur notifia en même temps que lui, Messire Rousselot, curé de la dite paroisse de Montréal, et les défendeurs, comme officiers et fonctionnaires civils, étaient prêts à accorder la sépulture civile aux restes du dit Joseph Guibord, et à constater légalement son décès, à l'heure qu'ils pourraient fixer, le tout suivant que de droit; et qu'à chaque demande et réquisition subséquente de sépulture faite par la dite demanderesse ou ses agents, pour les restes du dit Joseph Guibord, le dit Messire Rousselot et les défendeurs firent ensuite constamment la même réponse et la même offre, mais que cette offre ne fut pas alors, ni depuis, acceptée par la dite demanderesse ni par ses représentants.

Qu'en conséquence et vû l'ordre ou decrêt rendu par l'administrateur du dit diocèse catholique romain de Montréal, la demanderesse ne pouvait réclamer des défendeurs, pour le corps du dit feu Joseph Guibord, son mari, que la sépulture civile et ce dans les conditions réglées par les lois ecclésiastiques de la dite Eglise catholique romaine, ce que les défendeurs n'ont jamais refusé.

Et les défendeurs allèguent ici spécialement:

Que c'est l'usage et la coutume invariable et immémoriale dans tout le Bas-Canada, et spécialement dans la paroisse de Montréal, que toutes les inhumations de personnes appartenant à la dénomination de catholiques romains, se font dans la matinée, et à des heures convenues avec le curé de la paroisse et jamais dans l'après-midi, et que cet usage a toujours été suivi pour les inhumations faites dans les cimetières appartenant aux défendeurs et spécialement dans celui en question en cette cause.

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Que ce cimetière est situé en dehors des limites de la ville de Montréal, à environ deux milles du bureau des défendeurs et de la résidence du curé de la dite paroisse et que vû l'usage établi dans cette paroisse comme susdit, les défendeurs n'ont jamais eu et n'ont pas l'habitude de se transporter au dit cimetière, ou d'y avoir aucun représentant autorisé à faire les inhumations et à constater légalement les décès, dans l'après-midi.

Qu'ainsi qu'allégué ci-dessus, il est faux que les défendeurs aient jamais refusé de donner au corps du dit Joseph Guibord la sépulture civile, dans le cimetière susmentionné, et de constater légalement on décès; mais qu'au contraire ils ont toujours été prêts et ont offert de lui donner ou faire donner la dite sépulture civile dans les conditions qu'il appartenait.

Qu'il appert néanmoins, ainsi que les défendeurs on ont été informés depuis que le vingt et un novembre dernier, savoir le dimanche, vers quatre heures de l'après-midi, pendant l'office divin de l'après-midi, la demanderesse aurait, sans avis préalable aux défendeurs et à leur insu, fait transporter au cimetière susmentionné, les restes du dit feu Joseph Guibord pour les y faire inhumer.

Que les dits défendeurs n'étant pas prévenus qu'on transporterait ainsi et à une heure aussi exceptionelle et inconvenante pour eux, les restes du dit feu Joseph Guibord, au cimetière sus-mentionné, et qu'en conséquence ils n'étaient pas là et alors présents, ni duement représentés par aucune personne en état de et autorisée à constater légalement le décès du dit Guibord et à faire procéder à son inhumation, et que, de plus, vû ce que dessus, ils n'étaient pas non plus tenus de se trouver là et alors présents, sans avis et entente préalable quant à l'heure de la dite inhumation.

Que s'il eussent été régulièrement prévenus et avertis, ils se seraient rendus au dit cimetière, à une heure convenable, et auraient procédé à constater légalement le décès du dit feu Joseph Guibord, indiqué l'endroit du dit cimetière où devait se faire son inhumation et auraient accordé à ses restes telle inhumation civile qui pouvait appartenir.

Qu'il résulte de tout ce que dessus, que les défendeurs, comme officiers et fonctionnaires civils, n'ont jamais négligé ni refusé d'inhumer le dit Joseph Guibord, ni d'accomplir aucun devoir à eux imposé par la loi, et que tout ce que les défendeurs ont, dans les circonstances sus-rapportées, refusé d'octroyer, et accorder au corps du dit feu Joseph Guibord, était la sépulture ecclésiastique, refus pour lequel ils ne sont responsables et justiciables que de l'autorité religieuse et non de l'autorité civile, qui est incompétente à prendre connaissance de tel refus et à juger des motifs sur lesquels il peut être fondé.

Que la demandresse est en conséquence mal fondée dans sa présente demande et qu'elle en doit être déboutée.

Pourquoi les défendeurs concluent au renvoi du prétendu bref de *Mandamus* émané en cette cause, et de la dite demande de la demandresse, avec dépens.

5o. Une Défense en fait.

REPONSES ET REPLIQUES.

1. A la première exception, celle fondée sur ces moyens de forme, l'appelante répondit que c'était là l'objet d'une exception à la forme qu'il eût fallu produire dans des délais expirés et avec un dépôt de deniers qui n'avait pas été fait.

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2. A la seconde exception, l'appelante répondit que les intimés ayant, à diverses reprises, refusé d'enterrer le défunt dans le cimetière affecté aux catholiques, il était superflu de fixer une heure pour la présentation du corps, que d'ailleurs l'action était une mise en demeure formelle, et que les intimés refusaient encore d'accomplir l'acte qui leur était demandé.

3. A la troisième exception, l'appelante répondit *en droit* que cette exception ne contenait aucun énoncé qui put légalement en justifier les conclusions; que d'après le droit et la jurisprudence prévalant en France, lors de la cession du Canada à la Grande-Bretagne, et le droit public de cette dernière puissance, le pouvoir judicaire avait pleine juridiction pour réformer et empêcher les abus de l'autorité religieuse; que les intimés admettant qu'à une époque qu'ils mentionnent, feu J. Guibord appartenait au culte catholique, ils n'alléguaient aucun fait d'où serait résulté la perte des droits attachés à ceux qui professent ce culte et notamment la sépulture due à ses restes et réclamée par cette action: que les Intimés connaissant que l'Institut Canadien était une société incorporée, suivant la loi, et d'ailleurs la dite société était incorporée en vertu d'un acte public (16 Vict. ch. 261) il n'appartenait à aucune autorité autre que le Parlement, de restreindre les droits et franchises des membres de la dite société et que la prétention énoncée par les intimés tendant à attribuer à l'évêque le droit de restreindre ou altérer les dits droits et franchises, constituait une entreprise contre l'autorité du souverain; que le curé, M. Rousselot, ne pouvait justifier son refus d'inhumer par l'ordre de son supérieur, qui ne possédait aucune autorité pour donner cet ordre; que l'offre d'inhumation faite par les intimés impliquait le refus de donner aux restes du défunt la sépulture dans le cimetière affecté aux inhumations des catholiques suivant que le voulaient l'usage et la loi.

L'appelante répondit de plus à cette exception par une dénégation générale et dans une réponse spéciale, après avoir réitéré les allégations de la réponse *en droit* qui vient d'être analysée, elle dit: qu'en supposant que l'autorité religieuse puisse, sous certaines circonstances et par certains procédés, limiter les droits réclamés par cette action, il était faux, d'après les principes auxquels la dite autorité religieuse était soumise aussi bien que d'après le droit civil, qu'il ait jamais été prononcé aucune peine canonique contre les membres de l'Institut Canadien; que le dit Institut avait été incorporé par acte du Parlement (16 Vict., ch. 261) et que par le fait de telle incorporation, les membres du dit Institut, pouvaient et peuvent appartenir à tous les cultes, avaient été reconnus par les lois du pays, comme autorisés à poursuivre les fins de leur association et que le Parlement seul pouvait altérer ou restreindre les droits que leur conférait leur charte; qu'en 1858, une minorité des membres du dit Institut ayant prétendu que la bibliothèque contenait des livres futiles, irréligieux et immoraux, la majorité affirma que cet avancé était faux; que l'évêque de Montréal adoptant, sans examen ni enquête, l'affirmation mal fondée de la minorité, avait, le 30 avril 1858, publié une lettre pastorale, faisant appel aux catholiques de l'Institut et les engageant à se soumettre aux lois de l'Eglise, sans dire comment et sans prononcer aucune peine contre ceux qui ne se soumettraient pas: que pour témoigner de leur respect pour le dit évêque, les membres du dit Institut avaient délégué plusieurs d'entre eux, auprès du dit évêque, à l'effet de lui soumettre le catalogue des livres du

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dit Institut, afin qu'il put ou se convaincre qu'on l'avait trompé ou indiquer ceux des livres qu'il considérait comme immoraux ou dangereux: que le catalogue était resté six mois entre les mains de l'évêque et que l'évêque l'avait remis sans indiquer un seul livre comme immoral ou dangereux; que nonobstant cette revendication du caractère moral de la bibliothèque du dit Institut, l'évêque avait privément donné instruction aux prêtres de son diocèse de refuser les sacrements aux membres du dit Institut, leur infligeant ainsi sans aucune cause, sans monition ni excommunication, une peine abusive et contraire aux canons et aux lois de l'église; que cette peine toutefois étant purement spirituelle, cette cour n'avait à en prendre connaissance, qu'en appréciant les conséquences qui s'en étaient suivies et auxquelles les intimés faisaient allusion en alléguant que feu J. Guibord était, lors de son décès, soumis à de prétendues peines canoniques; qu'en 1865, certains membres catholiques du dit Institut s'étaient plaints au Pape, supérieur du dit évêque, des abus susdits des pouvoirs spirituels du dit évêque; qu'en août 1869, le dit évêque avait fait publier une annonce pastorale, dans laquelle il prétendait donner le texte d'un document émané d'une congrégation dite de la Sainte Inquisition, qui déclarait "qu'ayant soumis à l'examen la "difficulté soulevée depuis longtemps à l'égard de l'Institut Canadien, ils ont "voulu qu'il fut signifié au dit évêque que les doctrines contenues dans un certain "annuaire (de 1868) devaient être tout-à-fait rejetées et que ces doctrines "enseignées par le même Institut devaient elles-mêmes être réprouvées, etc., etc., "que le dit évêque devait être exhorté à s'entendre avec le clergé de son diocèse "pour que les catholiques, et surtout la jeunesse, fussent éloignés du dit Institut "*tant qu'il sera bien connu que des doctrines pernicieuses y sont enseignées;*" "que l'évêque avait pris occasion de ce document pour déclarer "que celui qui "persisterait à vouloir demeurer dans le dit Institut ou à lire ou seulement garder "le dit *annuaire*, sans y être autorisé par l'église, se privait lui-même des sacre-"ments, même à l'article de la mort, parce que pour être digne d'en approcher, "il faut détester le péché qui donne la mort à l'âme et être disposé à ne le point "commettre;" que rien dans le document prétendu émané de Rome ne justifie les conclusions auxquelles en était arrivé l'évêque; que le dit document n'exprime aucune opinion sur les questions soumises, autrement que par l'impression causée par l'annuaire, postérieur de dix ans aux questions soumises et de quatre ans à l'appel déféré à l'autorité romaine, de la conduite abusive de l'évêque; que l'abstention de l'autorité romaine de se prononcer sur la question soumise impliquait le condamnation de la conduite de l'évêque; que les conclusions de l'évêque et notamment celle déclarant que *ceux qui persistent à demeurer membres du dit Institut se privent eux-mêmes des sacrements, même à l'article de la mort,* sont un nouvel abus de l'autorité du dit évêque; que les prétendues peines canoniques dont parlent les Intimés ne peuvent avoir d'autre prétexte que la lettre pastorale en dernier lieu citée: que telles peines n'ont aucune existence légale, 1°. Parce que la seule peine canonique qui puisse séparer un membre de l'église et le priver de la sépulture ecclésiastique est l'excommunication majeure, nominativement prononcée, précédée de monitions écrites et individuellement signifiées; 2°. Parce que rien de tel n'existe à l'égard du défunt; que d'ailleurs, ces peines ne pouvaient être prononcées que *tant que l'Institut enseignerait des doctrines pernicieuses,* que le 23

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septembre 1869 les membres de l'Institut avaient unanimement déclaré qu'ils n'avaient aucune espèce d'enseignement et qu'ils excluaient avec soin tout enseignement de doctrines pernicieuses; que le même jour, les membres catholiques du dit Institut avaient unanimement déclaré qu'ils se soumettaient purement et simplement au décrêt condamnant l'annuaire de 1868; que vu tout ce qui précède, feu J. Guibord n'était soumit à aucune peine canonique et que l'exception des Intimés devait être déboutée.

Le 3 janvier 1870, les Intimés obtinrent la permission de produire une réplique spéciale à la réponse qui vient d'être analysée, et dans ce document, ils prétendirent que l'évêque était indépendant de l'état; que le défunt Guibord était soumis au contrôle absolu et exclusif des lois de l'église catholique; que l'ordre de l'administrateur enjoignant aux défendeurs de refuser la sépulture ecclésiastique n'était justiciable que de l'autorité ecclésiastique, niant à cet égard la juridiction des tribunaux civils; que l'acte d'incorporation de l'Institut n'a pas soustrait ses membres aux exigences du culte catholique; que le défunt était sous le coup d'une peine canonique purement spirituelle dont la Cour ne peut s'occuper, *les conséquences seules de cette peine étant de son ressort;* que cette peine a été infligée en conformité aux lois et canons de l'église catholique, qui juge seule et sans contrôle, tout livre publié, et dont elle permet ou défend la lecture, ainsi que réglé par le Concile de Trente; qu'en 1850 et depuis, l'Institut a possédé des livres impies, irréligieux, hérétiques et immoraux, renfermant des doctrines condamnées et notamment Voltaire, Jean Jacques Rousseau, Eugène Sue, Dupuis et grand nombre d'autres; qu'on 1858, une majorité des membres du dit Institut déclara que *l'Institut était seul compétent à juger de la moralité de sa bibliothèque et qu'il était capable d'en prendre connaissance sans l'introduction d'influences étrangères;* que cette déclaration était une négation absolue de la doctrine catholique; qu'en conséquence l'évêque a eu raison de dire que les membres de l'Institut étaient sous l'effet des peines canoniques portées par les règles citées du Concile de Trente, et d'ordonner aux prêtres de son diocèse d'appliquer, le cas échéant, les peines portées par l'Eglise contre ceux qui refusent de lui obéir; qu'il est vrai que le catalogue des livres fut soumis à l'Evêque, mais que voyant que l'Institut n'avait fait aucune des démarches qu'il avait droit d'en attendre il s'était abstenu de prononcer; que le défunt Guibord n'était pas de ceux qui avaient appelé à Rome; que l'eut-il été, il n'en pourrait tirer aucun avantage, cet appel ayant été rejeté à Rome, attendu que l'évêque a été loué de ce qu'il avait fait; que le refus des sacrements infligé par l'évêque à la suite du décret de la Cour de Rome, n'est que l'exécution de la recommandation qui est faite à l'évêque d'éloigner les catholiques du dit Institut; qu'il est faux que, d'après le droit canonique, l'excommunication majeure puisse seule priver de la sépulture ecclésiastique; que de plus l'Institut continue à enseigner des doctrines pernicieuses, ainsi qu'il est prouvé par sa déclaration du 23 septembre 1869, qui invoque une autre déclaration du 7 mars 1864 où il est dit: "que la constitution "de l'Institut Canadien, en ne demandant compte à aucun de ses membres de "sa foi religieuse, n'implique en cela la négation d'aucune vérité ou autorité "religieuse, et laisse subsister dans leur intégrité les responsabilités et devoirs "individuels des membres, dans leurs rapports avec les cultes établis; que pour

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" placer la liberté religieuse admise dans cette institution, au-dessus de toute " espèce de conflit et à l'abri de tout malaise, il est essentiel d'éviter avec soin de " discuter toute question qui pourrait blesser les susceptibilités religieuses d'aucun " des membres de cette Institution ; " que d'après cette déclaration, l'affirmation dans le dit Institut, de la divinité de Jésus-Christ, pouvant blesser les susceptibilités des Juifs, il faudrait s'abstenir de la faire, et que cette doctrine est anti-catholique et pernicieuse ; qu'après avoir déclaré se soumettre au décret condamnant l'annuaire de 1868, l'Institut l'a conservé et le possède encore ; qu'à raison de ce qui précède, le dit feu Guibord était, lors de son décès un pécheur public, soumis comme tel aux peines canoniques qui ont été appliquées à ses restes.

The action was maintained in the Superior Court by the following judgment rendered by MONDELET, J., 2nd May, 1870 :—

La Cour ayant entendu les parties par leurs avocats, 1o. sur la réponse en Droit à la 1ère Exception des défendeurs, 2o. sur la Réponse en droit à la 3ème Exception des défendeurs, sur le mérite de la cause : aussi sur la motion de la demanderesse, du 17 mars dernier, sur les deux motions des défendeurs, de la même date, examiné la procédure, les pièces du dossier et la preuve, et sur le tout mûrement délibéré : procédant d'abord à adjuger sur la motion de la demanderesse du 17 mars dernier, à l'effet d'obtenir, vû l'urgence du cas, l'exécution provisoire du jugement, sous le délai à y être mentionné nonobstant toute révision ou appel qui pourrait être poursuivi ou interjeté par les défendeurs renvoie la dite motion.

Quant à la motion des défendeurs, aussi du 17 mars dernier, demandant que partie de la déposition de l'Hon. Louis A. Dessaulles, témoin entendu en cette cause, soit supprimée, biffée et rejetée du dossier, et considérée comme nulle et non avenue, cette cour rejette la dite motion.

A l'égart de l'autre motion des défendurs, de la même date que les précédentes, pour faire déclarer illégale, partie de la preuve de la demanderesse, en conformité aux objections offertes par les défendeurs, cette cour renvoie cette motion.

Et procédant à la considération de la réponse en droit de la demanderesse à la 1ère exception des défendeurs, la cour déclare bien fondée la dite réponse en droit et renvoie la dite 1ère exception des défendeurs. Cette cour déclare également bien fondée, la réponse en droit de la demanderesse à la 3ème Exception des défendeurs laquelle 3ème Exception est renvoyée.

Et sans égard à la réponse spéciale de la demanderesse, aussi bien qu'à la réplique spéciale des défendeurs, lesquelles ont déplacé, mal à propos, la contestation qui s'élève légitimement en cette cause, et à l'occasion desquelles les parties ont eu tort de ne pas provoquer une audition en droit, la cour procédant à adjuger la cause au mérite :

Considérant que la demanderesse a fait preuve des allégués essentiels de sa requête libellée, et nommément, que les défendeurs ont mal à propos, et sans aucun droit, mais en contravention aux usages et à la loi, refusé d'accorder et donner, aux restes de feu Joseph Guibord, époux de la demanderesse, décédé à Montréal, le 18 novembre 1869, la sépulture qu'ils étaient et sont par la loi et les usages tenus et obligés de leur donner dans le cimetière catholique de la Côte-des-Neiges,

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dans la paroisse de Montréal, suivant qu'il est allégué en la dite requête libellée :

Considérant que les défendeurs sont mal fondés en leur dite 3ème exception et nommément, à faire valoir la prétention que la sépulture ecclésiastique a dû et doit être refusée aux restes du dit Joseph Guibord, attendu qu'il était lors de son décès, le 18 novembre 1869, membre de l'Institut Canadien de Montréal, et au dire des défendeurs, sous le coup de censures et peines ecclésiastiques, prétention injuste de la part des défendeurs dont le refus d'accorder, comme dit est, la dite sépulture, est une violation des lois civiles et ecclésiastiques et des canons ;

Considérant que les défendeurs ne peuvent pas s'affranchir de leur obligation de donner aux restes du dit Joseph Guibord, la sépulture réclamée par la demanderesse, en s'appuyant, comme ils le font, sur une défense de l'administrateur du diocèse de Montréal, articulée dans une lettre adressée par ce dernier, à Messire Rousselot, prêtre, curé, l'un des défendeurs en cette cause, daté, " Evêché, 18 novembre 1869," produite par les défendeurs au dossier, laquelle défense de l'administrateur, est illégale, injuste, et sans fondement ;

Considérant que le dit administrateur du diocèse de Montréal est mal fondé en ce qu'il prétend s'appuyer sur ce que Sa Grandeur l'évêque diocésain lui a commandé ou enjoint de refuser la sépulture susdite, tandis qu'ils appert par la dite lettre du 18 novembre 1869, de l'Administrateur, à Messire Rousselot, l'un des défendeurs, qu'il n'est mention que du " refus de l'absolution même à l'article de la mort, à ceux qui appartiennet à l'Institut-Canadien et qui ne veulent pas cesser d'en être membres,"—et qu'il n'est pas dit un mot du refus de la sépulture ecclésiastique ;

Considérant que si Sa Grandeur l'évêque Diocésain, en se servant des mots " l'on doit refuser l'absolution même à l'article de la mort," a par cela seul, donné à l'administrateur du Diocèse, l'ordre de refuser la sépulture dont il est question, il s'est, comme l'a fait l'administrateur du diocèse, rendu coupable d'un abus de pouvoir que répudient les lois ecclésiastiques ;

Considérant que l'offre des défendeurs, d'accorder et donner aux restes du dit Joseph Guibord, une sépulture par eux arbitrairement, illégalement et injustement qualifié, est inadmissible, en autant que cette sépulture qualifiée, ne serait rien moins que de jeter à la voierie, le corps du dit Joseph Guibord, au lieu de lui donner, comme de droit, place au cimetière catholique susdit de la Côte des Neiges ;

Considérant qu'à son décès, le dit Joseph Guibord était en possession de son état de catholique romain et de paroissien de la dite paroisse de Notre Dame de Montréal, et de tous les droits que les lois y attachent ;

Cette Cour, considérant enfin, que les défendeurs ont entièrement failli en leur défense laquelle est injuste, et sans fondemont, déboute la dite défense, savoir la 3ème exception des défendeurs.

Et ce qui précède étant dûment considéré, la Cour adjuge et ordonne, que la demanderesse présentera ou fera au plus tôt présenter, en temps convenable, avec offres légales de ce qui sera à cet égard, dû à la dite fabrique, au cimetière susdit de la Côte des Neiges, le corps de son dit mari feu Joseph Guibord, requérant les défendeurs de par eux, savoir par le dit curé de la dite paroisse de Notre-Dame de Montréal, ou par tel prêtre qui sera à ce dûment commis et préposé, de con-

férer et donner aux restes de son dit mari, la sépulture voulue par les usages et par la loi dans le cimetière susdit.

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En conséquence de ce, cette Cour ordonne qu'il émane de suite, un bref de *Mandamus* péremptoire, commandant aux défendeurs et curé, de donner aux restes du dit feu Joseph Guibord, la sépulture susdite, suivant les usages et la loi, dans le dit cimetière, sur la demande qui leur en sera faite comme dit est, et tel que la sépulture est accordée aux restes de tout paroissien qui, comme lui, meurt en possession de son état de catholique romain; et aussi d'enrégistrer, suivant la loi, ès-régistres da la dite paroisse de Notre-Dame de Montréal, dont les défendeurs sont les dépositaires, le décès du dit feu Joseph Guibord, suivant qu'il est prescrit par la loi.

Et de ce qui aura été fait, en obéissance au présent jugement et au dit bref de *Mandamus* péremptoire, sera fait rapport devant cette Cour vendredi le sixiéme jour de mai courant, à onze heures de la matinée, pour, en cas de refus de la part des défendeurs, d'exécuter ce qui est ordonné parle présent jugement, être procédé à telle condamnation que le droit. La Cour condamne les défendeurs aux dépens.

In Review, 10th Oct., 1870, this decision was reversed by BERTHELOT, J., MACKAY, J., TORRANCE, J., the judgment being recorded as follows:—

The Court here, sitting as Court of Review, having heard the parties by their respective counsel, upon the judgment rendered in the Superior Court in and for the District of Montreal, on the second day of May, one thousand eight hundred and seventy, having examined the record and proceedings had in this cause, and maturely deliberated;

Considering that the writ issued in this cause, and called writ of *mandamus*, contains no command to perform anything, and was and is not in the form required by law, *nommément by article* 1022 *Code of Procedure*;

Considering that of the two demands involved in the *Requête libellée of said* Henriette Brown, the latter one, to wit: that the defendants should be ordered to "*insérer sur les régistres de l'état civil par eux tenus, le certificat de telle "inhumation du dit Joseph Guibord, aussi, conformément aux usages et à la "loi*" cannot be maintained, the said defendants not being the keepers of the Registers of *Etat civil*, nor bound to make any registration in them:

Considering that the other or first demand, to wit: That the defendants should be ordered "*inhumer ou faire inhumer dans le Cimetière Catholique Romain de "la Côte-des-Neiges, sous le contrôle et administration des dit Défendeurs, le "corps du dit Joseph Guibord, conformément aux usages et à la loi,*" is vague;— particularly considering the proof made that the said cemetery is divided (as Roman Catholic cemeteries in Lower Canada usually have been and are) into two parts: the one for ecclesiastical burial, the fact of which division was known to plaintiff before she presented her *Requête* in this matter.

Considering that whether by the burial demanded the said Henriette Brown meant to ask for ecclesiastical burial for the remains of the said late Joseph Guibord or for mere burial of them, without ecclesiastical ceremony, she is unable to maintain the judgment that she has obtained, to wit, the said judgment of the second of May against the defendants, because ecclesiastical burial was and is

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not in the power of defendants to perform, and as to mere burial, it has been offered by the defendants for the purpose of the burial of the said late Joseph Guibord, before the plaintiff presented her *Requête* in this cause;

Considering that the said judgment under review is erroneous in not particularizing the *sépulture* and kind of *sépulture* meant by it—also in maintaining, as it has done, the answer in law of paintiff to defendants' third exception;

Considering also that the said judgment has adjudged *ultra petita* in commanding the *curé* of the Parish of Notre-Dame to give to and perform the burial mentioned in the said judgment;

Considering that by reason of the insufficiency of the original writ in this cause and of the vagueness of the said conclusions of *Requête*, the said writ might be superseded, and that by reason of all the said several premises, together, the said writ ought to be superseded, and the said *Requête libellée* dismissed; Considering further, that, defendants have shown sufficient cause against peremptory *mandamus* in this cause or matter;

Considering therefore that there is error in the said judgment of the second day of May, one thousand eight hundred and seventy, complained of, doth, revising, *reverse the same;* and, proceeding to render the judgment that ought to have been rendered in the said premises, doth supersede and quash the said writ of *mandamus*, and doth dismiss said *Requête libellée* of said Henriette Brown, plaintiff or *requérante*, with costs, as well in the Superior Court, as in this Court of Revision in favor of defendants against the said Henriette Brown.

The plaintiff in appeal submitted the following on the question of form, on which the judgment of the Court of Appeal chiefly turned:—

Les questions de forme et notamment celles qui concernent le bref, semblent être les seules sur lesquelles deux des honorables juges (MACKAY & Torrance, JJ.) aient prétendu vouloir se prononcer, quoiqu'en définitive il aient concouru dans un jugement qui adjuge sur le fond.

Les défendeurs, composés du *Curé* représentant l'élément religieux du corps, et des *Marguilliers*, représentant l'élément laïque, avaient accepté eux-mêmes et la forme du Bref et la régularité de leur mise en cause respective, en ne s'en plaignant pas, dans la forme et sous les délais fixés par la loi.

C. P. C. Art. 116. "Sont invoqués par exception à la forme, les moyens résultant: 1o. des informalités dans l'assignation; 2o. des informalités de la demande, lorsqu'elle est en contravention avec les dispositions contenues dans les art. 14, 19, 50, 52, et 56." C'est-à-dire, Art. 14, Pouvoir ester en justice; Art. 19, Plaider pour soi et non pour autrui; Art. 50, exposer la demande dans le Bref ou dans une déclaration y annexée; Art. 52 décrire l'ojet de la demande; Art. 56, assigner, en laissant copie du Bref et de la déclaration.

C. P. C. Art. 107. Les exceptions à la forme doivent être produites sous quatre jours à compter du rapport du Bref; Art. 111.: A défaut par la partie de produire telle exception dans ce délai, elle est forclose de plein droit; Art. 112, le plaidoyer contenant une telle exception ne peut être reçu à moins qu'il ne soit accompagné du dépôt de la somme des deniers fixés par les règles de pratique du tritbunal. L'Article 117 permet d'amender, après l'exception à la forme. L'Article 119 dit que les informalitée de la demande sont couvertes par l

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défaut du Défendeur, de les invoquer dans les délais fixés. L'Art. 1002, s'appliquant aux brefs de prérogative, oblige de plaider, sous quatre jours *à la plainte* et non au Bref.

Comme matière de fait, ce n'est que dix jours après le rapport de l'action que les Intimés se sont plaints de la forme du Bref et ils n'ont pas accompagné ce grief du dépôt exigé par la loi.

L'objet de la douzième Vict,. ch. 41, sur laquelle est fondé le ch. 88 des S. R. B. C., était de ramener à l'unformité et à la simplicité de notre procédure, l'exercice des brefs de prérogative. Aussi n'a-t-on conservé de la pratique anglaise que les formes inhérentes et indispensables à l'usge de ces Brefs.

L'insurmontable obstacle qu'a rencontré la Cour de Révision, au seuil même de la cause, git dans le fait que l'Art. 1022 dit: Toute personne peut obtenir un Bref (qui n'est pas nommé) *enjoignant* au Défendeur d'accomplir le devoir ou l'acte requis,—et l'on en a conclut que par ce mots le Code exige impérieusement que le Bref contienne lui-lmême l'injonction.

L'on ne tient aucun compte de l'Art. 50, qui dit: "Un exposé des causes de la demande doit être contenu dans le Bref *ou dans une déclaration qui y est jointe*," sous prétexte que cela s'applique aux actions ordinaires et non au *mandamus*.

L'on ne tient pas compte de l'Art. 1023: "*Cette demande* (de l'injonction) *est faite par une Requête libellée*; ni de l'Art. 1024 qui référe à l'Art. 999: "le Bref d'assignation enjoint de comparaitre au jour fixé par le tribunal," l'Art. 1012: "les Défendeurs doivent sous quatre jours plaider spécialement *à la plainte*.

L'on ne tient aucun compte de l'Art. 1025: "*Si la Requête est déclaré bien fondée*, le tribunal peut ordonner un Bref péremptaire, etc.

Le mécanisme organisé par ces diverses dispositions de la loi est simple: le Bref assigne à répondre à la Requête, qui fait partie du Bref et s'incorpore avec ui.

Sur ce point donc il est impossible que le jugement de la Cour de Révision soit maintenu par cette honorable Cour.

In rendering judgment the following remarks were made by the honorable judges of the Court of Appeals;—

MONK, J.—I regret extremely that I am unable entirely to concur in the judgment about to be rendered by the Court in this important case. After very careful consideration I have come to the conclusion that the judgment of the Court of Review must be confirmed, but for reasons differing in some essential points from those assigned by the Court below, and concurred in, if I am not mistaken, by this tribunal, or at least by a majority of my honourable and learned colleagues. It is due, however, to the parties that I should state, as succinctly as possible, my reasons both for differing from this Court as to the *considérants* of the judgment, and for my concurring with the decision of the Court below upon the merits of the case.

This cause is one of considerable importance, not only by reason of the particular circumstances to which it relates—not alone in regard to the parties themselves, but also in so far as the decision of it may bear upon, or tend to influence

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the decision of causes of a similar or an analogous character in the future. Both as to law and fact, the case has undergone a remarkably able discussion on both sides before the Courts below. Most elaborate and learned decisions have also been rendered, not only on the questions of form, but also upon the merits. I hope, however, it may not be considered irregular to remark that these judgments of the Superior Court do not come up for revision by this tribunal, sustained by the force and significance of concurrent opinions on interesting questions of law and procedure. One judge was in favour of the appellants, both on the form and upon the merits. Two decided for the respondents, not only in regard to the mode of proceeding which they regarded as defective, but also on the merits; and a fourth judge, considering the defects of form fatal to the appellants' pretensions, gave no opinion on the merits. I regret to say that this diversity of opinion is in some degree, though not to the same extent, apparent in the decision about to rendered by this Court. I have no hesitation in saying, that, so far as I am concerned, I have found all this, though inevitable and perhaps in some measure not to be regretted, rather embarrassing, entertaining, as I do, much respect for the learning, judicial experience and abilities, not only of my honourable colleagues, but also of the judges of the Court below. This divergence, I may say antagonism, of opinion convinces me that the case is not without difficulty; and, considering the importance of the principles of law involved, I have been fully impressed with a sense of the obligation resting on me as a member of this Court, of bestowing upon this, as it is my duty to do so on all other cases, a careful, anxious and impartial consideration, without any fear or any influence from any quarter, operating on my decision, and with the view exclusively to a faithful performance of my duty as a sworn administrator of the law.

This remark may, indeed, be considered as superfluous; but as the learned counsel for the appellant seemed to labour, I have no doubt with conscientious conviction, under the painful impression, from some peculiar circumstances, that this might possibly not be the case, I am desirous of relieving his mind upon this point, in so far as I am concerned, and in so far as it is possible, and this assurance, therefore, may not be entirely out of place. Had there been a concurrence of opinion in the case as presented, and a formal judicial opinion about to be pronounced upon the merits of the appellant's demand, I should probably have felt it my duty to extend my observations over a wide field of enquiry and investigation. As it is, however, my remarks must be abridged and condensed as much as possible, and it is, therefore, not my intention to discuss at present the historical questions which have necessarily received my serious attention and which are of so much interest in this case; nor do I deem it expedient now to enter into an extended examination of the legal authorities so profusely cited by the parties. They have received full consideration, but a critical analysis of this immense mass of learning exceeds the proper limits of a judgment embodying a partial dissent only from the decision of the Court. I shall briefly refer to those points in the case which seem to me to merit special attention, and upon which, as I view the case, the judgment of this Court should be based.

The first question to be considered in the order in which they are submitted

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to this Court, regards the form of the writ. The proceeding was commenced by a *requête libellée* and writ of summons and not by a writ of *mandamus* properly and technically so called. This, it is contended by the respondents, is irregular and defective. By the article of the Code it is argued the writ calling upon the parties should be a writ of *mandamus*. By *some* of the members of this Court this deviation from the requirements of the law is regarded as a fatal defect. The law not expressly enacting, not providing that the proceeding may be commenced by a writ of summons simply, but declares that it should be by a writ of *mandamus*, properly so called, and, no doubt, strictly speaking, the mode adopted in regard to the writ summoning the parties to appear, is not in precise and rigid conformity to the letter and language of the law. Reading the law as a grammarian, a philologist, or a man of letters, no doubt this must be regarded as an irregularity; but is it fatal? Is the law so restrictive and peremptory that it must be a writ of *mandamus à peine de nullité*, particularly when a mere writ of summons, with a petition attached to it, setting forth all the reasons for the demand, and with most ample and exact conclusions, will, to every intent whatever, answer the same purpose? I think not, and I am decidedly of opinion that this exception to the mere form of the writ does not possess the serious importance ascribed to it by the respondents. I am strongly inclined, under the circumstances of this case, to overlook this informality, and not to regard this proceeding as an absolute nullity. Of course, I am well aware of the extreme danger of disregarding what may be considered as even mere forms, and of departing uncautiously from what seems to be pointed out as the proper course by the intent and language of the law, more particularly when the Code seems to provide a special mode of proceeding in seeking remedies of an extremely difficult and technical character.

Delicate, illusory, and complicated as the procedure is, in seeking these remedies, even at the best and under the simplest forms, the technicalities insisted on by the respondents only render them more so; and although these captious and bewildering formalities may be insisted on in England, it does not seem to me a good reason why we should be enslaved and distracted by them here. When a complete and detailed averment of the complaint is served upon the party complained of, with the writ, it does appear to me that issuing two writs of *mandamus*, one ordering the thing to be done before the party is heard, and another after he has been heard and the case adjudicated upon, and the least deviation the one from the other vitiating the whole proceeding, is about as puerile and deceptive a mode of seeking a remedy and vindicating a man's rights as the legal mind has ever yet invented in these matters. Be that as it may, such intricacies and complications are obviously unnecessary before our Courts; and it may be said, I think with perfect truth, that the issuing a *mandamus* against a man or a public body in the first instance and without hearing him, does not entirely or in any way harmonize with our usual procedure; and more particularly is this the fact in regard to writs of prerogative generally, where the writ of summons and the petition duly served upon the party is all that is necessary, and I may add that there is no good reason or practical utility in the course insisted upon by the respondents. But it is said the law is so. Yet it may be

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argued with equal force that the article of the Code is ambiguous, not so much so in the particular article, 1022, sec. 4 *per se*, as in the whole article, and particularly by the last paragraph. The writ is not styled a writ of *mandamus*, as in every case where a writ of *mandamus* may issue in England ordering defendant to perform a certain act or duty, or to give his reasons to the contrary on a particular day. As before stated, it is not called a writ of *mandamus*, nor is the English practice or rules applied to such proceeding, made applicable here. In England the defendant shows cause on the writ, and here on the writ of summons and petition together. In both cases it is a proceeding calling upon the defendant to show cause, no more and no less. If it be contended that the law is not ambiguous, yet it may be urged with equal truth that it is not peremptory and exclusive of the mode adopted here in express terms. Where the object of the law is clearly attained, by means not prohibited by the law—where no party is injured and every ground of defence may be fully and practically urged—it will require something very precise and peremptory in the law to induce me to declare a mere proceeding null as to form. But there is something more to be said on this point. The appellants have followed the mode of procedure which has been heretofore, in almost every decided case, generally adopted under our Statue and under the Code. There is, I believe, only one reported exception to this form of procedure, and the old maxim, so often cited, may be invoked here, that is *Cursus Curiæ legem facit*, may be applied. In any case parties should not be defeated in the pursuit of remedies guaranteed by law, and deprived of their rights unless their course is in clear violation of a precise and peremptory provision of law, more especially when such a course has heretofore been sanctioned by our courts of justice. Now in this case there is obviously a doubt; and we may inquire, have the respondents suffered? They were bound to shew cause why a mandamus, a final and peremptory order, should not issue, and they have appeared and shewn cause, fully and upon every ground. This is, of course, no formal waiver of matters of form, but there are pleas to the merits and adjudications *au fond;* and on all these issues the case comes before us for judgment upon every ground, and I entirely agree with Mr. Justice Berthelot, as he is reported in the Court of Review, in thinking that this important case should not be decided upon a defect of so slight and preliminary a character as the mere form of the writ. Adopting this view, then, I would overrule this objection of the respondents.

The second defect of form technically urged by the respondents is that the terms of the position of appellant, the conclusions and prayer thereof, are too general, too vague, in fact, altogether too obscure, and do not with sufficient clearness and precision disclose what she wants, what is demanded, and what she requires to be done. It is contended that requiring that a deceased person should be interred *conformément aux usages et à la loi* has not a signification sufficiently definite for the purpose and object of this proceeding. I am not disposed to regard this as a very serious objection, nor do I attach much importance to this pretension of the respondents. An order in exact conformity with the prayer of the petition, that the remains of the deceased Joseph Guibord should be interred in the Roman Catholic Cemetery therein designated, *confor-*

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ment aux usages et a la loi, is a judicial decree, which, as I understand the meaning of the words, would be perfectly intelligible. I understand it to be required that the deceased should be buried according to the usages—the usual and ordinary custom of the Church of Rome to which Guibord belonged—not according to exceptional cases, but in strict conformity with the rules, regulations and observances sanctioned and practised by the Church—in plain French *conformément aux usages*—in other words unconditional burial in the Catholic cemetery of the parish to which the deceased belonged at the time of his death, and I can easily comprehend that the words *conformément a la loi* may mean that in addition to the mere act of interment, whether civil or ecclesiastical, all the requirements of the civil law should be strictly observed. The appellant seeks to obtain for the burial of her deceased husband's remains the observance of all the customary forms and solemnities of Christian interment. If the words mean anything they mean this, and also that all the exigencies of the civil law should be rigidly enforced in the registration of his death and burial. All this might have been set forth in terms more ample and language more explicit, but it seems to me that this was not necessary. I am therefore of opinion that this objection is not well founded. In any view of the matter, I should not be disposed to rest my decision of a case so urgent and so important upon such a *fin de non procéder*.

I come now to the third exception in relation to the form according to the order which I am disposed to regard these objections, and that is that for the purposes of this demand, not only the *Curé et Marguilliers de l'Œuvre et Fabrique de la Paroisse de Montreal*," but also the Rev. Messire Rousselot, the *Curé* of the parish, should have been included in the writ of summons. This, properly speaking, is a plea of *nonjoinder* and not an *exception à la forme*. But in whatever light we may be inclined to consider this objection of the respondents, the first enquiry to be made is whether as a matter of law, and in the course of regular proceeding, the Rev. Mr. Rousselot could be, in his individual name and capacity, introduced into this proceeding along with the respondents? Manifestly, according to English practice, and according to the objects and the exigencies of the proceeding, he could not. This would have been a misjoinder obviously fatal in the very first stage of the appellant's proceeding. Two separate bodies or two distinct persons with separate functions and separate duties, cannot be included and proceeded against by one and the same writ of *mandamus*. This is elementary, and will, I presume, admit of no controversy. So as a matter of law and regular procedure, the only means of introducing Mr. Rousselot into this record was by impleading him, as he has been cited to appear. In his individual name and in his spiritual capacity he cannot be joined with the respondents, and could not be impleaded before this Court in conjunction with them in a proceeding like the present—and further as a matter of fact he is before the Court, but only as a part of the Corporation, and as a further, and more important matter of fact, Mr. Rousselot, being at the head of the *Fabrique* in the record, has himself individually, or in conjunction with the respondents, pleaded directly to the merits of the appellant's demand. It is true that this plea is produced and filed under reserve, but I think he has unadvisedly raised

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an issue upon the merits which we must dispose of. The spiritual power of the Church is invoked by him—his ecclesiastical authority is appealed to—his action as Curé of the Parish of Montreal is defended and justified. He has set up, or there has been set up for him in conjunction with the Corporation to which he belongs, what he or they or both regard as a triumphant, a conclusive *fin de non recevoir* to this action. We are told that he is not in the record in his individual—his spiritual—his personal quality—but he is before us in the capacity of head of the Corporation, and being here he defends his individual, civil and spiritual action in this matter, he calls upon the Court to justify him in what he has done. He says we cannot go to the merits, yet in so far as this demand relates him to individually as Curé, he has pleaded to the merits. Of course Mr. Rousselot knows very little about legal technicalities; but this blowing hot and cold in his behalf won't do. This exception cannot stand. Mr. Rousselot is in the record in one capacity—he has defended himself in another. The function and duties of the Fabrique and the Curé are closely connected in the subject matter of this burial, and I think Mr. Rousselot is right in saying—"I am in the record; I waive all objections as to my double capacity; I refused ecclesiastical burial to the remains of Guibord; I was justified in doing so; I offered him civil burial in that part of the Cemetery where, by ecclesiastical authority, by purely spiritual orders, he could alone be interred. This was refused. I will, I can do no more. I pray that this demand be dismissed, my conduct as Curé be justified, and my action as the keeper of the Registers also justified." In order that there may be no mistake, let us see what he did plead, or what was pleaded for him and with his sanction by the respondents. (His Honour here cited the plea, setting up among other things the Bishop's order.) This obviously is a plea on behalf and in vindication of Mr. Rousselot, not in his capacity of head of the Corporation, but in his quality of *Curé*. Under the peculiar circumstances of this case, I think he had the right to take this course. He has done so; and I am of opinion that it is the duty of this Court to give him a formal and decisive adjudication upon the merits of his defence, irrespective of all exceptions as to mere form, which he has himself, though informally, yet practically, waived; and I feel satisfied, that, seeing the issues raised, it would be more satisfactory to both parties, more in the interests of justice, that a judgment should be rendered on the main question—provided, always, that it can be done without any violation of law or transgressing any clear rule of procedure. From what has been said I think it can. Disregarding, therefore, these objections of form as insufficient in themselves, under the circumstances of this case, to defeat the appellant's pretensions, I come now to what I regard as the merits of this highly important cause.

Before entering upon this part of the case, however, and in anticipation of the remarks I am about to make, I would observe that into the great historical questions in relation to Gallicanism and Ultramontanism, and into the variety and conflict of views which this strange antagonism in the Church involves, I shall not enter. These controversies and these discussions cannot touch or diminish the ancient and recognized power of the spiritual authority of the Church. Despite all the revolutionary violence and persecutions by which she

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has been assailed, the spiritual authority remains, and has remained through centuries, undiminished, and is as essential now to the moral welfare of those who belong to the Catholic faith as it was in the beginning—and I am not going too far in stating that every Roman Catholic owes to its inculcations, its discipline and decrees absolute obedience in all matters purely spiritual. Nor shall I discuss the interesting question as to whether it is or is not advisable to have a free church in a free State. This is, perhaps, not a very new or a very original idea—it was agitated centuries ago, and has long been familiar to those who have read or examined these matters. The saying has been recently revived and loudly proclaimed—and it is not for me to express any opinion as to how far it is wise to carry it out, and to apply this principle. No doubt the doctrine is illustrated in rather a remarkable manner in the present day, but whatever may be the advantages or disadvantages of such a system, there can be no doubt, so far as my knowledge extends, that the civil power in this country has never directly controlled the spiritual action and decrees of the Church in Canada. For example, an order, by a Bishop, refusing ecclesiastical interment to the remains of a deceased Roman Catholic for spiritual reasons assigned, is an instance of that character, and could not be, I apprehend, superseded or set aside by any Civil Tribunal in this Province, not at least without the Bishop being in the record, which is not the case in this instance. In purely spiritual matters the course, therefore, as I view the case, is easy enough. We know where we are, and we can, I apprehend, have no difficulty in determining what we have to do—but that is not simply the question. Interment in the Roman Catholic Cemetery *conformément aux usages et à la loi*, is an act partaking partly of Ecclesiastical and partly of Civil function. The real difficulty we have to contend with is to determine what are the purely spiritual and what are the purely civil acts required to be done, and those also which are of a mixed character. For example, it may be said that the furnishing of the ground—in fact the grave in the cemetery, the supplying of Registers in which the death and burial are to be recorded, are purely civil acts. These are duties of the Fabrique, and these are required of them. The registration of the burial is also a purely civil act, and is required of the *Curé* in his capacity of Parish Priest. The division of the cemetery into two parts and the consecration of the one of them destined to ecclesiastical burial are acts performed or to be performed by the spiritual power alone. It is by it and under its authority these acts are performed, and it does not appear to me that the civil power, the Fabrique in other words, has any directing or controlling authority here. The decision of the question also as to whose remains are entitled to ecclesiastical and as to those who may receive only civil interment, must, as I apprehend, rest with the spiritual authorities exclusively, but the material act of burial, civil interment *per se*, is more of a civil than a religious proceeding, and as such may be said to be under the control of the Civil Tribunals of the country. Combining all these acts together, and viewing them as a whole and inseparable, we have, no doubt, before us a series of proceedings, which appertain partly to the spiritual and partly to civil authority. But in applying remedy by a writ of *mandamus*, and forcing what is known as specific performance, we must regard these and appreciate

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them separately, more particularly when they are to be performed by separate and distinct agents. We are called upon to order each agent, body or person separately to do that which he has refused to do and what the law compels him to perform; and that in the individual personal capacity in which the law has constituted him a public functionary, no further, no more and no less. In proceedings like the present the utmost caution and precision are necessary, and the direct and exclusive application of the remedy to the proper party and to the real subject of complaint is absolutely essential.

Bearing these principles in mind, let us examine what bearing they have upon, and how they effect the decision of the present case.

Considering, as I do, that Mr. Rousselot has pleaded to this action, and that he has alleged and put in issue as a matter of fact, that he refused ecclesiastical burial to the remains of the late Joseph Guibord in obedience to an order from the Bishop of the Diocese, that this order is binding on him, that it is valid, and justifies his refusal to give religious interment, I must first inquire whether we can supersede this order, assuming it to be proved, whether we can or cannot, as a civil tribunal, pass judgment on its validity, or compel Mr. Rousselot to disobey it. This, it seems to me, is the chief point, the main difficulty in this case. It is here that the spiritual power of the Church and the civil law of the land are brought face to face, and thus confronting each other over the mortal remains of the late Joseph Guibord, we are called upon to decide which of these two authorities has the right to determine where and how these remains are to be interred. It must be conceded that this is a difficult and a delicate position. But my embarrassment is greatly increased by the necessity under which I find myself of first determining whether I have any right to pass any such judgment in the matter, or to give any decree which will determine the contest. It does appear to me, however, that these difficulties are not insurmountable.

According to the view which I take of this case it is unnecessary for me to describe the difficulties which existed between the *Institut Canadien* and His Lordship, the Catholic Bishop of Montreal. It is always painful to witness the existence of such controversies,—such instances of antagonism in the Church. But we must not forget that the Bishop had sacred duties to perform—a grave responsibility rested upon him. I can easily understand how embarrassing the position was. He had to deal with a body of men of ardent and cultivated minds; he thought they were wrong in the attitude they had assumed [illegible] rary and scientific body, and that their course was pernicious to the [illegible] of themselves and others; and in the conscientious discharge of [illegible] pastoral duties, he wished to bring them as Catholics and children of the Church into a safer road. After the submission of the *Institut* perhaps a wise forbearance and judicious admonition on his Lordship's part might have resulted in harmony and reconciliation. I know not if this would have been the case, but these deplorable differences went on and culminated in the order pleaded by Mr. Rousselot in this action. Guibord came under ecclesiastical censures, and became a victim to his own [illegible] perseverance in a course condemned by the Bishop. Now, I am not disposed to enter into the important question whether he was or was not, at the time of the order from Monseigneur Truteau, under canonical cen-

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sures of a formal character, or to a degree so serious, so unequivocal, that he was justly refused ecclesiastical burial. Nor am I inclined to offer any opinion upon the point whether, at the time of his death, he was or was not, as a member of the *Institut*, formally and regularly excommunicated. I am clearly of opinion that sitting here as a civil tribunal, administering the civil law of the land, I have not the right to give any decision on these questions, which belong exclusively to the spiritual power. Had I such a right, and were I forced to adjudicate on these points, I have no hesitation in saying that I should be extremely embarrassed in this instance. For the present I will not suppose a case of an abuse of the spiritual power so obvious, so outrageous, that the civil law is or would be bound to interpose its authority. It is quite within the bounds of possibility that such a case might arise, but this is not one of them. I may, however, venture to remark, and it is plain that the observation embodies no more than a truism, obviously nothing more than what is reasonable, and it is this, that it is impossible to conceive a case in which the greatest care, the most deliberate and scrupulous caution, are more necessary than in proceedings cutting a man off—rejecting a Catholic from, the rights and communion of his Church. To every Christian it is an extremely serious matter: and for the best reasons, in view both of this life and the next, the spiritual power should so act as to leave no doubt whatever in any reasonable mind as to the formal and strict regularity and justice of its proceedings from beginning to end. The facts established by the evidence adduced in this cause do not warrant me in saying that this has not been the case here, and hence I am bound to presume that the proceedings of the Bishop in this instance were in strict conformity to justice and the rules of the Church. It must be borne in mind that the powers of the Church in spiritual matters are exceedingly great—are, in fact, supreme—and as we Roman Catholics view her object and end on earth, and her divine origin, it is proper that they should be so. The laws for her government, and the rules of her mora discipline, are precise and peremptory enough. The obligation of obedience and submission on the part of those who belong to her communion is of the most sacred and binding character. But if much is expected from the faithful —if in their own eternal interests much is required—still more is expected from the Church itself. If she admonishes and commands, she is also our infallible teacher and guide; and any mistake or omission by one of her ministers would be lamentable in the extreme, and might lead to the most deplorable consequences. These of course are obvious truths; but they are adverted to here as indicating the very great importance of this matter, and also to intimate that if we possessed the power we should look closely into the proceedings of the ecclesiastical authorities in this case. But, as before stated, I think it is manifest that we have no such power. It is quite true that instances are cited where the Civil Courts in France did interfere and did adjudicate in such matters when connected with the performances of civil duties; they went very far and were under peculiar influences, whilst the organization and the composition of their High Courts were different from ours. It is plain to my mind that no such power exists in the civil tribunals of this country, nor do I believe it ever existed as a regular and recognised authority in the *Conseil Supérieur* of Quebec, and if it

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ever did, I am clearly of opinion that it did not continue to exist after the cession of this country to the Crown of Great Britain, and after we came under the rule of a Protestant Sovereign. It was the theory and practical exercise of the Royal power in France which gave to their High Courts the apparent right to interfere and to exercise certain control in ecclesiastical questions. I need not enlarge upon this point.

But conceding for a moment that this Court possessed the right to enquire into the justice and regularity of the Bishop's proceedings in regard to Guibord and the Institut Canadien, and suppose I came to the conclusion that there existed no ecclesiastical censures of a regular kind—that he was not excommunicated—that he was not by the laws of the Church excluded from the privileges of ecclesiastical burial—and that Mr. Rousselot ought to have given to his remains religious interment without referring to the Bishop at all—and it has been said that this is the proper view to take of the whole matter—even so, can we give a judgment declaring the action of Mr. Rousselot wrong in referring the matter to his ecclesiastical superior, and set aside the Bishop's order declaring it null? And if we had that right, can we do so in this instance, the Bishop not being in the case? Clearly not. Then, is the order right or wrong? Mr. Rousselot had the right to refer the matter to the Bishop, and having received this order he is and was bound to obey. Could any Court in France, at any time, call in question the acts of any ecclesiastical functionary in spiritual matters without the party whose acts were complained of being before the Court? I never heard of such a proceeding, nor do I believe such a case ever existed. All this may be regarded as an extreme view of the ecclesiastical power. But I think not, and I am of opinion that the law is as I have stated it. It may be considered as extremely stringent, in some cases inconvenient; but after all, if a member of the Roman Catholic Church in this country is not satisfied with the acts and decrees of the local authority of his Church, let him appeal to the higher—the highest ecclesiastical tribunal in the regular and appointed way. If he is right the abuse will be recognised and the remedy applied. If he is wrong he must submit. The fact is, if a man is not satisfied with the teaching and the authority of his Church—if he is not disposed to submit to her decrees—he has a very plain course before him—he may leave it and go elsewhere;—but while he remains a member of it, he owes his Church and the Church's authority in all spiritual matters, implicit and absolute obedience—it seems to me that practically there can be no wavering or evasion here. A man must be either one thing or the other or nothing—in any case he must settle these questions with his own conscience and with the Church. The civil tribunals of the country can give him no relief. We cannot touch the Bishop's order. But apart from all these questions, let us suppose that Mr. Rousselot had not applied to the Bishop, and had received no injunction to refuse to Guibord's remains ecclesiastical burial—and let us assume that when required to inter the remains of Guibord, he had of his own authority refused to give them ecclesiastical interment, assigning what he considered valid reasons of a spiritual character for his refusal, could we compel Mr. Rousselot, as a priest, and against his conscience, to do so? Could we force him or any minister of the Christian religion of any denomination to appear

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dressed after a peculiar fashion suitable to the occasion, and to say prayers over the dead or over the grave? Plainly not. Therefore, this pretension of the appellant must be overruled. All this reasoning, it may be said, rests upon pretty obvious principles. No doubt such is the case, and I do not suppose that these doctrines *per se* will be very seriously or very strenuously disputed by the appellant. But there still remain points of no little difficulty in the application of these principles.

The appellant, if I understand her demand rightly, asks that the remains of her late husband, he having died a Roman Catholic, be interred in the Roman Catholic cemetery according to the law of the land and the usages of the Church. She does not in express terms require any particular form of interment, nor the observance of any particular ceremonies at the funeral. But as a matter of fact it would appear that if even civil burial *en terre sainte* were granted, she would be in a great measure satisfied. I collect this from the appellant's case—it is the condition attached to the offer of civil burial, that is, interment in the unconsecrated, or rather unhallowed part of the cemetery, that constitutes the appellant's chief ground of complaint. This is very natural—very reasonable. Can this Court come to her assistance in this matter? It is quite possible that we might order civil burial—but can we direct that the remains of the party claiming it should have a grave in that part of the cemetery destined to the interment of those who alone are entitled to ecclesiastical burial? If not, it is plain we can do nothing. Now as a matter of fact, the cemetery is divided into two parts, as before stated. It will not be disputed that the respondents, under the direction of the curé or the Bishop, had the right to make this division, and that, for the purposes before adverted to. It is prohibited by no law, and it is in strict conformity to custom. Catholic cemeteries in Lower Canada are, with scarcely an exception, so divided, and for precisely the same object and for the same reasons. The custom in this case makes the law —in fact is the law. Every person entitled to burial in that cemetery is aware or should be aware of this state of things, and they must abide by them. There is, therefore, a distinction and a difference in the rights of persons claiming to be buried in the cemetery, this is perfectly legal. Now is it the Fabrique as a lay Corporation that determines who are to be interred respectively in these divisions? If so, we may perhaps order them to give Guibord civil burial in the consecrated part of the cemetery. But it is beyond controversy that it is not the Fabrique which decides this question—it is the Church and the Church alone. It is the ecclesiastical authority of the parish. It is to it exclusively belongs the right to regulate this matter. In this instance they have done so in the exercise of a purely spiritual power. It is legal, and the decision is final. From this action of the ecclesiastical authority determining *where and in what part* of the cemetery Guibord's remains shall be interred, there is no appeal to this Court as I understand the law. The appellant has invoked law and usage in this matter of burial. On these a decision has been given against her by an authority from whose adjudication there is no appeal to this Court. We cannot, therefore, assist her. As to furnishing a place for Guibord's burial in the cemetery, the registers and the enregistration of his burial—in fact civil burial, it must be re-

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marked, has not been refused either by the Fabrique or Mr. Rousselot. But, on the contrary, both have been offered by them conjointly, with an objectionable condition it is true, that he should be interred in that part or division of the cemetery destined to the burial of children dying without baptism. This offer has been refused, in consequence, I presume, of this condition being attached to it. We have no power to set aside this condition for the reasons above mentioned. So far as we can act in this affair, it must remain as it is. We cannot give the order required of us. The judgment of the Court of Revision must consequently be confirmed—but I would do so for reasons different from those assigned by that Court, and the following are the *motifs* I would assign, but they will not be accepted by this tribunal.

Considering that the writ issued in this cause, at the instance of the appellant, is not in the form of a writ of *Mandamus*, properly so called, but is in the nature of a writ of summons, with a petition calling upon the respondents to show cause why a writ of *Mandamus* should not issue against them, according to the demand and exigency of the case; and considering further, that such form and mode of proceeding in the first instance has been in use and has been sanctioned by the Courts of Lower Canada, and therefore that such proceeding by writ of summons and petition in cases like the present is in conformity to practice and not contrary to law.

Considering that the first of the two demands embodied in the conclusions of the appellant's *Requête Libellée*, to wit: that the respondents be ordered to *inhumer ou de faire inhumer dans le cimitière Catholic de la Cote des Neiges, sous le contrôle et administration des défendeurs, le corps de feu Joseph Guibord comformément aux usage et à la loi* sets forth her demand in terms sufficiently precise and comprehensive in form to indicate what is, in fact, intended and sought for by the present *Requête Libellée*, and that, therefore, there is no defect or essential insufficiency of form in the allegations and prayer of the appellant's demand;

Considering that the Rev. Mr. Rousselot is in fact before the Court, though not exclusively or properly speaking as Curé of the Parish, and in that quality, and being so before the Court as that of the Corporation of the *Fabrique*, he, the said Messire Rousselot, has defended and justified his action in this matter, and has pleaded to the merits of this cause; and consequently that he is sufficiently before the Court for the purposes of this case;

Overruling, therefore, the objections to the form pleaded by the respondents, and proceeding to adjudicate upon the merits of this case, in so far as it is in the power of the Court to give any decision upon the merits;

Considering that it is established by legal and sufficient evidence adduced in this cause, that the aforesaid Catholic cemetery of the *Cote des Neiges* is divided, as Roman Catholic cemeteries usually are and have been in Lower Canada, into two separate and distinct parts; the one part or division thereof destined to the interment of the dead receiving what is and is known as ecclesiastical burial, and the other part appropriated to the burial of the dead entitled to what is and is known as civil interment only, which division is conformable to custom, and not contrary to law, and is, therefore, binding and obligatory on all those entitled to interment in the aforesaid cemetery;

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Considering that the ecclesiastical or spiritual authority of the Parish of Montreal alone has the right to determine whose remains shall be interred in the first named division, and who shall be buried in the second of the above mentioned divisions, and that the division of the said cemetery was known to the appellant before she presented her *requête libellée* in this matter, and that in the decision of this case, this Court is bound to recognize the division of the aforesaid cemetery, and that it is the exclusive right of the ecclesiastical authorities of the parish to order and regulate all matters connected with the division of the said cemetery as above mentioned, and with the interments to be made in them respectively;

Considering that the second of the said demands of the appellant, to wit: that the respondents be ordered to *insérer sur les registres de l'état civil par eux tenus le certificat de telle inhumation du dit Joseph Guibord aussi conformément aux usages et à la loi*, cannot be maintained; firstly, because the respondents being impleaded in their corporate capacity, are not the keepers of the registers of *l'état civil*, nor are they bound, nor have they authority to make any such registration as that demanded of them; and secondly, because such registration was offered to the appellant, as a record of civil interment, and was by her refused;

Assuming the appellant to demand ecclesiastical burial for the remains of the late Joseph Guibord; considering that under the circumstances of this case, this Court, as a civil tribunal, has no power or authority to consider, revise or reverse the orders of the ecclesiastical authority of the parish in a purely spiritual question, such as that involved in the refusal to give ecclesiastical burial to the remains of the late Joseph Guibord;

Assuming that the appellant demands civil burial for her late husband's remains, this Court has the right to order such civil interment, but has no power or authority to declare in what part or in which division such civil interment shall take place; and considering that civil burial has never been refused, but on the contrary was offered by the respondents and by the *Curé*, although such civil burial was to be made in that part of the said cemetery destined to the interment of children dying without baptism;

And considering that this Court has no authority, has no right to order civil burial in the part of the said cemetery in which civil burial is prohibited by the ecclesiastical authorities of the parish;

This Court confirms the judgment of the Court of Revision, but for reasons different from those assigned by that Court.

BADGLEY, J.—The material facts specially connected with this contention are few and simple. The sepulture of the late Joseph Guibord, which has been the subject of very lengthy and tedious discussion in the Courts below, has been brought into this Court for our consideration, and has been submitted not only in the argumentative factums required by the practice here, and in the exhaustive oral arguments of Counsel before us, but also in the printed papers of arguments and discussions, which formed the staple of the case before those Courts from whose judgment this appeal has been taken, necessitating the labour of examining them all, and of becoming acquainted with a variety of subjects interesting in themselves, and exhibiting the very great research and industry em-

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ployed by the counsel for both the parties in this cause, but with little in them of assistance, and with much of little or no account in settling the judicial opinion sought to be had from this Court upon the contention as it really exists of record. The personal subject of this contention, Joseph Guibord, was born of Roman Catholic parents, and received into the Roman Catholic Church by the Sacrament of Baptism at the Parish of Varennes, in 1809. He in after time settled himself in this city, and was a printer by trade, and in 1828 was married to the appellant in the Parish Church of Montreal, under the Sacrament of Marriage, and according to the rites and customs observed in the Roman Catholic Church. The certificates of his baptism and marriage are filed of record in the cause. He was for many years and up to his decease a member of a charitable friendly Society, in close connection with the clergy of his church, and also a parishioner of the parish of Montreal; during all his lifetime having professed the Roman Catholic faith, and lived and died in that religious community. He was struck with sudden death on the night of the 18th–19th of November, 1869, without time allowed him to make his peace with God or man, and died, having survived all his children born of his marriage, and predeceased his wife, the appellant.

In 1844 a literary and scientific institution was formed in this city, principally by French Canadians, and of course Roman Catholics, under the name of the Institut Canadien, admission to which was according to the constitution of the society general and unexclusive from difference of religious belief or opinion; not long after the formation of the society, it was incorporated under its original name, by an Act of the Legislature, 16 Vic. cap., the preamble of the act exhibiting the object and purpose of the Society to be literature and science. In furtherance of these purposes, a library was commenced which has reached to a number which speaks favourably for the laudable exertions and perseverance of the officers and members of the society, in those pursuits. In a society so numerous and general as that soon became one is not surprised to learn that some of its members were not individually as tolerant as the rules of its formation professed, and in consequence a few of them endeavored to exclude from the library some books and papers which they assumed to consider objectionable, and to force their opinions upon the Institute in general. These domestic differences, which commenced in 1857, were terminated by the defeat of the objecting small minority in 1858, when, however, the Roman Catholic Bishop of the Diocese, in the quality of protector and guardian of the Roman Catholic teaching and morals in Montreal, intervened in the domestic quarrel in support of the pretensions of the minority, and converted the difference into one of a more serious character, bringing the Institute as a body, face to face with himself as their Diocesan. It is true that the Bishop limited his pastoral exhortations in the first instance, and his Diocesan censures afterwards, to the Roman Catholic members only, but his own astuteness or the shrewdness of the defeated minority, could not fail to tell him, that the abandonment of the society by the members of his belief, would necessarily be the disruption of the Institute, and effectively prevent all literary and scientific information except that of a denominational character. Without entering into an uninteresting detail of the incidents of

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the dispute between the Institute and the Bishop, which drew its length along for ten years until the Bishop's final decree in October 1869, it will be sufficient to mention that two apparent grounds of complaint have been made prominent against the Institute, the first and original one being its having in its library a few French books which were declared to be in the Roman Index, thereby under an antiquated decree of the Holy Inquisition, entailing sin upon all who possessed or read such indexed books; and the last and for the time, important one, passing over the former ground, directed against the Annuaire of 1868, namely, the report of proceedings of the society for that year, which referred to the tolerant principle upon which the society had been originally formed and had prospered for 20 years, and approved and recommended the same, and which was also indexed by the Roman Inquisition. In August, 1869, the Bishop, being then in Rome, transmitted for publication in his diocese a pastoral letter in which he announced that the Roman Congregation of the Index had reprobated the doctrines contained in the Report of the *Annuaire* as imperilling the education of Christian youth, and directing the withdrawal from the Institute of Roman Catholics, particularly *la jeunesse*, so long as such pernicious doctrines should be taught, and thereupon declaring that every continuing member of the Institute, and every reader and possessor of the *Annuaire*, without the authority of the Church, would incur the loss of the Sacraments, even when dying, *même à l'article de la mort*. With the view to remove this censure, the Roman Catholic members resolved, with the sanction of the Society in general, "that having "learned the condemnation of the *Annuaire*, by authority at Rome, they sub"mitted to the decree purely and simply," and the Society itself resolved, that "the Institute having been formed solely for literary and scientific purposes, had "no doctrinal teaching, and scrupulously excluded all teaching of pernicious doc"trine." These were the recorded actions of the Institute in general, and of its Roman Catholic members in particular, on the 25th of September, 1869, and yet no one who has followed the proceedings would be surprised to learn that these resolutions were not sufficient or satisfactory: they may have met the apparent difficulties of the Institute having indexed books in its library, and of having published the mere *Annuaire*, but the substantial difficulty of the Bishop altogether passing over these as of but little moment, declared one of a more important character, which he finally announced in his letter from Rome, of the 30th of October, 1869, to the Vicar-general Truteau, and which, that official says, reached him on the 19th Nov., a copy of which he has produced with his deposition in the cause. In that letter the Bishop in substance asserts, having reference to the September resolution of the Institute, "*Qui établit en principe la tolérance religieuse qui a été la principale cause de la condamnation de l'Institut*," and therefore that all should know that absolution should not be given, even when dying, to those who do not renounce the Institute. "*Tous "comprendront qu'il n'y a pas d'absolution à donner, pas même à l'article d "la mort à ceux qui ne voudraient pas renoncer à l'Institut, &c.*," because the principle of its organization was religious tolerance. It will be seen that the apparent former grounds for censure have been shifted and replaced by the condemned tolerant character of this literary and scientific Society, but even this

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became known generally or at all only when Guibord's burial was demanded on the 20th November. No one would be surprised to learn that the decree resting chiefly upon such a ground of censure when once known became public property and the text of remark and criticism. The Roman Catholic clergy of the Diocese could not be found fault with, it was their duty to submit to their Diocesan in ecclesiastical matters, and it only remained for them to carry out the directions of their Bishop; but their submission could not control persons of that faith outside of the ecclesiastical order, and therefore, the Institute, placed in the midst of a mixed community of different persuasions, where hitherto religious intolerance was unknown, and where Christian charity in its best sense was generally practiced, disregarded the Bishop's last announcement, and this has been shown in the treatment it has received in this unfortunate and ill-timed discussion, in which such pretentions are held up as revived expositions of ecclesiastical power in the dark ages, which neither knew nor cared for the amenities of sympathy nor the humilities of persuasion towards the laity, but in isolation and despotism denied the right of individual reason, and imposed beliefs without allowing private judgment, forgetting that conviction does not enter human intelligence until that intelligence has opened the door for its acceptance by reason, and that belief only enters because reason and intelligence accept it. Guizot says that human thought, human liberty, private morals, and individual opinions, cannot be governed by ecclesiastical co-action, which is the illegitimate employment of force; all which may be summed up in the words religious intolerance. This decree of the Bishop is the more obnoxious in this country, a British colony open to all persuasions, and under a government of the utmost tolerance, where Roman Catholic ecclesiastical authority has always been most beneficently displayed, even though it were absolute in effect, and where the law assumed the equality of all who are subjected to reciprocal and equal obligations to be the free common sense and opinion of the people. In this country arbitrary ecclesiastical laws had become forgotten or existed only on the dusty shelves of Church libraries, and were only to be found in the compilations of ancient times which first saw light during the world's darkness and were made, though not promulgated, without the consent, as they were without the knowledge, of either clergy or laity, and specially without the sanction of the highest secular power of the existing Christian commonwealths. History must have been read to little purpose, if these facts could be denied, and yet upon these assumptions was predicated the outrageous dogma revived by one of the respondents' counsel in the court below, that all human Governments were subjected for their existence to supreme R. C. ecclesiastical rule. It is only surprising that another rule, equally outrageous as that mentioned, drawn from the same ancient archives, was not also re-announced, that *hereticis non est servanda fides*, no faith is to be kept with heretics, that is, with persons who choose to think for themselves or to form their own opinions on any subject, this being the true meaning of the word *heretic*, as every Greek scholar knows. The high morality and uprightness of life and conduct of the R. C. *secular* clergy of this province have by their own personal conduct and precepts annulled and set aside this latter ecclesiastical rule, and substituted a more exalted one, that in this mixed community tolerance is not only a virtue

but a necessity for good and peaceful government which could not subsist for an instant without its benignant and kindly influence. Men who teach otherwise or revive these ancient unprincipled incitements to popular confusion *sont des hommes dont le passé stérilise l'avenir* as has been curtly observed. They would unite legislation and jurisdiction in the same persons and execute their judgments at the same moment.

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The Bishop's letter of the 30th of October finally closed the controversy between the Institute and the Diocesan, and it has been necessary to state these circumstances with some fulness, because such was the position of affairs at Guibord's death.

As already observed his death occurred in the night of the 18-19 Nov., 1869, at which time he was a member of the Institute and as such assumed to be obnoxious to the above ecclesiastical censures and disabilities at the time of his decease. There is nothing to shew that he individually was either known to or thought of by the Bishop in the generality of his decree, but his membership in the Institute made him individually liable to its infliction. In all these ecclesiastical proceedings and in this final Diocesan decree, the marvel to lawyers and judges is, that everything is taken for granted in favour of authority, no citation for complaint is given, no opportunity offered for defence, but, outraging the rule of common justice and common right of being heard before condemnation, the judgment is decreed pretty much upon the same authority as that which influenced the Roman lady who had ordered her slave to be crucified and upon being remonstrated with, that he was innocent, answered,—"my command, my will; let that for a reason stand."

It is not my business, according to my appreciation of this cause or of its merits, to question the validity of the Bishop's decree of ecclesiastical disabilities nor to follow out the legal objections taken against it; it is sufficient to say that he is the highest R. C. ecclesiastical authority in the Diocese, and as such his decree was within his authority to enforce upon his Diocesan clergy until it should be set aside by appeal to Superior Ecclesiastical authority. *Non nostrum tantas componere lites*, and the more especially as, in my apprehension, it is but very remotely connected with the real points of this contention which the Court must adjudicate upon; as long as the decree was confined within its ecclesiastical province, civil jurisdiction might not touch it, but when it overreached its sphere and extended into the region of civil or mixed jurisdictions, the civil law of the province by its civil jurisdiction might question its abuses, and subject it to a power paramount to its own. It is not necessary, as the case presents itself, and simply for that reason, to examine the jurisdiction and power of the Civil Courts in this province in matters of *abus* before the Cession of 1763. Whatever the treaty of that year or the proclamation of the same year or the capitulations of Montreal and Quebec may aver, the Imperial Act of 1774 surely removed all possible difficulty upon that score, having declared, "that the inhabitants at the conquest, not the cession, professed the religion of the Church of Rome, and enjoyed an established form of constitution and system of laws, by which their persons and property had been protected, governed and ordered for a long series of years from the first establishment of the Province of Quebec," &c., and

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again afterwards, by the 8th section, declared that Her Majesty's Canadian subjects may hold and enjoy their property and possessions, together with all their customs and usages relative thereto, and all other their civil rights, in as large, ample and beneficial a manner as if the proclamation, &c., had not been made and as may consist with their allegiance to the King and subjection to the Crown and Parliament of Great Britain; and in all matters of controversy relative to property and civil rights resort shall be had to the laws of Canada for the decision of the same, and all causes instituted in courts of justice with respect to such property and rights shall be determined agreeably to the said laws and customs of Canada, until varied or altered, &c. I presume it would be, therefore, no difficult thing to ascertain and fix the jurisdiction of our courts in matters of ecclesiastical *abus*, the more so as the Court of King's Bench has been more than once declared to have inherited all the superior jurisdictional powers of the highest jurisdictions and courts in Canada previous to the conquest. The necessity for such an examination does not present itself in this cause, but it would not be difficult to fix the extent of the jurisdiction of the courts in such matters if the occasion required it. Now Guibord, without any renunciation of his quality of Roman Catholic, or of parishioner of the parish of Montreal, died in that parish, to which the Roman Catholic Cemetery of the Cote des Neiges belongs, as the burying ground for Roman Catholics, and especially of the Roman Catholic parishioners of the parish of Montreal. His widow, whose interest and right to have him decently and Christianly interred is unquestioned and unquestionable, by writing duly executed, authorized some of his friends to obtain burial for his body in that Cemetery, which was, in fact, the only one for burial of Roman Catholics of the parish. Application was made in due course, on the 20th November, to the clerk of the respondents, at their office, for the purchase of ground for a grave in that cemetery, and the application was referred by the clerk to the Curé of the parish. The demand was renewed on the same day to Messire Rousselot, the Curé, who, being asked generally for burial of Guibord's remains on the following day, the 21st of November, and conceiving that the demand was for a burial to be performed by the priest with the usual religious and ecclesiastical customs and ceremonies, requested a short delay for instruction from the Vicar-General, Messire Truteau, who replied by letter, filed of record, that having received from the Bishop his directions to refuse absolution to members of the Institute when dying, he could not permit the ecclesiastical sepulture to be given to Guibord, who had died suddenly, but who had not renounced his membership with the Institute, and therefore it was impossible to allow him ecclesiastical burial. This answer, which was predicated upon the supposed demand for ecclesiastical burial alone, having been communicated by the Curé to the applicant, the latter intimated that ecclesiastical burial was not required, but only simple interment in the Roman Catholic Cemetery of Cote des Neiges, which Messire Rousselot, the Curé, as a public officer was required to allow, offering at the same time to purchase for the appellant sufficient ground for a grave, or to have him buried in the ground belonging to one Poulin, for which purpose the applicant exhibited a written consent. The Curé was quite willing to sell to the appellant, what ground she might require

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for burial, but refused interment therein to her husband, Guibord's, remains. He also refused to allow the interment to be made in Poulin's lot, but offered to allow interment in what is called the reserved lot, divided off and separated from the burying-ground of Roman Catholics by a wooden fence, and kept for the interment of bodies of infants unbaptized in the R. C. Church, and of such as were not known to have been Roman Catholics. This was manifestly not Christian burial, and the qualified and distinctive offer of the Curé was refused. Afterwards, on the same day, a similar demand for burial in the cemetery was made through a notary to the respondents at their office, speaking to their clerk, demanding interment for the deceased in the cemetery used for Roman Catholics of the parish of Montreal, known as the Cemetery of Côte des Neiges, in the parish of Montreal, and requiring the respondents to give or cause to be given interment on the morrow, or then to receive the remains into the cemetery for the purpose of interment, and offering money for the purchase of the necessary ground, to which the answer of the Secretary was *that he was authorized to answer that the Fabrique (the respondents) would give the interment in that part of the cemetery not consecrated, and without any dues or charges for sepulture.* On the following day, the 21st November, the body was brought by Guibord's friends to the cemetery gate and refused entry into the cemetery by the keeper, acting under directions, except for interment in the so-called reserved lot, the lot reserved for unbaptized and unchristian bodies, as stated before, to which the keeper added another class, the bodies of executed criminals who had not made their peace with the Church. The remains were thereupon removed, and received interment, temporarily, in the Protestant cemetery. Now, under the circumstances, as stated above, of the demand and of the qualified and distinctive refusal, the refusal itself may be deemed absolute and a distinct determination not to do what was demanded, to bury the body of this Roman Catholic and parishioner in the ground appropriated for the interment of Roman Catholics, and the refusal also was made by the party properly called upon to do the act. So that a demand and refusal are clearly established by the evidence of record, both preliminaries required for the issue of the mandamus, and, indeed, no objection is taken against either. On this state of things the appellant presented a *requête libellée* to a judge of the Superior Court, as provided by law, for the issue of a writ of mandamus, and the judge being satisfied with the application, granted the petition, and ordered the writ to issue. The petition averred the circumstances of Guibord being a Roman Catholic and a parishioner of the parish of Montreal, together with the circumstances and time of his sudden death, and also the demand for his interment, and the refusal of the respondents; in fine, all the intendments and averments necessary, and with the conclusions for the issue of a Writ of mandamus directed to the respondents enjoining and commanding them, on payment by the appellant of the usual fees, to inter or cause to be interred, within eight days from the judgment to be rendered, in the R. C. Cemetery of Cote des Neiges under their control and administration, the body of Guibord, according to custom and law, and *further* enjoining and commanding the respondents to insert in the civil registers kept by them the certificate of such interment of said Guibord, also according to custom and law, under the

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legal penalties in case of the respondents' resistance to the orders of the Court, with costs, &c. The writ was in the form of a summons issued from the Superior Court, specially endorsed, however, as issued under the order of the Judge of its date, and requiring the respondents to appear and answer to the *requête libellée* attached to the writ of summons, circumstances which take that writ out of the class of ordinary summonses, and give it a superior character. The writ and the *requête* being together are one process, ordered to be issued by special judicial order as endorsed on it. The writ and the *requête* attached thereto were duly served upon the respondents. The respondents pleaded first by petition to quash the writ by reason of informalities stated, which was dismissed as being irregular and contrary to the course of practice in such cases, and, moreover was out of time. *Secondly*, by a peremptory exception reiterating the formal objection contained in their rejected petition, and being, in fact, an exception *à la forme*, which was also rejected as being out of time. *Thirdly*, by peremptory exception denying their refusal of the interment claimed in the *requête*, and their want of notice of the time of presenting the body at the Cemetery, as with such notice they would there and then have offered interment in the reserved lot. *Fourthly*, that in the free exercise of the Roman Catholic worship the respondents had divided the Cemetery into two parts, one for the interment of Roman Catholics with religious ceremonies, the other for the interment of those deprived of ecclesiastical sepulture; that Guibord at the time of his death was a member of the Institut Canadien, and, as such publicly and notoriously subject to canonical penalties depriving him of ecclesiastical burial, which was refused by the Curé, by directions from his ecclesiastical superior acting under orders from the Bishop, but that he offered civil burial under the conditions regulated by the ecclesiastical laws, which the appellant refused, and *fifthly*, a *défense en fait*. Upon exceptions taken by the appellant the respondents' petition and the first exception, to wit *à la forme*, were both rejected, and need not be referred to hereafter; except upon the merits of the cause. The appellant answered the second exception by averring that it was superfluous to fix an hour for the presenting of the body at the cemetery, because the respondents had refused the interment in the cemetery used for Roman Catholics; that the process was a formal document for that purpose, but which the respondents still refused by their plea. The appellant demurred to the third exception, averring that it contained no legal averment sufficient to justify its conclusions; that by the law of France in force at the cession, and the public law of England, the Courts had full jurisdiction to reform and prevent abuses by religious authority; that the respondents admitting that Guibord was at some time a Roman Catholic, have averred no fact whence could result the loss of rights belonging to those of that faith, and notably to the interment claimed; that the Institute being an incorporated body under an Act of Parliament, no authority but the Parliament could restrain the rights and franchises of its members, and that the asserted pretension of the Bishop thereupon was an attack upon Sovereign authority; that the order of his superior could not justify the curé's refusal to inter the body, the superior having no authority to give such order; that the offer of interment by the respondents was a refusal to give to Guibord's remains inter-

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ment in the cemetery used for burials of Roman Catholics according to custom and law. The appellant further replied by a general denegation and by a special response reiterating the terms of the demurrer, and averring a large number of facts and incidents of law and fact to which it is at present unnecessary to refer. To this elaborate response the respondents filed an equally elaborate special replication which will meet the same fate as the response. Evidence was taken in the case, and a full and exhaustive argument was had before the judge who issued the writ, and by whose judgment the conclusions of the *requête libellée* were granted in full in both particulars against respondents, and a peremptory writ ordered to issue against them for both conclusions—namely, to bury and to enregister the burial. Three judges sitting in revision have set aside the judgment and quashed the writ, and it is upon this last judgment that the case has been appealed to this Court.

The case will be followed in the order of the objections made by the respondents. The first objection is purely technical, that the writ is not in the form required by law; that is, not in conformity with the articles of the code of procedure which apply to its issue. It is proper to premise this part of the subject by saying that the writ of Mandamus has in England, from whence it is derived here, been liberally interposed for the benefit of the subject and the advancement of justice, *though originally a writ of High Prerogative*, and that in modern times in that country, the general policy of the legislature to promote it as a remedy has made it more remedial and useful, and conforming it more and more to the ordinary practice upon actions at law. On account of its extensive use and highly remedial nature, it obtained the sanction of an original writ, and was dispensed by the Court Banco Regis in all cases where there was a legal right of justice, but for which right the law had not provided any specific remedy, and commanding the performance of a particular act or duty, by those to whom it was directed and sent. In other words, the definition given of it is a high prerogative writ, *breve regium*, and not a writ of right, like the summons now issued in our practice, it is properly and in its nature a writ of restitution of a most extensive and remedial nature to the aid of which the subject is entitled, upon a proper case previously shown, to the satisfaction of the Court of Queen's Bench. It is said to be founded on *Magna Charta* to ampliate justice by the prevention of disorders arising from either a failure or defect of justice, and therefore used on all occasions where the prosecutor has a legal power consequent upon the violation of some legal right or duty where no specific or adequate remedy is given by law, and where in good government and justice there ought to be one. It does not, of course, go to a redress of mere private wrongs. This remedial writ, which is gradually being assimilated to an actionable writ, forms part of our *procedure*, and it is under the 1022 Art. of the Code that the appellant has applied for its issue in this cause. By the terms of the article it may be issued here in all cases where a writ of Mandamus would lie in England: the article providing that any person interested may apply to the Superior Court, or to a judge in vacation, and obtain a writ commanding the defendant to perform the act or duty required, or to show cause to the contrary on a day fixed." The Code has varied our procedure from that of England, where the writ could not

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be applied for except in B. R., and it has also abolished the English practice of the motion in Court, the rule *nisi* and rule absolute with the other intricate requirements of the English practice, for the issue of the writ which was framed upon the rule absolute, and which issues in the alternative, commanding the defendant by a fixed day, called the return day, either to execute the writ or to signify to the Court a reason to the contrary, so that by English practice the writ is in effect, a mere rule *nisi* to show cause, containing a mandate to the defendant for that purpose, and therefore, it must be served upon defendant personally. The return is immediate, and thereupon the real issue and contention arises because the prosecutor may plead to or traverse, the return, and the defendant may reply, take issue, or demur to the prosecutor's plea, according to Tapping, as upon an action brought for making a false return; and afterwards, if judgment go for the prosecutor, the peremptory writ issues, which is only a writ of execution compelling defendant to admit or restore as commanded. All this intricate proceeding and practice have been abolished by our Legislature, and here the *ex parte* presentment of a petition to the Superior Court or to a Judge, supported by the affidavit of the prosecutor, and containing the indictment and averment of the complaint, with the previous demand and refusal of the performance of the duty sought, and with conclusions for that duty and its enforcement, being found *prima facie* sufficient by the Court or Judge, the prayer of the petition is granted, and the writ is ordered to issue, which is served upon the defendant with the petition *requête libellée* attached thereto to form part of it, and only after service the defendant for the first time shews cause by special plea, not to the writ but to the petition. By this course our practice is simplified and assimilated to that upon actions at law, and the writ is the substitute for the rule *nisi* to show cause with the mandatory injunction for that purpose. It has been deemed necessary to show both courses of practice, because of the alleged defect in the writ issued in this cause. In England the averments and indictments of the prosecutor are in the rule absolute and not in the writ, and the Court there frames the writ upon the rule so as to declare explicitly the mandatory right or duty required, that is, to show what is demanded—Tapping, p. 309. In our proceeding all these are shown in the *requête libellée*, and Tapping says that in England the writ is likened to a declaration in a personal action, no precise form of words being necessary, provided the writ be formal and substantial—that is, that the matter is sufficient, and that it is deduced and expressed according to the forms of law—thus following out the forms of old writs which contained in themselves the causes of action and demand. Without a mandatory clause the English writ lapsed, and here, without sufficient conclusions upon which to frame a mandate for execution, the writ would also lapse or be quashed. In this case a writ of summons has issued, endorsed with the special order of the judge, granted upon the petition for the issue of a writ of Mandamus, and commands the defendants-respondents to appear and shew cause against the demand contained in the *requête libellée* attached to the writ as forming part thereof, and, in fact in itself bringing into the writ all the intendments and averments, and the mandatory conclusions or requirements of the prosecution in the most precise and formal manner, giving to the defendants

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the fullest information of the title of the prosecutrix and of the particular acts of duty demanded. According to our practice, this is technically sufficient; the words of the article in this respect are merely descriptive of the writ and not prescriptive in substance, because the writ is not pleaded to here as in England, where it is really the action, but the pleadings to the Code are required to be directed against the *requête libellée* only: that is, the defendants are required to show cause by *pleading specially to the information, la plainte.* A similar practice prevails in the Code of Ontario, where the English law prevails, see C. S. U. C. Cap. 22. Now where the reason of the English practice does not prevail the strict literal rule against our common practice should not apply, and our procedure being different from that of England, although we have nominally adopted her writ, I am satisfied that this first objection as to the form of the writ should not prevail.

The next objection is as to the direction of the writ to the *Curé et Marguilliers de l'Œuvre et Fabrique de Montréal*, and that it should be to the Curé of the Parish only. Now the direction of the writ is a matter of great importance and the utmost care is required to ensure its accuracy, it must be directed to all those who are legally to execute it, and when directed to a corporate or quasi corporate body must describe it by its corporate or quasi corporate title, so also if several persons form but one artificial person or officer they must all be included. Now the Curé of the Parish and its Churchwardens are too well known to our laws and our jurisprudence to create a doubt of their *legal* quality and of their right and authority in the administration in and over the Cemetery of Cote des Neiges, as the Parish Cemetery; their administrative power is, however, admitted. The Cemetery was purchased for the Parish by the Fabrique, composed of the Curé and Marguilliers for the time being, and is appropriated to the interment of members of the Roman Catholic faith. The respondents admit so much in the authorities cited by themselves. *Les Fabriques comme corporations, sous le nom collectif du Curé et des Marguilliers sont formellement reconnus dans notre droit; et dans tous les actes et toutes les procédures qui se font au nom de la Fabrique, le Curé et les Marguilliers doivent être en nom collectif.* This Corporation as such, and not the *Curé* as such in his curial functions, because if the *Curé* alone as such had command of burials in the parish burying ground, why not his ecclesiastical superior who has undertaken to order him to refuse the burial ecclesiastical? The corporation alone administer the cemetery; they sell the grave lots as required, and it is proved were willing to sell a grave lot to the appellant. One of these sales is produced of record, and shows the sellers to be the Fabrique of the parish, composed of the *Curé* and *Marguilliers*. It would be waste of time, therefore, to deny the legal validity of the direction of these proceedings against the respondents, the *Curé et Marguilliers*, and therefore this second objection cannot prevail. The special legal validity of that question however turns upon the duty to be done, and depends upon the requirement of the appellant, that is, the demand of duty, required by her; the distinction is plain, because two kinds of burials have been mentioned, the ecclesiastical and the civil, both so called for purposes of explanation; the first being the burial of a body by a priest, with ecclesiastical rites and cere-

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monies of the Roman Catholic church and the benison, by him, of the grave at the time of the interment, which being of ecclesiastical cognizance I should not be disposed to interfere with or order, as being beyond that right; the other the civil, that is simple interment without religious rites, which may be attended by the *Curé* or his deputy as a civil duty to recognize the civil fact—*inhumation dépouillée de toutes cérémonies religieuses*—which constitutes civil sepulture, *an act purely* civil. A technical difficulty arises, and meets me here. It is plain that the applicant knew that religious as well as civil burial exists: at first, the demand for interment was general without distinguishing either kind of burial, and only upon the *Curé's* refusal to allow religious burial was the other, the civil burial demanded. Now the rule laid down by Tapping, p. 284, is that the demand must be express and distinct, and not couched in general terms; it should accurately demand performance of that which the respondents legally could and should do, and yet the conclusion for burial of the *requête libellée* is couched in the same general terms, without accurately specifying either an ecclesiastical or civil burial. In England the practice is to quash the writ for uncertainty, where uncertainty exists, and the generality of the terms here as to the burial demanded would probably in England be fatal to the writ; but as a more fatal error exists in my apprehension in this proceeding, this uncertainty need not be pressed. Assuming as a general fact admitted, that the Cemetery of the Cote des Neiges was in the possession of and under the administration of the respondents, as the Roman Catholic burying ground for the Roman Catholic parishioners, and appropriated for and used for persons of the Roman Catholic persuasion who had been made Christians by admission to Roman Catholic baptism, it differed from the English churchyards and parish burying grounds in this, that the entire English grounds were consecrated and required to be consecrated for Christian burial, either by actual consecration of the ground itself, or by consecration of the church within the inclosed ground, and therefore all without the area of consecration was not consecrated ground, and the clergymen of the Church of England could not be forced to perform clerical duties except upon consecrated grounds—Wurtele's case at Quebec; Rugg's case in England, Privy Council, 1868.—Here the Cemetery is simply purchased ground, for the purpose of burial, but in no part is it consecrated except grave by grave as purchased and used for interment of Roman Catholics with ecclesiastical rites. There is no part of the English ground set apart expressly for bodies of such as are not Christians, or admitted to Christian fellowship, or excluded from it as schismatics, and all parishioners and others dying in the parish are entitled to be decently interred in the parish burying ground which is convenient, as Hooker says, for very humanity's sake. Yet by the rubrics in the Church of England common prayer book it is declared that the Church office for the burial of the dead is not to be used by the clergyman for any that died unbaptized or excommunicated, or have laid violent hands upon themselves; it is true that the canon in this respect is almost a dead letter, because baptism may be performed at any time before death, even by lay hands. Excommunicated persons are those only who were denounced *excommunicate majori excommunicatione*, for some grievous and notorious crime, which is no longer practised, because the courts act upon

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the crime by way of punishment, and lastly suicides, that is only those who kill themselves voluntarily and by the instigation of the devil, as the canon says, which are put aside by the verdicts of the Coroner's jury that the act was done by the person when out of his senses, nor am I aware of the existence of any canon which necessarily enforces the reading of the office over every corpse consigned to consecrated ground. But still it is the common law of England that every person may at this day be buried in the churchyard of the parish where he dies. In England, therefore, the right to interment is general, every person according to the circumstances having a right to sepulture in the church yard or other burial place attached to the parish church. Hence the right of interment is general for Christians because amongst them the honor which is valued on behalf of the dead is that they be buried in appointed burying grounds, where the field of God, God's acre in German, is sown with the seeds of the resurrection, that their bodies also may be among Christians with whom their hope and their portion is and shall be for ever. This, *mutatis mutandis*, applies to the R. C. interments in the R. C. parish cemetery of this parish appropriated and used for professed Roman Catholics. In England there is no exclusion from interment in the church burying ground, although there may be privation of the religious office for the dead over the dead body. Here the R. C. Cemetery is not generally consecrated, and besides that, a portion has been separated and enclosed from the cemetery, and is called the reserved lot which has been appropriated to unbaptized infants and to persons not known to profess the R. C. faith. The fact of the reservation and distinctive separation with its recognized appropriation to the bodies of those not Christians raises a conviction that the reserved lot, although it may be ground belonging to the Fabrique and purchased by them, the Curé and Marguilliers, was not the parish cemetery appropriated and used for the burial of Christians and especially for the interment of R. Catholics by R. C. profession and of R. C. parishioners. The reserved lot formed no part and was not intended to form a part of the R. C. Cemetery *eo nomine*, and the offer of the Curé to give burial in that lot, was evasive and delusive as it regarded a professed R. Catholic, it had not even the merit of the neglected corner for the poor, and was equivalent to an absolute refusal to allow the interment of the R. C. Guibord in the R. C. Cemetery at all. He could not and would not have been prevented in attending the services of his religion in the R. C. Parish Church, in his lifetime, and by no right could his remains be legally excluded from simple interment in the cemetery of the parish attached to the parish church which he could not be prevented from attending while alive. It is clear that the exclusion of the remains of the parishioner from civil interment in the parish cemetery is something touching the *acte civil* alone, over which the authority of the Bishop could have no control whatever; over which moreover the *Curé* as such could have no ecclesiastical control, and which the *Fabrique* itself, the *Curé et Marguilliers*, were powerless in law to prevent, because the right in the Roman Catholic parish cemetery is the civil property of the parishioners, belongs civilly to, and is impliedly by law, to be divided amongst all present and future parishioners as such; and therefore the ecclesiastical exclusion by the Bishop or the *curé*, as a mere ecclesiastic, was a gratuitous exten-

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sion of their ecclesiastical power over objects not within their special province as ecclesiastics. If the want of absolution and of the sacrament was the equivalent for the refusal of burial in the Roman Catholic cemetery, where were acknowledged Roman Catholics to be buried, who, by accident or sudden malady, died without these offices of the Church at their death-bed? Surely they would not be dumped into the reserved lot. In Guibord's case, it is manifest that the Bishop's censures could not and did not disfranchise him from being a Roman Catholic; they might prevent him from receiving the religious and ecclesiastical offices, but these censures remained outside of the parish cemetery, appropriated for him and other Roman Catholics; and moreover, from which no professed Roman Catholic could legally be excluded by the act of the *Fabrique* in making the unreserved part to be used for merely ecclesiastical burials only. The *Fabrique*, as a civil body, had no legal right to make such a distinction by any civil authority, or ordinance that they know of, and where, as a civil act, *au fond*, every Roman Catholic was entitled to his last resting place. A wrong argument has been drawn from the power of the parish rector, *Curé*, in England to determine where, in the burying ground, or in what particular manner, he, in his discretion, would allow the interment, for which no mandamus could coerce him, because the mode of burial is held there to be within the cognizance of the ecclesiastical courts. Now, that is quite true, because the freehold is in the rector; and here also, probably, the proper discretion of the *Fabrique* might not be interfered with, with relation to such incidents; but these are very different from total exclusion from burial in the parish church cemetery. Case in 2 B. and A. 205, R. and Coleridge—where the mandamus would issue to compel the interment in the church-yard, a ruling which, in this cause, I should have found myself compelled, as a rule of law, to adopt, had Guibord's burial alone been demanded by the *requête*. It is here that the main difficulty arises, because the demand by the writ is multifarious. It seeks to compel the *Fabrique*, the *curé*, and churchwardens to a double duty, not only to bury but to enregister the burial, which is, in my mind, a fatal mistake—one which the Court cannot rectify, because the demand is indivisible in the one mandamus. It is plain that the demand must be made to him or them who has or have the immediate right to the subject matter of the writ, whose duty it is to execute the writ, and if the writ in that respect, that is the required duty, be defective or bad in substance, the writ will be either superseded or quashed. The writ *requête libellée* must clearly show upon its face that it is the respondents' duty to execute it, and thereupon it has been invariably held as the primary rule that the mandatory clause or mandate must not include more than one duty or right complete in itself, whether of the same or of many individuals, for, two or more distinct rights cannot be joined in the same mandamus. If, therefore, the separate and distinct rights or duties of two or more persons be so improperly joined, the writ may be quashed: the mandate cannot exceed or extend beyond the powers of the defendants legally to perform—hence, if several distinct rights and duties are joined in one writ it will be set aside and must be quashed, when it commands the defendants to do that which they have no power to do. Now, in this cause the *requête libellée* demands of the *Curé* and *Marguilliers* of the *Fabrique* to

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inter the body of Guibord; this I consider a good and legal demand, and had it been alone, I cannot see how it could be refused as to the civil burial, because that duty was within the province of the *Fabrique*, the *Curé* and *Marguilliers* to perform, but the same conclusions require the same *Fabrique*, the *Curé* and *Marguilliers* to enregister the burial, and this is a different duty from the burial and one in which they could not interfere. That duty belongs to the *Curé* alone: the law has made him alone the custodian and keeper of the registry book, he is required to see to the registration therein of all burials in the parish cemetery, he gives certificates of those burials and is liable in penalties for the contravention of his duties in this respect. Under these circumstances, he individually in the performance of his particular duty, formed no part of the *Fabrique*, *les Curé et Marguilliers*, and by these double conclusions against the respondents, for one of which they could not legally be held or constrained, the proceedings are bad and informal, and the writ reprehensible, and must be quashed.

DRUMMOND, J., said that his brothers, who had already spoken, had gone over the facts of the case so clearly and eloquently, that he would not refer to them in his remarks. There remained to be considered the questions of law. He referred to the history of the law bearing on the question, which had been drawn up by Mr. Justice Mondelet, and said there could be nothing better than this history. The case had also been very ably argued before this Court, and the *factums* filed had been of great assistance. Coming to the preliminary objections of form, his Honor expressed his regret that the Fabrique had not thought proper to set aside all question of irregularity in the procedure, and meet the case on the merits. Our Legislature had wisely determined to retain the benefit of these writs without loading them with the formalities which encumbered the English procedure. He considered the writ regular as to form and well directed, and the conclusions sufficient. The Court might order the Fabrique to perform the interment, while it restricted the order to register to the *curé* only. The majority of the Court, however, being opposed to the appellant on questions of form, he thought it would have been better not to have entered into any consideration of the merits; but as his colleagues had spoken of the merits of the case, he would make a few remarks. He looked at the case differently from any of his colleagues. Under the ancient French law the civil tribunals could intervene in these matters. The people and the Sovereign were Catholic. There was an intimate connection between Church and State, and the Sovereign, as a pledge of the protection extended to the church, assumed the right in certain cases to intervene for the purpose of checking and repressing the abuses and encroachments which ecclesiastics sometimes committed. The cession of Canada to England changed this state of things. The guarantee of the free exercise of the Roman Catholic religion granted to the members of that faith, and the fact that the new Sovereign was a Protestant, necessarily changed the ancient state of things, and rendered it as impracticable as dangerous for the State to intervene in ecclesiastical matters. If it were not for this want of jurisdiction, he would have been disposed to order the burial to take place. Guibord was not excommunicated. He was only under canonical censure. His honor's opinion

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on this point could only be considered as extrajudicial, the case being decided on questions of form.

CARON, J.—Cette cause célèbre, qui doit une bonne partie de sa célébrité aux matières étrangères qui y ont été introduites et aux nombreuses questions qui ont été soulevées sans nécessité ni avantage, est sûrement d'une grande importance, non-seulement à raison de l'intérêt bien légitime qu'y ont mis les parties, mais encore et surtout par suite de la délicatesse et de la complication du sujet sur lequel roule le présent litige.

Tout en admirant l'immense travail, accompli avec une persévérance et une habilité peu communes par les savants procureurs représentant les parties, et après l'avoir examiné avec toute l'attention convenable, j'ai cru me mettre mieux en état de rendre justice à la cause, en la dégageant de tous les faits inutiles ou de peu de conséquence, et aussi en laissant de côté plusieurs questions, qui, quoique de grande importance en elles-mêmes, sont ici d'une application douteuse et peuvent avec avantage être remises à une autre occasion. Je me contenterai donc de rappeler les faits que je regarde comme utiles et essentiels à la contestation, et de ces faits, je déduirai et poserai les questions qui me paraissent en découler.

Les faits, tant admis que prouvés, peuvent se résumer comme suit: Guibord était paroissien catholique romain, de la paroisse de Notre-Dame de Montréal; il était en même temps, depuis plusieurs années, membre de l'Institut-Canadien, société littéraire, incorporée, se composant indistinctement de personnes de diverses dénominations religieuses. Cette société possédait une bibliothèque, dans laquelle se trouvaient des livres regardés comme mauvais et dangereux par les autorités religieuses du diocèse. Après diverses représentations et démarches sur le sujet demeurées sans résultat pratique, l'évêque diocésain lança, contre les membres catholiques de l'Institut qui continueraient d'en faire partie, des censures et peines canoniques, ayant pour effet de les priver de l'usage des sacrements et par suite de la sépulture ecclésiastique ainsi que prétendu par les intimés.

Les choses en étaient dans cet état, lorsque la mort est venue frapper Guibord, décédé en novembre 1869, sans s'être retiré de la dite société. Des amis du défunt à la demande de l'appelante, son épouse, chargés de voir aux arrangements nécessaires pour les funérailles, se sont adressés au curé de la paroisse, et l'ont prié de donner à Guibord la sépulture ordinaire dans le cimetière de la paroisse; le curé ayant appris que Guibord était membre de l'Institut, désira se consulter avec ses supérieurs, et à cette fin écrivit à l'administrateur du diocèse, en l'absence de l'Evêque, lui demandant ce qu'il devait faire dans la circonstance.

En réponse à cette demande, il reçut la lettre qui se trouve à la page 2 du factum des Intimés, déclarant en substance, que vu que Guibord était décédé sans avoir renoncé à l'Institut-Canadien, la sépulture ecclésiastique ne pouvait lui être accordée. Cette lettre communiquée aux amis de l'appelante, fut suivie de discussions et d'explications entre eux et le curé, dans le cours desquelles il fut distinctement admis et déclaré de la part de l'appelante par ses représentants que l'on n'insistait pas à obtenir pour les restes de Guibord, la sépulture ecclési-

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astique, mais que l'on se contenterait de la sépulture civile, laquelle le curé déclara, de sa part, qu'il était prêt à accorder.

Sur explications subséquentes entre lui et M. Doutre, représentant l'appelante, ayant été déclaré que cette sépulture civile ne pouvait se faire que dans cette partie du cimetière destinée à l'inhumation des enfants morts sans baptême, et à ceux auxquels la sépulture ecclésiastique ne pouvait être accordée; cette espèce de sépulture offerte par le curé fut refusée de la part de l'appelante, laquelle par son représentant, consentait bien à se dispenser des prières et autres cérémonies religieuses en usage dans les inhumations ecclésiastiques, mais insistait à ce que la sépulture eût lieu dans la partie du cimetière destinée aux restes de ceux à qui la sépulture ecclésiastique est accordée.

C'est sur cette prétention émise de la part de l'appelante et refusée par le curé, que les parties ont brisé: et c'est à la suite de cette conversation que la requête dont il faut maintenant s'occuper, a été présentée et qu'a été commencé l'important procès que nous avons à décider.

Dans cette requête, présentée à la Cour Supérieure, dirigée contre les Intimés, en leur qualité et dénomination de "Les curé et marguilliers de l'œuvre et Fabrique de la paroisse de Montréal," l'appelante, après avoir allégué le décès de son mari, sa qualité de catholique romain, le droit qu'il avait comme tel d'être enterré dans le cimetière commun, destiné aux Catholiques Romains décédés dans la dite paroisse, en la manière voulue par l'usage et par la loi, la demande qu'elle avait faite aux défendeurs à cet effet, leur refus de se rendre à cette demande, et elle concluait [voir la conclusion, page 1, du factum de l'appelante] à ce qu'il fût émané *un bref de Mandamus*, adressé aux défendeurs [les curé et marguilliers susdits] leur enjoignant d'inhumer ou faire inhumer dans le cimetière sous le contrôle et administration des défendeurs, le corps du dit Guibord, conformément aux usages et à la loi et aussi d'insérer sur les régistres de l'Etat civil par eux tenus le certificat de telle inhumation.

A cette requête était annexé un bref de sommation ordinaire, sommant les défendeurs de comparaitre pour répondre à la requête, de laquelle, copie était aussi signifiée aux défendeurs.

En conformité de cette sommation, les défendeurs ont comparu et ont, en réponse à la demande, plaidé en substance, tous ensemble:

I. Que le bref qui leur avait été signifié, lequel d'après les allégués de la requête, était, et devait être un *bref de Mandamus*, n'était pas tel mais un simple bref de sommation ordinaire.

II. Qu'en supposant que ce bref fût dans la forme voulue, il aurait dû être adressé au curé seul, en sa qualité de curé, auquel incombe le devoir de faire les inhumations et de les constater, en en faisant l'entrée aux régistres dont il est le dépositaire et gardien, au lieu d'être adressé, comme il l'a été, aux curé et marguilliers, lesquels représentent collectivement la Fabrique, laquelle n'a rien à voir aux inhumations et à la teneur des régistres.

III. Que c'est la sépulture civile seulement qui a été demandée ou dont on est convenu de se contenter; or cette sépulture a été offerte par le curé et refusée par le représentant de la demanderesse dûment autorisé.

IV. Qu'à l'offre ainsi faite par le curé avant l'action, de procéder à la sépulture

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civile, il n'a été par lui apposé aucunes conditions ou restrictions de nature à justifier l'appelante à la refuser.

V. En addition à ces défenses les Intimés ont produit une autre exception rapportée *verbatim* et tout au long dans leur factum à la page 3 et suivante; exception dont l'analyse prise du factum de l'appelante à la page 2 peut se résumer comme suit: La Fabrique de la paroisse de Montréal représentée dans l'instance par les défendeurs suivant le droit qu'elle en avait, tant par la loi que par l'usage non-seulement dans la dite *paroisse*, mais dans le diocèse *entier* et de temps immémorial, divise le cimetière catholique de la dite paroisse, duquel ils ont la garde et contrôle, en deux parties distinctes, l'une destinée à l'inhumation des catholiques romains ayant droit à la sépulture ecclésiastique, et l'autre destinée aux catholiques romains qui n'ont pas droit à cette sépulture; que c'est dans cette dernière partie que le défunt, mari de l'appelante, d'après les circonstances particulières où il se trouvait lors de son décès, devait être inhumé et non dans la première, à laquelle il n'avait pas droit: que la sépulture dans la partie du dit cimetière réservée est celle où le défunt devait être inhumé, non-seulement par des déclarations faites de son vivant, mais aussi par celles faites depuis son décès avant l'institution de l'action par les représentants autorisés de la dite appelante; que l'inhumation du défunt dans cette partie à laquelle seulement il avait droit, a été offerte aux représentants de l'appelante avant la dite action et refusée de sa part sans cause ni raison légitime.

Les Intimés ont, dans la même exception, soulevé plusieurs questions d'une grande importance, savoir entre autres, l'effet que devait avoir les peines canoniques, prononcées contre les membres de l'Institut Canadien sous les circonstances, la validité de la censure ou excommunication lancée contre eux, la juridiction exclusive attribuée aux autorités ecclésiastiques dans le cas actuel et autres semblables; si ces censures et excommunications avaient, pour avoir effet, été accompagnées des procédures requises et faites dans la forme voulue par les canons; quelle était l'étendue et les limites de la juridiction de nos tribunaux civils dans le cas où les matières religieuses se trouvent impliquées ou concernées: Enfin quel est le résultat de la conquête et quels changements elle a introduits au pays sur ces matières.

Tous ces questions sur lesquelles il a été longuement écrit et parlé dans la présente cause méritent bien l'attention qu'on leur a donnée. Je me ferais un devoir de les traiter si leur décision me paraissait nécessaire pour rendre justice à la cause, mais d'après la manière dont j'envisage le sujet, après y avoir donné toute l'attention convenable, pensant qu'il est acquis dans la cause d'après la preuve et les aveux des parties que c'est la sépulture civile seulement qui a été demandée, que c'est la seule qui a été exigée et dont on est convenu de se contenter et que l'on a nullement insisté sur la sépulture ecclésiastique, il me parait que la question est restreinte à celle de savoir si les défendeurs et ceux qui les représentaient, ont refusé directement ou en imposant des conditions exorbitantes ou illégales à l'octroi de cette sépulture dont l'appelante voulait bien se contenter.

Les questions qui viennent d'être énumérées et plusieurs autres, sont justement celles dont je disais au commencement de ce mémoire, quelqu'importantes

qu'elles fussent, que la considération pouvait s'en remettre avec profit à une autre occasion.

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Je me contenterai de dire en passant qu'il me parait extrêmement difficile de poser des règles générales quant à l'étendue et aux limites des deux juridictions, l'ecclésiastique et la civile. Il est hors de tout doute que dans tous les cas où les questions agitées sont purement ecclésiastiques, les autorités ecclésiastiques sont seules compétentes à les juger, mais la grande difficulté, suivant moi, est de distinguer les cas qui sont purement ecclésiastiques de ceux qui ne le sont pas en tout ou en partie.

Il me parait arriver si souvent que les sujets à décider sont mêlés de droit religieux et de droit civil, que dans une infinité de cas les autorités ecclésiastiques ont besoin de l'intervention des tribunaux civils pour les aider dans l'exécution et l'accomplissement des droits et priviléges qui leur appartiennent incontestablement. Il me paraît donc que la question de juridiction dépend beaucoup des circonstances de chaque cas, sans qu'il soit possible avec avantage de poser une règle générale.

Comme la chose ne me parait pas nécessaire dans le cas actuel, je m'abstiendrai de poser cette règle, me réservant de le faire en temps convenable, et je passe maintenant à l'examen succinct des questions posées plus haut, et qui me paraissaient découler des prétentions respectives des parties.

Réduites à leur simple expression, ces questions peuvent se résumer comme suit:

I. C'est un bref de Mandamus que l'on a demandé et qu'on devait demander; la demande qui en a été faite est-elle dans la forme voulue?

II. Le bref de Mandamus doit être adressé à celui qui, ayant à remplir un devoir que lui impose la loi, refuse ou néglige de le faire. Dans le cas actuel quels étaient les ou le devoir à remplir, à qui étaient-ils imposés; le bref a-t-il été adressé à celui ou ceux tenus de le faire?

III. La loi reconnait deux espèces de sépulture, la sépulture ecclésiastique et la sépulture civile; toutes deux, d'après les circonstances particulières de chaque cas, sont ou peuvent être conformes aux usages et à la loi. L'appelante dans sa requête n'ayant pas spécifié, laquelle de ces deux sépultures elle réclamait, les intimés, d'après les faits prouvés antérieurs à l'action et même au décès du défunt, étaient-ils fondés à croire que c'était la sépulture civile qui était demandée, et si c'est le cas, cette sépulture a-t-elle été offerte et refusée?

IV. Cette offre a-t-elle été accompagnée de conditions ou restrictions qui puissent justifier l'appelante à la refuser. Ce refus était-il justifié par le fait que l'on ne voulait faire cette sépulture que dans la partie du cimetière réservée pour ceux qui se trouvent dans les circonstances où se trouvait le défunt; cette condition était-elle injurieuse à sa mémoire et à sa famille; la division du cimetière aux fins et de la manière susdite était-elle légale? L'appelante avait-elle droit d'insister sous les circonstances à faire inhumer le corps de son mari dans la partie destinée à ceux ayant droit à la sépulture ecclésiastique? En se déclarant satisfaite de la sépulture civile ne se soumettait-elle pas aux conséquences

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y attachées et entre autres à celle de voir les restes de son mari placés dans la partie du cimetière à laquelle elle a depuis objecté.

1o. Sur la forme du bref.

L'on se rappelle que la présente instance est basée sur la 3me section du chapitre 10 du C. de P. Article 1022 et suivants; elle a commencé, comme elle le devait, par une requête libellée, adressée aux juges de la Cour Supérieure, à laquelle requête était annexé un bref de sommation ordinaire, requérant les Défendeurs de comparaître au jour indiqué pour répondre à la demande contenue dans la dite requête qui concluait à l'émanation d'un bref de Mandamus adressé aux défendeurs pour les fins que l'on connait.

Les Intimés ont prétendu et prétendent encore que cette procédure est nulle et contraire au code; ils disent que c'est un bref de Mandamus qui aurait dû être demandé, obtenu et signifié aux défendeurs; que c'est à ce bref que les Intimés auraient dû être appelés à répondre; que c'est sur ce premier bref obtenu et signifié que la discussion aurait dû avoir lieu, que ce n'est qu'après cette discussion que le bref de *Mandamus* péremptoire aurait dû être ordonné tandis qu'il l'a été sans un bref primitif qui aurait contenu ce qui était ordonné par la Cour et auquel le bref péremptoire serait en tout semblable, que ce résultat impérativement ordonné d'après le Code ne pouvait s'effectuer qu'autant qu'il y aurait deux brefs, l'un primitif et l'autre péremptoire, ce qui n'avait pas eu lieu dans le cas actuel où le bref primitif était remplacé par un bref de sommation ordinaire qui n'était aucunement nécessaire. Telles sont les prétentions des Intimés sous ce rapport et je dois avouer ici que c'est avec une répugnance considérable que je me suis décidé à les accueillir.

L'interprétation que l'Appelante voudrait donner aux articles du code en question me parait plus raisonnable, plus simple dans la pratique, et plus satisfaisante; elle semble surtout plus conforme à l'idée qui parait avoir guidé la législature dans la passation de l'acte, chap. 88 des S. R. B. C. sur lequel sont calqués les articles du code mentionné plus haut.

Si donc, il était possible par implication ou autrement de donner à ces dispositions l'effet que leur prête l'appelante, je me rendrais volontiers à son opinion; mais la loi est trop positive et trop claire, les termes en sont trop formels et ne se prêtent nullement à aucune interprétation autre que celle qu'ils expriment.

La loi, telle qu'elle est, est sans doute moins bonne qu'elle pourrait être, mais telle qu'elle est, il faut l'exécuter. Quand on a lu la section du code où il est traité du Mandamus, il faut nécessairement en venir à la conclusion que la législature a voulu faire et a fait une distinction entre les brefs de Mandamus et la procédure qu'il faut suivre et entre les autres brefs de prérogative; il me parait constant que l'on a voulu garder le bref de *mandamus* et la procédure qui lui est propre; tandis que pour les autres, on a adopté le bref de sommation ordinaire dont l'appelante s'est servie mal à propos, suivant moi, dans le cas actuel.

Au soutien de l'opinion que je viens d'émettre, je n'entrerai point dans de plus amples détails: je suis décidément d'avis que le bref qui a été obtenu et signifié n'est pas ce qu'il devrait être et que la procédure qui s'en est suivie est radicalement nulle.

Je me contenterai d'ajouter sur ce point que tout ce qui peut être dit en

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faveur de cette opinion, l'a été parfaitement dans le factum des Intimés et surtout dans le mémoire additionnel produit de leur part depuis l'audition de la cause.

2o. A qui devait être adressé le bref, en supposant qu'il fût valable quant à la forme? Etait-ce à la Fabrique comme il l'a été ou plutôt au curé de la paroisse?

La réponse à cette question doit être nécessairement contre l'appelante. Il a été dit et l'on trouve répété partout que c'est à celui à qui la loi impose un devoir qu'il refuse ou néglige de remplir que le bref de Mandamus doit être adressé pour l'y contraindre. Or, dans le cas actuel, les devoirs à remplir étaient au nombre de deux: présider et assister à la sépulture de Guibord afin d'être en état de la constater, et en dresser acte authentique dans les régistres de la paroisse. Chacun de ces deux devoirs était imposé au curé seul, qui, comme tel, était dépositaire et gardien de ces régistres, dont il était responsable sans que la Fabrique y eût aucun contrôle, quoiqu'elle fût obligée de les fournir; l'autre devoir, celui de présider à l'inhumation, est également imposé au curé seul, la Fabrique n'ayant rien à y voir, sa seule obligation étant de tenir en état convenable et décent le cimetière où se font les inhumations, lequel appartient à la paroisse représentée par la Fabrique qui se compose des marguilliers et du curé, ce qui n'empêche pas ce dernier d'avoir à remplir des devoirs autres et indépendants de ceux de la Fabrique et des marguilliers; ceux exigés de la part de l'appelante dans le cas actuel, faisant partie de ces devoirs qui sont tout à fait étrangers à la Fabrique, qui non-seulement n'est pas tenue de les remplir mais n'a aucune qualité pour le faire.

C'est donc mal à propos que l'on prétend que la Fabrique devait être mise en cause et le curé, comme tel, laissé de côté pour la raison que c'était elle qui avait charge du cimetière et qui devait fournir les régistres.

Une fois ces régistres fournis et livrés au Curé, la Fabrique n'y posséde plus aucun droit, leur tenue, leur garde, leur dépôt, la responsabilité qui en résulte, tout est à la charge du curé, et les marguilliers n'y ont pas plus de droit que les autres paroissiens et même les simples étrangers, quant à la sépulture même, il est inutile de dire que les marguilliers n'ont rien à y voir.

Au reste il est facile de concevoir quel inconvénient résulterait de l'adoption de la doctrine émise par l'appelante, savoir que le bref est bien adressé, en l'étant à la Fabrique. Le curé, comme faisant partie de cette fabrique n'a pas plus de pouvoir que chacun des autres membres qui la compose; sa voix dans les délibérations ne compte que comme celle d'un autre; or ne serait-il pas absurde d'exposer le curé à être contrôlé, empêché même par une majorité de ses marguilliers dans l'accomplissement des devoirs dont il est seul tenu et qu'il est seul qualifié à remplir.

La conclusion à tirer de tout ceci, c'est que le bref, en le supposant valable, a été mal adressé, celui auquel il devait l'être n'étant pas régulièrement et légalement en cause, le bref péremptoire ordonné contre lui est nul, et pour cette raison encore, le jugement de la Cour de Révision doit être approuvé.

3o. Quelle sépulture a été demandée?

En référant à la requête l'on voit que rien n'est spécifié à ce sujet: l'on se

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contente de demander qu'il soit enjoint et ordonné aux demandeurs d'inhumer dans le cimetière, etc., etc., le corps de Guibord *conformément* aux *usages* et à la *loi* et d'insérer dans les régistres par eux tenus le certificat de cette inhumation.

Tout ce qu'on exige donc, c'est que l'inhumation et l'enrégistrement soient faits conformément aux usages et à la loi. Or, chacune des dites sépultures peut être conforme aux usages et à la loi d'après les circonstances. Dans le cas actuel tout indique que c'est la sépulture civile que l'on a voulue, que l'on a demandée et dont on est convenu de se contenter.

Cette assertion est justifiée d'abord par les termes mêmes de la requête, qui sont vagues et incertains quant à l'espèce de sépulture que l'on demande et qu'il faut en conséquence interpréter par les faits établis dans la cause. Ces faits entre autres sont, antérieurement au décès de Guibord, la déclaration qu'il a faite comme quoi il savait bien que s'il persistait à demeurer membre de l'Institut, il ne serait pas inhumé en terre sainte, mais qu'il s'en occupait peu, que pourvu qu'il eût à ses funérailles un concours nombreux de personnes, c'est tout ce qu'il désirait. C'est à sa femme, l'appelante, que cette déclaration était faite et partant, lors du décès de son mari, elle savait que c'était la sépulture civile dénuée de toute cérémonie religieuse et faite dans le lieu où se faisait alors et se fait encore actuellement telle sépulture que son mari avait entendu et désiré avoir. En conséquence et pour donner suite à ce désir exprimé, le représentant de l'appelante, chargé du soin des funérailles, a déclaré que l'on se contenterait de la sépulture civile, que l'on n'insistait pas sur les prières et autres cérémonies religieuses usitées dans le cas des sépultures ecclésiastiques. C'est en exécution de cette détermination que le corps de Guibord a été, accompagné de ses amis, porté au cimetière, un dimanche dans l'après-midi, à une heure où les inhumations religieuses ne se font guère et sans en avoir prévenu le curé: la présomption étant, d'après ce qui s'est alors et là passé que si le gardien du cimetière, auquel on s'est adressé pour en ouvrir les portes, avait consenti à le faire, le corps du défunt y aurait été déposé sans cérémonie aucune et hors la présence du curé.

Tous ces faits prouvent, suivant moi, que l'on n'avait aucun désir d'obtenir la sépulture ecclésiastique, que c'est bien la sépulture civile seule que l'on exigeait et que l'on réclamait; or, cette sépulture a été offerte et refusée.

4o. Sur le refus de la sépulture offerte.

La preuve sur ce point est abondante et décisive pour établir que le curé a offert d'accomplir la sépulture civile, c'est à savoir celle dénuée de toute cérémonie religeuse, prières, chants, habits sacerdotaux et autres choses usitées aux sépultures ecclésiastiques. Il est également établi que le représentant de l'appelante a d'abord accepté l'offre ainsi faite et a déclaré que de la part de l'appelante on ne tenait pas aux prières et aux cérémonies religieuses; ce n'est que lorsque l'on est entré en explication sur le lieu où devait se faire cette sépulture qu'a commencé le mal-entendu qui a donné lieu au regrettable litige qui nous occupe.

En effet on était d'accord sur tout le reste, le lieu où devait se faire l'inhumation dont on était convenu était le seul point sur lequel on ne s'entendait pas et sur lequel on n'a pu s'entendre. L'appelante prétend qu'elle pouvait et

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devait se faire dans la partie destinée aux sépultures ecclésiastiques, tandis que les Intimés, eux, prétendent que c'est dans la partie réservée à ceux qui n'ont pas droit à la sépulture ecclésiastique, mais à la civile seulement. C'est parce que les Intimés ont insisté sur ce point que l'appelante a refusé d'accepter la sépulture offerte et a porté la présente plainte pour l'obtenir telle qu'elle l'a réclamée.

Tout dépend donc de savoir si les Intimés sont fondés dans leurs prétentions, car s'ils le sont l'appelante insiste sur un droit qu'elle n'a pas, et qu'on ne saurait lui accorder; si au contraire elle a ce droit, les intimés, en insistant comme ils le font, ont tort et doivent être condamnés, vû qu'ils opposent à l'accomplissement du devoir qui leur est imposé, une condition illégale, à laquelle l'appelante n'est pas tenue de s'y soumettre et qui peut être regardée comme un refus indirect? Après avoir examiné avec attention ce point important de la cause je trouve qu'il est suffisamment prouvé que de temps immémorial, il a été d'usage, non-seulement dans la paroisse de Montréal, mais encore dans tout le diocèse et même dans toutes les parties catholiques du pays, de faire dans les cimetières la division faite à Montréal et dont se plaint l'appelante, que l'une de ces divisions est appropriée à la réception des corps de ceux des catholiques romains qui ont droit à la sépulture ecclésiastique, et l'autre destinée à ceux qui n'ont pas ce droit, que c'est dans cette dernière partie que sont inhumés ceux qui se trouvent dans la position où était Guibord lors de son décès; que c'aurait été déroger à la règle générale et à l'usage, si l'on avait accordé au nommé Guibord ce qui aurait dû être refusé à d'autres.

C'est à tort, suivant moi, que l'on prétend que ce refus de la part de la fabrique dans le cas de Guibord, est injurieux à sa mémoire, ainsi qu'au caractère et à la réputation de sa famille. Si, en réalité, il y avait flétrissure et déshonneur pour le défunt d'être enterré dans le lieu prétendu par la Fabrique, ce ne serait sûrement pas à elle qu'il faudrait en attribuer la cause, mais bien à celui qui sachant ce qui l'attendait, a volontairement soumis lui et sa famille à une disgrâce qu'il pouvait si bien éviter. C'est en vain que l'on a prétendu que la partie réservée était destinée et employée à la réception des corps des suppliciés; cette preuve n'existe point au dossier; au contraire il est établi que dans le cimetière en question, les suppliciés ont été inhumés dans la partie non-réservée, étant tous décédés après avoir reçu les secours de la religion. Si donc, dans la partie réservée, il y avait quelques pendus ainsi que le prétend l'appelante contrairement à la preuve, ce ne serait pas comme pendus mais bien uniquement parce qu'ils auraient refusé les secours de la religion catholique à laquelle ils auraient appartenu. Ce serait bien inutile de s'étendre davantage sur cette partie de la cause toute importante qu'elle soit; en le faisant, je ne pourrais que répéter ce qui a été dit sur le sujet dans le factum des Intimés et surtout dans le mémoire supplémentaire produit de leur part auquel j'ai déjà fait allusion et auquel je réfère de nouveau.

Je me résume en disant: Le bref émané et adressé aux défendeurs n'est pas dans la forme voulue, ou plutôt il n'est pas le bref qu'il fallait; il n'a pas été adressé à qui il devait l'être, étant adressé à la Fabrique seule tandis qu'il devait l'être au curé seul. C'est la sépulture que le défunt a déclaré de son

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vivant préférer et devoir obtenir à son décès, c'est cette sépulture, qui a été accordée et offerte, qui d'abord a été acceptée et ensuite refusée par l'appelante ; c'est la seule sépulture à laquelle dans les circonstances le défunt avait droit ; en l'acceptant, l'appelante a dû se soumettre aux conséquences qu'elle entrainait et dont elle avait été informée par son mari, de son vivant ; elle savait conséquemment que c'était dans la partie réservée du cimetière que les restes de son mari devaient être déposés, que cette réserve était légale, conforme à l'usage et à la loi du pays, qu'elle ne comporte rien de flétrissant, ni d'injurieux à la mémoire du défunt, ni à la réputation ou au caractère de sa famille. Pour ces raisons et autres déduites au présent mémoire, la Fabrique qui seule est en cause n'avait ni le droit, ni l'obligation d'accorder la sépulture dans la partie non réservée du cimetière, et que partant la Cour de Révision a bien jugé en mettant de côté le jugement de la Cour de première instance qui ordonnait cette sépulture, et que partant le jugement dont est appel est correct et doit être confirmé.

DUVAL, C.J.—There can be no pleasure in listening to the repetition of a twice-told tale. The Bar will therefore be pleased to hear that I intend to say very little. No doubt, the question is one of the highest importance. It affects the feelings and interests of every family in the country, and therefore it is not a subject which should be treated lightly.

It is to be regretted that the question should be disposed of on what may be considered a question of form. We think the writ of *mandamus* is not of such a character as the writ which has been taken out in this case. Whatever our own opinions may be as to what might suffice, if we are satisfied that the law is imperative, it is our duty, not to judge the law but to respect the law. If on reading the Code and the law which preceded the Code we find the law stated in such terms as to admit of no doubt whatever, I say it is the duty of the Judge to respect the law, and to obey it.

The first question in this case is: Has the writ issued in accordance with the requirements of the law? I say, most assuredly it has not. It has issued in the very teeth of the law. We have been told that we have nothing to do with the English law in this instance. Nothing to do with the English law! Then, where are we to find the law? Is it the law of Canada which has told us what a writ of *mandamus* is? So far is this from the case, that the Code informs us, after mentioning two or three cases in which the writ of *mandamus* may be obtained, that the writ is to issue in all cases in which the writ of *mandamus* would lie in England. I turn to Article 1,022 of the Code of Procedure for Lower Canada, and I find no definition of what the writ of mandamus is. Here is what is stated. "In the following cases," (two or three instances are given) "4: In all cases where a writ of mandamus would lie in England, "any person interested may apply to the Superior Court or to a judge in vaca- "tion and obtain a writ, commanding the defendant to perform the act or duty "required, or to show cause to the contrary on a day fixed." What right have we to say that the direction of the writ shall be otherwise than to show cause on a day fixed? This does not admit of any doubt. Must we not look to that writ?

The modern writ of mandamus is a high prerogative writ, not a writ of right.

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The subject is entitled to it on a proper case shewn to the Court. It was founded on Magna Charta. In England, what does the writ contain? Here is what we are told by a writer on the subject. (His Honour cited the form of the English writ) The writ must expressly state the act. The absence of such a form will render the writ liable either to be superseded or to be quashed. I will now show that our own statute, our own Code, expressly enjoins the observance of this form. It is only necessary to refer to the commencement of Chapter 10. We find, in Article 998, that "the summons for that purpose must be preceded "by the presenting to the Superior Court in term, or to a judge in vacation, of "a special information, containing conclusions adapted to the nature of the con- "travention, and supported by affidavits to the satisfaction of the court or "judge; and the writ of summons cannot issue upon such information without "the authorization of the Court or Judge." Here we are told in one page what the defendant is to do. In the other page we are told that the writ of summons is merely to call him in. Can it be said, then, that the Legislature has not pointed out what the defendant is to do? It is to be a mere writ of summons to call him in. But it is said that the man is to answer a petition. The law, however, has made a distinction as to the proceedings. The law says in the one case, that a corporation violating or exceeding its powers you are to do so and so —a simple writ of summons. In the other case you are to take the English writ of *mandamus*, and that the writ must enjoin upon the defendant what he is to do. (Several references were here made to Tapping on the writ of *mandamus*.) Then the Code says that the proceedings after the service are to be in accordance with the provisions contained in the preceding section. He who runs may read. There is a positive injunction. I find the Legislature making a distinction between the mere writ of summons and the mandamus, and it is not for me to judge the law. But if we are to be left without any rule at all; if we are to have only the three clauses of Article 1022 to guide us, I say that the judge in that case has no guide. He becomes as free as air. If he is of an arbitrary disposition, he is at liberty to indulge it to any extent to the detriment of the subject. I repeat, then, that we have no right to dispense with the law. It would be a most arbitrary proceeding. I do not think the Court has any such power. I say, if the law is bad and defective, let it be reformed.

I should certainly have wished all remarks on this case to stop at this point. Mr. Justice Monk, however, not objecting to the writ, entered upon the merits of the case. For my part, I am very desirous to stop here, simply saying that this writ is bad, that this person is not *rectus in curid*, and therefore the writ is quashed. It is desirable, certainly, that a question of this kind should be disposed of on the merits. Here again we find a difficulty. If we are to refer to the law of England, the writ is not good.

The first question is, to whom has the writ been directed? I say it was directed merely to the Fabrique, *un corps laique*. There used in former years to be much discussion as to the name to be given to these Fabriques. The writ is addressed in this case to the Curé and Marguilliers, not to the Curé personally. If you order a man to do a thing—either a Curé, or anyone else,—and tell him you intend to send him to jail if he does not do it, when you came to send him

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to jail, you certainly would not tell the Sheriff to put in jail the Curé et Marguilliers. It might be a different person who was *curé* when you went to execute the judgment, and how could you, with a judgment against the *curé* sue out a writ against another individual? The writ is therefore not properly directed. It is addressed merely to the Fabrique, a corporation *laïque*. What has the Fabrique to do with the keeping of the registers of burials? The duty of making entries of marriages and interments is not imposed on the churchwardens. The Fabrique may, therefore, say: We cannot comply with your request; we have no power to make an entry in the register.

With respect to the burial itself, here again I must say I could have wished that this question had not been touched, for it may be said, we are not meeting the merits of the case. What has taken place, however? What was asked of the Fabrique? The widow deputed a person to call on the *curé*. He stated that Madame Guibord would be satisfied with a civil burial. The *curé* answered that he was willing to give a civil burial. Here came the difficulty. The *curé* said: I will bury the body in consecrated ground. There is a division in the cemetery. The two portions are distinct, the one being allotted for persons dying without baptism, and unknown individuals. In France, the power of the Fabrique extended over cemeteries. As a matter of right, the churchwardens were authorized to direct where the graves were to be dug. There could be no doubt of this in France; and according to the authorities which have been cited, the same rules have been laid down in England. If there is a little difference in the powers held, the result is the same.

But as I have said already, I am desirous of not going beyond the question before us. I therefore confine myself to the remarks I have now made. The writ was in my opinion contrary to the law, and therefore must be quashed.

Mr. DOUTRE inquired whether the majority of the Court quashed the writ because the form was defective. Three of the judges appeared to hold that the form was correct.

DUVAL, C. J.—We quash the writ for the reasons we have given. Mr. Justice Badgley, though of opinion that the writ issued legally, held that it improperly joined two conclusions which were incompatible, and could not be obeyed by the persons to whom it was addressed.

DRUMMOND, J.—It is one thing whether the form of the writ is in accordance with the requirements of the Code, and another thing whether it makes the proper demand in this particular case. I say the form of the writ is correct.

DUVAL, C.J.—I say that the form of the writ is wrong, and, moreover, that it is wrongly addressed. We all agree in quashing the writ.

Mr. DOUTRE said he was aware of that. He merely put the question that the Bar might be satisfied as to the point of procedure.

Mr. DOUTRE then moved for leave to appeal to the Privy Council. Leave was granted.

The judgment of the Court is recorded as follows:—

The Court, etc.

Considering that the writ and mandate thereon in this cause issued and made upon the demand and at the requisition of the said appellant were informal and

irregular and therefore liable to be quashed and set aside; considering that in the judgment rendered on the 10th of September, 1870, in review of the judgment herein rendered on the 2nd of May, 1870, there was no error, doth maintain and confirm the said judgment in review with costs of this Court in favour of the respondents against the said appellant.

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Mr. Justice DRUMMOND being of opinion that the said writ of Mandamus was properly addressed, and was, as well as all proceedings taken thereon by the petitioner, good and valid, concurs in the judgment solely on the ground that the jurisdiction, power and authority vested in the Civil Courts of old and new France to adjudicate in certain cases affecting spiritual rights and duties, have ceased to be enjoyed by any of the Civil tribunals of Canada since its cession by a Roman Catholic king to a Protestant Sovereign.

Mr. Justice BADGLEY concurs by reason only of the illegal joinder in the said writ and mandate of two separate and different duties enjoined for performance by the respondents in their said quality and for one only of which they could be held liable.

Mr. Justice MONK being of opinion that all the proceedings adopted in this case were and are regular and sufficient, but that seeing the tender and offer made by the respondents, this Court has no jurisdiction to adjudicate upon the matters really in dispute between the parties, and therefore, that as the appellant cannot obtain the conclusions of her demand, doth concur in the judgment confirming the decision of the Superior Court sitting in review.

J. Doutre, Q.C., for the appellant.
R. Laflamme, Q.C., Counsel.
L. A. Jetté, for the respondents.
F. Cassidy, Q.C., Counsel.

(J. K.)

CIRCUIT COURT, 1873.

MONTREAL, 6th MARCH, 1873.

Coram TORRANCE, J.

No. 2778.

Maillet vs. Séré.

HELD: That after the appointment of an attorney in a cause as stipendiary magistrate, no proceeding can be had in such cause until the party for whom he was acting has been called upon to appoint another attorney, and has made default to do so.

In this cause, the plaintiff applied to proceed to his proof.

Pauzé, for the defendant, resisted the application on the ground that the attorney of the defendant, Charles Ouimet, Esquire, had ceased to act as an attorney, by accepting the office of stipendiary magistrate in the district of Beauharnois, 32 Vic., ch. 23, (Quebec, A.D. 1869). He cited C. C. P., 200.

The Court refused the application of plaintiff.

Maillet, for plaintiff.
Charles Ouimet, for defendant.

(J.K.)

SUPERIOR COURT, 1873.

ENQUETE SITTINGS.

MONTREAL, 18th JANUARY, 1873.

Coram JOHNSON, J.

No. 660.

Brush vs. *Stephens* et vir., and *Stephens* et vir, Petitioners.

HELD:—That under the Quebec Act, 35 Victoria, chap. 6, sect. 9, the right to examine a consort as a witness is conferred upon the adverse party only.

JOHNSON, J.—This is an application made by a wife *séparée de biens*, and who is defendant in this case, to be allowed to examine her husband as a witness to prove certain acts of administration of her property. It is made professedly under Sec. 9 of the 35 Viet. Chap. 6, of the Quebec Legislature. That statute amends Art. 252 of the Code of Civil Procedure by enacting that "If consorts "are separated as to property, and one of them as agent has administered "property belonging to the other, the consort who has so administered may be "examined as a witness in relation to any fact connected with such administra-"tion;" provided the Court shall so order. I am of opinion that this extension of the law was made in the interest of the adverse party only. The mischief to be removed was, as every lawyer knows, that in cases directed against married women *séparées de biens*, they frequently answered when interrogated, that they knew nothing about the matter, and that their husbands had acted for them. The Legislature has not conferred the right to examine the husband under such circumstances upon any but the adverse party.

Application rejected.

S. W. Dorman, for plaintiff.
A. & W. Robertson, for defendant.
(J.K.)

COUR DE CIRCUIT, 1873.

ST. HYACINTHE, 27 FEVRIER, 1873.

Coram SICOTTE, J.

No. 8595.

Maynard vs. *Marin*.

JUGE:—Qu'un arbitre ne peut réclamer ses honoraires comme tel arbitre de la partie, qui l'a choisie, s'il n'a pas fait son rapport dans les délais mentionnés dans le compromis, et s'il n'a pas prononcé et signifié aux parties, la sentence arbitrale, et cela quand même cette partie aurait, lors du compromis, promis verbalement lui payer *tant par jour* pour tout le temps qu'il agirait ainsi comme tel arbitre.

Action déboutée.

Bourgeois, Bachand & Richer, avocats du demandeur.
Chagnon & Sicotte, avocats du défendeur.
(H.W.C.)

SUPERIOR COURT, 1872.

MONTREAL, 30TH APRIL, 1872.

Coram MACKAY, J.

No. 2483.

The City Bank vs. White et al.

HELD:—1. That a memorandum *sous seing privé* by which a Printing Company authorized W. its president, to collect a debt due to the company, the memorandum stating that such account had been transferred to him for value received, was not a transfer to another company of which the same person was also president.

2. That if it could be considered a transfer, the transferee under such *acte sous seing privé* not signified upon the debtor, not using diligence to collect the debt, had no claim upon a subsequent *cessionnaire* buying in ignorance of such alleged previous transfer, by a notarial *acte* duly signified and acted upon by the debtor by payment of the debt to such subsequent *cessionnaire*.

The action was for the recovery of the sum of $566.67 amount of a debt due to the Montreal Printing and Publishing Company by the Grand Trunk Railway Company; which the plaintiffs alleged had been transferred to them and which they said the defendants had wrongfully collected and retained. The pretension of the defendants was that the document on which appellants relied was not a transfer, nor even an order in their favor; that such as it was, it was never accepted, or notified to the Grand Trunk Railway Company. That the defendants became proprietors of the debt by a valid title duly signified to the Grand Trunk Railway Company: and collected and received the money before they had any intimation of any claim by the Bank upon it. The defendants said, moreover, that the paper referred to was unauthorized and informal. That no right of action could possibly arise against them for the money, as they received it in good faith from the Grand Trunk Railway Company as being transferred to them by the Montreal Printing and Publishing Company; and that any recourse the plaintiffs might have had, should have been waged against the Montreal Publishing Company, or the Grand Trunk Railway Company, and not against them.

The declaration states that on the 10th of May, 1870, the Montreal Printing and Publishing Company transferred and made over to the plaintiffs accepting thereof, to wit to William Workman, president of the said City Bank and its duly authorized agent in that behalf; a debt or sum of $566.67; being an amount then due to the Montreal Printing and Publishing Company by the Grand Trunk Railway Company for printing, for the four weeks ending 7th day of May, 1870.

That the said transfer was made by written instrument then and there executed and delivered by the Publishing Company acting by their duly authorized agent William Moriarty, their then acting secretary and treasurer, in the usual manner and course of business dealing between the Bank and the Publishing Company in relation to accounts due for printing to the said last Company, by the Grand Trunk Railway; and that the said William Workman, though apparently acting in his own name, in fact acted on behalf of the plaintiffs, as was well known and understood at the time between the parties.

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That the said transfer was made for value then and there given by the plaintiffs to the Publishing Company in cash, credits, and advances.

That by means of these facts the Publishing Company were divested of all right and title to the said debt.

That on the 7th day of October 1870, the said Publishing Company by Notarial transfer passed on that day transferred to defendants all the rights the Publishing Company then had in their outstanding book debts and accounts, amounting in all to the nominal sum of $30,000; it being by the said transfer expressly agreed and understood that the same was made without any warranty whatever; and also that the defendants purchased and acquired the rights of the Montreal Publishing and Printing Company only in such debts and accounts.

That it was also agreed by the said transfer, that the defendants should not make any reclamation whatsoever upon the Publishing Company on account of money received by the said Company or otherwise; or for any cause or pretext whatsoever; and the defendants consented and agreed by said transfer to allow contra claims against individual creditors of said Publishing Company. And that by the said transfer the defendants generally in fact and effect bound themselves not to claim, or demand, or collect, any debt which the Publishing Company could not themselves claim or collect; or the making or collecting of which would give rise to a reclamation against the Montreal Printing and Publishing Company, and that by means of the said transfer the defendants acquired no right to the debt in question.

That immediately after the date of the said transfer, without the knowledge of the plaintiffs, the defendants assumed the collection of the debts of the said Publishing Company; and among others collected the said sum of $566.67: and that they must be held in law and equity to have collected the said debt for the plaintiffs and were bound to account to plantiffs for it and interest; all which the defendants have refused to do.

That plaintiffs, owing to insufficient signification, were without remedy against the Grand Trunk Railway Company for the said debt, although they had delivered to the Railway Company a copy of the Publishing Company account long before the date of the transfer, and believed that they had sufficiently signified it thereby; that the Publishing Company is insolvent without assets; and that if the defendants be allowed to retain the said sum, they will be unjustly benefitted at the expense of the plaintiffs. These allegations were followed by the usual assumpsit counts.

The document referred to in this declaration is as follows:—

Office of the M. P. P. Co.

" Montreal, May 10th 1870.

" Wm. Workman Esq., president of the Montreal Printing and Publishing " Company is hereby authorized to collect from the Grand Trunk Railway Com- " pany the account of the M.P.P.Co., for printing, for the four weeks ended May " 7th 1870, amount five hundred and sixty-six 67-100 dollars the said account " having been transferred to him for value received.

" Wm. Moriarty
" Act. Sec. & Treasurer."

To this action the defendants pleaded that it was not true that the Publishing Company ever transferred the said debt to the plaintiffs, that the written instrument produced and fyled by the plaintiffs in support of their action is not and does not purport to be a transfer of the said debt, nor does it purport to be accepted by the said William Workman as president of the City Bank. That in fact no transfer of the debt was ever authorized by the Company to be made to the City Bank or to the said William Workman in any capacity whatever.

That William Moriarty who signed the said instrument as Acting Secretary and Treasurer, was not such Acting Secretary or Treasurer at the time and was not authorized to sign said instrument. That in fact at the time of the execution of it, the Company had divested itself of all its plant and stock, and had placed the collection of the debts due to it under the control of Hugh Allan, of Montreal, Esquire, (now Sir Hugh Allan,) and that no one in connection with the said Company except Sir Hugh Allan was competent to authorize the execution of that instrument.

That the terms and conditions of the notarial transfer by the Company to the defendants which are set forth in the plaintiff's declaration, were agreed upon between the parties thereto for their mutual protection, in the event of any erroneous charge or credit made in the Books of the Publishing Company, their accounts having been to some extent irregularly kept; and the defendants being desirous that the sale and transfer effected by the deed should be final; and that no question of adjustment of accounts should afterwards be permitted to arise between them.

That at the time of the execution by the Company of the Notarial transfer of its Assets to the defendants, the pretended instrument or transfer had never been presented to the Grand Trunk Railway Company; nor had that Company ever been notified of, or signified of any transfer or intention to transfer the said debt, and that the Publishing Company were entitled at the time of the transfer by them to the defendants, to recover the amount; and had never divested themselves of the right to recover the amount; nor had the debt become vested in the plaintiffs in any way, and that the defendants, upon the execution of the transfer to them, duly notified the same to the Grand Trunk Railway and were subsequently paid by that Company the amount due.

That the conditions of the said notarial transfer were agreed upon by the parties only after full enquiry into the state of the accounts of the Publishing Company, in view of which conditions the defendants had taken extraordinary pains to ascertain how much of the apparent debts might be considered to be really due to the Publishing Company, and had ascertained that a large number of errors had existed in the accounts of the said Company; some in favor of them and some against them; and amongst others had ascertained that the amount due by the Grand Trunk Railway Company to the Publishing Company was the amount that they subsequently collected from the Company. And that without such investigation and information, the defendants would never have purchased the said debts at the price fixed in the said deed, and that if plaintiffs were ever entitled to obtain a transfer of the debt; which the defendants expressly deny; they lost the opportunity of obtaining and completing such

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transfer by their own negligence and laches, and cannot recover the same from respondents.

In support of this plea the defendants produced a copy of the transfer by the Publishing Company to them; and also of the transfer from the Publishing Company to Sir Hugh Allan, dated 5th May, 1870, in which the control of all the Assets of the Company including the debts was placed in his hands.

The plaintiffs answered generally, and thereupon the parties proceeded to evidence.

MACKAY, J.—Up to May, 1870, a Corporation called the Montreal Printing and Publishing Company existed at Montreal. It printed for the Grand Trunk Company and others. It required money from time to time, and William Workman, its President, being President of the City Bank also, the practice was, after sending out accounts—as, for instance, against the Grand Trunk—to transfer them to William Workman and give him written orders or authority to draw the amounts from the debtors. Possessed of this authority, William Workman would get placed to the credit of the Printing and Publishing Company at the City Bank money equivalent to the sums of the orders less the discount, and the Printing and Publishing Company used to check it out, as is usually done.

Lowe explains the system. He says:—We transferred our accounts against the Grand Trunk to the City Bank by this mode, and the Bank got paid, and we used to be informed of the fact, from time to time. We considered the accounts the property of the City Bank from the moment of the transfers. We considered we had no right to receive payment of them afterwards and never did. We considered the transactions to be sales out and out to the City Bank.

Workman says that though *he* used to get the money from the Grand Trunk, that was a matter of no importance: it was really the Bank receiving from the Grand Trunk. Be this as it may it is certain that before May, 1870, the City Bank had several times advanced moneys so to the Printing and Publishing Company, which moneys were repaid to the Bank when the Printing and Publishing Company's debtors (the Grand Trunk for instance) paid afterwards.

On the 10th of May, 1870, Workman got from the Printing and Publishing Company the paper writting plaintiffs' exhibit No. one, (p[illegible] above). Upon receipt of it, he ordered to be placed to the credit of the Printing and Publishing Company at the City Bank an equivalent sum.

The bank has given full value for this receipt, which is, (it says) to read in its favor, as if William Workman in the receipt had *not* been styled president of the Printing and Publishing Company, but of the City Bank.

Early in May, 1870, the account of the Printing and Publishing Company for the $566 67c. had been sent in to the Grand Trunk Railway Company by the Printing and Publishing Company. But no exhibition was or has been made to the Grand Trunk Railway Company of this receipt or authorization of May 10th at any time.

On the 11th of July, says Wallis, the account was passed for payment by the Grand Trunk Railway Company. From that time till October, a signed cheque lay, for the amount, in the Grand Trunk Railway office, to the order of the Printing and Publishing Company, but was not communicated to anybody.

On the 7th of October, 1870, the defendants by notarial transfer, obtained a transfer of all debts due to the Printing and Publishing Company by any of its debtors. This in consideration of $8,300. The Grand Trunk Railway Company afterwards had knowledge, evidently, for they took counsel; though I do not see signification of the transfer proved upon this record, by notarial certificate, as usually.

On the 11th of October the cheque before referred to was changed and made payable to the order of defendants, and paid to them. Previously to getting the money defendants had asked from the Grand Trunk Railway Company what was due to the Montreal Printing and Publishing Company, but not specifying any sum as demanded, or items of account.

Says Wallis: The amount of the account sent in in May, had never been asked from the Grand Trunk Railway Company till defendants claimed it. The defendants got several cheques from the Grand Trunk Railway Company at the same time, upon merely asking for what was due to the Montreal Printing and Publishing Company. Richard White swears that he had no knowledge that any part of what he got was claimed by the City Bank, or any person, till several weeks afterwards.

Fraud is not even charged against defendants; and though one of the defendants, after the notarial transfer, found out that the Grand Trunk Railway Company account would be some $500 more than previous informations and lists made to appear, I cannot pronounce against him as prayed; for he did not know of the City Bank claim, or of Wm. Workman's paper Exhibit No. One, and afterwards got his money from the Grand Trunk Railway Company not unfairly.

The plaintiffs by their declaration take *special* groundagainst the defendants; for instance, they contend that after making the plaintiffs' Exhibit No. One, the Printing and Publishing Company became and were divested of all right or title or claim to or upon the debt or sum of $566.67, and particularly so after receipt by the Printing and Publishing Company, from plaintiffs, of the equivalent sum, or condition; that so, the Printing and Publishing Company could not, by the later notarial transfer, prejudice the rights of the plaintiffs; and that the notarial transfer really only meant to give such rights to defendants as the Printing and Publishing Company had, and that it had none at that time to this $566.67, having executed for the benefit of plaintiffs the Exhibit No. One.

The plaintiffs further contend that defendants were bound also to allow all contra claims against any accounts transferred, and so are bound to allow plaintiffs' claim, &c.

The defendants deny these pretensions of plaintiffs, and say that the order or authorization, plaintiffs' Exhibit No. One, is an absolute nullity, *ultra vires* of Moriarty who signed it, and that Wm. Workman as president of the Printing and Publishing Company, could not take from it as *per* signed paper. We need not say more about this.

The plaintiffs to support their argument to the effect that the Printing and Publishing Company became by Exhibit No. One, completely divested of their *créance* against the Grand Trunk Railway Company, cite LaRombière and

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Demolombe, who go far, but treating more the question of right of property as between two different purchasers of one object, corporal, from the same seller. They hold that if A sell to B, a chair, or table, and no actual *déplacement* be, and A subsequently sell to C the same chair or table, C can get no title, nor property, though A may deliver to him; for A can give him no more rights than he himself had, and he had none, having previously sold them, though without *déplacement*, to B. They go to the extent of holding that after such a sale to B by A. the creditors of the latter could not, and cannot seize the chair or table referred to, *super* A, because of its being B's. If fraud be, let them resort to an appropriate action direct, say these authors, fraud is not to be presumed, &c., &c. Those authors are contradicted by a dozen others, and cannot make law against our own, coupled with our jurisprudence. Moreover, the question is here upon a transfer of a *créance*, whether an earlier *cessionaire* by *acte sous seing privé*, unsignified, is to go before a later one by notarial act signified; or what is the same thing, noticed and acted upon, and upon this point our law and jurisprudence are clear and invariable.

Even had the Whites had knowledge of the May order to Wm. Workman, they could legally take payment from the Grand Trunk Railway Company under the notarial cession of October. Certainly so in the absence of fraud, and none is even alleged. See p. 327, Marcadé, and No. 2 and 3 p. 328.

The judgment is as follows:

The Court having heard the parties by their counsel upon the merits, examined the proceedings, proofs of record and evidence adduced, and on the whole duly deliberated; considering that the sum of five hundred and sixty-six dollars and sixty-seven cents, sought to be recovered by the plaintiffs was received by the defendants from the Grand Trunk Railway Company in their, defendants' right, under the notarial transfer to them of seventh October, one thousand eight hundred and seventy, mentioned in Plaintiffs' declaration.

That said money was paid by the Grand Trunk Railway Company in payment of an amount previously due to the Montreal Printing and Publishing Company, as per an account rendered in May, one thousand eight hundred and seventy, for printing, after the rendering of which account the said amount had never been claimed from the Grand Trunk Railway Company till the defendants got it paid to them in October, under and by virtue of the notarial transfer aforesaid, previously to the time of which payment the said Grand Trunk Railway Company had no kind of notification of, and defendants had no knowledge of the paper, plaintiffs' exhibit No. one, or of the alleged *cession* by the said Montreal Printing and Publishing Company to William Workman, or to plaintiffs, of said five hundred and sixty-six dollars and sixty-seven cents.

Considering that the said Montreal Printing and Publishing Company had not by said paper, plaintiffs' exhibit No. one, divested themselves of the said *créance* against the said Grand Trunk Railway Company, so that they might not at date seventh October, one thousand eight hundred and seventy, transfer the said *créance* five hundred and sixty-six dollars and sixty-seven cents to defendants so that the Grand Trunk Railway Company could validly pay it to defendants, and that defendants doing the diligence they did (the said Wm. Workman and

plaintiffs doing none), might and can hold the said five hundred and sixty-six dollars and sixty-seven cents, gotten from said Grand Trunk Railway Company.

Considering that fraud is not alleged in plaintiffs' declaration against the defendants, and that defendants, *cessionaires* by aforesaid transfer notarial of the *créance* that once belonged to the Montreal Printing and Publishing Company against the Grand Trunk Railway Company, got paid the said five hundred and sixty-six dollars and sixty-seven cents, before the said Grand Trunk Railway Company had notice of the plaintiffs' exhibit No. one, and that defendants by law are entitled to keep what they had gotten, and are not bound to account for it or for anything in respect of it, even supposing plaintiffs to be in the right of Wm. Workman, president of the Montreal Printing and Publishing Company, named in plaintiffs' exhibit No. one, and that that exhibit was or is a transfer valid to said Wm. Workman, president of the Montreal Printing and Publishing Company of the amount referred to in it.

Considering that nothing, subrogation clause or anything else, stipulated in and by said notarial transfer of seventh October, can prevent defendants from maintaining their defence against plaintiffs in this cause.

Considering, finally, that plaintiffs have failed to prove that defendants are indebted to or liable towards them as alleged, doth dismiss said plaintiffs' action, with costs, distraits to Messrs. Abbott, Tait and Wotherspoon, attorneys for defendants.

Action dismissed.

N. W. Trenholme, for the plaintiffs.

Abbott, Tait, Wotherspoon & Terrill, for the defendants.

(J.K.)

PRIVY COUNCIL, 1873.

OSBORNE HOUSE, 16TH JANUARY, 1873.

Coram:—THE QUEEN'S MOST EXCELLENT MAJESTY, MR. SECRETARY CARDWELL, MR. CHANCELLOR OF THE EXCHEQUER, MR. GOSCHEN.

HERSE *et al.*, APPELLANTS., AND DUFAUX *et al.*, RESPONDENTS.

A, by donation *inter vivos*, gave his property to his son B., to be enjoyed by him *à titre de constitut et précaire sa vie durante*, and to his said son's children in property after his death. And the donation declared that, in default of such issue, the property should belong to the other heirs of the donor, who should enjoy and dispose of it in such manner as the donor should direct by his will.

The donor made his will before making the donation, by which he gave all his property in usufruct to his said son B, and the property thereof to B's children, and gave B power by his own will to dispose of and to apportion said property as he pleased among the testator's grandchildren. And, by a codicil executed after the donation, confirmed the will.

B survived A, and died without issue, leaving a will by which he bequeathed the particular property in question in this cause to the respondents, two of A's grandchildren.

HELD: 1. That the donation did not create a substitution, in default of lawful issue of B, in favor of "the other heirs of the donor."

2. That the conditional reversion of the property provided by the donation was perfectly legal.

3. That, under the circumstances, B had a legal right to bequeath the property as he did.

This was an appeal from a judgment rendered by the Court of Q. B. for L. C.

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on the 8th June, 1867, and reported in the 17th Vol. of the L. C. Law Reports, p. 246.

The Lords of the Judicial Committee pronounced their judgment on the 14th of December, 1872, as follows:—

Present:—Sir James W. Colvile, Sir Barnes Peacock, Sir Montague Smith, Sir Robert P. Collier.

In the year 1825 M. Pierre Roy, then of Montreal, by a notarial instrument dated the 21st of May, 1825, acknowledged and declared that he had made a donation by act *inter vivos* of a certain piece of land situate in one of the suburbs of Montreal, whereon five houses had then been built, the rest consisting of meadow, orchard, and garden ground.

The terms of this instrument, on the construction of which the principal question raised by this appeal depends, will have to be considered more particularly hereafter. It is not, however, disputed that the donation purported to be made by the donor to his son, Maître Joseph Roy, his heirs and assigns, in acknowledgment and reward of services rendered by him; that in dealing with the beneficial enjoyment of the property the instrument reserved the usufruct to the donor himself for life, and afterwards gave it to Joseph, also for life only (both life-interests being expressed to be "à titre de constitut et précaire sa vie durante"); that it further contained a provision whereby any site, not exceeding forty feet of frontage by ninety feet of depth, on which Joseph might build a house, was to become his absolute property, subject to the stipulation that he was not to sell it during the donor's life, and that the land, other than those parts on which Joseph should exercise this privilege, was effectually given after his death to his children born in wedlock. The question to be determined in this cause arises upon the construction of the provision which the act of donation made in the event, which happened, of Joseph dying without such children.

Pierre Roy, who seems to have been possessed of considerable property besides that which was the subject of the donation, died on the 16th of August, 1832. He left a will dated the 15th of December, 1821, and a codicil dated the 12th of December, 1831. The latter is material only in that being made after the donation, it expressly confirmed the will which was made before the donation. His legal heirs were his son Joseph, and his granddaughters by a deceased daughter. The latter were Madame Grothé, the appellant, and Madame Dufaux, the mother of the respondents. Whether a third granddaughter, Catherine, who is said to have died young and unmarried, was then alive, does not very clearly appear. She was alive at the date of the donation, but in the argument it has been assumed that she died before her grandfather.

The will of Pierre Roy gave to his son Joseph the enjoyment and usufruct during his life of all the property, moveable or immoveable, which the testator should leave at his death; the absolute interest in such property to pass on the death of Joseph to his children born in wedlock; and it provided that in default of such children Joseph should have the power to dispose of such property at his discretion, and without being bound to follow any rule of equality or proportion, amongst the testator's grandchildren, who were to be content with the share so to be assigned to them. The will contained further provisions to the effect

that the share of any grandchild dying without children born in wedlock should go to her uterine sisters; and that if all should die without children born in wedlock, whatever they had received from the testator should go over as thereby directed.

Joseph Roy died unmarried in 1848. By his will dated the 2nd of September in that year he disposed, without making any express distinction between the three different classes of property, of what belonged to himself in his own right; of what unquestionably passed under his father's will; and of the land which was the subject of the donation of May, 1825. The latter, with the exception of the sites upon which he had built two houses, he gave to the Respondents, the children of Marguerite Dufaux (then deceased). Of the two sites and the houses thereon he gave one to a daughter of the appellants, since deceased; and the other to the appellant Madame Grothé for life, with remainder to her children. Of the whole mass of property disposed of he is said to have made, subject to a few legacies, a tolerably equal division, according to its then value, between the Grothés and the Dufaux. He vested the administration of his estates in a M. Dubois and M. Joseph Dufaux (the father of the respondents) jointly, but with a direction that if they could not agree they should divide the administration,—Dubois administering that part of the estate which was given to Madame Grothé or her children, and Dufaux administering the property given to his children, the respondents, who were then minors. The will also contained an express clause that if any of his legatees or their descendants should dispute any of the clauses or dispositions of the will, he should forfeit his rights under the will, which were in such case to pass to the co-legatees who should respect the testator's last wishes and intention.

The respondents have, under this disposition, been in the possession or enjoyment of the land in dispute since 1848, and the appellant Madame Grothé has, under the circumstances to be afterwards considered, taken and enjoyed the benefits given by the will of Joseph to her. Nevertheless, on the 10th of September, 1861, she and her husband commenced the action, which has given rise to this appeal, for the recovery of one moiety of the land included in the act of donation exclusive of the portions built upon by Joseph Roy, with mesne profits and damages. The claim, as stated in the declaration, is, in effect, that by the act of donation of the 25th of May, 1845, one moiety of this land was effectually assured to the Appellant, Madame Grothé, as one of the legal heirs of Pierre Roy, subject to such directions touching the enjoyment of it as he might give by his will; that he had given no such directions; and that the devise of the whole land by Joseph to the respondents was made without regard to the act of donation and in violation of the appellants' rights. The declaration also endeavoured to meet, by anticipation, any defence that might be founded on an alleged ratification of the will of Joseph Roy, by a notarial act of the 10th of October, 1848, by asserting that if that act was signed by the appellants, which they denied, it was signed by them in ignorance of the act of donation, and of their rights under it; that they claimed, if necessary, to question its validity by an "inscription en faux"; and that it ought to be declared null, and of no validity, as against them; and no bar to their recovery of the moiety of the land in question to which they were entitled under the act of donation.

Herse et al., Appellants, and Dufaux et al. Respondents.

The defence by way of "exception péremptoire" insisted on the right of Joseph Roy to dispose, as he had disposed, of the land in question by his will; and opposed a ten years' prescription to the claim of the appellants to set aside the act of the 10th of October, 1838. By a subsequent proceeding of the 18th of April, 1864, the respondents obtained a judge's order, made after hearing both parties, giving them liberty to add to their pleading allegations to the effect that the plaintiffs had accepted the legacy in their favour contained in the will of the late Joseph Roy; that they had taken possession of the property so bequeathed to them, and still enjoyed it; and that they had thereby lost whatever right they might have had to contest any of the dispositions of the said will.

The cause was heard in first instance by Mr. Justice Smith, one of the Judges of the Superior Court, who decided it in favour of the present appellants. The respondents appealed from this judgment to the Court of Queen's Bench, which reversed it, and dismissed the Appellants' suit; one judge of that Court, Mr. Justice Drummond, dissenting. The appeal is from the last judgment. From what has been said it is obvious that the title of the appellants depends upon the interpretation to be given to that clause in the act of donation which deals with the property in the event of Joseph Roy dying without legitimate children. The words of the clause are, "Et à défaut d'enfans nés en légitime mariage du dit Maître Joseph Roy, la propriété demeurera et appartiendra aux autres héritiers du dit donateur, qui en jouiront et disposeront conformément à ce qu'il en aura disposé et ordonné par son testament et ordonnance de dernière volonté."

The record shows that upon this clause, taken in connection with the rest of the instrument, at least four different constructions have been put.

1. Mr. Justice Smith says, "The qualification made by Pierre Roy in the character of the enjoyment of Joseph Roy, viz., "à titre de constitut et de précaire," clearly points out that it was not the intention of Pierre Roy to "grever" Joseph Roy with a substitution, but to give him a mere usufructuary right of enjoyment, and to give the property directly to the children of Joseph Roy, if he had any at the time of his death, and in the event of his death without children, then, and in that case the property was to belong and go to the other heirs of the donor, subject to the restriction expressed in the latter part of the donation. Joseph Roy died without leaving any issue. By the express terms of the donation, the property in question passed at once after his death to the heirs-at-law of Pierre Roy, and the enjoyment by Joseph Roy of the property during his lifetime only suspended the enjoyment of the heirs-at-law; but the title of the property vested in them by virtue of the donation itself, and it could not be taken away from them, or their title in any way touched, by the acts of either Pierre or Joseph Roy." And this construction is more fully expressed in the "considerations" upon which the formal judgment of the Superior Court is founded.

2. Mr. Justice Drummond, the dissentient judge in the Court of Queen's Bench, who held that the judgment in the Superior Court ought to be affirmed, construed the act of donation as importing a regular substitution in favour of the children of Joseph Roy, and in their default of the donor's grandchildren,

as his other heirs, treating Joseph Roy as the institute "grevé" with those substitutions. The right reserved to Pierre Roy to deal with the enjoyment of the property by his will he considered to be at most a right to "grever" the substitutes with further substitutions, and in no way to imply a power to revoke the substitution altogether, and dispose of the property otherwise. The learned judge in this adopted and concurred in the interpretation put upon the act of donation by Maître Truteau in the opinion which forms part of the Appendix.

3. The interpretation put upon the act of donation by the majority of the Court of Queen's Bench seems to be that it gave the property to Joseph Roy, "grevé" with a valid substitution in favour of his own children; but that in default of such children it created no further estates, but reserved to the donor the power of disposing of the property by his last will; and that such reservation was not contrary to law.

4. The opinion of Messrs. Peltier and [illegible] which has been somewhat irregularly introduced by consent into the [illegible], is to the effect that the act of donation created a valid substitution in favour of the legal heirs of the donor, other than Joseph, but subject to a condition which the donor had power to impose; and that the effect of that condition and of the will of Pierre Roy taken together was to revoke the substitution, to bring back the property into the general assets of Pierre; and to make it capable of passing under his will.

The very able arguments which have been addressed to their Lordships by the learned Counsel on both sides have been mainly directed to establish either the second or the third of the above constructions. It seems to be now agreed that under the act of donation, notwithstanding the use of the words "à titre de constitut et précaire," Joseph Roy became to all intents the institute "grevé" with a substitution in favour of his own children: the only question being what is the effect of the subsequent limitation. On this point, viz., Joseph's character of "grevé," the present case is almost identical with that stated by Pothier (Traité des Substitutions, Sect. III, Art. 1) to have been decided in 1719.

It is desirable to determine in the first instance upon the construction of the instrument what intention the donor has expressed in the clause in question, without considering how far such intention was consonant with the law of Lower Canada.

The contention of the Appellants is that the terms "autres héritiers" imports certain *personæ designatæ* viz., the legal heirs of the donor, other than Joseph Roy and his issue; that the clause operates as a valid and irrevocable substitution in favour of those persons, and that the last sentence of it is satisfied by supposing that the donor reserved to himself the power of qualifying by his last will the enjoyment of the property by his substitutes, to the extent even of making them "grevés" with further substitutions. This construction, therefore, admits an intention in the donor to reserve to some extent a testamentary power over the subject of the gift; and *primâ facie* it seems more probable that if he reserved such a power at all he would reserve one which enabled him to select the objects of his bounty, as well as to qualify and control their enjoyment of it. Do, then, the words admit of the latter construction? It may be granted that the terms "les autres héritiers," if found in a French instrument, would neces-

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sarily import the legal heirs of the donor other than Joseph and his issue to be ascertained at his death, even if they did not import the persons who were such presumptive heirs at the date of the gift. But it is to be observed that, owing probably in a great measure to the fact that the Statute Law of Lower Canada has engrafted on the old French law an unlimited power of disposition by will, the word "héritiers" has there acquired a signification wider than and differing from that which it would obtain in France. The 597th Article of the Civil Code of Lower Canada, after defining abintestate succession and testamentary succession, says, "The former takes place only in default of the latter;" and again, the persons on whom either of these successions devolves is called heir ("est désigné sous le nom d'héritier"). It follows from this, 1st, that it was competent to Pierre Roy at any time during his life, after the execution of the act of donation, to deprive his grandchildren of the character of "héritiers" in the proper sense of the term; and that, in such case, if they took the subject of the donation by a valid substitution they would take it only because they were presumptive heirs, or *hæredes viventis* at the date of the act; and 2ndly, that when using the term "autres héritiers" he may have meant the persons whom by his last will he should constitute his heirs, or, in other words, that he may have intended to reserve to himself the power not only of qualifying the enjoyment of the persons who were to take in default of Joseph and his issue, but of declaring who those persons were to be. Their Lordships agree with Chief Justice Meredith in thinking that this latter construction is the true one, and that it is supported by other parts of the act of donation, particularly by that which declares the donor's reason for making it to be his desire to acknowledge and reward the essential services rendered to him by his son; a desire accomplished by an irrevocable gift in favour of Joseph and his issue. They also agree with that learned judge in thinking that some further confirmation of this construction is afforded by the provisions of the then existing will, which it may be presumed, the donor had in his mind when he executed the act of donation—a will which he afterwards confirmed by his codicil, and ultimately left as the final expression of his wishes touching the disposal of his estate.

It is, however, contended that the intention thus attributed to the donor is inconsistent with the law of Lower Canada touching donations by acts *inter vivos*; and the majority of the Court of Queen's Bench was in error in holding that the power, which it supposed the donor had reserved, was one which he could lawfully reserve, and one which, in the events that happened, he had effectually exercised. These propositions are now to be considered.

It has been assumed that the effect of the act of donation was to create a fiduciary substitution ("fidei-commissaria substitutio"), which completely satisfies the definition of such a disposition given by Thevenot d'Essaule de Savigny in chapter i, sec. 2. of his treatise; inasmuch as by it Pierre Roy passed the absolute property in the subject of the gift to Joseph, who took some beneficial interest therein, but became "grevé" with the obligation to transmit on his death the thing given to third persons, viz., his children. And such a disposition, being made by act *inter vivos*, must be taken to be subject to the general rule of irrevocability which is expressed in the old Coutumes by the words "donner

et retenir ne vaut." Again for the trial of the question now under consideration it must further be assumed that the "fidei-commissum" in question is what Thevenot (chapters xvii and xviii) terms "simple" and not "graduel," *i. e.*, that it extends only to one and not to several and successive classes of substitutes, the disputed clause being only the reservation of a right to the donor, and the question being the lawfulness of such a reservation.

Their Lordships are of opinion that for the law which obtains in Lower Canada they ought to look, in the first instance, to the Civil Code of that Province, which, though enacted after the commencement of this action, is admitted to be, when the contrary is not expressed, declaratory only of the law as it previously existed. And if this be so, it follows that the works of learned French authors, whether written before or after the promulgation of the Code Napoléon, are useful only in so far as they explain what may be ambiguous or doubtful in the Canadian Code. They cannot control its plain letter or express provisions.

The 755th Article of the Code says, "Gift *inter vivos* is an act by which the donor divests himself, by gratuitous title, of the ownership of a thing in favour of the donee, whose acceptance is requisite, and renders the contract perfect. This acceptance makes it irrevocable, saving the cases provided for by law, *or a valid resolutive condition*." Articles 811 to 816 explain what are the cases provided for by law; but none of them are material to the present question, unless it be the final clause of Article 816, which says, "The stipulation of all other resolutive conditions, when legally made, has the same effect in gifts as in other contracts." Again, Article 779 says, "A donor may stipulate for the right of taking back ("le droit de retour") the thing given, in the event of the donee alone, or of the donee and his descendants, dying before him. *A resolutive condition may, in all cases, be stipulated, either in favour of the donor or of third persons.*" Article 782 says, "It may be stipulated that a gift *inter vivos* shall be suspended, revoked, or reduced, under conditions which do not depend solely upon the will of the donor." And Article 713 says, "All gifts *inter vivos* stipulated to be reversible at the mere will of the donor are void." It is obvious that the law thus declared, however closely it may correspond with the ancient law of France, as contained in the Coutume de Paris, differs materially from the law as it exists under the Code Napoléon. The latter prohibits substitutions altogether, and avoids the instrument which attempts to create one, but retains the principle of the irrevocability of a gift by an act *inter vivos*, subject only to a "droit de retour," which it thus limits and defines:—"Le donateur pourra stipuler le droit de retour des objets donnés, soit pour le cas du prédécès du donataire seul, soit pour le cas du prédécès du donataire et de ses descendans. Ce droit ne pourra être stipulé qu'au profit du donateur seul." (See Code Civil, Articles 894, 896, 951.) Nothing is said in these Articles of any resolutive condition other than this limited "droit de retour."

A resolutive condition (a term which comprehends the "droit de retour," however limited) is thus defined by Dalloz (Répertoire de Jurisprudence, Article 1740): "Il y a condition résolutoire, en matière de donations, lorsque la donation se réalise immédiatement, avec tous les effets qu'elle doit produire, au

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profit du donataire, mais sous la clause que, si tel événement incertain arrive, la donation prendra fin, et que les choses seront remises au même état que s'il n'y avait pas eu donation. Le donateur, qui était maitre de ne point donner du tout, peut évidemment ne donner que sous cette modalité. Mais quel sera l'effet de l'accomplissement de la condition résolutoire? On vient de dire qu'elle ne suspend point la réalisation de la donation : ainsi le donataire acquiert, dès à présent, la propriété même des biens. Mais lors de l'accomplissement de la condition, la donation sera résolue, c'est-à-dire que le donataire cessera d'être propriétaire des biens qui lui ont été donnés et livrés."

It is obvious from this passage that when a resolutive condition takes effect it operates as a revocation of the gift, and divests the donee of the property in the subject of the gift which the act of donation had conferred upon him. If, then, it was competent to Pierre Roy by the law of Canada to stipulate by way of resolutive condition that, in the event of his son dying without lawful issue, the property should pass as he might direct by will, there can be no difficulty as to the *modus operandi* of the condition when it took effect. The proprietary right in this land thereupon ceased to be in Joseph Roy or his heirs : it fell again within the dominion of Pierre, and became capable of passing with the rest of his estate under his will.

Let us now try the legality of the supposed condition by the Articles of the Canadian Code. It does not sin against the principle of irrevocability, because its accomplishment does not depend solely on the donor, but on the happening of an event over which he had no control, viz., the death of Joseph without issue.

If it be objected that it is not strictly a "droit de retour" within the meaning of the first clause of Article 779, because the event on which it depends is not that of the donee and his descendants dying before the donor; the answer is that it may nevertheless be "a valid resolutive condition," within the meaning of the latter clause of that section, which says that a resolutive condition may be stipulated either in favour of the donor alone, or of third persons. On the letter of the Code the supposed condition seems to be a valid one. It has, however, been strenuously argued on behalf of the appellants that the illegality of such a condition is established by the authority of writers like Demolombe and Troplong, who though they are professedly only commenting on the Code Napoléon, incidentally state what was the ancient law of France on this subject. Their Lordships desire to say nothing that may seem to derogate from the authority of these eminent jurists. It is, however, obvious that the works cited do not profess to be a complete or authoritative exposition of the old law; and that if they were, it would not follow that the law of Lower Canada, during the long period that has elapsed since the separation of that province from France, has not more or less departed from the stricter rules which even before the Code Napoléon may have obtained in France. However, their Lordships are not satisfied that these writers are so adverse to the contention of the respondents as they have been represented to be. Both sides have appealed to M. Troplong's commentary on the 951st Article of the Civil Code, vol. ii, paragraph 1261 to 1269. The Article is that which restricts the "droit de retour" within the limits abovementioned. And the general object of the learned commentator is to show that

particular provisions may fairly be construed to be reservations of a "droit de retour" rather than substitutions; the consequence being that in the former case the reservation, if within the limits prescribed by the Code, will be operative; and, if beyond those limits, will be simply inoperative: whereas such provisions, if construed as substitutions, would vitiate the whole disposition. He applies this reasoning to a stipulation for a "droit de retour" to the donor or his heirs, arguing that it was not because the latter was really a substitution, but because its consequences were similar to those of a substitution, that the Code Napoléon limited the benefit of a "droit de retour" to the person of the donor, excluding his heirs. And he fully admits that by the ancient law such a reservation would have been valid, and that, if the donor happened to die before it took effect, his heirs might have claimed the benefit of it. He says, "There will always be this essential difference betwen the 'droit de retour' and a substitution, that in the former case the heir comes forward as the representative of the donor and as exercising a right which would have come to him by reversion if an exceptional law had not deprived him of it; whereas the substitute is only a third person who is so far from exercising any rights of the donor that the latter, in making an institution and substitution, has shown that he does not wish to retain any of his rights, but that he abandons them all." He adds, "En un mot, dans le droit de retour, stipulé même au profit des héritiers, la chose donnée remonte vers sa source; dans la substitution, elle s'en éloigne; dans l'un elle est censée rentrer dans la succession du donateur défunt, comme si elle n'en fût jamais sortie; dans l'autre, elle passe dans un patrimoine étranger." Troplong, therefore, must be admitted as an authority in favour of the proposition that a stipulation for a "droit de retour" to the donor or his heirs was permitted by the ancient French law. He no doubt afterwards comes to the conclusion that where the stipulation is for a "droit de retour" for the benefit only of a third person whether heir or not, and without mention of the donor, the stipulation is either altogether invalid, or can take effect only as a substitution; "le donateur n'étant pas du tout dans la stipulation de retour." But on this it is to be observed that if the stipulation really imports the reservation of a power to the donor on the happening of a certain contingency to dispose of the property by his will, it is in substance a "droit de retour" to him and his testamentary heirs, although he is not expressly named in the condition; its effect being to bring back the property into his succession as if it had never gone out of it. And the objection founded on the mere letter of the stipulation, viz., that it does not in terms mention the donor, can hardly prevail against the words of the 779th Article of the Canadian Code which says, "A resolutive condition may in all cases be stipulated either in favour of the donor alone or of a "third person."

Their Lordships having to deal with an instrument, as to the construction and effect of which there has been so much difference of opinion amongst those conversant with such dispositions, and with the law to be applied to them, have naturally felt considerable doubt in this case. But the conclusion to which they have come is that the construction put upon the disputed clause by the majority of the Court of Queen's Bench is correct: and that there is nothing in the

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law of Lower Canada which is repugnant to that construction, or to the effect given to it.

They may further observe that even if the appellants had succeeded in showing that the reservation implied in the construction put upon the clause by the judgment of the Court of Queen's Bench was unlawful, they would not thereby have established their right to recover in this case. To establish their title they must show that the clause constituted a valid and irrevocable substitution in their favour. That consequence does not necessarily follow because the clause was not a valid resolutive condition, or even because it was not a resolutive condition at all. The argument for the appellants assumed that the words might import the reservation of a power to the donor to "grever" the substitutes with further substitutions. Hence, if he did not intend to create, and did not create, an irrevocable substitution in favour of the other heirs, the clause may well be taken to reserve a power, which has not been duly exercised, to "grever" the institute Joseph Roy with further substitutions. But what would be the effect of holding either that the condition was altogether void, or that it reserved a power to create new substitutions in succession to the first, which had not been exercised. The effect would obviously be that there was not valid substitution after that in favour of Joseph's children; and that on the failure of that, the property became absolutely his, and capable of passing under his will. On this view of the case it would be only necessary to qualify the grounds of the judgment, which would have to remain a judgment for the dismissal of the appellants' suit. Their Lordships, however, have already intimated their opinion that the judgment, as it now stands, ought to be affirmed.

This being so, it is unnecessary for them to decide the question of ratification, and they abstain the more willingly from the consideration of that question, because they have not the benefit of the judgment of the Court of Queen's Bench upon it. They may, however, observe that whatever might have been their opinion as to the effect of the act of the 10th of October, 1848, they would have felt considerable difficulty in holding that there had not been "acceptation tacite" by reason of the receipt of the rents of the property bequeathed by Joseph Roy to Madame Grothé, and in distinguishing this case from that of Roy *v.* Gagnon (3 Lower Canada Reports). Nor, as at present advised, are they satisfied that Mr. Justice Smith was warranted in treating the amendment in the pleadings which had been made under a judge's order, pronounced after hearing both parties, as "utterly irregular and insufficient to put the plaintiffs to answer."

Their Lordships will humbly advise Her Majesty to affirm the Decree under appeal, and to dismiss this appeal with costs.

The Report of their Lordships was approved of, as follows:—

"Her Majesty having taken the said Report into consideration was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, as it is hereby ordered, that the said Decree or Judgment of the Court of Queen's Bench, (Appeal side,) for Lower Canada, of the 8th June, 1867, be and the same is hereby affirmed and this appeal dismissed, with three hundred and forty-nine pounds and ten shillings sterling, costs. Whereof the Governor General of

the Dominion of Canada, the Lieutenant Governor or Commander in Chief, for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly."

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Judgment of the Q. B. confirmed.

H. Matthews, Q. C., J. Westlake, E. Barnard, for appellants.

Hon. A. A. Dorion, Q. C., C. R. Freeling, for respondents.

(s. n.)

COUR DE CIRCUIT, 1873.

MONTREAL, 10 MARS 1873.

Coram TORRANCE, J.

No. 422.

Barcelo vs. Lebeau.

JUGE.—1o. Que d'après l'art. 2269 du Code Civil, tel qu'amendé par l'Acte provincial 32 Vic. ch. 32, le médecin est cru à son serment, quant à la nature et la durée des soins pour tout ce qu'il réclame en justice et qui n'est pas prescrit.

2o. Que la loi telle que conçue dispense le médecin de prouver la réquisition de ses services ; il lui suffit d'en prouver lui-même la nature et la durée et d'en justifier la valeur, par un autre médecin.

3o. Que partout, il y a en sa faveur présomption que s'il a donné des soins, c'est qu'il en a été requis ou qu'on a permis ou souffert qu'il en donnât.

Le demandeur, qui est médecin, a réclamé par son action, le prix des soins par lui prodigués au défendeur et à sa famille, depuis le 14 février 1867, jusqu'au 4 juillet 1870.

Le défendeur a plaidé que le compte du demandeur, moins le dernier item ($1.25), était prescrit lors de l'institution de l'action ; quant au dernier item, il s'est contenté de le nier.

Le demandeur a répondu spécialement que le défendeur ne pouvait invoquer la prescription, parce qu'il y a eu continuation de services et reconnaissance de la dette réclamée : ce qu'il a en vain essayé de prouver par le défendeur.

Il ne restait donc plus au demandeur pour éviter le rejet de son action, qu'à prouver le dernier item de son compte, le seul qui ne fut pas encore prescrit.

Il fut en effet assermenté comme témoin, prouva la nature et la durée des soins en question et ajouta qu'il avait été requis de les donner par le défendeur lui-même. Quant à la valeur, le défendeur déclara Cour tenante, n'en pas exiger d'autre preuve.

J. Duhamel, pour le défendeur, prétend que la preuve offerte par le demandeur est insuffisante et illégale. La loi ne lui permet de prouver la nature et la durée de ses soins, que lorsqu'ils ont été requis. Dans le cas actuel, le demandeur n'a prouvé aucune réquisition et le défendeur vient de jurer qu'il n'a jamais requis les services en question et que le demandeur n'a donné aucun soin dans sa famille, depuis le 14 février 1867 ; l'action est évidemment mal fondée et doit être renvoyée.

J. G. D'Amour, pour le demandeur, soutient au contraire, que la preuve de la réquisition des soins donnés par un médecin, n'est pas nécessaire ; la loi a réglé

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la question d'une manière péremptoire, en décrétant que le médecin a le droit de prouver la nature et la durée de ses services.

Si la loi telle que conçue signifie quelque chose, c'est que le médecin n'a pas à avoir rendu des services de telle ou telle nature, est dispensé de prouver qu'il en a été requis; la preuve des soins donnés et de la nature et durée de ces soins comporte évidemment celle de la réquisition; car il y a, jusqu'à preuve du contraire, présomption en faveur du médecin, que s'il a donné des soins, c'est qu'il en a été requis ou qu'on a au moins permis ou souffert qu'il en donnât. Il ne restait donc plus au demandeur qu'à prouver la valeur de ses services par un autre médecin et s'il n'a pas fait cette preuve, c'est qu'il en a été dispensé par la partie adverse.

La preuve du demandeur est donc légale et suffisante et il a droit maintenant d'obtenir jugement pour la somme de $1.25, non prescrite.

La Cour a accordé raison au demandeur et condamne le défendeur à lui payer $1.25 avec dépens.

D'Amours & Bertrand, pour le demandeur.

Dubuc, Pelletier & Rinfret, pour le défendeur.

(J. C.)

N.B.—Le jugement ci-dessus fut rendu le 15 Octobre 1869, dans la cause de White vs. McDonald, TORRANCE J.J. 14 L. C. J. p. 133.

SUPERIOR COURT, 1871.

MONTREAL, 22 JUNE, 1871.

Coram TORRANCE, J.

No. 1366.

Miller vs. Bourgeois, & Holland et al., mis-en-cause.

PLEADING—PRACTICE.

HELD: On demurrer, 1° that a plea which is good in part, and bad in part, should be rejected. 2° That a voluntary guardian cannot claim fees.

PER CURIAM. This case is before the Court on an answer in law to the answer made by the *mis en cause* Holland & al., to a rule taken upon them by the defendant to produce certain property of which they had been appointed voluntary guardians. The *mis en cause* answered in writing to the rule, that they were ready to deliver the property "upon payment to them of the costs and charges incurred by them in and about the guardianship of said coal, and the fees as guardians thereof, amounting in all up to the date hereof, to the sum of $1058, as detailed in the statement of account, hereunto annexed, and here[illegible] to form part hereof."

The defendant has demurred to this answer on the ground that the *mis en cause* as *gardiens volontaires* could not make such claim for [illegible] *garde*.

There is no doubt that the voluntary guardians have no claim [illegible] compensation for services against the defendant naming them. The [illegible] volun-

tary and gratuitous, and Jousse in his commentary on the ordonnance de 1667, for this reason likens such a guardian to a *dépositaire*. Tit. XIX. On the other hand, the guardians have a right to be re-imbursed their necessary expenses. C.C. [illegible]. The answer of the guardians is therefore in part bad, and in part good, in so far as it does not fully answer the rule, and the conclusion demanding $3,0[illegible] does not legally flow from the premises, it is dismissed with costs, the parties [illegible] cause to be allowed 3 days to put in another answer, if they should be advised to do so, claiming their expenses, but not any fees.

Demurrer maintained.

Trenholme & Dugas, for defendant.

Ritchie, Morris & Rose, for Hollands.

(J. K.)

Vide McDougall vs. Morgan, S.C. 30th December, 1853, (Day, Smith. & Mondelet, Justices,) Law Reporter 2nd Part, p. 8; also Chitty, pleading, p. 524, and Stephens, pleading, p. 242. Chitty says: "If a plea profess in its commencement to answer the whole cause of action, and afterwards answer only a part, the whole plea is bad: and in this instance, the plea being insufficient, the plaintiff's course is to demur generally or specially. Comyn, Digest vo. Pleader, E. 36, "Plea bad in part, is bad for the whole."

COURT OF REVIEW, 1872.

MONTREAL, 30 DECEMBER, 1872.

Coram JOHNSON, TORRANCE, BEAUDRY, JJ.

No. 2453.

Milligan vs. Mason.

HELD:—1. That in an affidavit for capias on the ground of intention to depart, though the omission to disclose the names of deponent's informants, as to his grounds of belief, would be fatal if his belief rested on information only, yet the affidavit is good if deponent swears *directly* to another of his grounds of belief, which is in itself sufficient.

2. That it is sufficient that deponent as one of his grounds swears directly that defendant is master of a ship, and that said ship is cleared at Custom House, though without saying that this is done by defendant or that he is going with her, or naming the destination.

3. That in the circumstances plaintiff was not limited to the remedy by revendication, but was entitled to Capias.

4. That, though since the Confederation, there has been no "Province of Canada," when such affidavit states that defendant is leaving "the Province of Canada," it is sufficient, and the Court will understand that thereby "the heretofore Province of Canada" is meant.

This was a petition to quash capias on ground of insufficiency of the affidavit.

The plaintiff's affidavit stated that Wm. E. Mason, at present in the city and district of Montreal, captain of the ship "Eliza Alice," now in this port of Montreal, is personally indebted to this deponent in a sum of $80, being as and for the price and value of 400 new bags, &c., &c; that said Mason obtained possession of said bags by false pretences; that the same had been by plaintiff (deponent) hired to another party than said Mason, and that the same were by deponent sent by his carters for delivery to this other person, the captain of the ship "Grafwedel," also in the port of Montreal, that Mason, by falsely pretending to deponent's said carters that said bags were to be delivered to him, and that he was the party

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to whom said carters had been instructed to deliver said bags, deceitfully persuaded said carters to deliver to him said bags, and doth now refuse to deliver the same to this deponent, owner thereof; that this deponent hath reason to believe, and doth verily believe, that the said defendant is about immediately to leave *the Province of Canada* with intent to defraud his creditors and plaintiff, and that departure will deprive said plaintiff (deponent) of his recourse against defendant; that the grounds of the belief of deponent that said defendant is about immediately to leave this Province, are as follows: That his, said defendant's vessel, is already loaded and cleared at the Custom House, that is, her papers have been passed there. And deponent has been credibly informed, to wit, by several parties, and by Custom House officers in this city, that said defendant is about immediately to leave the port of Montreal, and this Province; that defendant has no domicile in this Province; that said debt was created within this district and in this Province. That without the benefit, &c.

Upon this affidavit capias was issued, and under it defendant was arrested on 11th Oct., 1872.

Defendant petitioned the Honorable Mr. Justice Berthelot, in Chambers, to quash this writ on the following grounds:

1. Because said affidavit doth not disclose any cause of action which entitles plaintiff to the proceeding by capias.

2. Because it doth not establish that defendant was about to leave limits, intention to go beyond which might give this remedy.

3. Because it doth not disclose the reasons of belief or the sources of information with exactness, but the same are vague, and do not establish such intention in defendant to depart as to justify this proceeding and suit.

On 31st Oct., 1872, His Honor rejected this petition, and defendant inscribed the case for revision of this judgment.

The transaction out of which the matter arose was as follows: Ships sailing from this port to Britain are bound to carry a portion of their grain cargoes stowed in sacks, which prevents the shifting of the loose grain. For this purpose, the masters hire from parties in Montreal sacks to stow such grain for a certain hire for the voyage. Defendant had hired his sacks from one party, and the plaintiff was supplying the "Grafwedel" lying near defendant's vessel. By plaintiff's own mistake, (defendant says in his plea,) by defendant's misrepresentation (plaintiff's affidavit says) a load of bags intended for the "Grafwedel" was delivered to defendant's ship, "Eliza Alice," and stowed in her hold with grain. Plaintiff, under the statements of his affidavit, contends that he has remedy by capias.

Ramsay, (*R. A.*) for defendant:—Defendant submits that plaintiff's affidavit does not disclose any cause of action which entitles him to capias, and contends that the proper and only remedy was revendication, and that capias would only be warranted by the allegation that defendant had secreted or converted the bags, and thereby rendered revendication impossible. Vide *Demaine vs. Guillemot*, 6 L. C. R., 477. It was held that the action should have been revendication of the horse, and damages for detention, and that no capias lay. That no personal debt was created by the refusal.

Also *Allen vs. Allen*, 6 L. C. R., 478. Plaintiff's action should have been for a deed.

In Royal Insurance Co. vs. Knapp, 11 L. C. J. 1., cited below by plaintiff, the affidavit stated the secretion of bonds, &c., whereby plaintiff was prevented from revendication.

2. No intention to leave the required limits is disclosed.

Affidavit states, 1st, "Province of Canada," and 2nd, in two places farther on "this Province," viz., Quebec. Where is the "Province of Canada" now? and where its limits?

3. The sources of information and reasons are vague, no informant's name given, this is necessary. Perrault vs. Dseve, L. R., 19; Cornell vs. Merrill, 1 L. C. R., 357; vide Judge Day's remarks.

Cameron vs. Breyer, 10 L. C. J., 88.

Unless defendant himself be stated to have given the information.

Affidavit does not state to what place the ship is cleared: Does not state that defendant is going with her, this is usual and necessary. Vide Wilson vs. Reid, 4 L. C. R., 157; and other cases cited. Ramsay, p. 51, all the affidavits state this fact.

In these affidavits for capias nothing must be left to inference.

Onge vs. McAlister, L. R., 27.

Defendant therefore prays for the revision of the judgment referred to, and that the capias be quashed.

Butler, for plaintiff: The affidavit is in perfect accordance with Article 798 of the Code of Procedure.

1. With regard to the first moyen of the petition, plaintiff begs to refer to the following cases, from which it is to be gathered that under the circumstances disclosed, capias is competent, 9 L. C. J., p. 225; Redpath vs. Giddings, C. L. C. Reports, p. 15; Hassett vs. Mulcahoy, 2 L. C. Law Journal, p. 189, and 11 L. C. J., p. 1; Royal Insurance Co. vs. Knapp & Griffin.

2. The question raised by the 2nd moyen was decided *in re* No. 2190, Superior Court, Montreal, L'Aine vs. Clarke, in Review, (not reported yet) where it was held that the words "Province of Canada" were a sufficient description of limits, the intention to go beyond which gave rise to this proceeding.

3. As to the 3rd moyen the affidavit is sufficient. As reasons of belief, the plaintiff alleges that the defendant, a ship captain, has taken his clearance papers at the Custom House, that his ship has cleared the customs (a proceeding not necessary for an inland vessel); and that the officers of customs themselves have furnished him with this information, and informed him that defendant is immediately about to sail and to leave Canada; surely sufficient reasons for his belief and a sufficient avermont of his source of information.

On 31st Dec., 1872, the Court of Review rendered judgment confirming that of Mr. Justice Berthelot, and rejected the petition.

JOHNSON, J. By some error, as it is alleged, a number of sacks were given to defendant, a ship captain, by error, and he was capiased as he was about to sail. The only question at present is as to the sufficiency of the affidavit. It is impugned because the names of the persons giving the information to the deponent are not

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disclosed. This would be a fatal omission, if such information were the only ground for deponent's belief, but there are other grounds stated in the affidavit. One is that the defendant had sold everything that was necessary to clear his ship, and was ready to sail. In a matter of common sense, therefore, the creditor was not bound to wait until his debtor had actually sailed in order to be sure he was going away. We find that the deponent had sufficient grounds for his belief apart from the information received from the persons whose names are not disclosed. As to the objection relative to words "Province of Canada," it has been already held sufficient, and we have a right to [illegible] their reasonable meaning, of the heretofore "Province of Canada." Further, we hold that, if the circumstances under which the bags are in defendant's possession, be as stated in the affidavit, plaintiff is entitled to his capias, and not limited to revendication only. We therefore confirm the judgment *a quo*, rejecting the petition to quash.

Doutre & Butler, for plaintiff.

R. A. Ramsay, for defendant.

(J. J M.)

SUPERIOR COURT, 1873.

MONTREAL, 22ND APRIL, 1873.

Coram MACKAY, J.

No. 1061.

The Bank of N. V. America vs. *Jubinville et al.*, and *Jubinville et al.*, opposants.

HELD:—That an opposition by defendants, under Art. 484 of the Code of C. P., which is in the nature of a preliminary plea, must be accompanied not only by the deposit required by Art. 486, but also by that required by Art. 112 and the 32nd rule of practice.

This was a motion by the plaintiffs to reject an opposition fyled by the defendants, under Art. 484 of the Code of Civil Procedure.

The opposition was in the nature of a preliminary plea, alleging a misnomer in the writ and declaration of one of the defendants, and praying for the dismissal of the action, and was accompanied with a deposit of a certain amount (although insufficient) to cover the costs incurred after the return of the writ and up to judgment, in terms of article 486 of the same Code, but was not accompanied by any deposit such as required by Art. 112 of said Code and the 32nd Rule of Practice.

The plaintiffs, therefore, moved for the rejection of the opposition, on the double ground that the deposit under Art. 486 was insufficient, and for want of any deposit such as required by Art. 112 of the 32nd Rule of Practice.

After taking time to consider, the Court maintained the motion and rejected the opposition with costs.

Opposition rejected.

Bethune & Bethune for Plaintiffs.

Duhamel, Rainville & Rinfret, for opposants.

(S. B.)

SUPERIOR COURT, 1872.

MONTREAL, 31st OCTOBER, 1872.

Coram TORRANCE, J.

No. 95.

Grant et al. vs. *Teasel, and McShane, jun., Tiers saisi.*

HELD:—1. That a *Tiers saisi* is bound to give a detailed statement of the property and effects belonging to defendant in his possession.

2. That a *Tiers saisi*, who declares on oath that he has nothing in his possession belonging to defendant, and afterwards, when examined as a witness, admits having a number of articles of value, but refuses to give any precise or detailed statement thereof, will be condemned as the personal debtor of the plaintiff for the value of such articles.

TORRANCE J.—The plaintiffs obtained judgment against the defendant on 29th Dec., 1871, for $374.21, with interest from 15th Dec., 1871, and costs taxed at $32.10. On the 24th Jan., 1872, they lodged an attachment in the hands of the *Tiers saisi*, James McShane the younger, and he declared on the 5th Feb., 1872, under oath, that he had not had at the time of service, had not then, and was not aware that he would have thereafter, in his hands, possession or custody, any good, credits, monies or effects belonging to defendant in any manner whatsoever—on the contrary, the defendant owed him £50, with interest, for fifteen months' rent.

The plaintiffs contested this declaration, and alleged that the defendant, in April, 1870, being lessee of the *Tiers saisi* in a house on the Lower Lachine Road, left the Province of Quebec: that, at the time of his departure, he was possessed of a large quantity of household effects, carriages, waggons, sleighs and other chattels and effects of great value, to wit, $1000: that the *Tiers saisi* shortly afterwards took possession of said house and effects, and converted the said furniture, waggons, sleighs, &c., to his own use, and hath refused to account for the same. That defendant was not indebted to *Tiers saisi* in any greater sum than £20 for rent. That the value of the effects converted by the said McShane was $1000, in which sum he is indebted to defendant. Then follow the usual conclusions of the contestation of a *Tiers saisi*, praying that McShane be condemned, as the personal debtor of the plaintiffs, to pay them the amount of their debt, interest and costs in this cause.

The *Tiers saisi* specially answered this contestation and said, (admitting the lease) that Teasel absconded from the Province, leaving the premises unoccupied and without paying his rent, and is still indebted to *Tiers saisi* in a sum exceeding $200 for the year's rent ending 1st May, 1870; that in September, 1870, receiving information that the premises had been broken into, the *Tiers saisi* went there with a police officer and found that the house had been broken into, and further noticed that several articles had been stolen therefrom; that *Tiers saisi* placed a man in charge; "that in an outhouse belonging to the premises "the said James McShane discovered a harness and waggon, which he, acting "upon the advice of the said police officer, caused to be removed to a place of "safety, and which said harness and waggon the said James McShane is prepared to return to the said premises if so required to do by this Honorable

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" Court; and the said James McShane further avers that these were the only " articles or effects removed from the said premises by him and for the reasons " aforesaid; also that there was not in the said house and premises when he so " visited them, or since, goods, chattels or effects sufficient to pay said rent."

The conclusion was for the dismissal of the contestation.

The evidence is in substance as follows:

Robert Irwin, examined 16th May, 1872, saw defendant in April, 1870, who told him he was going to England, and if he wished to go into his house, he might do so; took possession about 15th June; went there before this with Cullen, a blacksmith, and Mr. Eager's foreman, to look for some traces belonging to J. Paulblanc; went there a second time with Paulblanc; occupied the house just one month; made a list of articles he saw there, which he valued in detail at $350 in all; left on 15th July; " and about a fortnight after I went " to the house again, on Mr. McShane's telling me the house had been broken " into. On this occasion I saw some boxes of paper overturned, as if some one " had been there, but I did not see that any of these things had been taken away. " I found the outhouse locked up as before;" speaks with great confidence as to value of harness; is a saddler and made most of it himself.

John S. Hall, jun., son of one of the plaintiffs, states while defendant resided in McShane's house, he visited him about once a week; values articles there at $400, exclusive of household furniture; defendant kept a quantity of harness about equal to a saddler's shop. " I never saw these articles in the pre- " mises after defendant's departure. I saw, however, the said Mr. McShane " driving the defendant's waggon with the defendant's harness." Waggon and harness worth about $120. Defendant left for England in April, 1870. Shortly before defendant's departure, witness assisted in nailing up the shed containing vehicles; did not visit the house after his departure.

Alfred Greece worked for defendant when he occupied McShane's house; he left in April; helped him to put certain articles in room; also two single sleighs and one double sleigh, and a four-wheeled vehicle called a break, a light gig and waggon in shed; assisted young Mr. Hall to nail up shed.

James McShane, examined 10th June, 1872, on being asked to state in detail the number, description and value of articles belonging to defendant, removed by him from premises leased, answers: " I never removed anything except " an old red waggon and a lot of old harnesses. The detective advised me to " take these effects to my own house, to place them there, all of which articles " removed by me, I insisted upon Mr. Teazel to examine at my house, where " I had them stored and where they are still."

Question.—" Can you enumerate the articles taken by you or not, from the " defendant's premises?"

Answer.—" No. Some old harness, and I think bridles and one or two old " saddles, which are still in the same place where they were stored. There may " have been other things of no value," etc..... " I have them still " in my possession as well as the waggon."

Question.—" Where did you find that waggon?"

Answer.—" In the shed which had been broken open."

Question.—"What other vehicles were in the shed besides the waggon?"

Answer.—"I swear that any other sleighs or vehicles that were in the said "shed are still on the premises."

Mr. McShane states that he rented premises to a new tenant in spring of 1871.

Joseph McGrath, witness for *Tiers saisi*, states he was there when detective Cullen and plaintiff visited place in fall of 1870. The house had been broken into.

David Drew states that he was placed in charge of house by McShane, in fall of 1870; hall door broken, cellar door broken, window with two panes broken; trees around broken. Did not see any other damage in the house; only occupied one room and kitchen; rest of rooms locked. In cross-examination witness states he did not go up stairs; that part of house was locked.

We see here the *Tiers saisi* in possession of a considerable quantity of property and effects belonging to the defendant. Then we have the fact proved of his driving the defendant's waggon and harness on the public roads; then his denial under oath on the 5th February, 1872, that he had anything in his possession belonging to the defendant; then in June, under examination as a witness, on being asked to state in detail the number, description and value of the articles by him removed, his answer is: "I never removed anything except "one old red waggon and a lot of old harnesses."

Question.—"Can you enumerate the articles taken by you, or not, from the defendant's premises?"

Answer.—"No. Some old harness, and I think some bridles and one or two "old saddles, which are still in the same place where they were stored. There "may have been other things of no value," etc. ..... "I have them "still in my possession, as well as the waggon."

Question.—"What other vehicles were in the shed besides the waggon?"

Answer.—"I swear that any other sleighs or vehicles that were in the said "shed are still on the premises."

The *Tiers saisi* was bound to give full information as to the number and description of all articles and effects which had come into his possession belonging to defendant. Yet we find him first denying the fact and then refusing to give any distinct or definite enumeration. In using the defendant's property for his own purposes, he did what he had no right to do. The language used by the authors in reference to an act of this kind on the part of a depositary is very strong. Muller, Prompt. vo. Furtum, N. 16. Depositarius, re depositâ utens, fur est. ***. si interverterat, majus etiam fur est. Dig. L. 47, T. 2, l. 67. Inficiando depositum nemo facit furtum; nec enim furtum est ipsa inficiatio, licet prope furtum est. Sed si possessionem ejus adipiscatur intervertendi causâ, facit furtum. Mayne, Damages [156]. If any evidence of value is withheld by the defendant the goods, as against him, would be presumed to be of the highest value articles of that nature were capable of. (210.) When the defendant in trover will not produce the article, it will be presumed against him to be of the greatest value that an article of that nature can be. Taylor, Evid. § 347. When a matter is peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or negative character.

Grant et al., vs. Teasel and McShane, jun.

Broom's maxims, [726]. If a man, by his own tortious act, withholds evidence by which the nature of his case would be made manifest, every presumption to his disadvantage will be adopted. When a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a strong inference against him. Thus, where a person who has converted property will not produce it, it shall be presumed as against him, to be of the best description. In the present case the *Tiers saisi* must be held responsible for the property which was taken possession of by him at the value put upon it by Irwin and Hall. According to Irwin the value of the articles proved by him was $350, in which was included $70 for furniture. Hall proved the value of the vehicles, horses, &c., exclusive of the furniture at $400.

The *Tiers saisi* had made no proof of damage or rent beyond the amount admitted by plaintiff, viz., $80. The Court would therefore give judgment for $470 and costs, less the $80 admitted.

The following is the judgment. "The Court having heard the plaintiff's contestants and the *Tiers saisi*, James McShane, junior, as well on the motion of "the plaintiffs to reject the deposition of Andrew Cullen, as on the merits of this "cause, examined the proceedings, proofs of record, and evidence adduced, and "on the whole duly deliberated.

"Considering that it does not appear by the said deposition, that the plaintiffs "were called to cross-examine the said Andrew Cullen, or that the said deposition was taken at *Enquête* sittings—Doth grant said motion with costs, and "doth in consequence reject the said deposition from the record in this cause.

"Considering also that the said *Tiers saisi*, by his declaration declared under "oath, in answer to the *Saisie arrêt* served upon him on the 24th day of "January, 1872, that at that date he had not, nor had he on the date of his "said declaration, to wit, on the fifth day of February, 1872, nor would he "have thereafter in his possession or custody, any goods or effects belonging to "the defendant in any manner whatever.

"Considering that the said *Tiers saisi* subsequently, to wit, on the 10th day "of June, 1872, while under examination as a witness, while admitting that he "had a vehicle and harness of the defendant, did not specify, as he was bound "to do in answer to the questions put to him, the number, description and value "of the articles taken by him from the defendant's house.

"Considering that the *Tiers saisi* answered evasively the questions put to him "at said examination.

"Considering that it appears from the evidence of Robert Irwin, that there "were in the premises occupied by the defendant in the month of July, 1870, "property to the amount of $350, apart from the sleighs and waggons and gig "described by the witness Hall.

"Considering that the value of the articles seen there by the witness Hall is "stated by him to have been about $400, exclusive of household furniture, "which furniture is valued by the witness Irwin at an additional sum of $70 "and upwards.

"Considering that the said *Tiers saisi* has given no satisfactory account of

"the disappearance of said articles, or of the number, description and value of "the articles of the defendant which came into his possession, and has failed to "furnish a detailed statement thereof, as required by article 619 of the Code of "Civil Procedure.

"Considering his denial under oath, on the 5th day of February, 1872, that "he had anything belonging to the defendant.

"Considering that it is in evidence that said *Tiers saisi* converted to his own "use, property of the defendant of value, but that information of the precise "description and value thereof is withheld by said *Tiers saisi*.

"Considering that the burden of proof was upon the the said garnishee to "establish the quantity and value of the effects of defendant in his possession.

"Considering that the Court is, under the circumstances, justified in estimat- "ing said articles according to the evidence of said Irwin and Hall at the sum "of $470.

"Considering that it does not appear from the record that the said *Tiers saisi* "is creditor of the defendant for a greater sum than $80, as admitted by the "contestation of the plaintiffs, doth overrule the answer of the said *Tiers saisi*, "and doth adjudge the declaration of the said James McShane, junior, as such "garnishee, to be insufficient and unfounded, and doth set aside the same— "doth declare the said attachment in the hands of the said garnishee to be good "and valid—doth adjudge the said James McShane, junior, to have been at the "date of the service upon him of the said attachment indebted to the defendant "in the sum of $470, less the said sum of $80, to wit, in the sum of $390, with "interest thereon from the 24th day of January, 1872, and doth condemn the "said James McShane, junior, as the personal debtor of the plaintiffs, to pay "and satisfy to plaintiffs the said sum of $390, with interest from the 24th day "of January, 1872, on account and in deduction of their judgment against "defendant in principal, interest and costs, and doth condemn said James "McShane, junior, to pay the costs of the present attachment and contestation "of his declaration, distraits, etc.

Judgment for plaintiffs.

Cross & Lunn, for plaintiffs.
B. Devlin, for *Tiers saisi*.
(A. H. L.)

SUPERIOR COURT, 1872.

MONTREAL, 30 SEPTEMBER, 1872.

Coram MACKAY, J.

No. 1397.

Stewart vs. *Ledoux*.

HELD: In the case of a *Saisie revendication* of a waggon, by an assignee under the Insolvent Act of 1869, wherein defendant pleaded a *droit de rétention* for repairs, that plaintiff cannot claim possession of the waggon without pre-payment of or security for such repairs.

This was a hearing on law, on the issue raised by the plaintiff's answers in law to the defendant's pleas.

The plaintiff, an assignee under the Insolvent Act of 1869, seized, by process

Stewart vs. Ledoux.

of revendication, in the hands of the defendant, a waggon alleged to belong to the estate of the insolvent.

The defendant pleaded, in effect, that he had done sundry repairs to the waggon, and that plaintiff could not claim the possession of the waggon, without first paying the value of such repairs.

The plaintiff demurred to these pleas, contending that under the Act the property in the waggon passed to the plaintiff as assignee, and that any claim which he, the defendant, had against the estate for the repairs, could only be legally recovered by means of a claim fyled under the Act.

The Court dismissed the answers in law, and maintained the sufficiency of the pleas.

Answers in law dismissed.

J. C. Bureau, for plaintiff.

De Bellefeuille & Turgeon, for defendant.

(S. B.)

COURT OF REVIEW, 1872.

MONTREAL, 30 SEPTEMBER, 1872.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 1293.

Allaire vs. *Mortimer.*

HELD: That eight days notice must be given to the opposite party of an inscription for proof and hearing on the merits at the same time, and that a simple receipt of copy on such an inscription for the 27th, and dated the 21st, is not a waiver of the right to object thereafter to the shortness of the notice.

This was a hearing in review of a judgment rendered by the Superior Court at Montreal, in favor of the plaintiff. The case had been inscribed for *enquête* and final hearing on the merits at the same time, and no special application was made to reject the inscription, on the ground of short notice.

The defendant inscribed in review and urged, that the judgment was bad, inasmuch as the inscription on its face contained a receipt of a copy dated the 21st for proof and hearing on the 27th of February 1872. And the Court sustained the point raised, but without costs in Review, and in doing so reversed the judgment complained of, set aside the inscription and all the proceedings had in the case subsequently to the 21st of February, and ordered that the parties should be placed in the state they were in on that day.

The following are the reasons assigned in the judgment:—"La Cour * * * considérant que l'avis du 15 Fevrier filé le 21 Fevrier pour enquête et audition sur les mérites de la cause le 27 Fevrier 1872, n'était pas suffisant; le Code de Procédure exigeant avis au moins 8 jours avant celui fixé pour l'enquête dans une telle cause."

"Considérant que le défaut de tel avis par l'espace de 8 jours n'est pas couvert par le reçu daté du 21 Fevrier écrit par le conseil du défendeur sur la face de l'inscription," &c., &c.

Judgment of Superior Court reversed.

Jetté & Archambault, for plaintiff.

Ritchie, Morris & Rose, for defendant.

(S. B.)

SUPERIOR COURT, 1873.

MONTREAL, 14TH MARCH, 1873.

Coram JOHNSON, J.

INSOLVENT ACT OF 1869.

In the matter of

Richard Worthington, an Insolvent, and *The Mechanics Bank*, Claimant, and *George Ball et al.*, contesting.

HELD:—That on a petition by the claimant, alleging facts which he claims to be legal grounds of recusation of the assignee, and claiming to be allowed to recuse the assignee, the judge will order the assignee to suspend all further proceedings, and order proof of the facts alleged in the petition.

PER CURIAM:—A petition has been presented to me on behalf of the claimant recusing the assignee, who by law has to hear and determine the contestation pending in this case, and asking for an order to him to suspend further proceedings as official assignee upon the contestation in question, until the matters alleged are substantiated or otherwise. This application is resisted by the assignee, and by the party contesting; and they contend that an assignee cannot be recused, and that the insolvent statutes have regulated the cases in which his functions can be superseded by order of the Court.

Sec. 137 of the Act of 1869 provides for certain cases of disqualification in a judge sitting in insolvency, and also for the case of assignees being so disqualified. The language of the Act as respects the assignee is as follows:

"And if the assignee to any estate be a claimant thereon as a creditor, or be collocated for any charges or remuneration, or be the agent, attorney, or representative for any claimant thereon, he shall not hear, award, or determine upon any contestation of his own claim or collocation, or of the claim of the person represented by him, or of any dividend thereon, or upon any contestation of issue raised by him, or by the person represented by him; but in such case, such contestation shall be decided by the judge, subject to appeal, as hereinbefore provided."

By Sec. 9 of the 34 Vic. c. 25, it is enacted that relationship by marriage, or within the degree of first cousin to any of the parties before him, shall disqualify the assignee in the same manner as he is disqualified for the causes mentioned in the 137 section of the Act of 1869.

The petition before me sets out that in the contestation of the claims of the Bank, the assignee has acted with partiality, as if he were the agent or solicitor of the contesting parties. That he expressed a decided opinion that he had formed upon one considerable part of the contestation respecting 46 cases of books—an opinion which he stated he had formed on private information received by him. It further alleges that the assignee has been illegally employed by the contestants and their agents to collect information for the purpose of contesting the claim of the Bank, and without the authority of the inspector of the insolvent's estate. There are more ample allegations still, tending to show gross.

Wosthington and The Mechanics Bank.

partiality, which it is not now necessary to refer to. The assignee has fyled his declaration denying the truth of the contents of the petition, and the suggestion now before me is whether I am to order a suspension of proceedings, and proof of petition.

The present application is apparently not based on the 137 section, as it does not ask simply, as provided by that section, that the hearing of the contestation be transferred from the assignee to the judge; but only asks now that the petitioners may be allowed to prove their allegations, and to *recuse* the assignee, and that upon proof he may be recused and declared incompetent to act further in the matter. It is argued that there is no such thing provided for in the law as the *recusation* properly so called of an assignee; but I hold that I am bound, under the supervisory discretion vested in the Judges of this Court over their officers, of whom the assignee in this case is clearly one, to deal with facts and remedies, and not merely with names and forms. It is not my duty to seek texts of statutes directly authorizing strictly and technically the recusation of an assignee to an insolvent estate. There is, indeed, I believe, no such direct authority in the case of an assignee *eo nomine*; though the proceeding is substantially had every day in the case of *experts*, and even in the case of commissioners of expropriation it has been adopted. But it would rather be the duty of a Court of Justice in such a case to make sure of the existence of some plain legal provision abrogating the natural right of every man to have his case determined by those who have no direct interest in deciding against him. The assignee in this case is exercising within certain and narrow limits suited to his office the functions of a judge. One of the parties before him says, you are acting with partiality, and as the agent of another party contesting my right. I do not want to be judged by you. I have good reasons. I will prove them, if I am allowed. Under these circumstances it is my duty to turn to the written law of the land, and to the plain principles and practice of the administration of justice.

I find the first words of the written expression of the law in the Code of Procedure, Art. 176, to be: "Any judge may be recused." It is true I do not find the word 'assignee,' any more than I do that of expert, or commissioner for expropriation, or commissioner for the trial of small causes, or justice of the peace; but I will not violate a sacred principle inseparable from the due administration of justice for the mere omission of a name. I rather hold that the words 'any judge' include all those who exercise even within certain limits judicial functions, and I therefore order the proceedings on this contestation to be suspended, until this petition has been disposed of upon proof.

It is not necessary to observe that the declaration of the assignee would be conclusive unless the contrary were proved by the petitioner, and that this proof must by law be made in writing; but as all the facts referred to in the petition are facts depending upon written memoranda said to be in possession of the assignee, and upon the books and proceedings also in his custody, the verification of the facts cannot cause any serious delay. As to whether the recusation was necessary at all, I give no opinion; the matter, if it could have been brought before the Court by simple petition, would probably have been disposed of quite as satisfactorily; but the preliminary step of a recusation having been taken, I

consider it my duty to the party applying, as well as to the assignee, to order proof.

McGauvran vs. Johnson.

Proof on petition ordered.

E. Barnard, for claimant.
A. & W. Robertson, for the assignee.
Bethune & Bethune, for contestants.
(S. B.)

COURT OF REVIEW, 1872.

MONTREAL, 31st OCTOBER, 1872.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 2128.

McGauvran et al. vs. *Johnson* and *The Royal Institution et al.*, *T. S.*

HELD:—That building materials, delivered on a street opposite the building for which they are intended, and which have been paid for by the owner of the building, become his absolute property, without being actually incorporated in the building.

This was a hearing in Review of a judgment rendered by the S. C. at Montreal on the 30th March, 1872, and reported in the 16th L. C. Jurist, p. 254.

BEAUDRY, J., dissented on the ground that the case was one of *bail d'ouvrage*, and that, in his opinion, the architect's certificate had not the effect of transferring the building materials to the owner of the building.

MACKAY, J. (for the majority of the Court), said that the judgment below would be reversed in part and confirmed in part. So far as the materials delivered on Metcalfe street, opposite the building of Cushing, the T. S., they were the property of Cushing, inasmuch as he had paid for them, as he was bound to do, under his contract with Johnson, on their delivery; at which time the contract declared the materials were to be at Cushing's risk. On this point he cited Arts. 1,025 and 1,493 of the Code, and Troplong, Gage, No. 309. But, as to the materials delivered on the lot itself, as they were delivered after Johnson's flight, the Court did not consider Cushing to be proprietor of them. This part of the judgment, therefore, would be confirmed, but the amount to be paid by Cushing would be reduced to $50, the value of the materials thus delivered on his lot.

The following was the judgment of the Court:—

"The Court * * * considering that the question in this cause was and is, not as to whether certain materials (meant to be used in building) were or were not to be held moveables or immoveables, but whether, as regards said materials, Cushing was owner of them or not:—

Considering, as to the lumber and materials of the value of $220 that were upon Metcalfe street, the same were, long before date of plaintiff's *saisie arrêt* in this cause, the property of the T. S. Cushing, had been paid for by him, and were in his possession; that the defendant, before he fled from this country, had

Ex parte Rouleau certiorari.

ceased to have ownership or possession of them, and had placed them upon and near Metcalfe street for the T. S. Cushing, and that the T. S. ought not to have been condemned to pay to plaintiffs anything in respect thereof, upon the issues in this cause:—

Considering that though the said lumber and materials be to be held moveables, it cannot be held that materials moveables, that a proprietor buys and pays for, and gets put down at the place where he is building, though intended to be incorporated in a building, are not to be reputed his till incorporated in the building:—

Considering, therefore, that there is error in the judgment appealed from, in so far as by it the T. S. has been condemned to pay plaintiffs for the value of the said lumber and materials upon and near Metcalfe street:—

The Court doth vacate and reverse said judgment *pro tanto*, and as regards said lumber and materials and their value:—

But, considering as to the other effects and materials which are referred to in the said judgment, that the judgment *à quo*, in its *dispositif* as to the ownership of them, is not erroneous (the said Cushing having had no possession of said effects last referred to, until after the flight of said defendant), it is confirmed as regards that; but the value of said other effects and materials found to be $50 only.

This Court doth therefore, confirming said judgment only in part, condemn the said T. S. Cushing to pay plaintiff said sum of $50, and no more, with interest, &c., &c."

Judgment of S. C. reformed.

Girouard & Dugas, for plaintiffs.
L. Cushing, for Cushing, T.S.
(S. B.)

SUPERIOR COURT, 1872.

MONTREAL, 31ST OCTOBER, 1872.

Coram TORRANCE, J.

No. 536.

Ex parte Rouleau for *certiorari*.

HELD:—That a conviction before a J. P. for having disturbed the public peace by gravely insulting a party, and by committing an assault on him, and by crying out and threatening to beat him is bad and will be quashed.

This was a *certiorari*, praying that a conviction of the petitioner before a Justice of the Peace, on a charge of having disturbed the public peace by gravely insulting one Brunet, and by committing an assault upon him, and by crying out and threatening to beat him, be quashed as illegal.

The Court granted the motion to quash the conviction, assigning as a reason "that the conviction does not appear to be warranted by any law or statute in such case provided."

Certiorari maintained.

McCoy & Lefebvre, for applicant.
Bélanger, Desnoyers & Ouimet, for complainant and J. P.
(S. B.)

COUR DE CIRCUIT, 1872.

MONTREAL, 30 NOVEMBRE 1872.

Coram TORRANCE, J.

No. 3359.

Cyr vs. *Cadieux.*

JUGE:—Dans une action pour salaire par un domestique, que la Cour peut prendre la déclaration du maître et se déterminer par les circonstances.

Le demandeur réclame du défendeur la somme de $38.10 pour 2½ mois de salaire comme domestique ou employé de ferme. Entr'autres choses, le défendeur allègue par un plaidoyer spécial un engagement verbal pour une année au prix de $185, qu'il offre de prouver par son serment, et prétend que le demandeur ayant, sans raison valable, malgré les protestations réitérées du défendeur, abandonné le service de ce dernier avant l'expiration de son engagement, son action doit être déboutée. Il n'y a aucun doute que, d'après la loi et la jurisprudence établie, la serviteur qui déserte le service de son maître avant l'expiration de son engagement, ne peut être reçu à réclamer le salaire qui pourrait lui être dû pour le temps qu'il a fait; car le maître ne peut être tenu de payer le salaire de son employé qu'en autant que ce dernier a rempli de son côté ses obligations. Mais le demandeur prétend que, d'après l'engagement verbal allégué par le demandeur, il avait été expressément convenu qu'il pourrait abandonner le service du défendeur quand bon lui semblerait et que dans ce cas ce dernier serait tenu de lui payer le temps qu'il aurait fait. Le défendeur admis en vertu de l'article 1669 du Code Civil, à prouver par son serment l'engagement allégué par son plaidoyer, nie formellement les avances du demandeur. Le défendeur a aussi produit des témoins qui tendaient à prouver des aveux de la part du demandeur que l'engagement était tel qu'allégué par le défendeur. De son côté ce dernier fait entendre quatre témoins, son père et trois sœurs, qui prouvent les allégations de sa réponse. Le défendeur s'est objecté à cette preuve comme illégale, s'appuyant sur la seconde partie de l'article déjà cité, lequel se lit comme suit: "Dans toute action pour salaire par les domestiques ou serviteur de ferme "le maître peut, à défaut de preuve écrite, offrir son serment quant aux condi- "tions de l'engagement et aussi sur le fait du paiement en l'accompagnant d'un "état détaillé." Si le serment n'est pas offert par le maître, il peut lui être "déféré, *et il est de nature décisoire* quant aux matières auxquelles il est res- "treint."

Cette objection réservée par la Cour, renferme toute la difficulté de la cause. Le texte de la loi est formel et appuyé sur l'autorité de plusieurs anciens auteurs cités par les codificateurs, et la Cour après mûr examen de la question, prononce en faveur du défendeur et déboute l'action du demandeur.

Action déboutée.

Loranger & Loranger, pour le demandeur.
Abléric Ouimet, pour le défendeur.

Vide Pothier: Louage No. 175: Ancient Denisart, vo. Gages, n. 6. Actes de Notoriété p. 304. Nouv. Den. Gages, p. 143.

(J. K.)

SUPERIOR COURT, 1873.

STE. SCHOLASTIQUE, 20TH MARCH, 1873.

Coram TORRANCE, J.

Ex parte *Isidore Thérien*, Petitioner,

and

Gedéon Lauzon, Opposant.

HELD:—That an interdiction for habitual drunkenness under 33 Vic., cap. 26 (Quebec), cannot be pronounced by the prothonotary of the Superior Court in the absence of the judge under C. C. P. 465.

A petition was presented to the prothonotary of the Superior Court, District of Terrebonne, on the 15th October, 1872, in the absence of the judge, under C. C. P. 465, praying for the interdiction of Gedéon Lauzon, as being an habitual drunkard, according to the provisions of 33 Vic., Cap. 26 (Quebec).

An assembly of the relatives was held on the 26th October at which Lauzon was present, and after evidence taken by the prothonotary and advice under oath of the relatives, the prothonotary the same day pronounced the interdiction.

The now opposant, Gedéon Lauzon, in the terms of C. C. P. 465, on the 28th October, fyled an exception to the order of the prothonotary on two grounds: 1st. That the prothonotary had no jurisdiction, but only the judge. 2nd. That the service of the petition had not been made upon the opposant in the terms of the statute.

The case was argued before the Court in the February term (1873).

PER CURIAM.—The objection of the opposant as to the insufficiency of the service of the petition upon him has not occupied the Court from the record of proceedings shewing that the opposant was present at the assembly, but not shewing that he then took exception to the insufficiency of the service. There remains the other question as to the jurisdiction of the prothonotary in the absence of the judge. Admitting for the sake of argument that the prothonotary had jurisdiction in the absence of the judge by C. C. P. 465 at the time when that article of the Code of Procedure took effect as law in 1867, we have to look at the provisions of 33 Vic., C. 26, providing for the interdiction of drunkards. This mode of interdiction was created by the Act which came into force on the 1st February, 1870.

The first clause reads: "On petition, under oath, presented to any one of the judges of the Superior Court for Lower Canada, who alone shall have power to act, &c., &c."

This clause gives exclusive jurisdiction to the judge, and the exception fyled by the opposant to the order of the prothonotary must be maintained, and the order set aside and annulled.

Exception maintained.

De Montigny, for opposant.

Prévost & Rochon, for petitioner.

(J. K.)

CIRCUIT COURT, 1873.

STE. SCHOLASTIQUE, 20TH MARCH, 1873.

Coram [illegible] BRANCE, J.

No. 745.

Beaudry vs. *Tomalty* et al.

SURVEY—COSTS—NULLITY.

HELD:—1. That where a surveyor commits a notable fault in the making of a survey, and his report is in consequence set aside by the Court, he is not entitled to claim fees for his work.
2. That a failure to give the requisite notice to the parties before proceeding, is such notable fault.

The plaintiff's action was to recover from the defendants jointly and severally $43.50, costs of a survey made by him in an action *en bornage* between the two defendants.

The defendants pleaded separately that the survey made by the plaintiff had been of no avail or advantage to them in consequence of the plaintiff's neglect to comply with requisite formalities, and among others to give the parties due notice of his proceedings, in consequence of which neglect the Court had set aside the report made by him of the survey.

The evidence of record showed that the plaintiff by judgment of the Circuit Court for the County of Argenteuil, at Lachute, on the 30th May, 1868, in the cause No. 173, Tomalty vs. Broadfoot (Aimé Lafontaine, J.), was appointed to run the line between the properties of the then plaintiff and then defendant, and "to establish the said line in presence of the respective parties or after due notification to them, &c." The plaintiff made a survey and report to the Court fyled 11th January, 1869, which by judgment of the same Court on the 16th Sept., 1869, was set aside, "considering that the defendant (Broadfoot) was not duly notified of the survey to be performed by the said surveyor, and that he, the said defendant, was not duly represented at the said survey." The notice by the plaintiff that he would proceed under the order appointing him to make the survey was served on the two defendants on the 2nd September, 1868, requesting them to be on the spot on the third of the same month. The plaintiff's report to the Court states, "after due notification of the parties as it appears by the "return of the bailiff, dated the second day of September instant, 1868, the said "parties appeared, the said Thomas Tomalty personally, and the said Samuel "Broadfoot represented by his son, David Broadfoot."

Burroughs and *Filion*, for defendants, cited C. C. P. 943 and 333.

W. Prévost, for plaintiff, contended that the proceedings in the other case of Tomalty and Broadfoot setting aside the report was *res inter alios acta*, and that his client should not lose his fees and disbursements without *culpa negligentia*, which did not appear.

PER CURIAM.—C. C. P. 333 requires the *expert* to give three days notice of his proceedings in any case unless there is a distinct waiver, which does not appear here. By C. C. P. 943 the same rule is to be observed by the surveyor *en bornage*. Was David Broadfoot authorized to represent his father? It does

Johnson et vir. vs. Drummond.

not appear, and the Court de Rochete has not given an unreasonable judgment. The plaintiff was certainly required to give due notice, without which his proceedings were of no avail. It was an indispensable preliminary condition. An *arrêt* of the Cour de Rennes, 16th July, 1812, decides that the experts must support the cost resulting from the annulling of a report as a consequence of a notable fault on their part. (Journal des Ayoués: T. 12, p. 709.) Carré by Chauveau says, T. 3, p. 134, No. 1216, A.D. 1862: "Cette decision nous paraît fort equitable." This Court holds that the omission to give the notice in time is a notable fault, and that the plaintiff in consequence is not entitled to his bill. The action is dismissed.

Prévost & Rochon, for plaintiff.

J. H. Filion, for Broadfoot.

C. S. Burroughs, for Tomalty.

(J. K.)

CIRCUIT COURT, 1873.

MONTREAL, 1st APRIL, 1873.

Coram TORRANCE, J.

No. 309.

Johnson et vir. vs. *Drummond.*

HELD:—That the supply of refreshments to a gang of men collected during an election of a representative to the Commons of Canada, to be used in case of an emergency, gives rise to no action at law for payment of the refreshments.

The action of the plaintiff was to recover $72. The declaration alleged that in the month of August last, the defendant was a candidate for the representation in the Commons of Canada of the electoral division of Montreal West, the voting at which election took place at the city of Montreal, on Wednesday, the 28th day of August last. That the said defendant and the committee representing and working for him hired a large number of men to be ready in case of emergency during the said election, and sent fifty of them to the place of business of the female plaintiff, where they remained during the 24th, 26th, 27th and 28th days of the month of August aforesaid, and were furnished with refreshments by the female plaintiff at the instance and solicitation of the defendant and his committee aforesaid, and for the benefit and on the account of the defendant. That the said gang of hired men was visited at intervals during the said days by members of the said committee and by their and the defendant's employés, for the purpose of calling the roll and paying the wages of the said hired men, and the said roll was called, and the said wages were paid to the said hired men in the female plaintiff's establishment. Then followed the "quantum meruit."

The defendant demurred to the declaration, on the ground that the expenses sought to be recovered arose out of a parliamentary election, and as such were not recoverable.

Kerr, Q.C., for defendant, plaintiff on demurrer, cited C. S. C. chap. 6, S.S. 82, 83; 23 Vic., chap. 17, S. 6 (A.D., 1860); Confederation Act (1867), S. 41; 34 Vic., C. 20, S. 2, 9 [Canada].

D. Browne, *è contra*.

PER CURIAM.—The Act of 1860 enacts that "every executory contract or "promise, or undertaking in any way referring to, or arising out of, or depending "upon any Parliamentary election, even for the payment of lawful expenses, or "the doing of some lawful act, shall be void in law."

The plaintiff contends that this provision has not been kept alive by the Confederation Act of 1867, which makes certain provisions for elections by S. 41, and they think that 34 Vic., C. 20, S. 9, shows that by [illegible] the clauses of the Act of 1860. The defendant on the other [illegible] 41 of the Confederation Act kept alive the provision of 1[illegible] enactment of 34 Vic. was only made in order to extend the [illegible] the Provinces of the Dominion. The Court is with the defe[illegible]tions. But another grave consideration may be suggested. Art. [illegible] Civil Code enacts that contracts are illegal which are contrary to good [illegible] to public order. Here we have the plaintiffs alleging that they supplied refreshments to a gang of 50 men collected by the defendant to be ready in case of an emergency. Against whom were these men to be used? Was it in support of public order or otherwise? We are not informed. They were certainly organized as an "*imperium in imperio*," and the Court has no hesitation in deciding that the cause of action disclosed by the declaration is unlawful, and the action must be dismissed.

Action dismissed.

D. Browne, for plaintiff.
W. H. Kerr, Q.C., for defendant.
(J. K.)

CIRCUIT COURT, 1873.

MONTREAL, 15TH MARCH, 1873.

Coram TORRANCE, J.

No. 322.

Pariseau v. *Grenier*, and *Grenier*, Opposant.

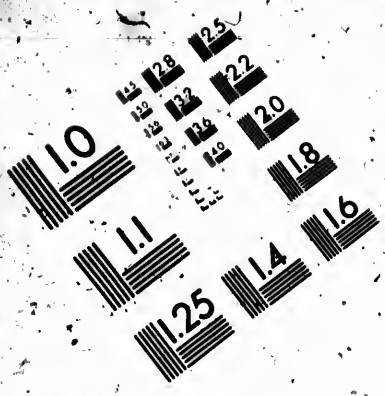
HELD:—That an opposition *à jugement* fyled to a judgment rendered in term in a case by default on a note, will be rejected on motion of plaintiff.

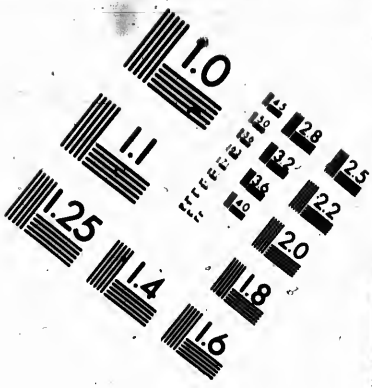
The plaintiff obtained judgment on 1st February last, in term, by default, on a note. Subsequently the defendant fyled an opposition to the judgment, and *Beique* for plaintiff, moved to reject the opposition, citing C. C. P. 484, 486. *Alphonse Ouimet*, *à contra*.

PER CURIAM:—In the present case the judgment was rendered in term on proof, and an opposition *à jugement* is not admissible in such cases. My brothers Mackay and Beaudry concur.

Motion granted.

Jetté & Beique, for plaintiff.
A. Ouimet, for defendant.
(J. K.)





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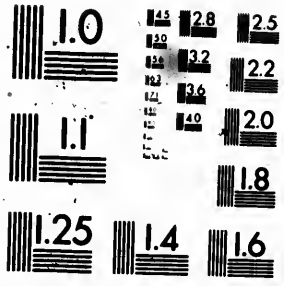

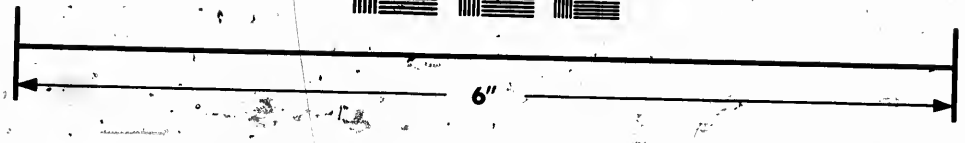

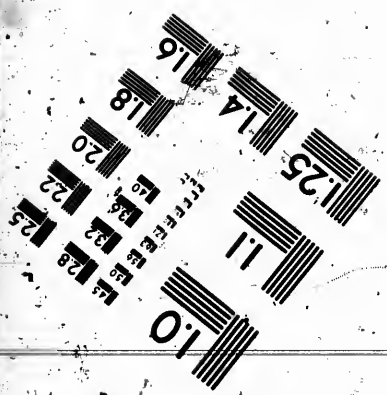

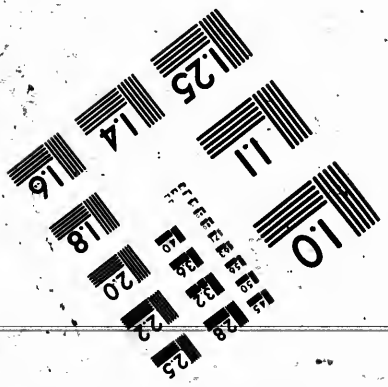

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PRIVY COUNCIL, 1873.

WINDSOR CASTLE, 3rd MARCH, 1873.

Coram THE QUEEN'S MOST EXCELLENT MAJESTY, LORD PRIVY SEAL, EARL OF KIMBERLEY, DUKE OF ARGYLE, SIR JOHN BYLES.

CHARLES LECLERE, ET AL., APPELLANTS;

AND

JEAN LOUIS BEAUDRY, RESPONDENT.

HELD:—That the authority contained in the deed of donation recited in the pleadings, to sell the property therein described if *experts* should deem it advantageous to do so, could be legally acted on, on *experts* so reporting, without the necessity of any subsequent judicial proceedings.

This was an appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal aside), rendered on the 9th of December, 1869, confirming a judgment of the Superior Court at Montreal, rendered on the 31st of December, 1866.

The Lords of the Judicial Committee pronounced their judgment on the 1st of March, 1873, as follows:—

Coram:

Lord Justice James.
Sir Barnes Peacock.
Lord Justice Mellish.
Sir Montague Smith.

The late M. Pierre Leclere, the appellant's testator, having obtained judgment against a Mr. Short for 50*l.*, the price of a piece of ground, part of an orchard in Montreal, he had sold to him, the Sheriff seized the ground in execution. The respondent (Beaudry) filed an opposition to the seizure as purchaser of the interest of persons entitled to a share of the orchard under a deed of gift, and he sought to annul a previous sale made to Pierre Leclere himself, as well as the subsale by Leclere to Short.

The Court of Queen's Bench, by a majority of Judges, affirmed the decision of the Judge of the Superior Court, which in effect annulled the sale to Leclere, and whether this sale ought to stand is the principal question in this appeal.

By the deed of gift referred to, dated the 14th May, 1827, Madame Castonguay, a widow, gave to her son François Xavier Castonguay, to take effect as an immediate gift, the enjoyment and usufruct during his life of lands in Montreal, including the orchard in question, and after his death she gave the property, in substitution, to his legitimate children. She further declared that, in case the donee died without children, the enjoyment and usufruct should go ("seront reversibles") to his brothers and sisters, or any of them during their lives; and that if, at her son's death, all his brothers and sisters should be dead (the event which happened) the property "retournera et appartiendra" to their legitimate children *per stirpes* ("par souches").

Power was given to the donee to sell the orchard for a rent charge, if it should be judged by experts to be advantageous to the succession. This power under which the sale in question was made is in the following terms:—Que le dit donataire pourra vendre à constitution de rente seulement, le tout ou partie du

terrain complanté d'arbres fruitiers, si par experts et gens à ce connaissans c'est jugé avantageux pour ses enfans."

It is probable that the suitability of the land for building purposes was the motive for giving this power to the institute. Two conditions are annexed to its exercise:—(1) That the sale shall be for a rent charge ("à constitution de rente"); and (2) that it shall be declared by experts to be advantageous to the succession.

It may be observed that both appear to have been complied with.

F. X. Castonguay, the institute, died childless in 1861, having survived all his brothers and sisters. Two brothers, Jean Baptiste and Benjamin, left children.

His sister Josephte married Leclere, and there were seven children of this marriage. Benjamin died before the deed of gift of 1827, leaving three sons, and the respondent (Beaudry) in 1857 purchased their expectant interest (one-third) in the substitution. He afterwards, in 1862, purchased the share (one twenty-first) of one of the sons of Leclere and his wife Josephte. By virtue of these purchases (subject to a question to be hereafter considered), Beaudry became entitled to question the validity of the sale to Leclere, made by virtue of the power in the deed of gift of 1827.

The following are the circumstances under which this sale was made, so far as they appear to be material.

In 1844, F. X. Castonguay, the institute, desiring to exercise the power of sale, filed a petition in the Court of Queen's Bench, stating this desire, and that, with reference to the condition requiring experts to certify that the sale would be advantageous, he considered the experts should be nominated by him, and a person representing the substitutes; he, therefore, prayed the Court to nominate a council of the family to appoint a tutor to the substitution for that purpose.

In pursuance of an order made on this petition a family council met and appointed Joseph Castonguay to be tutor.

The tutor having refused to name an expert, in September, 1844, F. X. Castonguay brought a suit against him praying for a declaration of his right to sell, if experts certified that it would be advantageous to the substitutes, and that the tutor should be ordered to nominate an expert. The Court ordered the parties to appoint experts who were to report to the Court, and they were appointed accordingly, and made a report to the Court that a sale would be advantageous to the succession.

The right to sell was still disputed by the tutor, but upon the hearing of the cause the Court, on the 13th October, 1847, after referring to the report of the experts and considering ("considerant") that F. X. Castonguay had then the right to exercise the power "en observant les formalités requises," adjudged and decreed that he had the right to sell, an estimate being first made of the value by experts to be named by the parties, or, if not, by the Court. The effect of this judgment is one of the principal questions for consideration. It is so far in favour of the appellants that it declares the condition imposed by the donor, viz., the certificate of experts that the sale was advantageous, to have been complied with, and that the donee had then the right to sell. But it was insisted on the part of the respondent that the Court imposed as conditions, not merely a new

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valuation by experts, but all the formalities required upon a judicial sale, without which the sale would be, it was contended, a nullity.

The tutor having appealed against this judgment it was affirmed with costs after a long delay, in 1857.

The tutor again refusing to appoint an expert, the Court appointed one for him. These experts reported that the value of the orchard was 5,000*l.*, and their report was confirmed by the Court on the 20th June, 1857.

It was afterwards thought to be better to sell the orchard in lots, and, on the 24th July, 1857, F. X. Castonguay petitioned the Court to appoint an expert for the tutor so to value it. The tutor appeared, and having submitted himself to the Court, the same experts were again appointed. They valued the orchard, as divided into twenty lots, and made the aggregate value 5,000*l.* as before.

Their report was filed on the 30th July, 1857, but no application was made either to confirm or reject it, and no further proceeding, prior to the sale, was taken in the suit.

Pending these proceedings, F. X. Castonguay, by a deed of the 22nd April, 1857, sold his life interest in the usufruct to Leclere and one Garceau, whose rights Leclere afterwards acquired. By another deed of the 15th May, 1857, reciting that subrogation had been omitted in the deed of sale, Castonguay declared that Leclere and Garceau should be subrogated in all his rights under the deed of gift, and the judgments of the 13th October, 1847, and on the appeal, and might exercise them in his name, consenting to do all acts necessary to give them entire possession of the rights ceded to them by the deed of sale.

It was after the usufruct for the life of F. X. Castonguay became thus vested in Leclere, that the purchase by him of the corpus of parts of the orchard, which is now impeached, took place.

The orchard was sold on the 1st September, 1857, at an auction held at the Court House. All the lots were sold, and a price realized much in excess of the valuation, viz., in all 6,442*l.*

Leclere was the highest bidder for six lots, which, after being put up separately, were offered in one lot. They were knocked down to him for 1,000*l.* These lots had been valued at 1,300*l.*, and Leclere afterwards agreed to pay that sum for them. All the lots were sold "à constitution de rente," calculated at 6 per cent. on the purchase money.

On the 14th September, 1857, F. X. Castonguay conveyed by deed of sale these six lots to Leclere. On the 2nd November, 1857, Leclere sold one lot to Short, as stated in the outset, for 50*l.* in addition to the rent-charge; but this sum really represented a profit of 30*l.* only (20*l.* having been paid by Leclere for commuting the seigniorial rights), and was not payable for five years.

The above purchase by Leclere of the six lots is impeached by Beaudry in the proceedings which give occasion to the present appeal, on the grounds, first, that the sale was fraudulent and collusive, and not a *bonâ fide* execution of the power of sale; and, second, that the requisite formalities required upon a judicial sale not having been complied with, the sale is void as against the substitutes.

As to fraud, the judge of the Superior Court (Mr. Justice Monk) came to the conclusion that it had not been established. He says, "As to frauds being

set up by Beaudry as having been practised by Leclerc, they have not been proved. There was looseness in his proceedings, and irregularity in the particulars referred to, but no such intention as is imputed to him." The three Judges who formed the majority in the Court of Queen's Bench do not dissent from that opinion, and their Lordships are satisfied with it.

The principal objections urged at their Lordships' Bar on this part of the case were based on the deed of subrogation, by which Leclerc was subrogated in all the rights of the donee. It was contended that the power of sale was a trust for the benefit of the substitutes, which could not be delegated, but this their Lordships think is not its true nature. The settlor gave this power to her son, the donee, who was the principal object of her bounty, for his own benefit, as well as that of his successors. She guarded the substitution by two conditions, viz., by requiring the sale to be for a rent charge, and a previous report of experts. In so far as the power of sale affected the usufruct, Leclerc had, after the transfer to him, a beneficial interest in the exercise of it, and to that extent the subrogation was protective of his own rights. The execution of the power, no doubt, remained with F. X. Castonguay, and he, in fact, did exercise it by authorizing and joining in the sale, and executing the deeds of conveyance.

No authority in Canadian law was cited to shew that the alienation of the usufruct by Castonguay, and the subrogation of his rights in Leclerc, rendered the execution of the power by the former invalid. Upon principle, there is no reason it should be so. It might be very much to the prejudice of the substitution to hold that powers of this kind were extinguished upon a sale of the usufruct, which the grévé is competent to make, or that its subsequent execution should be considered necessarily to indicate fraud. In an analogous case arising in England it was held that the power was not extinguished, and that its subsequent exercise was not evidence of *mala fides*. (See Alexander v. Mills, L. R., 6 Ch. App. 124.)

No doubt Leclerc took the most active part in the management of the sale, but F. X. Castonguay concurred in all that was done, and had separate legal advisers to whom the conditions of sale were submitted. Nothing unusual or objectionable has been pointed out in these conditions, and it appears the usual and full publicity was given to the sale.

Evidence was given of negotiations between Leclerc and a Mr. Simpson, with a view to establish that Simpson was prevented from bidding by a promise from Leclerc to sell to him after the auction, but the proof on this point is quite inconclusive; and on the other hand, there is much evidence to show that Leclerc exerted himself to obtain a good sale, and to counteract the efforts of Beaudry himself to prejudice it. There is satisfactory evidence that the sale was well attended, and that the biddings were fairly conducted.

Although some of the circumstances in the case are undoubtedly such as to rouse suspicion, and the attention of their Lordships has been properly called to them, they do not think it necessary to comment further upon the facts, particularly after the finding of Mr. Justice Monk already referred to, from which the majority of the Judges in the High Court expressed no dissent, and in which Mr. Justice Badgley strongly concurred. The latter learned Judge says:—"The

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general charges of fraud and connivance alleged against Leclerc are entirely without foundation."

Their Lordships therefore consider that the sale cannot be annulled on the ground that it was a dishonest one.

Its validity was next impeached on the ground that the formalities required by law had not been observed.

The objections on this head are, that the second report of the experts was not homologated, and that the subsequent proceedings in the conduct of the sale were taken without the further sanction of the Court.

Their Lordships consider that these objections cannot prevail, unless it can be shown that it was necessary for the due execution of the power that the sale should take place under the authority of the Court. But the Council for the respondent failed to establish to the satisfaction of their Lordships that, by the law of Canada, the exercise of powers of this kind requires judicial sanction, and all the judges below were of the contrary opinion. Notwithstanding, however, this opinion, it was held by the Judge of First Instance (Mr. Justice Monk) and by the majority of the Judges in the Court of Queen's Bench, contrary to the opinion of Mr. Justice Badgley, and that of the Chief Justice Duval (who concurred with him), that the grévé having once applied to the Court, was bound to act to the end under its directions. It will be seen that the Judges declare even this opinion with great doubt and hesitation.

Mr. Justice Monk says: "As to the question of the homologation of the second report, the Court finds difficulty in holding it to be necessary, 'a peine de nullité.' It is not easy to see why an action was necessary at all by François Xavier Castonguay. The donation gave a right to sell 'à constitution de rente,' after the report of experts was made, and why should he bring a suit? Nevertheless, he did sue, and the Court ordered the sale after certain formalities; it homologated the first report, and if the donee took legal proceedings he was bound to carry them out and have the second report homologated also, and the new terms and conditions of sale sanctioned by the Court. This is the opinion I have arrived at."

The opinion of Mr. Justice Caron, in which Mr. Justice Drummond and Mr Justice Loranger concurred, is to the same effect. That learned Judge says in substance, that being of opinion the donee could sell the property without having recourse to judicial authority, he at first thought the erroneous proceedings which had taken place could not injure the sale, since they ought to be regarded only "comme un simple surplusage;" but that on reflection he thought that, the donee having sought and obtained a judgment, the conditions which it imposed ought to have been followed.

Mr. Justice Badgley speaks without doubt. He says, "It is conceded on all hands that François Xavier had full and sufficient authority by the deed to make a valid sale without recourse to proceedings at law, but desirous *ex cautela* to give the assurance of law to his power by a declaratory judgment in favour of his right, he was advised to institute a suit at law for this purpose, which required a representation of the substitution to be defendant in the suit, against whom the judgment might be rendered 'contradictoirement.'"

It appears from the statement of the proceedings already given that the suit arose in this way: F. X. Castonguay, desiring a tutor to the substitution to be appointed for the purpose of naming an expert on their part to make the declaration required by the deed of gift, applied to the Court. This was apparently done to obtain the nomination of an expert which should be beyond question.

But the tutor having, when appointed, refused to name an expert, and disputed the right to sell, Castonguay took further proceedings to procure a judicial declaration of his right to sell. The Court made this declaration of his right by their Decree of the 13th of October, 1857, but annexed a condition, not required by the donor, that a valuation should be made by experts. It is not necessary to consider whether this condition was rightly imposed, because it was complied with, and the report of the experts homologated. Besides this condition the "consideration" of the judgment contains the words "en observant les formalités requises," and it was argued that this clause made it necessary to observe all the forms required on judicial sales. Their Lordships consider this is not so. They think it very doubtful whether it was competent for the Court to impose new conditions upon the sale not required by the donor, and none, in fact, are specifically imposed by the Decree, except that requiring a valuation. They think that the "consideration" can at most be regarded as directory only, and not as imposing conditions which rendered the sale void, if not complied with. It may be granted that the formalities referred to not having been observed, the sale cannot have the quality of a judicial act; but if, as their Lordships think, the sale did not require judicial sanction, it cannot be annulled for the absence of it.

It is unnecessary to say whether, even in the case of a sale requiring judicial authority, the non-observance of the usual formalities would, before the introduction of the code, have been of itself a sufficient ground for annulling it; for their Lordships agree with the first impression of the Judges below, that in this case the authority of the Court was not required.

A further objection was, that the tutor to the substitution ought to have been consulted in the management of the sale, and particularly as to the conditions of sale.

It was not in their Lordships' view established by the argument at the Bar that the appointment of a tutor was essential to the valid exercise of the power of sale; and it appears to them that, at the most, the tutor was only necessary for the purpose of having the experts duly appointed.

Article 951 of the Code of Lower Canada, which was assumed to be declaratory of the former law, was relied on; but that Article does not relate to sales made in virtue of a power contained in the settlement. Such cases appear to fall within Article 952, which is in these terms:—

"The grantor may indefinitely allow the alienation of property of the substitution, which takes place in such case, only when the alienation is not made."

The French law applicable to the province does not appear to require the appointment of a tutor where the alienation is allowed by the grantor.

M. Thévenot D'Essaule in "Traité des Substitutions" (1266), speaks of the

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tutor to the substitution as a novel introduction. After referring (1272) to two cases which do not comprehend the present, he says (1273) :—

"Hors ces deux cas fixés par l'ordonnance, nos tuteurs à la substitution ne sont guère nommés que pour mettre le grévé en état de faire juger ses prétentions contre les substitués dont le droit n'est pas ouvert. C'est un personnage qui a été imaginé pour donner au grévé un adversaire," &c.

It is evident that the appointment here spoken of being for the purpose of providing an adversary, where a judicial decision on some claim of the grévé in opposition to the substitutes is sought to be obtained, the rule is not applicable to the case of a sale in exercise of a power, where, as already shown, no action and no judicial sanction were required.

It has already been pointed out that the appointment of the tutor was originally applied for in this case to name an expert on the part of the substitutes. It, no doubt, appears that when the tutor declined to nominate one, he was treated as an adversary against whom, as representing the succession, the suit was continued to obtain a declaration of the right of the grévé to sell. But if neither a suit nor judicial authority for the sale were necessary, their Lordships think the fact of the tutor being made an adversary in a needless suit cannot render his participation in the actual sale essential to its validity.

Their Lordships have therefore come to the conclusion that none of the objections made to the sale can be maintained. In doing so, they are glad to be spared the necessity of setting aside a sale which the family itself has not objected to, at the instance of a stranger who purchased an interest at a low price, on the speculation that he might succeed in annulling it.

A question arose on Beaudry's title, viz., whether the children of Benjamin, one of the brothers of the donee, were, in the events which happened, entitled to a share under the deed of gift. Benjamin was dead at the time of the gift, but four of his brothers and sisters were then living. These all died before the donee, but two of the four left children; and the question is, whether the children of Benjamin are entitled to one-third, as the grandchildren of the donor, or are excluded by the terms of the donation.

The conclusion to which their Lordships have come on the principal matter in the Appeal makes a decision on this question unnecessary, but since it has been fully argued, they desire to say they agree with the judgment of the majority of the Court of Queen's Bench in favor of the respondent on this point.

They think in the events which have happened, viz., the death of F. X. Castonguay without children, having survived all his brothers and sisters, that all the grand children of the donor became entitled to share ("par souches"). The literal terms of the ultimate limitation would include the children of Benjamin, although he died before the donor; and their Lordships do not find in the context such evidence of an intention to exclude them, as would justify a construction different from that which the ordinary and natural meaning of the language imports.

In the result their Lordships will humbly advise Her Majesty that both the judgments of the Courts below ought to be reversed, and that the opposition fyled by the respondent to annul the seizure ought to be dismissed, and that he

ought to pay the costs occasioned by such opposition in both the Courts below. He must also pay the costs of this appeal.

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Her Majesty was pleased by and with the advice of Her P. C., to approve of the report of the Judicial Committee, and to order that the judgments appealed from should be reversed with £563 4 0 stg. for the costs of this appeal, and that the opposition fyled by the respondent should be dismissed with costs in the Court of Queen's Bench and in the Superior Court against the respondent.

Judgments of Court of Queen's Bench and Superior Court reversed.

Mr. Wills, Q. C.
Mr. Westlake, } for appellants.

Mr. Eddis, Q.C.
Mr. Roy, Q.C.
Mr. Gibbs, } for respondent.

(S. B.)

PRIVY COUNCIL, 1873.

AT THE COURT AT WINDSOR CASTLE, 24TH MARCH, 1873.

Coram THE QUEEN'S MOST EXCELLENT MAJESTY, LORD PRIVY SEAL, MARQUIS OF HARTINGTON, EARL GRANVILLE, LORD CHAMBERLAIN, MR. BAXTER, MR. KNATCHBULL-HUGENSEN.

TORRANCE ET AL.,

AND

APPELLANTS;

THE BANK OF BRITISH NORTH AMERICA,

RESPONDENTS.

HELD:—That when a bank discounts for A a draft by him on B, and accepts a check for the proceeds and delivers it to A, for transmission to B, to enable B therewith to retire a draft for a similar amount, drawn by A and accepted by B for A's accommodation, and about to fall due at the branch of the bank where B resides, on the faith of A's representation, assurance and undertaking (without authority, however, from B) that B will accept the new draft, and B receives the check, and before using it has knowledge of the transaction as between A and the bank, B cannot legally use the check to retire his own acceptance on the old draft, without accepting the new one.

This was an appeal from the judgment of the Court of Queen's Bench, at Montreal, reported at pages 169 *et seq.* of the 15th vol. of the Lower Canada Jurist.

The Lords of the Judicial Committee pronounced their judgment on the 11th of March, 1873, as follows:—

Coram:—Sir James W. Colville, Sir Barnes Peacock, Lord Justice Mellish, Sir Montague E. Smith, Sir Robert P. Collier.

This is an appeal from a decision of the Court of Queen's Bench in Canada, by which they affirmed the judgment of the Court below there, in which it was held that the Bank of British North America were entitled to recover a sum of $10,600 and interest against Messrs. Torrance & Co.

The facts are set out in the declaration in the cause, and in the findings of the jury, the substance of the defence having been a denial of all the material

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facts alleged in the declaration, and those facts in a great number of issues having been left to the jury, and the jury having given their determination upon them. The real question to be determined is, whether, having regard to the facts alleged in the declaration, and the findings of the jury, a cause of action sufficiently appears to entitle the Bank of British North America to recover this sum of money against Messrs. Torrance.

Now, the material facts as found are these:—The Bank of British North America were the holders for value of a bill of $10,000 which had been drawn by one E. M. Yarwood upon Messrs. Torrance. As found by the jury Messrs. Torrance were accommodation acceptors, and it was the duty of Yarwood, as between him and Torrance, to provide for the bill when it became due at Montreal on the 18th of July. On the 15th of July Yarwood applied to the Bank of British North America to enable him to renew the bill, and he represented to the bank that Messrs. Torrance would be willing to come into an agreement to renew the bill, and to accept the renewed bill, and thereupon it was arranged between Yarwood and the bank that a new bill should be drawn. A new bill was drawn on the 15th of July at three months' date. It was discounted by the bank for Yarwood, and he at the same time, in order to provide funds to take up the bill which became due on the 18th of July, drew a cheque on the bank in favor of Messrs. Torrance or order. That cheque the bank accepted, payable at par at Montreal; this transaction taking place in London. They then delivered the cheque to Yarwood, and Yarwood forwarded the cheque to Messrs. Torrance with a letter, in which he stated: "I have drawn on you to-"day at three months for $10,000, and enclose cheque on B. B. N. America "for same amount to retire bill due on 18th inst." That letter, having been sent on the 15th July with the cheque, arrived at Montreal on the morning of the 17th, and was there received by Messrs. Torrance. The bank at the same time sent the renewed bill of the 15th of July to their manager at Montreal to obtain the acceptance of Messrs. Torrance to the renewed bill, and the bank, on the morning of the 17th July, left the renewed bill with Messrs. Torrance for their acceptance, it being the practice there that 24 hours are allowed before the drawee determines whether he will accept or not. That having been left for acceptance on the morning of the 17th July, on the afternoon of the 17th of July Messrs. Torrance presented the cheque for $10,000 at the bank and received payment of it. Messrs. Torrance, the same day, gave notice to Yarwood that they refused to accept the renewed bill. There was a letter received the same day or the next day by Cramp, one of the partners in the firm of Torrance & Co., and another letter subsequently which fully explained the whole transaction. It is not necessary to enter into the subsequent letters because they are really not material, but Messrs. Torrance on the 18th duly paid the first bill. The material questions submitted to the jury where these:—"Fifth, did Yarwood "request the plaintiff to discount said draft of the 15th day of July, 1867, and "allow him to draw a cheque for the full amount thereof, in order that he might "therewith retire the said first mentioned draft, and upon the representation and "engagement by him that the defendants would accept such new draft, and did "the plaintiff discount such new draft, and accept the said cheque, and certify it

"as being payable in cash at Montreal, on the faith of such representation, assurance, and undertaking, and deliver it to the said E. M. Yarwood for the purpose aforesaid?" And to that they reply "Yes." Then, the 6th asks about the contents of the letter, and on that they say, "Yarwood remitted the cheque in his letter of the 15th of July, 1867, to cover the draft due the 18th instant, without explaining how he had obtained it." Then the 11th is, "When they so presented the cheque for payment did they know, or had they reason to believe, that it represented the proceeds of the draft of the 15th of July, 1867, and that such draft was only discounted upon the faith that they would accept it?" The answer to that is, "We are of opinion that the defendant had reason to believe that the cheque was the proceeds of the draft of the 15th of July, and that the said draft was discounted upon the faith that the defendants would accept it." Those being the facts found, the real material question appears to be this: Here is a bill of exchange drawn by Yarwood and accepted by Messrs. Torrance, of which the bank are the holders. There is a proposal on the part of Yarwood to renew that bill. It is obvious that the bill could not be renewed except with the consent of three persons, namely, Yarwood, the bank, and Messrs. Torrance; without the consent of Messrs. Torrance it was obvious that the bill could not be renewed. Then, Yarwood and the bank do agree to the renewal. Then the first question is, were Messrs. Torrance informed of those facts before they presented the cheque? Now, the jury have found as a fact that they had reason to believe them, which in their Lordships' opinion is the same thing as finding that they had knowledge of them, and therefore the result of it is that they had knowledge at the time when they presented the cheque that both the Bank of British North America and Yarwood were proposing to them to renew the bill of exchange, and they had knowledge that the cheque was forwarded to them on the assumption that they would assent to renew the bill of exchange, and with the view that, for the purpose of enabling them to renew it they should have the cheque in order that they might obtain funds with which to pay the first bill.

Then, that being so, it appears to their Lordships most clearly that Messrs. Torrance were bound either to refuse or to accept the offer that was made to them. There was an offer made to them, on behalf of both parties, on behalf of the Bank of British North America and on behalf of Yarwood, that they would assent to renew the bill of exchange, and the cheque was given to them for the purpose of enabling them to carry out the renewal, if they assented to it. Therefore, it appears that they were entitled to do one of two things, either to accept the offer that was made to them, and then they were bound to accept the bill of exchange, or else they were entitled to reject the offer that was made to them, and then if they did that they were bound to return the cheque. But, without giving any notice to the bank that they accepted or refused the offer made to them, they took upon themselves to present the cheque and get it cashed. Now, it appears to their Lordships quite clearly that they were not entitled to take advantage of the agreement which had been made between Yarwood and the Bank of British North America, to which their assent was requested by cashing the cheque, unless they meant to bind themselves to

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act upon the agreement by accepting the bill of exchange. That being so, the consequence is that having acted upon it, and then afterwards having refused to accept the bill of exchange, they were bound to return the money which they had obtained on what the bank must have understood to be a representation that they were going to accept the offer that was made to them, and going to accept the bill of exchange.

It does not appear to their Lordships that it is really necessary to say precisely what, if these facts had arisen in England, and it had become necessary to bring an action or to file a bill in England, would have been the precise remedy which would have been open to a person in England, whether it would have been an action for not accepting the bill of exchange, or an action for money had and received, or whether it would have been a bill in equity to recover back the moneys as having been obtained in bad faith, though if it were necessary to give an opinion upon that point, probably an action for money had and received would be the real remedy which would be open in the Courts here; that, however, is a technical question. The substantial and real question is that it was a matter of bad faith. I do not mean to make any remark against Messrs. Torrance's character at all, but, still, under the circumstances, a matter of bad faith; that when they got the cheque with full notice that the cheque was only given to them on the assumption that they would come into the arrangement of renewing the bill of exchange, it was a matter, as it appears to their Lordships, of bad faith for them to go and cash the cheque, being determined at the very same time, and having already made up their minds, that they would refuse to accept the bill of exchange.

Then, it was contended by Mr. Benjamin, in his very able argument, that Messrs. Torrance's position was altered by the arrangement, and that he, being a surety, was thereby discharged. Their Lordships are not able to see in what respect his position was altered. Certainly no time was given, because the first bill of exchange was not due until the 18th of July, and before the first bill was due the second bill must either have been accepted or rejected; and Yarwood was not discharged from any obligation which he had, because his only obligation was to provide the funds on the 18th July. The argument seems to be that having made this arrangement with the bank, he, as a matter of fact, would not make any other efforts to obtain the funds. He was not discharged from obtaining them. His liabilities remained exactly what they were before, and if the bill had not been renewed, that is to say, if Messrs. Torrance did not accept the bill of exchange, no time would have been given, because he would have been instantly liable on both bills. Therefore their Lordships do not see that there is any ground for saying that Messrs. Torrance were discharged, because their position as surety was altered or affected by what was done. It is very difficult to say how a surety's position can be altered, because the two parties say, "We offer to you to postpone your payment for three months if you like "to accept it, you may either accept or reject it; but we offer to you, if you "please, to postpone your liability to pay us for three months." It appears to their Lordships that that did no harm to the surety, and could not have the effect of discharging him.

Some authorities were cited; there was the case of the Bank of Ireland *v.* Archer, the facts of which do, to a certain extent, resemble the facts in the present case; but, really, the only question that was decided in that case, the only question which was reserved by the Judge at the trial was, whether a promise to accept a foreign bill of exchange before the bill of exchange was drawn amounted to an acceptance. No question whatever was raised respecting any right to recover under money had and received, or in any other way. The other case which was cited, Key *v.* Cotesworth, appears to their Lordships to have no bearing on the present case.

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On the whole, their Lordships are of opinion that they must humbly advise Her Majesty that the judgment of the Court of Queen's Bench for the Province of Quebec should be affirmed, and that this appeal should be dismissed, with costs.

Her Majesty, by and with the advice of Her Privy Council, was pleased to approve of the report of the Judicial Committee, and to order that the said judgment of the Court of Queen's Bench for L. C. be affirmed, and the present appeal dismissed, with £312 2 10 sterling costs.

Judgment of Court of Q. B. confirmed.

Thomas & Hollams, attys. for appellants.
Mr. Benjamin, Q.C. } counsel.
Mr. Cohen, }
Bischoff, Bompas & Bischoff, attys. for respondent.
Sir John Karslake, Q.C. } counsel.
Mr. Henry Bompas, }

(S.B.)

SUPERIOR COURT, 1872.

MONTREAL, 30TH SEPTEMBER, 1872.

Coram BEAUDRY, J.

No. 374.

The Molsons Bank vs. *Connolly.*

HELD:—That when a creditor agrees to a composition with one of two members of an insolvent firm (without discharging the other) and obtains security for such composition, and afterwards releases the compounding debtor (without the consent of the other debtor) for a less amount than the composition, and surrenders the security, the other member of the firm, in an action against him by such creditor to recover the balance of his claim, may successfully resist the action by an *exceptio cedendarum actionum*.

This was an action by the Molson's Bank, as well in its own right, as being also the legal holder of certain promissory notes belonging to the Bank of Montreal, to recover from defendant, as having been a member of the firm of Connolly, Lantier & Co., the sum of $36,004.55 and interest.

The defendant pleaded, in effect, that the firm was insolvent when the notes sued on became due. That J. O. Lantier, one of the firm, was largely indebted to the firm and the defendant, at the time of the dissolution of the firm by such

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insolvency. That the two banks agreed to a composition of ten shillings in the pound from Lantier, and obtained from him ample security therefor, by mortgage on his real estate. That subsequently, without defendant's consent, the banks released Lantier, by accepting about five shillings in the pound on their claims, and discharged their mortgages, And that, in consequence, the banks were unable to cede to defendant the actions and mortgages which they so had and held respectively against Lantier and his said property, and thereby deprived the said defendant of all remedy or recourse for the recovery from Lantier, or his estate, of any portion of the composition, which he so originally engaged to pay the banks.

At the hearing the defendant's counsel relied on Pothier on Obligations, Nos. 275 and 557, and the Arts. 2070 and 2071 of the Civil Code of L. C.

The following was the judgment of the Court:

"The Court * * * considering that the said plaintiffs did take and receive from Jean O. Lantier, one of the late firm of Connolly, Lantier & Co., who signed the notes in said plaintiff's declaration mentioned, an obligation before C. F. Papineau and colleague, notaries, bearing date the 4th day of April, 1860 whereby the said Jean O. Lantier promised and bound himself personally to pay to the said plaintiffs the sum of $9270.78 on demand, with interest thereon at the rate of seven per cent., and for security of the payment of said sum, being a portion of the amount due said plaintiffs by the said firm of Connolly, Lantier & Co., did affect and hypothecate to and in favor of the said plaintiffs the immoveable property described in said deed, and being the private property of said Jean O. Lantier, and considering that the said Bank of Montreal, likely, did take and receive from the said Jean O. Lantier an obligation before C. F. Papineau and colleague, notaries, bearing date the 11th day of April, 1860, whereby the said Jean O. Lantier did promise and oblige himself to pay the said Bank of Montreal the sum of $8777.00 on demand, with interest thereon at the rate of seven per cent. per annum, and for security of the payment of the said sum, being for a certain portion of advances made by the said Bank of Montreal to the said firm of Connolly, Lantier & Co., the said Jean O. Lantier did affect and hypothecate the immoveable property described in said deed, being his own private property; and considering that at said dates no other claim appears to have been due to the said plaintiffs and said Bank of Montreal, but the two notes mentioned in said plaintiffs' declaration, and that the said two obligations were so given to cover ten shillings in the pound of the respective claims of said banks:—Considering that at the time of the passing of the said obligations, the said firm of Connolly, Lantier & Co. was insolvent as well as the said J. O. Lantier; and considering that afterwards, to wit, on the 6th day of September, 1860, by deeds executed before C. F. Papineau and colleague, notaries, the said banks respectively in consideration of certain sums of money to them respectively paid by the said Jean O. Lantier did, without the consent of said defendant, grant to him a full discharge of the aforesaid obligations and hypotheques thereby created upon the said Jean O. Lantier's private real property, and thereby became and are unable to cede and transfer to the said defendant any right or recourse whatever against the said Jean O. Lantier or

his representatives; considering that after said discharge by the said banks the said Jean O. Lantier was enabled to sell the said real property and obtain therefrom for his own use and benefit large sums of money, which should otherwise have been paid to and received by the said banks in discharge of said defendant; and considering moreover that it is in evidence that the said defendant had large claims against the said Jean O. Lantier in liquidation of the business of the said firm, and that by reason of the aforesaid mortgages and discharges he was prevented from exercising his recourse against the said Jean O. Lantier, and considering that the said letter bearing date the 11th of April, 1860, addressed to Wm. Sache, Esq., cashier of the Molson's Bank, purporting to be signed by the said firm of Connolly, Lantier & Co., and fyled by the said plaintiffs, was written and sent by the said Jean O. Lantier, when the said firm was no longer subsisting, and could not bind the said defendant; considering that for the reasons above mentioned plaintiffs' action is barred and cannot be maintained: Doth dismiss the said action with costs."

Sheperd vs. Buchanan.

Action dismissed.

Hon. J. J. C. Abbott, Q.C., for plaintiffs.
Strachan Bethune, Q.C., for defendant.
(S. B.)

COURT OF REVIEW, 1873.

MONTREAL, 23RD MAY, 1873.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 1453.

Sheperd vs. Buchanan.

HELD:—That an inscription which has been discharged, on application of the opposing party, in the absence of the inscribing party, may be replaced on the rôle during the same term and before the actual remission of the record, on sufficient cause shewn.

This was a motion by the plaintiff (the party inscribing) to restore the case to its place on the rôle; the inscription having been discharged, on the application of the defendant's attorneys, in the absence of the plaintiff's attorney, who represented to the Court by affidavit that he was so absent in consequence of missing the railroad train.

MACKAY, J. (*dissentiens*), was of opinion that the Court was no longer seized of the case, the judgment having been actually pronounced, and, therefore, that it was quite out of their power to grant the motion.

TORRANCE, J.—I have always understood, that where an application like the present is made during the same term that the inscription has been discharged, the Court is still sufficiently seized of the case to be able to entertain the motion. On the merits there can be no doubt that the Court should come to the plaintiff's relief. I am quite satisfied also, that the Court of Appeal, under similar circumstances, would restore the case to the *rôle*. The motion is, therefore, granted, but it must be understood that what we are doing is not to be regarded as a precedent.

Motion granted.

James O'Halloran, Q.C., for plaintiff.
Bethune & Bethune, for defendant.
(S. B.)

COUR DE CIRCUIT, 1873.

MONTREAL, 31 MARS 1873.

Coram BEAUDRY, J.

No. 21.

MICHEL LAURENT,

Requérant;

vs.

LA CORPORATION DU VILLAGE ST. JEAN-BAPTISTE,

Défenderesse.

JUGE:—Que la Cour de Circuit ne peut pas prendre connaissance de la validité d'un rôle d'évaluation.

PER CURIAM:—La Cour de Circuit peut-elle prendre connaissance de la validité d'un rôle d'évaluation?

Au soutien de cette proposition on invoque les articles 100 et 698 du Code Municipal: examinons ces deux artieles.

L'art. 100 porte:

"Tout procès-verbal, rôle, résolution ou autre ordonnance du Conseil Municipal peuvent être cassés par la Cour de Magistrat ou par la Cour de Circuit du Comté et du District, pour cause d'illégalité, de la même manière, dans le même délai et avec les mêmes effets qu'un règlement municipal, et sont sujets à l'application des articles 461 et 705."

L'art. 698 statue:

"Tout électeur municipal en son nom propre peut, par une enquête présentée à la Cour du Magistrat ou à la Cour de Circuit du Comté et du District demander et obtenir, pour cause d'illégalité la cassation de tout règlement municipal avec dépens contre la Corporation."

Dans mon opinion ces deux artieles n'ont trait qu'aux actes faits par le Conseil Municipal, savoir, *tout règlement*, suivant l'art. 698 et suivant l'art. 100, "tout procès-verbal, rôle, résolution ou autre ordonnance du Conseil Municipal."

Mais le rôle des évaluations n'est pas un acte du Conseil Municipal; le Conseil Municpal peut seulement le reviser, le modifier ou le compléter suivant l'art. 734. Les amendements par lui faits conformément à l'art. 738 au rôle seraient bien des actes tombant dans la catégorie de ceux mentionnés en l'art. 100, mais le rôle lui-même ne peut être rejeté ni passé sous silence par le Conseil Municipal; c'est l'acte d'*officiers municipaux* [art. 365] qui, quoique nommés par le Conseil Local, ne sont pas néanmoins sous son contrôle, leurs fonctions étant réglées par la loi [art. 366, 375, 585, 716, 717, 727, 728, 730, 731, 733.] Ce rôle d'évaluation n'est donc pas un de ces rôles dont parle l'art. 100, et il n'est assujetti qu'aux règles contenues dans le ch. II du titre XI du Code Municipal.

Les requérants ici se sont trompés en s'attaquant directement au rôle d'évaluation sur lequel le Conseil Local n'a fait aucun acte, ni rendu aucune décision, puisqu'il n'y a eu aucun procédé adopté à cet égard.

Peut-être eussent-ils pu y arriver incidemment en attaquant le rôle de cotisation fait par le Conseil Local basé sur ce rôle d'évaluation; mais encore il se serait élevé une difficulté: Comment la Cour aurait-elle pu sur contestation du rôle de cotisation déclarer nul le rôle d'évaluation?

La Cour de Circuit n'a donc pas juridiction pour s'enquérir de la validité de ce rôle d'évaluation, et c'est ce que la Cour de Révision vient de décider dans la cause McLaren vs. La Corporation de Buckingham.

N. B. Les défendeurs ont d'abord plaidé par une défense en droit dont les raisons ont été déclarées insuffisantes; mais ils n'ont pas soulevé la question de juridiction, et comme la Cour a été d'opinion qu'elle était incompétente *ratione materiæ*, il lui était impossible de procéder à juger le fond, et elle a en conséquence rendu le 31 mars 1873 le jugement qui suit:

"Considérant que la Cour de Circuit n'a pas de juridiction pour s'occuper de la présente demande, la Cour renvoie les parties à se pourvoir comme elles aviseront sans frais."

Dorion, Dorion & Geoffrion pour le requérant.

Vilbon pour les défendeurs.

(J. K.)

COUR DU BANC DE LA REINE, 1873.

EN APPEL.

QUEBEC, 20 MARS 1873.

Coram DUVAL, JUGE EN CHEF, DRUMMOND, BADGLEY ET MONK, JUGES.

No. 79.

LOUIS DOYON,

APPELANT;

ET

LA CORPORATION DE LA PAROISSE DE ST. JOSEPH,

INTIMÉE.

JUGE:—Que, dans une action en réintégrande avec des conclusions demandant des dommages, l'avis d'un mois requis par l'art. 22 C. P. C. n'est pas nécessaire.

Qu'une Corporation municipale, est responsable des actes de ses officiers, si elles les a ordonnés ou si elle essaie de les justifier.

Que dans l'espèce l'action en réintégrande était bien intentée et que dans tous les cas, ses conclusions contenant tout ce qui est nécessaire pour une action en complainte, elle aurait toujours été maintenue;

Que les formalités imposées par le Statut pour l'ouverture d'un chemin et pour l'expropriation des particuliers doivent être suivies avec rigueur et à peine de nullité.

L'appelant avait porté une action en réintégrande contre l'intimée pour recouvrer la possession d'une partie de sa terre dont la Corporation s'était emparée en y ouvrant un chemin au public, et demandait en outre des dommages.

L'intimée produisit une défense en fait et une exception dans laquelle elle prétendit qu'elle avait agi en vertu d'un procès-verbal du conseil du comté de Beauce en date du 24 juillet 1867, lequel ouvrait ce chemin et ordonnait que les travaux fussent faits dans l'espace de trois ans. Elle prétendit ensuite par le même plaidoyer que les voies de fait en question avaient été commises à son insçu et qu'elle n'en était pas responsable; enfin qu'elle avait la possession de l'an et jour du terrain en question, lequel formait partie des chemins de la Muni-

Louis Doyon, et La Corporation de la paroisse de St. Joseph.

cipalité. L'appelant fit de suite motion suivant l'art. 146 C. P. C., mais cette motion fut rejetée avec dépens.

Il produisit alors des réponses spéciales dans lesquelles il alléguait la nullité du procès-verbal en question:

1. Parce que le conseil du comté de Beauce, après avoir nommé un surintendant pour faire ce procès-verbal, (lequel avait fait une visite des lieux et avait refusé de continuer sa charge,) n'avait pas le droit de nommer un autre surintendant tel qu'il l'avait fait; 2. Que le 1er surintendant était le seul qui pouvait agir. (Voir Sect. 45 et 62 § de l'acte de 1860. Voir aussi Sect. 30 § 3); 3. Que le 2e surintendant n'avait pas donné les avis nécessaires et que les avis donnés par le conseil de comté pour l'homologation du procès-verbal étaient insuffisants, l'un de ces avis ayant été donné cinq et l'autre trois jours avant la séance, la loi exigeant sept jours d'avis.

L'appelant prétendait de plus qu'en supposant que le procès-verbal en question fut régulier, l'intimée ne pouvait pas entrer sur son terrain; 1. Parce qu'il n'y avait pas eu d'estimation légalement faite de la valeur de son terrain. Que les prétendus estimateurs qui avaient déclaré qu'il n'y avait pas lieu à accorder de compensation à l'appelant n'étaient pas légalement estimateurs, et que dans tous les cas il avait objecté à leur décision, et avait appelé de leur sentence, dans les délais voulus, et que le 12 novembre 1869, jour des voies de fait en question il n'y avait pas encore de décision sur le dit appel.

La preuve établit la possession de l'appelant et les voies de fait allégués.

1. L'intimée prétendit d'abord qu'elle aurait dû avoir un avis d'un mois de la présente poursuite suivant l'art. 22 du C. de P. C., et cita à l'appui la cause de Jetté vs. Choquette, 7 L. C. R., p. 63.

L'appelant cita en opposition la cause de Iwan *vs.* Boston et al., 2 L. C. J., p. 171; celle de Esinhart *vs.* McGuillan, 6 L. C. R., p. 456. Cette prétention de l'intimée a été repoussée par les deux cours.

2. L'intimée prétendit ensuite que l'appelant ne pouvait pas obtenir les conclusions d'une action en réintégrande, et que les faits prouvés par lui ne pouvaient servir de base qu'à une action en complainte. Il était établi en preuve qu'on avait défait la clôture des deux côtés de la terre de l'appelant et qu'on avait abattu les arbres et les *ferdoches* sur une largeur de douze pieds en y traçant un chemin dans lequel on avait passé depuis. Que ces travaux avaient été faits par l'inspecteur des chemins nommé spécialement pour faire ouvrir celui-ci, et à qui il avait été ordonné par une résolution du 2 août 1869 de faire les travaux nécessaires à cet effet. L'appelant prétendait qu'il n'y avait pas une dépossession plus réelle que celle qui consistait à convertir son terrain en un chemin qu'on ouvrait ainsi à tout le public.

La Cour Inférieure adopta les prétentions de l'intimée, mais la Cour d'Appel a renversé cette partie du jugement et déclaré que l'appelant avait de fait été dépossédé par l'intimée, et que, même dans le cas où la dépossession n'aurait pas eu lieu, l'action de l'appelant pouvait encore être maintenue, parce que ses conclusions contenaient tout ce qui est nécessaire dans une action en complainte.

Louis Doyon, et La Corporation de la paroisse

3o. L'intimée prétendait encore qu'elle n'était pas responsable des voies de fait commises par son inspecteur;—que celui-ci n'est qu'un mandataire et que du moment qu'il excède ses pouvoirs il ne lie plus son mandant; que son devoir, si les travaux n'étaient pas faits, était de faire rapport au Conseil et de se faire autoriser à les faire, et que n'ayant pas pris cette précaution, et ayant agi de sa propre autorité, il ne pouvait pas rendre l'intimée responsable.

L'appelant répliquait que le Conseil avait lui-même ordonné que les travaux fussent faits par sa résolution du 2 août 1869, et que l'inspecteur en question avait été nommé exprès pour faire ouvrir ce chemin, et que si l'intimée était responsable des omissions de ses officiers, à plus forte raison, devait-elle être responsable des actes qu'elle commande et qu'elle ordonne. La Cour Inférieure avait aussi adopté l'avis de l'intimée, mais la Cour d'Appel a encore renversé cette partie du jugement.

La question de la validité ou de la nullité du procès-verbal longuement débattue en la présente cause devant les deux cours a été décidée dans le sens des prétentions de l'appelant en appel. Telle était aussi l'opinion de la Cour Inférieure, quoiqu'il n'en soit pas fait mention dans son jugement. Il a été clairement déclaré que les formalitées imposées par le statut doivent être suivies rigoureusement, et que lorsque la loi prescrit qu'une chose sera faite d'une certaine manière, il est non seulement de l'intérêt et de l'avantage de tout le monde de se conformer à ses prescriptions; mais tout ce qui sera fait en violation de ces prescriptions sera considéré comme une nullité.

La Cour Supérieure présidée par l'hon. J. N. Bossé, avait rendu le 13 juin 1872, le jugement suivant:

La Cour, etc., etc., considérant qu'il résulte de la preuve faite par le demandeur que dans le mois de novembre 1870, le nommé Louis Jacques et quelques autres individus sont entrés sur la terre du demandeur décrite en la déclaration en cette cause, y ont abattu trois ou quatre épinettes, arraché les arbustes qui s'y trouvaient dans environ douze pieds de large, sur la largeur de la terre du demandeur, et ont aussi défait trois ou quatre pagées de clôture de ligne et ont ensuite laissé le tout dans le même état, n'y sont jamais retournés depuis, sans qu'il soit prouvé ni même prétendu que le demandeur ait été dépossédé ni aucunement dessaisi du dit terrain;

Considérant que les dites violences sont des voies de fait qui constituent bien en loi un trouble qui aurait pu donner lieu à une action en complainte dont l'objet aurait été de la part du demandeur d'être maintenu dans la possession du terrain sur lequel a eu lieu le trouble dont il se plaint, mais ne peuvent donner lieu à une action en réintégrande, par laquelle il demande que la défenderesse soit condamnée à lui vendre cette dite partie du dit terrain et à être réintégré dans la possession paisible d'icelui pendant qu'il n'a jamais perdu cette possession ni la saisine d'icelui;

Considérant de plus que les voies de fait dont se plaint le demandeur sont des violences commises par le nommé Louis Jacques, qui, bien qu'inspecteur de chemins pour la localité dans laquelle se trouve le terrain en question, ne paraît cependant pas avoir agi dans la dite circonstance par l'ordre immédiat de la dite défenderesse qui ne paraît pas en avoir pris la responsabilité.

La Cour déboute, etc., avec dépens.

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La Cour d'Appel renversa ce dernier le 20 mars 1873. Voici son jugement.

La Cour, etc., Considérant que l'appelant a prouvé les allégations principales de son action en cette cause et notamment que l'intimée s'est illégalement emparé de l'étendue de terre appartenant à l'appelant et désignée en sa déclaration, et la détenait malgré lui et à son préjudice lors de l'institution de l'action de l'appelant tel qu'allégué en la déclaration susdite de l'appelant ;

Considérant que l'intimée a failli de prouver les allégations de sa défense et de plus que le procès-verbal en date du 24 juillet 1867, en vertu duquel elle s'était emparé et mis en possession du terrain de l'appelant pour l'utiliser comme chemin public n'a pas été précédé des formalités nécessaires pour le rendre valable, et qu'en autant le procès-verbal est nul ;

Considérant que dans le jugement de la Cour Supérieure rendu à St. Joseph, dans le district de Beauce, le 13e jour de juin 1871, il y a erreur en ce que par le dit jugement l'action de l'appelant est renvoyée, cette Cour casse et anulle le dit jugement, et rendant le jugement que la dite Cour aurait dû rendre, renvoie la défense de l'intimée et la condamne à rendre et restituer la dite partie de terre à l'appelant, et défense est par le présent faite à l'intimée de ne plus molester ni troubler l'appelant dans la possession du dit terrain ou d'aucune partie d'icelui, et de plus condamne l'intimée à payer à l'appelant par forme de dommages, la somme de dix piastres avec intérêt de ce jour, et condamne l'intimée à payer à l'appelant tous les frais dans les deux Cours.

Blanchet & Pentland, procureurs de l'appelant.

E. Vézina, procureur de l'intimée.

(B. & P.)

CIRCUIT COURT, 1873.

MONTREAL, 9TH MAY, 1873.

Coram BEAUDRY, J.

Lusher vs. *Parsons.*

HELD :—That in cases in the Circuit Court, under $60, a deposit is required with preliminary pleas. 2. That in such cases copies of these pleas must be served on the plaintiff's attorney.

This was an action for the recovery of $41, and the defendant fyled an exception *à la forme*, alleging certain informalities in the writ and copy. The plaintiff moved to dismiss the exception, on a number of grounds, the two last being that there was no deposit made with the exception, and that no copy had been served on the plaintiff's attorney. The Court granted the plaintiff's motion on the last two grounds, and dismissed the exception.

Exception dismissed.

L. H. Davidson, for plaintiff.

F. J. Keller, for defendant.

(M. B. B.)

Vide Contra : Desjardins vs. Chretien. TORRANCE, J., 15 L. C. Jurist, page 56, and Allie vs. Pamelin, LORANGER, J., 14 L. C. Jurist, page 134. (Reporter's note.)

COURT OF REVIEW, 1873.

QUEBEC, 16TH JANUARY, 1873.

Coram STUART, J., TASCHEREAU, J., DUNKIN, J.

No. 1614.

La Banque Nationale,

Plaintiff;

vs.

The City Bank,

Defendant;

&

The City Bank,

Plaintiff en garantie;

vs.

The Bank of Montreal,

Defendant en garantie.

HELD:—That checks fraudulently initialed as accepted by the manager of a Bank, and for which the drawer has given in exchange to the manager certain securities which the Bank retains, cannot be repudiated by the Bank, when the checks are held by a "bona fide" holder for value.

This was a hearing in review of a judgment rendered in the Superior Court at Quebec, by STUART, J., 7th June, 1872.

The action was in Warranty, argued in March 1872, against the Bank of Montreal, to guarantee and save harmless the City Bank against a demand of the Banque Nationale for $95,000, amount of four cheques drawn by Edward Sanderson upon the Bank of Montreal, accepted by the latter and placed to the credit of the City Bank in its deposit account with the Banque Nationale, upon an alleged undertaking of the City Bank to refund the amount of the four cheques, if not paid. The defence to the action was that Harris, the manager, who accepted the cheques for the Bank of Montreal by placing his initials P.P. H. on them, had no authority to do so, and that there was collusion between the officers of the City Bank and Harris, to supplement an overdrawn account of Sanderson with the Bank of Montreal by means of the four cheques.

The case of the City Bank was argued by Mr. OKILL STUART, Q.C., and Mr. D. A. Ross.

The facts, as submitted for the plaintiff, were that on the 14th Sept., 1869, the Bank of Montreal had its branch at Quebec.—That Harris, for about three years before, had been manager of it, preceded by Mr. Christian, for about two years. Sanderson was the broker of the Bank of Montreal, and kept a general deposit account at the Branch. Overdrafts of Mr. Sanderson on this account had been allowed by Christian, as manager, in matters of exchange and silver purchased for the Bank, by placing his initial C. on them, and afterwards by Harris, as manager, who placed his initials P. P. H. on them when the account was overdrawn by Sanderson for his general business. The Ledger of the Bank of Montreal at a glance indicated every overdraft. In 1867 and in 1868, Harris

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being then manager, the account of Sanderson was inspected by Mr. Christian, then inspector, and no fault was found with these overdrafts by the head office at Montreal, to which Christian made his reports. Previous to the 16th Sept., 1869, for a whole year, the certified cheques of Sanderson to the amount of from three to four daily, in the aggregate amounting to a large sum, initialed P.P.H., passed through the Banque Nationale alone, and were paid daily by the Bank of Montreal. Observing this practice, the cashier of the Banque Nationale went to ascertain if it was correct, and was informed by Mr. Harris, at the Branch, that it was. This was about six months before the 14th of September.

The City Bank had no branch at Quebec, but employed Mr. McGie, as agent, for the special purpose of circulating its notes there, by giving them in exchange for cheques and drafts obtained from the community at large and depositing them in the Banque Nationale, in the deposit account kept there for the City Bank, against which McGie had authority to draw. Mr. McGie had for his clerk Mr. Ahern, to whom was entrusted the pass book and a blank cheque book, each blank cheque in it signed by him, leaving to Ahern the filling up of the cheques as "City Bank Agency" cheques, when required for the purpose of circulating the City Bank notes. On the 13th September, 1869, Sanderson obtained from Ahern, one of the "City Bank Agency" cheques, filled up over McGie's signature, for $17,000, and gave in exchange for it a cheque of his own, accepted by Harris, on the Bank of Montreal, also $17,000. The "City Bank Agency" cheque was received by Harris and placed to the credit of Sanderson's account in the Bank of Montreal. Harris then sent it to the Banque Nationale, where it was paid and debited to the City Bank. The next day (14th September) Sanderson obtained a second "City Bank Agency" cheque filled up over McGie's signature by Ahern, for $18,000, and gave for it a cheque of his own accepted by Harris, on the Bank of Montreal, for $18,000, and this "City Bank Agency" cheque so given for the last mentioned cheque of Sanderson, was also received by Harris, placed by him to the credit of Sanderson, in his deposit account with the Bank of Montreal, and then sent by him to the Banque Nationale, where it was paid and debited to the City Bank, in its account there. On the same day, (14th September,) a third "City Bank Agency" cheque for $17,000, filled up by Ahern, over McGie's signature, for $17,000, was obtained by Sanderson from Ahern, for which he gave his own on the Bank of Montreal, accepted by Harris, and this "City Bank Agency" cheque was also received by Harris, placed by him to the credit of Sanderson, in his deposit account with the Bank of Montreal, and then sent to the Banque Nationale, where the Bank of Montreal received the amount. On the afternoon of the 14th September, Mr. Christian, then the inspector of the Bank of Montreal, arrived at the branch at Quebec, for the purpose of examining the deposit account of Sanderson. Upon his arrival he looked at it and saw that it was overdrawn, and at the same time he said to Harris that he knew what he came for and hoped to find matters all right. Harris immediately sent for Ahern and obtained from him, over McGie's signatures, three drafts on the City Bank at Montreal, for the sum of 43,000, about the sum for which Sanderson's account was overdrawn. He

then went to the Bank Ledger and erased the letters Dr. and Cr., changing their places, and by entering the $43,000 received from Ahern in drafts, which he wrote over an erasure, he converted the debit seen by Mr. Christian into a credit. This was observed by Mr. Christian at the opening of the Bank, on the morning of the 15th September, when he received from Harris the three drafts received from Ahern making up the $43,000. On the same morning Ahern applied to Mr. Christian to exchange them for "City Bank Agency" cheques on the Banque Nationale at Quebec, to which Mr. Christian assented. This agreement between Mr. Christian and Ahern was carried into effect only in part, as but one "City Bank Agency" cheque on the Banque Nationale in exchange for one of the drafts, was filled up for $18,500, and given by him to Mr. Christian, and this was paid also to the Bank of Montreal on presentment at the Banque Nationale. The two remaining drafts which were made payable by Ahern to the order of the Manager of the Quebec Branch, were endorsed by him and paid by the City Bank to the Bank of Montreal in Montreal. The total of City Bank monies thus received by the Bank of Montreal, on and previous to the 15th September, amounted to $95,000. These moneys were taken from funds at the credit of the City Bank to facilitate the circulation of its notes, without its knowledge, but with the knowledge of Harris, acting as the manager of the Branch of the Bank of Montreal, on and previous to the afternoon of the 15th September. The four cheques of Sanderson mixed up with other monies, but shewn on *bordereaux*, were deposited to the credit of the account of the City Bank with the Banque Nationale. Shortly after receiving the last portion of the consideration for the cheques of Sanderson, viz: The above mentioned cheque for $18,500, the Bank of Montreal being then secured, as Mr. Christian imagined, he went over to the Banque Nationale, and intimated to their cashier that the cheques of Sanderson, accepted by Harris, would not be paid. This was between two and three o'clock in the afternoon of the 15th Sept. The cashier, Mr. Vezina, immediately sent for Ahern, and went with him to the office in the Branch always occupied by the manager, where Harris, seated in the manager's chair, notwithstanding the interposition of Mr. Christian to prevent him, admitted the initials on the accepted cheques to be his. Ahern then expressed his surprise to Mr. Christian at the refusal of the Bank of Montreal to pay its acceptances after he himself, Christian, had a short time before on that morning received from him, (Ahern,) the $18,500, a part of the consideration for which the last Sanderson cheque was given, and to this Mr. Christian made no answer.

Upon this statement the City Bank contended that Harris had the power to certify cheques as good, by virtue of his office, as well as from the usage prevalent in the commercial community as part of the law of merchants. The custom to certify cheques by the cashier had been abundantly proved, and, when certified, that they passed as freely as the notes of circulation of the Banks, and had always been received as money in their daily exchanges. The certification of cheques is so essential to commerce at the present day, that in large commercial cities where hundreds of millions pass daily through the banks, it is impossible to do the necessary amount of business without it. This has been felt in the United

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States, where the inherent power in a cashier to certify cheques was for many years questioned; but now, by a recent decision of the Supreme Court of the United States, in the case of *The Merchants' National Bank*, against *The State National Bank*, the question has been finally settled by the latter bank being condemned, so recently as in December, 1870, to pay to the former a sum of $600,000, the amount of three cheques certified by their cashier. The Court, in that case, said, in relation to the authority of a cashier:—"It is his duty to receive all the funds which come into the Bank, and to enter them upon its books. The authority to receive implies and carries with it the authority to give certificates of deposit and other proper vouchers. When the money is in the bank, he has the same authority to certify a cheque to be good, charge the amount to the drawer, appropriate to the payment of the cheque and make the proper entry on the books of the bank. This he is authorized to do *virtute officii*. The power is inherent in the office." But it is said, on behalf of the Bank of Montreal, there is an Individual Ledger Keeper in all the Banks, whose business it is to certify cheques before they go into circulation. An answer to this is to be found in the opinion of the Court already referred to. "The cashier is the executive officer, through whom the whole financial operations of the Bank are conducted. He receives and pays out the monies, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of his various functions are discharged. A teller may be clothed with the power to certify cheques, but this, in itself, would not affect the right of the cashier to do the same thing. The Directors may limit his authority, as they deem proper, but this would not affect those to whom the limitation was unknown." It is difficult to imagine that the management at the head office in Montreal were unaware of the practice of Mr. Christian and Mr. Harris to certify cheques, particularly as cashiers in Montreal do the same thing. A practice and usage as in Sanderson's case has prevailed in Quebec also for many years. The Bank of Montreal Inspector, Mr. Christian, made his reports of inspection and must have conveyed to the Board of Management at Montreal, information of all things done at the respective branches. Sanderson's overdraft seems to have been known to the Board of management at Montreal, as they sent down Mr. Christian for the express purpose of examining it. Why it came to this determination they have offered no evidence to show. It does not appear that they charge Harris with doing wrong, for allowing the overdrafts by Sanderson; nor does it charge Sanderson with doing wrong in overdrawing. There is nothing, either, showing its disapprobation of its officer, Mr. Christian, when he took $18,500 of City Bank monies direct from Ahern, and the balance of the cheques for $43,000 from Harris. The Bank of Montreal has approved, also, of the alteration in the Ledger, as it remains unchanged, and its own officers have balanced the account of Sanderson with the changes by erasure made by Harris upon it.

Apart from the inherent power in a cashier to certify, the usage is binding on the Bank of Montreal. A cashier, the offspring of modern commerce, is, as stated by Baron Parke, of bill-brokers, not a character known to the law with

certain prescribed duties, but his employment is one that depends entirely on the course of dealing. It may differ in different parts of the country. The nature of these powers and duties is a question of fact, and is to be determined by the usage and dealing in the particular place.

Holt, Q.C., for the Bank of Montreal, said, in substance:—The case of the City Bank was not of the favourable character ascribed to it. The case exhibited the following facts:—That in 1862, McGie was doing business as a general agent for assurance companies and others, and that, as such agent, he had an account in the Banque Nationale under the heading "Daniel McGie, agent." As part of his business he had to redeem the notes of circulation of the City Bank. Matters went on till 1869. He had in his pay, Ahern who indulged in speculations. Sanderson, through the weakness of Harris, was allowed to overdraw. Without imputing criminality to Harris, he permitted Sanderson to overdraw, and it was by means of Ahern that the overdraft was kept up. Ahern had access to blank cheques in McGie's drawer, so that when returns were made to Montreal the accounts were made correct. Ahern goes to the drawer, takes out a draft of McGie's, fills it up, and receives Harris' acceptance for the amount. For a few hours Sanderson had, perhaps, $35,000 to his credit, covering the deficiency from time to time by the agency of Ahern. If you, the City Bank, gave opportunities to Ahern to get these cheques, you are the cause of our loss. It so happened that when this course was interrupted the balance was in our favour, so that the Bank of Montreal is not without strong moral grounds. We say to the City Bank, this is your act and you are answerable. But what proof is there in support of this action? Why are we the *garants* of the City Bank? The warranty must be founded on something. The case set out in the plaintiff's declaration is that, Sanderson on the 13th September, 1869, drew a cheque on the Bank of Montreal for $17,000, payable to bearer, which the Bank of Montreal accepted; that Sanderson delivered the cheque so accepted to the City Bank for value received, and the City Bank transferred and delivered it to the Banque Nationale. The same allegations are made as to the three other cheques, and the declaration then states that the cheques were protested, that the City Bank was sued by the Banque Nationale in an action for the amount of the four cheques, and, therefore, the Bank of Montreal was bound to indemnify and keep harmless the City Bank against this demand. Looking at the case without reference to the special plea of the Bank of Montreal, it is submitted that the plaintiffs have failed to make out their demand in evidence, viz., the acceptance of the cheques by the Bank of Montreal, the delivery of them by Sanderson to the City Bank, and by the City Bank to the Banque Nationale. The proof of the City Bank is not in accordance with these allegations, however much it may appear to support a possible claim of the City Bank put in another shape. The salient points to be kept in view, for the purposes of this argument, are assumed by the Bank of Montreal:—1st. Donald McGie carried on business as a general agent for insurance, as a wharf-holder, for private individuals, and as agent of the City Bank at Quebec, in so far as respected the circulation of its notes there. As a

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general agent, McGie kept a deposit account with the Banque Nationale, and that account was not the account of the City Bank. It is true that in the principal suit of the Banque Nationale the jury have found that the account of McGie in the Banque Nationale was the City Bank account, but in this case it will be shewn that it was the account of McGie. Mr. McGie states that it was an ordinary deposit account, upon which he alone had a right to draw, that he paid into this account all insurance premiums and other monies he had to deposit, including the funds of the City Bank; he says also the City Bank never recognized Edward H. Ahern as their clerk or agent. The only account in the name of the City Bank was a circulation account between the two banks, settled daily. A copy of the bill of particulars, on which the principal demand is brought by the Banque Nationale against the City Bank, is headed: "The City Bank, Dr.," and is fyled in the suit. This heading is probably in accordance with the view which the Banque Nationale takes of this account, but it is at variance with the statements of McGie and his son, and of Paquet, the accountant of the Banque Nationale. The City Bank, in answers on facts and articles, state that they were not cognizant of the deposit account until about the 18th Sept., 1869, and were then led to believe that it had been exclusively a City Bank account, which subsequent enquiry shewed to be incorrect. The City Bank did not recognize the deposit account, and McGie never saw the cheques until produced in Court. The facts shew that Sanderson had, in an irregular way, obtained the initials of Mr. Harris, the manager of the Quebec Branch of the Bank of Montreal, upon the four cheques, there being no funds to meet them, he handed them to Ahern, who deposited them to the credit of McGie in the Banque Nationale. The obtaining and depositing of the cheques in the Banque Nationale was not a matter of business, but part of a system of accommodation between Sanderson, Harris and Ahern. The City Bank knew nothing of it. McGie, their agent, knew nothing of it. In receiving the cheques from Sanderson, Ahern neither actually nor constructively represented the City Bank, for they never knew or recognized his acts. There is, therefore, no pretence for saying that Sanderson delivered the cheques to the City Bank, or that the City Bank delivered them to the Banque Nationale. Even supposing that Ahern gave, in exchange for the cheques, gold, bank notes, or blank cheques filled up by Ahern, or [illegible] taken from the City Bank till, in McGie's office, that would not make the City Bank party to the reception of the cheques delivered to Ahern, a person [illegible] the City Bank, and deposited by him to the credit not of the City Bank, but of McGie.

Upon our plea we shall submit the following propositions:—That the account of Sanderson had been considerably overdrawn previous to Sept., 1869. That Harris, the manager, and Ahern, clerk of McGie, had, with Sanderson, been carrying on a system of concealment of the overdrafts. That the account was overdrawn [illegible] Sept., when there were no funds. That the Bank of Montreal had [illegible] appointed for the special purpose of certifying cheques, the individual ledger-keeper, and the paying-teller could pay no cheques unless accepted by him. That this ledger-keeper sometimes accepted a cheque upon an order of

the cashier and thereby enabled the holder to obtain payment from the teller. The cashier gives instructions to the ledger-keeper to accept under special circumstances, in the use of his discretion. That it is not customary for ledger-keepers of banks to accept cheques for which there are no funds, nor is it customary for the cashier of the Bank of Montreal to accept such cheques. That the cheques in question were given and taken to conceal the overdrawing. The covering of Sanderson's overdraft was for an immoral purpose. Ahern had notice of Sanderson's overdraft. The cheque for $43,000 was given in Sanderson's office to cover the account, and it is uncertain where the other cheques were given. Ahern knew there was no funds, and Harris made up the *bordereaux*. Ahern is, therefore, responsible for the disaster. But it is said that the overdrafts were admitted and known to the Bank of Montreal, through Christian, who saw them when he inspected the books in 1867 and 1868,—but a bank is not responsible for anything overlooked by one of its officers. Then, as respects the power of a cashier to certify cheques, the cases in the United States have been conflicting. A cashier does not bind a bank if he does not act within the scope of his authority, and his authority is analogous to that of the master of a vessel, whose signature to a bill of lading does not bind the owner if the goods are not on board. The Bank of Montreal contends that it is not answerable for the negligence of its inspector, or for the acts of Harris. It is further urged that the plaintiffs have not proved the principal suit to be pending, and that the case is not by the evidence made out against Sanderson.

Okill Stuart, Q.C., in reply—With reference to the deposit account with the Banque Nationale, Mr. Vezina, the Cashier, swears that McGie's account with it is the account of the City Bank, and that McGie, as agent for the City Bank, agreed with him that it should be and was the City Bank account. It is said that the Jury, in the principal suit, have found that it was the deposit account of the City Bank, but that in this case, the Court must say that it was not. Although, in one sense, it might not be, strictly speaking, an account confined to City Bank monies, yet it contained all their monies received by McGie for that Bank, and the "City Bank agency" cheques given for Sanderson were drawn against those monies and paid out of them. McGie had in his books a separate account for each of his agencies, and the cheques were drawn against the amount belonging to each. Besides, if cheques were drawn by the City Bank agency without any deposit account at all, and were paid without any funds to meet them, the credit being given to the City Bank, the latter would be liable for the amount of them, and this would be value when given in exchange for an equal amount of other cheques or drafts. The bill presented to the City Bank, headed "City Bank, Dr.," in which these cheques are debited, is a demand on the City Bank for so much money paid upon these cheques and it is sufficient that the City Bank has shown that these cheques were received by the Banque Nationale as drawn by the City Bank and paid. But it is said that Ahern was not an officer of the City Bank. This is true, but he took the City Bank money, and acting in the name of that Bank, he applied it, unknown to the City Bank, and purchased securities intending to apply them, and did apply them to the use of the City Bank with the Banque Nationale with its consent. It would be very extraordinary if the

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City Bank after discovering this could not avail itself of the substitutes for its own money, which it has done by acquiescing in the deposit of the four cheques to its credit in its account with the Banque Nationale. Then take the last cheque for $43,000; it was paid for by three drafts on the City Bank at Montreal, so that value was given out of City Bank funds for it, and the deposit account has nothing to do with it.

The consideration for the first three acceptances of Harris, on behalf of the Bank of Montreal, was cheques for a similar amount drawn on behalf of the City Bank on the Banque Nationale, and this amount has actually been paid and received by the Bank of Montreal. The consideration of the fourth acceptance was in three drafts on Montreal, for one of which a cheque of the City Bank on the Banque Nationale was substituted, the amount of all which drafts and cheque has, in like manner, been paid and received by the Bank of Montreal, and that Bank now attempts to repudiate their acceptances, to retain the money which they received on the faith of them, and apply that money to an overdrawn account of Sanderson. Mr. Christian assumed the control of the branch at Quebec on the 15th September, and in the morning of that day, after receiving the drafts and cheque amounting to $43,000 notified Mr. Vezina that the acceptances of Harris would not be paid, and this with a full knowledge of what had been done. If his plan of taking the money, without paying the acceptances, were successful, the money thus obtained from the City Bank would be applied to the liquidation of a debt of Sanderson due to the Bank of Montreal, in which neither the City Bank nor even Ahern or McGie had the slightest interest. The Banque Nationale have an undoubted right of action against the Bank of Montreal, the acceptor of the four cheques; their acceptance was an engagement, as in every case of acceptance, to pay the amount upon presentment of the cheques, and in default of payment by the Bank of Montreal, then, and then only, ought the Banque Nationale have attempted to enforce a liability against the City Bank or other party.

The device of the Bank of Montreal to obtain $95,000 of the City Bank money and then repudiate the acceptance on which they obtained it, is no doubt ingenious, and however questionable the morality of the act may be, there can be no question as to its being legally bound to fulfil its engagements and guarantee the City Bank.

The remarks made by STUART J., at Quebec on the 7th June, 1872, maintaining the action *en garantie*, were as follows:

The present is an action *en garantie* simple, by which the plaintiff *en garantie* prays that the defendants *en garantie* may be condemned jointly and severally to intervene in a suit now pending and undetermined in this Court, brought by La Banque Nationale against the plaintiff *en garantie*, and to cause such suit to be dismissed, withdrawn or discontinued, in so far as respects a claim of $95,000, amount of four cheques, one for $17,000, dated 13th September, 1869, one for $18,000, dated 14th September 1869, another of same date for $17,000, and the fourth of the same date for $43,000—amounting in all to said $95,000, drawn by defendant *en garantie*, Sanderson, on the Bank of Montreal, and accepted by it—and in default thereof that the defendants *en garantie* be adjudged and condemned, jointly and severally, to guarantee, indemni-

fy, and save harmless the plaintiff *en garantie* from any judgment which may be rendered in the said suit.

The facts which have given rise to the present litigation are the following:—The Bank of Montreal, as it is well known, for very many years has had a branch established in Quebec, which, in the year 1869 and for some years previously, was under the management of Mr. Harris. Sanderson, the other defendant *en garantie*, was then, and had been for a long time a customer of the Bank of Montreal, and the extent of his banking transactions may be judged of by the fact that there passed through the City Bank and La Banque Nationale, during the year immediately preceding the month of September, 1869, cheques of Sanderson on the Bank of Montreal, accepted by Harris as manager, to an amount exceeding a million of dollars, and the evidence leaves it to be inferred that other cheques of the same kind were negotiated by other banks in this city during the same period of time.

It is proper to explain how Sanderson's cheques found their way into the City Bank and La Banque Nationale. The former of these banks desirous of promoting the circulation of its notes in Quebec, established Mr. McGie as their agent for that purpose, and authorized him to make an arrangement with La Banque Nationale, to open a deposit account with it for the City Bank, and also to redeem the City Bank notes; the accommodation of a deposit account was highly useful, if not indispensable to the efficient circulation of the City Bank notes in the manner contemplated. The description of business that Mr. McGie did for the City Bank was that of cashing in City Bank notes, cheques drawn on other banks after the usual banking hours, thus affording to the commercial community the facilities of a bank for several hours each day, after three, when the doors of all banks were closed.

The understanding of Mr. McGie with La Banque Nationale was that the City Bank should always have to the credit of its deposit account $2,000 or $3,000, and should redeem, latterly, daily, the City Bank notes by means of bills of other banks, or by drafts upon the City Bank at Montreal, payable in gold. In the fulfilment of his agency, McGie every morning found himself worth a greater or less number of cheques which he had cashed the previous day, some unaccepted, and others accepted by the banks on which drawn. These cheques he deposited every morning in La Banque Nationale, and their amount was carried to the credit of the deposit account, and he further redeemed all City Bank notes held by La Banque Nationale. This continued for several years with complete satisfaction on both sides. It was in this manner that, almost daily for a year previous to September, 1869, the accepted cheques of Sanderson on the Bank of Montreal were cashed by McGie and deposited in course in La Banque Nationale, which presented all these accepted cheques for the enormous sum already mentioned to the Bank of Montreal, and received from it payment in due course. It is fitting to mark that the frequency and the importance of the amount of these accepted cheques of Mr. Sanderson, induced Mr. Vezina, the manager of La Banque Nationale, six months before the acceptance of the cheques in question, to call at the Bank of Montreal and inquire if everything was correct about these accepted cheques, and if they would be honoured. He

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received an affirmative answer from Mr. Harris, and in truth, all of such acceptances down to the 15th September, 1869, were paid by the Bank of Montreal to La Banque Nationale on presentation of the cheques.

On the 13th September, 1869, one of these accepted cheques for $17,000 was cashed in the usual way by McGie's clerk, Mr. Ahern, and deposited the next morning in La Banque Nationale. On the 14th Sept., 1869, Mr. Christian, the Inspector of the Bank of Montreal, reached Quebec, about 3 o'clock in the afternoon, having been despatched by the head institution, from information which it had received, to inquire into Sanderson's account, and he immediately proceeded to the Bank of Montreal, in this City, where he informed the manager that he had been sent to inspect the Bank, and without further loss of time looked at the account of Sanderson in the books; he found from this inspection that it was largely overdrawn, but made no observation on the subject. It having become known that there was be an inspection of the Bank, Harris the manager, and Ahern, McGie's clerk, met Sanderson at his office, and it was then thought fitting for Harris to cover the overdraft of Sanderson by monies to be furnished by Ahern, belonging to the plaintiff *en garantie*, upon the security of Sanderson's cheques on the Montreal Bank, accepted in the usual way by Harris, and accordingly a cheque for $17,000, another for $18,000, and a third for $43,000, was drawn by Sanderson on the Bank of Montreal, accepted by Harris and by him handed to Ahern, who then gave to Harris for these acceptances, a like amount of the monies of the plaintiff *en garantie*, consisting of cheques on La Banque Nationale, and drafts on the City Bank at Montreal. Ahern then deposited these accepted cheques in the usual way with La Banque Nationale the following day, which gave credit to the City Bank for the amount. McGie reposed implicit confidence in his clerk, Ahern; indeed to the extent of always leaving with him cheques on La Banque Nationale, signed by him in blank, with authority to fill them up; and also blank drafts on the City Bank of Montreal, with a like power to fill them up, so that Ahern had at all times the power in his hands to draw out any amount of the funds of the City Bank, if he had chosen to betray the confidence reposed in him—hence it was in his power, without any reference to McGie, to use the funds of the City Bank in the way he did on the 14th September, and the record establishes McGie's total ignorance of this transaction. It need not be said that the City Bank were ignorant of it as it could only have derived its knowledge from McGie. The City Bank through McGie chequed out of the Banque Nationale the amount of the four cheques amounting to $95,000. When La Banque Nationale presented these cheques for payment at the Bank of Montreal, they were refused and were thereupon protested—hence the suit brought by La Banque Nationale against the City Bank for $95,000, amount of these cheques credited to it and drawn out.

The Bank of Montreal plead to the present action that Harris, its manager, had no authority to accept cheques—that Sanderson had no funds in the Bank—was largely indebted to it on an overdrawn account—that no consideration or value was given to the Bank of Montreal for these acceptances, and that these acceptances were not given on the Bank premises during business hours—that

there was an officer called the ledger-keeper, whose exclusive duty it was to accept cheques, and that it was no part of Harris' duty —that Sanderson, Harris and the City Bank, intending to defraud the Bank of Montreal, were in the habit of covering and concealing Sanderson's overdrafts. These are the principal grounds on which the Bank of Montreal hold that the acceptances are not binding on it, and that therefore, it is not liable to the plaintiff *en garantie*.

In so far as the defence rests upon Sanderson having no funds in the Bank of Montreal, of his being largely indebted to it on an overdrawn account—on any concert to prevent such indebtedness being discovered, these facts, if established would have no effect one way or the other on the decision of this case. The acceptances in question, if authorised, are acts by which the Bank of Montreal evinced its consent to comply with and be bound by the request contained in the cheques directed to it; in other words, it is an engagement to pay the amount of these cheques to the bearer of them (Chitty on Bills, page 307, 837). Such an acceptance is not revocable, and the acceptor cannot be discharged otherwise than by release or payment. It is vain to invoke reasons, good in themselves, for not accepting, to an actual acceptance. All of the facts pleaded were within the knowledge of Harris, who had reasons for not deeming them sufficient to withhold from Sanderson the accommodation he required, and which had been so frequently before extended to him, and for such large sums; this part of the plea may be passed over without further observation.

The facts of real weight pleaded by the Bank of Montreal are the absence of authority in Harris to accept cheques, and that no consideration or value was paid by the plaintiff *en garantie* to the Bank of Montreal. It is urged, on behalf of the plaintiff *en garantie*, that the authority of Harris to accept the cheques in question is incident to his office of manager of the Bank of Montreal, and that there is a usage and custom among banks in this Province of permitting their customers to overdraw their account upon the authority of the manager and in his discretion, by his initialing or accepting such customers' cheques. This usage or custom appears to be established in evidence, and to be general with banks whenever a short credit is intended to be given to a customer. The strongest language is used by some of the witnesses, and among them managers of banks, to the effect that such acceptances give to the cheques the same currency and value as the notes of the bank itself, whose manager has accepted. Such a usage in one bank, if not pursued in another, would, in the competition for business, operate greatly in favor of the bank giving the accommodation, and to the prejudice, in fact, of such as did not. Such a usage, if at all general, makes its adoption by other banks a matter of business necessity. In this instance, the fact of Sanderson having no funds in the Bank of Montreal at the time, brings him within the category of persons requiring a credit, and who obtained it from Harris by his initialing his cheques. If he had the power, the Bank of Montreal is bound by the acceptance, whether it was judiciously given or otherwise, and whatever the motive, particularly in the hands of La Banque Nationale, which gave value for them. But Harris is not the only manager of the Bank of Montreal that has exercised this power. It appears probable that Mr. Christian, the manager preceding Mr. Harris, gave Sanderson his initials to

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cheques in the same way; but though this is not perfectly clearly established, it is well proved that Mr. Henry, the manager who succeeded Harris, accepted the cheques for customers by his initials, and that such cheques were duly paid. So that the power denied to Harris in the pleadings was permitted to be exercised at all events by Mr. Henry after the difficulties in question in this cause had arisen and were the subject of litigation. I incline, therefore, strongly to the opinion that the usage among banks of granting credit to their customers through their managers, exercised in the way it was in this case, is proved, and that such was the usage with the Bank of Montreal itself, so that the public, left to infer the power of managers by the exercise of such powers, would seem to require to be protected by holding the bank bound by the act.

But it is further urged by the plaintiff *en garantie* that whatever the power of the manager, under the general usage and custom of banks, Mr. Harris must be presumed to have had the authority of the Bank of Montreal to accept Sanderson's cheques, from the public exercise of that power for so long a time as that proved, and for so many and such important transactions with what must be held to be the assent and acquiescence of the Bank of Montreal—it having a knowledge, or the means of acquiring a knowledge, of the circumstances of the case; (Dunlap's agency, p. 771,) for what better evidence of the knowledge, and consequently of the assent and acquiescence of the Bank of Montreal, in this mode of granting credit to Sanderson, than the transactions being regularly entered in the books of the bank, and these shewing, as Mr. Christian swears in his evidence in this case, that Sanderson had been permitted to overdraw his account a hundred times and more? The Bank of Montreal cannot plead ignorance of the contents of the books of that institution, and hence with a knowledge of the circumstances of Sanderson being allowed to overdraw, the Bank by not objecting to it, has adopted the acts of their manager and is bound by them. It follows that the authority of Harris to accept the four cheques in question is presumed from the previous conduct of the Bank of Montreal in recognising his acceptances as binding upon it and paying them, and this to the knowledge of the City Bank and La Banque Nationale, who both received the four cheques in question and both gave value for them on the faith of similar acceptances having always been recognized and honored by the Bank of Montreal. The manager of a bank is entrusted with the funds of the bank, and is held out by the bank as its general agent; it would be productive of much injustice if the bank could, after sanctioning a particular mode of doing business, suddenly question the propriety of it, and deny the power of its own officers in such management.

In order to give weight to the objection taken to the authority of the manager to accept cheques, it is alleged that there was an officer in the Bank of Montreal specially appointed to accept cheques, known as the ledger-keeper. The reference to this officer is more plausible than real; it is necessary with every bank to be prepared when a cheque is drawn upon it, with the information whether the drawer has funds to his credit, hence the cheque is handed to the ledger-keeper, who turns up to the account of the drawer and if there are funds he enters the cheque to his debit, and initials it, as an authority to the paying-teller to honour it. This is not properly an acceptance of the cheque; the customer

has nothing to do with the operation. The Bank imposes on one clerk, the ledger-keeper, the duty to ascertain and certify if it has funds of the drawer, and upon another, the paying teller, the duty of paying it. This is the mere internal economy of the bank. The question between the bank and the drawer of a cheque upon it is, funds or no funds, without the operation of the ledger keeper influencing that question one way or the other. There is not a tittle of evidence that such clerks are checks on the manager, but the contrary appears. Mr. Vezina, the manager of La Banque Nationale, very properly and completely describes the effect of the initials of the manager upon a cheque to be an instruction to the ledger keeper to debit the drawer with the amount, and to the paying teller to pay it. The effect and intent of the manager in putting his initials on a customer's cheque is an instruction to the officers of the bank to give him a credit for the amount of it. This does seem to me to be an act of management, and to be incident to the office of manager.

I now come to the most important head of defence, that by which it is pleaded that the plaintiff *en garantie* gave no value or consideration for these acceptances. This, if true in fact, is one of great weight, and would give support to the allegation of a combination to deceive and defraud the Bank of Montreal, which allegation must be proved as existing, not in intent only, but in fact; a mere *consilium fraudis* would not be enough, unless there were t ie *eventus damni*.

Now, the evidence in this case leaves no doubt of Ahern havi g given $95,000 of the monies of the City Bank for the cheques in question, and that Harris handed the drafts and cheques so given to Mr. Christian, who saw to the collecting, and did, in fact, collect the $95,000 from the City Bank, and the Bank of Montreal have now in their coffers this money. That Harris obtained from Ahern the money of the City Bank for the Bank of Montreal, and paid it over is certain. It is equally true that his motive was to conceal the state of Sanderson's account. But though such conduct is, doubtless, blameable, I have looked in vain for an actual fraud practised on the Bank of Montreal in relation to these cheques. Sanderson's account was not by these means increased by a single dollar, it was overdrawn at the time, and the Bank of Montreal was informed of the fact before the acceptance of these cheques and, whatever the intention, nothing that was done did in fact deceive anybody, and the Bank of Montreal got full value for the promise of Harris to pay these cheques. The monies of the City Bank were given to the Bank of Montreal for these acceptances and for no other consideration.

Did the question present itself under the aspect of which of two innocent persons should suffer loss by the act of Harris, I should think that the Bank of Montreal, as having put in the power of Harris to cause the loss, should bear it, but under the circumstances of the present case the question does not present itself in that form. The City Bank has paid $95,000 for these cheques of the Bank of Montreal; and if it were to be compelled to pay other $95,000 to the Banque Nationale, because of the refusal of the Bank of Montreal to honor these acceptances, it would lose this sum, but if the Bank of Montreal be made to pay these cheques to La Banque Nationale, it loses nothing, because it had already received from the City Bank $95,000 for these very acceptances; but it

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would apply the monies of the City Bank to the payment of the debt due by Sanderson to it, and thus, benefit by $95,000 to the detriment of the City Bank. So that the question is not, which of two innocent persons shall suffer from the act of a third. The question is one of banking, to be governed by those comprehensive principles of fair dealing which should regulate commercial matters. The case would be different, if after obtaining the City Bank funds for his acceptance of Sanderson's cheques, Harris had appropriated them to his own use, and the Court were called upon to decide whether the loss should fall on the one bank or the other, but such is not the case. Harris gave his acceptances to get funds for the Bank of Montreal, and, having got them, he handed them to Mr. Christian, the Inspector, who forthwith proceeded to collect and put the amount in the coffers of the Bank, where it has ever since remained. Thus, funds obtained by the Manager of the Bank of Montreal from the City Bank for the Bank of Montreal have been received by it, and are now retained by it, and yet the Bank of Montreal thinks itself at liberty to call in question this act of Mr. Harris. It will be more satisfactory to state the law on this branch of the case from the books:—"As an authority may be presumed from the previous employment in similar acts, so the same presumption arises from subsequent acts of assent or acquiescence, and a smaller matter will be evidence of such assent, and if with a knowledge of all the circumstances an employer adopts the acts of his agent for a moment he is bound by them—Dunlop's Agency, p. 171 and 172. An adoption of the agency in one part, with a knowledge of the circumstances, is an adoption of the whole act; for an act cannot be affirmed as to so much as is beneficial and rejected as to the remainder. Thus an agent had been *secretly employed* on behalf of a bankrupt after his bankruptcy to lay out money in India bonds. The assignees, upon discovering the fact, *seized some of the bonds* remaining in the agent's hands, and accepted them as part of the estate, and afterwards brought an action against him for the money with which the bonds were purchased. The Court was very clearly of opinion that the acceptance of some of the bonds was an affirmance of the agent's act in laying out the money, and that the assignees could not now avow one part of the transaction and disavow the other.—Wilson and Poulter, 2 Str., 850.

Such adoptive authority relates back to the time of the original transaction, and is deemed in law the same to all purposes as if it had been given before. Lawrence & Taylor, 5th Hill 107, 113.

"If I make a contract in the name of a person who has not given me any authority, he will be under no obligation to ratify it, nor will he be bound to the performance of it. But if with full knowledge of what I have done, he ratify the act, he will be considered to have contracted originally by my agency, for the certification is equivalent to an original authority, according to the maxim that *omnis ratihabitio mandato aequi paratur*.—See Liv. Pri. and Ag. p. 44, and seq.

The acts of the principal are to be construed liberally in favor of an adoption of the acts of an agent.—p. 394.

It is evident that there can be no stronger ratification of the act of an agent

than the principal's availing himself of such act although unauthorized; and that in like manner a person by availing himself of the act of one whom he had not originally appointed his agent must be deemed retrospectively to have created the agency from which he derives profit. In either case the presumed ratification subjects the principal to the same liabilities to third persons or to the agent, as if the latter had in the one case acted within the scope of his power, or in the other had been duly constituted agent. That an act cannot be adopted in part and rejected in part, is a general rule applicable to other cases besides this of principal and agent.—Capel and Thornton, 3 Car. & P. 352.

The same principles are to be found in our own law. If applied to the present case, the manager of a bank would be considered an *institor* and would bind his principal by his proper act of administration—and how could that fail to be considered a proper act, which, as in the present case, is proved to be usual and customary with all banks—there is a delegation of power by presumption of law which applies to one at the head of a mercantile establishment such as the manager of a bank, and the maxim of law then applies *qui facit per alium facit per e.* (1 Bell's Commentaries, page 170.)

Applying these principles of law to this case, Mr. Harris, the manager of the Bank of Montreal, with what motives it is unnecessary to repeat, obtains from the City Bank $95,000 in return for his acceptance of Sanderson's cheques for a similar amount, and gives this sum to the Bank of Montreal. Is this or not a ratification of the transaction of Harris? Or can the Bank of Montreal be admitted to affirm so much of the transaction as is beneficial, and to retain the monies of the City Bank, and to reject that part of the transaction which consists in the promise to pay these cheques? Can the Bank of Montreal be permitted to repudiate the promise to pay these cheques, and yet retain the consideration given for it? I apprehend not. There has been by the Bank of Montreal a ratification of Harris' transaction, so unequivocal and substantial, that I cannot arrive at another conclusion than that the acceptance of Harris is the acceptance of the Bank of Montreal, and upon a review of the whole case I am of opinion:

1st. That there exists a usage or custom in the Banks of this Province of giving credit to their customers by means of the initials on accepted cheques of the manager, and in his discretion, thus permitting the customer to overdraw his account, and that this power is incident to the office of manager, and is an act of management.

2nd. That the authority of Harris to accept the cheques in question is to be presumed from Sanderson having been permitted to overdraw his account at the Bank of Montreal, by this means for so long a period of time, and for such very large sums, all of which overdrafts appear in Sanderson's account kept in the Bank books.

3rd. That these overdrafts of Sanderson, appearing in the bank books, established that the Bank of Montreal did know, or which is the same thing, is presumed to have known of such overdrafts, and to have assented and acquiesced in the same.

4th. That the fact of accepted cheques of Sanderson, passing in the ordinary course of business through the City Bank and La Banque Nationale, for so long

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a period of time, so frequently and for such large sums, all of which were honored and paid to the Banque Nationale by the Bank of Montreal, caused an authority to be presumed in Harris to accept the cheques in question from the previous conduct of the Bank of Montreal in recognizing and paying Harris's acceptances.

5th. That Ahern on the faith of the authority of Harris to accept Sanderson's cheques, having been so recognized, gave the funds of the City Bank to Harris for the accepted cheques in question.

6th. That the Bank of Montreal adopted the act of Harris's acceptance of the cheques in question, by receiving from him the funds of the City Bank given for such acceptances and are stopped from questioning the authority of Harris.

7th. That such adoptive authority relates back to the time of the acceptance by Harris of the cheques in question, and is deemed in law the same to all intents and purposes as if the authority to accept the same had been given before their acceptance.

With these views, I cannot hesitate about the judgment which it is my duty to render in this case, and it is in exact accordance with the conclusions of the declaration. The City Bank is sued upon these cheques as the depositor of them, and as having received the full value of them. It is so sued because the Bank of Montreal has refused to pay these cheques. If I am right in the conclusion that the Bank of Montreal has ratified and adopted the acceptance of their manager, it must indemnify the City Bank from any condemnation which may pass against it upon these cheques.

There are two *demurrers*, one to the declaration by Sanderson, and one to the special answer to the perpetual exception of the Bank of Montreal, upon which not a word has been said in the argument of the case. I presume they are not insisted upon: I must, however, dispose of them by their dismissal.

The following is the conclusion of the formal judgment rendered by the Court, after a statement of the reasons therefor:

"The Court doth adjudge and condemn the defendants *en garantie*, jointly "and severally, to intervene in the said suit or action so brought by La Banque "Nationale against the plaintiffs *en garantie* and now pending in this Court, as "*garants simples* of the plaintiff *en garantie*, and cause the said suit or action "of La Banque Nationale aforesaid to be dismissed, withdrawn, or discontinued, "so far as respects the claim and demand of La Banque Nationale for the said "sums of money in the said cheques, respectively specified, amounting together "to the said sum of ninety-five thousand dollars; and, in default thereof, the "said defendants *en garantie* are hereby adjudged and condemned, jointly and "severally, to guarantee, indemnify and save harmless the said plaintiffs *en "garantie* of and from every sentence, decree or judgment which may be made "and rendered against the said plaintiffs *en garantie* in favor of La Banque "Nationale, as well as for principal and interest as costs of suit which the "said plaintiffs *en garantie* may be condemned to pay to the Banque Nationale "for the causes aforesaid; the whole with costs. And the Court doth reserve to "itself the right of rendering such other and further judgment in the present

"cause as the justice of the case and the law and practice of this Court warrant "and admit of."

This judgment was unanimously affirmed by the Court of Review.

TASCHEREAU, J.—Il s'agit en cette cause d'une demande en garantie portée devant la Cour Supérieure à Québec, par la Banque de la Cité, contre la Banque de Montréal, sous les circonstances suivantes.

La Banque Nationale à Québec et la Banque de la Cité (de Montréal) étaient en compte courant au moyen de dépôts que cette dernière faisait dans la Banque Nationale pour racheter ses billets qui se trouvaient journellement dans le cours du commerce à Québec, en la possession de la Banque Nationale. Cette entente entre les deux Banques durait depuis plusieurs années, lorsque vers le 15 septembre, 1869, parmi les argents ou valeurs déposées comme d'ordinaire par la Banque de la Cité dans la Banque Nationale, se trouvent quatre chèques tiré par le défendeur Sanderson pour un montant total de $95.000. Ces quatre chèques ostensiblement étaient acceptés par la Banque de Montréal à Québec et furent sans aucun soupçon apparent mis au crédit de la Banque de la Cité qui en retira de suite le montant par des chèques tirés par M. McGie, agent de cette Banque. Sur présentation de ces quatre chèques à la Banque de Montréal sur laquelle ils étaient tirés, et dont ils portent l'acceptation, cette dernière en refusa le paiement d'une manière péremptoire. Sur ce refus, la Banque Nationale fit demande à la Banque de la Cité d'un remboursement immédiat du montant représenté par ces quatre chèques: La demande sans être absolument accueillie ou refusée de prime abord, fut suivie d'une lettre de M. McGie, agent de la Banque de la Cité, reconnaissant la responsabllité de sa Banque envers la Banque Nationale pour ces quatre chèques, mais cette reconnaissance ne fut suivie d'aucun paiement ni règlement final, mais au contraire après correspondance et entrevue entre les principaux officiers de l'une et de l'autre Banque, la Banque de la Cité refusa de rembourser les $95.000. A la suite de ce refus La Banque Nationale institua son action contre la Banque de la Cité pour $106.000 comprenant les $95.000 représentés par ces quatre chèques de Sanderson. Défenses furent produites par cette dernière à l'encontre de l'action de la Banque Nationale, et pendant l'instance, la Banque de la Cité, présente demanderesse, institua contre la Banque de Montréal l'action en garantie dont il s'agit actuellement, par laquelle elle reclame un droit de garantie de la part de la Banque de Montréal et de la part de Sanderson pour ces $95.000 contre tout jugement qui pourrait être prononcé contre elle en faveur de la Banque Nationale. La Cour Supérieure à Québec a donné gain de cause à la Banque de la Cité, déclarant que la Banque de Montréal et Sanderson doivent la garantir à toutes fins que de droit des conséquences de l'action de la Banque Nationale, et de tout jugement qui pourrait être prononcé contre elle à l'instance de cette dernière relativement aux quatre chèques en question ; c'est ce jugement qui nous est actuellement soumis en Révision.

La Banque de Montréal et Sanderson ont produit un long plaidoyer à cette action, lequel peut se réduire à ce qui suit, savoir que Sanderson était un homme n'ayant aucun fonds dans la Banque de Montréal, et ne possédant aucun crédit dans le monde commercial, que son compte dans la Banque de Montréal avait été surtiré, et que les quatre chèques dont il s'agit avaient été acceptés par Harris,

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administrateur général de la Banque de Montréal, sans autorité quelconque en dehors des devoirs de sa charge, hors de l'enceinte de la bâtisse de la Banque, que nulle valeur ou considération n'avait été reçue par la Banque de Montréal pour ces quatre chèques. Que M. Harris comme simple gérant n'avait pas le droit de certifier ou accepter des chèques, et que ce droit ou ce pouvoir résidait exclusivement chez un autre officier, le teneur du grand livre de compte, (Ledger Bookkeeper); enfin plaidant fraude et concurrence entre Harris, Sanderson et la Banque de la Cité, dans le but de porter préjudice à la Banque de Montréal.

Pour réussir dans sa demande en garantie il suffisait à la Banque de la Cité de prouver les faits suivants.

1o. Qu'elle avait reçu ces quatre chèques duement acceptés par la Banque de Montréal, qu'elle les avait déposés dans la Banque Nationale, et que sur refus de la Banque de Montréal, de les lui payer, la Banque Nationale avait institué contre elle la Banque de la Cité une action de répétition du montant de ces chèques.

2o. De repousser toute preuve qui serait faite d'aucune participation de sa part, dans la fraude que la Banque de Montréal par sa plaidoirie reproche à ses officiers, MM. Harris et Sanderson.

Une longue enquête s'ensuivit, et dans mon opinion il en résulte clairement que la Banque de la Cité a prouvé tous les faits ci-dessus, et notamment que d'après l'usage universellement reconnu et suivi par nos Banques dans la Province de Québec, un check tiré sur une Banque accepté soit par un officier subalterne à ce proposé, ou par le gérant administrateur de la Banque, est considéré comme valable et liant cette Banque d'une manière irrévocable. Il est aussi prouvé que l'habitude de tirer au delà de son dépôt est admise par les Banques, sous certaines circonstances. Ces permis discrétionnaires semblent avoir été exercés par tous les gérants de Banque et même par M. Christian qui est celui qui était descendu expressément de Montréal pour régler la difficulté en question en cette cause. Dans le cas présent, les livres de la Banque de Montréal démontrent jusqu'à l'évidence que ce M. Sanderson dont cette institution répudie le caractère et la solvabilité, avait surtiré plus de cent fois son compte, et ce fait n'a pu échapper nonseulement à un œil aussi perspicace et pénétrant que celui qui dirige depuis longtemps avec tant de succès les affaires de la Banque de Montréal, mais à tout le bureau de la direction de cette institution. Le fait me paraît clairement prouvé que ce M. Sanderson, en habile financier était l'organe de la Banque de Montréal, au jeu de la Bourse sur l'or ou fonds quelconque. Et c'est ce même homme que la Banque de Montréal répudie aujourd'hui comme s'étant prêté à une fraude manifeste de concert avec le gérant Harris. S'il y a eu fraude, elle date de loin et elle avait pris racine depuis longtemps dans les livres de la Banque de Montréal. C'est en vain que l'on cherche à se demander comment la Banque de Montréal peut prétendre répudier cette acceptation des quatre chèques de Sanderson, avec quelque chance de succès, ou même avec quelque apparence de plausibilité. Si elle pouvait y remplir, que deviendrait la sureté du commerce de Banques? Personne n'oserait accepter un chèque accepté, pas même un billet de Banque, sous le prétexte que celui qui avait accepté ce chèque ou signé le billet n'y était pas autorisé quoique depuis des années, au vû et su de la Banque, il eût déjà répété l'acte plus de cent fois.

En semblable matière, l'autorité se présume, s'infère d'une manière conclusive par le fait que le principal au vu et su duquel l'acte a eu lieu ne l'a pas répudié et a permis au public de croire à l'existence de l'autorité du subalterne. Les autorités légales dans ce sens sont abondantes et sont fondées sur le simple bon-sens, et l'équité. Mais la Banque de Montréal prétend qu'il y avait dans son Bureau un officier spécialement chargé de la besogne d'accepter les chèques. Je ne sais pas quelle différence ce fait puisse produire. Cet officier n'est pas en permanence, il peut être changé de jour en jour, et de fait ce changement s'opère souvent : comment le public peut-il le distinguer et savoir si celui qui la veille avait ce pouvoir le possède encore le lendemain ? Mais surement, il ne peut y avoir de meilleure et de plus sure acceptation que celle du gérant administrateur, homme toujours jouissant d'une haute capacité et de la confiance de ses supérieurs, et supposé connaître la valeur du crédit de tout individu qui se présente et veule devenir débiteur de la Banque, et c'est à cette homme supérieur, au chef directeur, que l'on ose nier le pouvoir qui se donne à un subalterne. Je ne puis m'expliquer cette différence d'une manière rationelle. Mais encore une fois, les livres de la Banque, ouverts depuis, je dirai des années à l'inspection de toute la direction, constatent que M. Sanderson avec l'approbation de M. Harris a tiré audelà de son crédit, et que la Banque a honoré ses chèques plus de cent fois ; et dans le cas présent, on veut faire supporter à un étranger les conséquences des actes imprudents, je ne dirai pas de M. Harris seul, mais de toute la direction de la Banque de Montréal.

L'Enquête en cette cause contient une réponse catégorique à cette partie du plaidoyer de la Banque de Montréal par laquelle elle allégue qu'elle n'a reçue aucune valeur pour ces $95.000, qui en réalité sont passés dans les coffres au moyen de divers chèques tirés sur la Banque National, par la Banque de la Cité. Ainsi sur ce fait point de doute qu'originairement elle (la Banque de Montréal), a reçu valeur pour les $95,000 mais elle à plus tard voulu accommoder son courtier confidentiel, et lui permettre de tirer sur elle audelà de ses fonds et avoir ces $95,000. Quelle en est la conséquence, et à qui la faute est-elle imputable, et les porteurs de bonne foi de ces chèques pouvait-ils être les victimes de cet excès de confiance de la Banque de Montréal dans MM. Harris et Sanderson ? Non, sans doute, disons nous, car elle se doit imputer la faute d'avoir encouragé la repétition d'un crédit quasi illimité donné à M. Sanderson, credit qu'elle a sanctionné près de cent fois, en connaissance de toutes les circonstances. Et d'ailleurs, si cet acte de M. Harris et de M. Sanderson était si imputable, pourquoi la Banque de Montréal, n'a t-elle pas essayé de se justifier par une accusation formelle ? Elle n'en a rien fait, Sanderson est à Québec comme de coutume, Harris a pu s'éloigner mais son lieu de résidence est bien connu, et cependant pour cette prétendue grande fraude que la Banque de Montréal leur reproche ils ne sont pas recherchés ni inquiétés par cette dernière. Ce n'est peut-être pas une admission d'innocence chez ces deux individus, mais une prescription assez forte que l'acte qu'on veut bien reprocher aujourd'hui n'est que la centième repétition de ce qui s'est passé, et qu'il serait impossible de convaincre au criminel des hommes auxquels on n'a pas seulement reproché de semblables faits, mais auquels on avait peut-être donné carte blanche pour le jeu de bourse.

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En révision, la Banque de Montréal a produit un factum exposant grand nombre de motifs pour lesquelles le jugement dont elle se plaint, devait être renversé. Ayant dans nos remarques précédentes fait allusion à toutes ces objections qui se réduisent en leur plus simple expression à nier les pouvoirs de M. Harris d'accepter les chèques de Sanderson et à reprocher fraude, je me bornerai actuellement à discuter deux de ces motifs, savoir: le 1er et le 2nd auquel je n'ai encore fait aucune allusion. Le premier motif est que cette cause n'avait pas dû être entendue au mérite ni jugé, si ce n'est qu'après la décision de l'action principale, savoir celle de la Banque Nationale contre la Banque de la Cité. Je crois que ce motif n'a aucun fondement et est contraire aux principes qui régissent la procédure à suivre sur une action en garantie. En effet, quoiqu'il serait désirable que les deux actions procédaient *pari passu* cependant le défendeur en garantie ne peut forcer ses adversaires à procéder ainsi à moins qu'il n'intervienne dans la cause, et ne plaide à l'action du demandeur principal et reconnaisse son obligation comme garant. Dans ce cas seul il devient jusqu'à un certain point Dominus litis, et exerce un certain contrôle sur la procédure. Mais s'il nie le droit d'action en garantie, il s'enlève par là une issue principale qu'il est loisible au demandeur en garantie de faire avant celle de la demande principale en prouvant qu'il est garant, en supposant et prouvant la vérité des allégations principales de la demande en chef, et en priant conditionellement à ce qu'il soit condamné à l'indemniser de toute condamnation eventuelle sur la demande principale. M. Pigeau dont l'opinion a fait loi au chatelet, comme elle nous a toujours guidé ici, s'exprime dans ce sens, à la page 181 du 1er vol. de la Procédure Civile, " si l'appellé en garantie se reconnait garant ou que l'ayant " denié, il y ait jugement qui l'ait déclaré tel, contre lequel il ne puisse ou ne " semble de pouvoir, il doit prendre le fait et cause pour la garantie." Ces lignes si clairement exprimés ne laissent aucun doute que la demande en garantie formelle comme la simple, pouvait être jugée séparément et avant la demande principale, puisque M. Pigeau supporte le cas ou le garant est condamné et doit en raison de cette condamnation prendre le fait et cause, ou intervenir. M. Serpillon, page 93 de son commentaire de l'ordonnance de 1667, dit:

" La demande principale et cette en garantie sont souvent si peu dépendantes " l'une de l'autre qu'elles peuvent être jugées séparément quand elles ne se trouvent " pas en état dans le même temps pour être jugés conjointement par un même " jugement, ce qui oblige de juger puisque toujours la demande principale " séparément."

Le 2d motif d'objection des défendeurs en garantie est que les Demandeurs en garantie n'ont pas répondu aux questions sur faits et articles qui leur ont été soumises par la Banque de Montréal, ou plutôt qu'il n'apparait pas que M. D. A. Ross leur procureur *ad litem* ait été autorisé à répondre en leur nom.

Cette objection fut renvoyée par la Cour Supérieure en première instance, et je crois avec raison. Le dossier établit une procuration certifiée par le président et le cassier attestée par un notaire public autorisant M. Ross à reproduire devant la Cour, la série des réponses de la Banque de la Cité aux interrogatoires signifiés aux demandeurs en garantie et contient les réponses à y être faites; cette procuration, cette résolution et ces réponses sont produites en le dossier

et ne sont pas répudiés par les demandeurs, les défendeurs seuls disent, ce ne sont pas vos réponses, et les demandeurs toujours censés présents en Cour et surveillant les actes de leur procureur, disent ce sont nos réponses donnés en vertu d'une résolution certifié par notre président en la présence d'un notaire public. Le tout est en forme authentique et le seul moyen d'attaquer ces réponses et par contrecoup les donnés y annexés, serait l'inscription de faux. The City Bank vs. The Bank of Montreal.

Je crois donc, qu'il n'y a pas eu erreur dans le jugement qui nous est soumis en Révision et qu'il doit être confirmé in toto, avec dépens sur la présente Révision.

DUNKIN, J.—The City Bank, sued by the Banque Nationale, sues the Bank of Montreal, and one Sanderson, *en garantie*; alleging that Sanderson, trading at Quebec as a broker and otherwise under the firm of E. Sanderson & Co., drew on the Branch there of the Bank of Montreal, and the Bank of Montreal on sight accepted, four cheques to bearer, one under date of the 13th September, 1869, for $17,000, the others under date of the 14th September, 1869, for $18,000, $17,000 and $43,000 respectively, in all $95,000, that Sanderson delivered the same so accepted to the City Bank for value received, and the City Bank delivered them to the Banque Nationale, which thus became and still is the lawful bearer thereof, and entitled to payment thereof from the Bank of Montreal; that on refusal of payment thereof, they were duly protested, and notice of protest duly given, on the 16th September, 1869,—that the Banque Nationale has since sued the City Bank to recover among other sums of money this $95,000, claiming that the City Bank is bound to make good to the Banque Nationale the amounts of these four cheques; wherefore the City Bank prays, that the Bank of Montreal and Sanderson be jointly and severally held duly notified of the suit in question, and be condemned to intervene therein as *garants simples* of the City Bank, and to indemnify and save harmless the City Bank, in respect of these four cheques.

The declaration *en garantie* says nothing as to the way in which the alleged acceptance of these cheques was effected; but the declaration in the main action, appended thereto, states (and the evidence in this action *en garantie* shows) it to have been the personal act of Harris, the then manager of the branch of the Bank of Montreal at Quebec, performed by his writing on each of the three cheques for $17,000, $18,000 and $17,000 respectively, the figures "526" with his initials "P.P.H.," and on the cheque for $43,000 his initials "P. P. H." only.

To this *demande en garantie*, the Bank of Montreal, besides a *défense en fait*, has put in a special plea styled a perpetual *exception peremptoire en droit*, setting forth—as by eight several pleas—the following pretensions:—

1st. That at the times in question, Sanderson had no funds in the Bank of Montreal,—that Harris had no authority from the Bank, or by law, usage or otherwise, to accept or initial cheques,—that no officer of the Bank had power to accept cheques in absence of funds, and that Harris' pretended acceptances were therefore utterly null.

2nd. That at the times in question, Sanderson's account with the Bank of Montreal was, and by Harris had been improperly permitted to be, largely over-

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drawn, and all this, to the knowledge of the City Bank and of their Quebec servants and agents,—that the City Bank and their Quebec servants and agents, and Sanderson and Harris, with intent to defraud the Bank of Montreal, had been in the habit of covering up and concealing such overdrafts,—that the City Bank and their Quebec servants and agents, with this intent procured the four cheques from Sanderson, and induced Harris (by way of pretended acceptance) to initial them,—that the City Bank and their Quebec servants and agents, and Harris, then, or immediately after, concerted and agreed that Harris should forthwith clandestinely leave the country,—that Harris accordingly did so, and in his flight was actively aided by the City Bank's Quebec servants and agents, and that one of the latter, named Ahern, after so aiding, himself also fled the country.

3rd. That at the times when the cheques were so initialed, Sanderson had no funds in the Bank of Montreal, and this to the knowledge of the person who received them so initialed, and that such pretended acceptances were not made in the office of the Bank of Montreal, nor during bank hours, but were made after bank hours and elsewhere, and this to the knowledge of the City Bank and of its Quebec servants and agents.

4th. That at the times when the cheques were drawn and initialed, Sanderson (to the knowledge of the City Bank and its Quebec servants and agents) had largely overdrawn his account with the Bank of Montreal,—that no value was given to the Bank of Montreal for the pretended acceptances, and that the City Bank never gave value therefor.

5th. That at the times when the cheques were drawn and initialed, Sanderson's account with the Bank of Montreal was largely overdrawn, and it was secretly and fraudulently concerted between Sanderson, Harris and one Ahern (a clerk of McGie, agent at Quebec of the City Bank), in order to prevent such overdraft from becoming known to the Directors or Inspector of the Bank of Montreal then in Quebec, that Harris should initial the same, and that Sanderson should thereby procure pretended securities for like amount to be put to his credit in the Bank of Montreal, to deceive the Inspector, the same to be removed again so as not to avail the Bank of Montreal as a real payment,—and that they were drawn and initialed, and by Ahern taken away and deposited with the Banque Nationale, in pursuance of such fraudulent agreement.

6th. That to the knowledge of the City Bank and their Quebec clerks, servants and agents, for long before 1869, Sanderson's account with the Bank of Montreal had been and was overdrawn,—that McGie, the Quebec agent of the City Bank, suffered Ahern (a clerk of his) to use blank cheques signed by him, as funds to Sanderson's credit in the Bank of Montreal, receiving in exchange pretended acceptances by Harris to be used in conjunction with Sanderson and Harris as a means of refunding to Ahern the securities so provided by him for concealing such overdraft from the President, Directors and Inspector of the Bank of Montreal, and that these cheques were received by Ahern with full knowledge of all this, and in pursuance of such plan to deceive and defraud the Bank of Montreal.

7th. That at the times when the cheques were drawn and initialed, it was

publicly known that there was in the office of the Quebec branch of the Bank of Montreal, a ledger-keeper, whose exclusive duty it was to accept checks, and that it was no part of Harris' duty to accept or initial them,—that the party receiving these cheques then knew that Sanderson had no funds, and that the initials were not meant to certify that there were such funds to Sanderson's credit.

And 8th. That at the times in question, and for years previous, it was notorious in Quebec, that the management of the affairs of the City Bank, and of its Quebec agency, was in the hands of Ahern, a clerk employed by the nominal agent McGie, and the City Bank held out Ahern as having equal authority with McGie,—that McGie so held out Ahern,—that for several years before, Ahern had in fact chiefly managed the affairs of the City Bank at Quebec,—that the City Bank, by Ahern, connived at and encouraged the frequent overdrawing of Sanderson's account with the Bank of Montreal, and the concealing thereof from the Directors of the Bank of Montreal, in fraudulent concert with Harris, and that the drawing and initialing of these cheques, and the receiving thereof by Ahern were part and parcel of such unlawful and fraudulent concert and design.

The City Bank meet this pleading, as a whole, by the general issue; and also by a special answer, averring, that at the times in question Harris, as manager of the Bank of Montreal at Quebec, had power to accept cheques,—that during all the time he was such manager, the usage of the Bank of Montreal, and of all other Banks in the Province was and now is, for the manager of any branch to accept cheques in order to render them negotiable and give them circulation, —that this usage specially prevailed with the Bank of Montreal at Quebec, long before and through all the term of Harris' service as manager there, the City Bank never having notice of any limitation of his power in that behalf,— that it so prevailed in all dealings, between the City Bank, Bank of Montreal, and Banque Nationale,—that the four cheques were taken and negotiated by the City Bank on the credit of the acceptances thereof by the Bank of Montreal, and were credited to the City Bank by the Banque Nationale in ordinary course on the faith of the obligation of the Bank of Montreal to pay them, the City Bank having no knowledge of want of funds on the part of Sanderson, and having no concern with the question whether he had funds or whether Harris so knew or not,—that Ahern never was a clerk or agent of the City Bank, and any possible fraudulent concert of his with Harris and Sanderson, or either of them, cannot affect the City Bank, which had no privity therewith,—that the cheques were taken by the City Bank without knowledge of any such supposed fraud, and the same is now pleaded by the Bank of Montreal for the sole object of evading liability and profiting by fraud of their own Manager, to the prejudice of the City Bank,—that by their acceptance of the cheques, the Bank of Montreal became bound as an original promissor to pay the same to the City Bank, by which they were received for value,—that when accepted, they were debited to Sanderson on the books of the Bank of Montreal, and certified accordingly, —that after they had passed into the hands of the Banque Nationale, Harris (still being manager) in presence of the officers of the Bank of Montreal, at their

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office in Quebec, acknowledged that they had been duly drawn by Sanderson and accepted by the Bank of Montreal,—that such acceptance was consistent with the nature of the office of Manager, and was authorized by the Bank of Montreal, and by its usage and that of all banks in the city and throughout the Province and Dominion,—that Harris was held out as having such power without limitation, and was in the daily practice of accepting cheques of Sanderson's precisely as he did these, and the same were from time to time paid by the Bank of Montreal, to an amount of many hundreds of thousands of dollars, he (Sanderson) being all the time connected with the Bank of Montreal as their broker, in exchange, silver and other operations of magnitude,—that for years previous the relation of banker and customer had existed between the Bank of Montreal and Sanderson, the latter making heavy deposits, and the former sustaining his credit, so as to induce other banks to take his cheques, and more especially when so certified or accepted,—that the four cheques were drawn and accepted and reached the City Bank and Banque Nationale, all in ordinary course, and that (while held by the Banque Nationale) the Bank of Montreal acknowledged their acceptance thereof, but that the Bank of Montreal has concerted with the Banque Nationale and others, in fraud of the City Bank, not to pay the same, and to have the Banque Nationale seek payment of them from the City Bank, in order that the debit of Sanderson's account with them (he having become insolvent) may be reduced by $95,000, and so much of the money of the City Bank be thus appropriated to the use of the Bank of Montreal,—that the Bank of Montreal have obtained from Sanderson (so insolvent) large amounts of monies and securities, which they are applying to other claims against him, in prejudice of the City Bank, upon whom they seek to fix this payment of their own debt to the Banque Nationale,—and that at the time of the acceptance of these cheques, and ever since, the Bank of Montreal have held monies and securities of Sanderson's, sufficient to cover these cheques, but have kept back from the City Bank and Banque Nationale all information as to his account, in order to divert such monies and securities to their own use, in prejudice of the City Bank.

The Bank of Montreal demur to this special answer; but, as nothing was said of this demurrer at the argument, it may here be passed over without notice.

Upon these issues, and those joined with Sanderson (of which nothing need here be said), and after an *enquête* of the utmost intricacy, ranging over ground far wider than these pleadings indicate, and taken at voluminous length, the judgment now under review has been rendered, in favor of the City Bank, plaintiff *en garantie;* the main action of the Banque Nationale against the City Bank having in the meantime gone to trial before a jury, and standing there ready for judgment upon the finding of the jury, both parties claiming to be entitled to judgment thereon.

The grounds of revision submitted by the Bank of Montreal are detailed in a variety of forms, as thirty-four in number; but may all be fairly reduced to, and treated under, one or other of five heads of objection; one of which was expressly abandoned by counsel at the hearing, and two more of which were not strongly insisted on. The two others were urged with the utmost energy and earnestness.

The first of these relates to a technical objection taken to the answers on *faits et articles* of the City Bank, and calls for no remark.

A second rests on the proposition, that the judgment is premature, because rendered before that on the merits of the main action. As to this, it is enough to say, that whatever may be the inconvenience of dealing with the two actions separately, it is here unavoidable. One is taken to a jury; the other, not. They cannot be kept together for proof or hearing; and therefore cannot be adjudged together. And it would be as reasonable to say that the main action must be held back till the action *en garantie* shall have been decided, as to say that the latter must be held back for the former. The plaintiff in each has the right to push it on, irrespectively of the progress of the other. Indeed, if a plaintiff *en garantie*, demanding that his defendant be condemned to intervene and help him in a suit, cannot get a judgment on that demand till after such suit is ended, his demand is *pro tanto* rejected beforehand—is for all practical purposes treated as though not made at all.

A third objection runs to the effect, that the main action, according to the evidence here adduced, ought to be dismissed as to the City Bank, and that therefore the action *en garantie* ought to be dismissed, as against the Bank of Montreal. But the merits of the main action are not here in issue, and cannot be dealt with. The plaintiff therein is not here present. The pleadings therein are here unknown; and the evidence. Even the Court as here personally constituted, and the Court as constituted to deal with it, are not the same. The question here is, whether or not the defendant here ought therein to help and save harmless the party defendant there. If the defendant there is in no serious danger, the better for the party defendant here. But not necessarily to the extent of entitling him to a judgment that shall clear him of obligation altogether. Whether his obligation is light or grave, is not in question; but simply whether it subsists at all. And this is a question purely between the parties to this action, irrespectively altogether of the relations between the parties to the main action.

The two remaining objections may be thus stated:—

1. That, under the issues substantially raised by the special plea of the Bank of Montreal, these cheques are not shown to have been validly accepted by the Bank of Montreal.

2. That under the issues substantially raised by the *défense en fait* of the Bank of Montreal, they are not shown to have passed to the City Bank and Banque Nationale, so as to entitle the former to implead the Bank of Montreal in manner as by their declaration *en garantie* they here assume to do.

The questions involved in these two propositions remain, therefore, to be considered; simply, however, in reference to this suit, that is to say, as between the two parties here litigant, under the issues here raised, and in view of the evidence thereto relevant and here of record. Limitations of view, which obvious as they are, yet go to set aside, in great part or wholly, no small portion, of the vast mass of conflicting evidence and argument, with which the case, (from the interests and feelings involved in it) has unfortunately come to be overlaid.

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Sanderson had long been a heavy customer of the Quebec Branch of the Bank of Montreal, and had acquired a fatal ascendancy over Harris, the unfortunate manager of that branch. Involved in speculations, he found need to overdraw his account; and Harris, weakly and wrongly allowed him to do so, and more weakly and wrongly combined with him to hide the fact from the head office.

Unhappily, this was but too easy. As a necessary internal arrangement of any bank doing a considerable business, cheques are required, before being presented to the teller for payment, to be taken to another officer, having charge of the Individual Ledger, and whose duty it is to see whether the drawer has funds, and if he has (but not otherwise) then to initial or otherwise mark the cheque so as to instruct the teller that he is to pay it. And as an unavoidable result, such cheques, instead of being always at once presented for payment, are often taken away and pass into other hands before payment, the initials or other known mark giving assurance that it will be paid. In fact, such initialled cheques have long come to be generally recognized as cheques accepted by the Bank. Upon this usage, it is contended that there has grown up another, of a more exceptional character. Circumstances may exist to warrant an overdraft, even in the interest of the bank; and in such case, of course, the subordinate officers of the bank may and should be instructed by their chief accordingly. The cheque with his initials may then pass into third hands before reaching them. And the question so arises, whether his initials, so written as an order to them, and suffered to reach and influence others, are or are not just as much an acceptance of the cheque by the Bank as theirs could be. Instance of such rightful initialling by a manager is even furnished by the evidence in this case. Sanderson, in the days of Harris's predecessor, had been more or less employed as a broker to buy exchange for the Bank. The sellers of course would not part with their exchange on his mere personal credit. And so, if his account stood low, the manager (informed of the circumstance) would initial his cheque by way of authority to the Ledger-keeper to make the necessary entry and add his own initials, as for the teller's guidance. Whether any such cheques in those days ever went into third hands before reaching the Ledger-keeper does not appear; but it is natural to suppose they may. Sanderson's employment as a broker for bank transactions went on under Harris, as under his predecessor, and the way was thus smoothed most dangerously for the gradual establishment of a system of overdrafts, set right and recurring from time to time in his behalf.

This state of things as regarded Sanderson's account had lasted so long as to have become inveterate, and the default had assumed alarming proportions; when the Head Office, hearing something of it, sent Mr. Christian, their Inspector (and who had not inspected the Quebec Branch for some eighteen months previous) to enquire into the matter. His arrival on the afternoon of the 14th of September (these disputed acceptances purporting to be of the 13th and 14th) brought things to a crisis, and has resulted in this litigation.

Meantime, the City Bank, without maintaining a Branch at Quebec, had long employed McGie as their agent there, to promote circulation of their notes; and

had so accredited him in that capacity to the Banque Nationale, as to have induced that institution to become their main ally and (in fact) banking house, in respect of their operations at Quebec,—which took a wide range and involved large amounts. McGie (being also agent for some other parties, though on a very much smaller scale) signed his name for all business purposes as "D. McGie, Agent," and in that name kept a Deposit account with the Banque Nationale, which account thus involved all the direct Quebec banking transactions of the City Bank, and—at times and to a less extent—some others besides. And he had unfortunately fallen into the habit of leaving the conduct of his whole business as City Bank agent and otherwise to Ahern, his clerk, whose doings he seems not to have controlled or watched in the least; and who filled in and disposed of his cheques (signed wholesale, in blank) absolutely at pleasure.

Between Sanderson, thus in undue relation with Harris, who was less watched than he might have been by the Bank of Montreal, his principal,—and Ahern thus unduly trusted by McGie, who again was unwatched by the City Bank, his principal,—there had long subsisted an undue alliance; the two contriving to set Sanderson's account right periodically, so as (with Harris' help) to deceive the Head office of the Bank of Montreal by means of exchanges of Sanderson's cheques accepted by Harris for his Bank, but without entry thereof made to the debit of Sanderson's account,—against cheques of McGie surreptitiously filled in by Ahern, or other City Bank funds or securities unduly at his (Ahern's) command. These latter being deposited to the credit of Sanderson's account some little time before the former found their way to it through the Banque Nationale, the reports made in the interval saved appearances, and gave the confederates the time by which they doubtless long hoped that they would eventually bring things round into a safe position for them all.

This Sanderson-Ahern alliance was of course well known to Harris, in so far at least as regarded its bearing on Sanderson's account. By McGie it seems to have been unsuspected. And it is hardly necessary to say that the evidence shows that the Bank of Montreal had no suspicion of anything wrong until just as they sent Christian down,—and that the City Bank had none until after Christian's mission had done its work.

Arriving late in the day, unexpected, and at once glancing at Sanderson's account in the Individual Ledger, Christian saw that it stood there apparently overdrawn to an amount of $33,365.05; but, as he says, from the fact that the transactions of the day might not all have found their way into it, he was not altogether certain as to the real state of the account. Presumably, his glance must have led him to infer much more as to past transactions. But he said nothing, and postponed examination to the next day.

After bank hours, between four and six, at Sanderson's office, Sanderson (with a clerk of his named Robertson,) and Ahern and Harris, met; and there, in the vain hope of getting Sanderson's account into such a state as might deceive Christian, the fourth Sanderson cheque for $43,000 was drawn and initialled,—the usual figures "526" indicative of Sanderson's folio in the ledger, being omitted in the hurry; and Ahern furnished City Bank effects (two cheques and a draft) for that total amount, which Harris took. Whether or not

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the other three cheques here in question (or some of them) were drawn or initialled at the same time and place, may admit of a shade of doubt; as the witnesses are not all of them clear in their recollections. Presumably, however, they had been drawn and initialled previously; that of the 13th during that day, and the two of the 14th, early in that day. And, presumably, they were initialled at the office of the Bank of Montreal and in bank hours. What is certain is, that (whenever and wherever initialled) Harris received for each, then and there, the like amount of cash-security furnished by Ahern. For the $95,000 of initialled cheques, he took, at the time or times when he initialled them, the full $95,000 of such funds. His initialling was meant and understood to be a bank acceptance, in consideration of the funds; and the funds would not otherwise have been given.

Looking next morning at Sanderson's account in the individual ledger, Christian found it altered in Harris' handwriting, by a credit of this $43,000, consisting of the funds thus obtained for such last acceptance, from Ahern, and by certain other entries and some erasures; and he immediately suspended Harris, and took charge of the Branch himself; though without at once announcing the fact to the public. Next day Harris, with Ahern's aid, absconded. And soon after, Ahern absconded also.

During the same day, the 15th, Ahern effected with Christian (who was then ignorant of the antecedent circumstances of the affair) an exchange of the three securities making up the $43,000, for another of a different form. And it is distinctly in evidence, that the whole $43,000 was paid to the Bank of Montreal; $24,500 directly by the City Bank, $18,500 by the Banque Nationale as on City Bank account.

The $52,000 of other securities taken by Harris for the three other acceptances, seem also to have been carried in the individual ledger to Sanderson's credit, and to have been realised at the cost (direct or presumably eventual) of the City Bank. But even if there be doubt as to this, it is at least certain that Harris handed them to Christian for the Bank of Montreal, and that the Bank of Montreal have taken them, and ever since dealt with them as their own.

The four acceptances were, of course, none of them debited to Sanderson, in the individual ledger, as they should have been.

Under these circumstances the Bank of Montreal contend that the act of their manager, Harris, in assuming thus to accept these cheques was so manifestly in excess of his powers and fraudulent, that they are entitled to repudiate it.

That it was irregular in the highest degree, and even fraudulent, is certain. Whether or not it was so in excess of Harris' powers as to import (*prima facie*, that is to say, independently of the point of their having or not having ratified it) their right to invoke its nullity, as against a holder in good faith,—and, according to the evidence, the two Banks themselves are here, the one in just as good faith as the other, in respect of these transactions,—is a question that may be open to more of argument. Pleading, evidence, argument and authority are all brought into abundant requisition, in reference to it, by both parties. But it is not the question that really here presents itself, and upon which this part of the case must turn.

Utterly wrong as Harris' act was, it was not the unilateral contract of allowance of an overdraft, in violation of bank rule and to the obvious direct prejudice of the bank. The overdraft existed; was a fixed fact; was made neither worse nor better. Each of these acceptances formed part of a bilateral contract, under which he got for his Bank funds supposed good (and which seem here to have so proved), in full equivalent for the new draft allowed. Keeping these funds as theirs under such contract, the Bank accept each such contract—burthens and advantages together; have made his whole act theirs; cannot escape from that part only of it which they do not like, as not theirs.

As this case stands, therefore, between the City Bank and Bank of Montreal, I have no choice but to hold these four acceptances as valid.

Are they then shewn to have so passed to the City Bank and Banque Nationale, as to warrant the former in suing on them in manner and form as they here do?

The declaration *en garantie* says Sanderson delivered them to the City Bank, for value, and the City Bank delivered them to the Banque Nationale, who now hold them. The fact, as the Bank of Montreal contend, is, that Sanderson delivered them to Ahern, who, without McGie's personal knowledge though in McGie's name, delivered them to the Banque Nationale, to the credit of McGie's account there kept,—the whole without any direct participation or knowledge of the City Bank as to the transaction.

It must be borne in mind, however, that the Bank of Montreal meet the above averment of the declaration only by a general issue; and that by their special pleading, so far from distinguishing between the City Bank and McGie and Ahern, as acting separately in these transactions, they make out both McGie and Ahern to be servants and agents of the City Bank, and their acts (to the extent even of complicity in fraudulent intent) the acts of the City Bank. So pleading, can they be suffered now to advance precisely the opposite pretension, unwarranted as it is by any other pleading on their part?

But aside from this, taking the facts as thus stated to be provable and proved under the issue as they stand, the very technical conclusion sought to be drawn does not follow.

McGie alone was the agent of the City Bank; that is to say, he had no right to delegate any function of his, as such agent, to Ahern, could not and did not *by any act of his* make Ahern their agent. But he could and did, by his blind confidence in giving Ahern full mastery of his signed blank cheques and of his business otherwise, make Ahern his own agent, and with the largest powers. Ahern's acts—unless as to personal imputation of whatever may have been Ahern's own fraud of purpose—were his; at all events were his, save in so far as he may availably and expressly disclaim them and get rid of them.

The City Bank cannot be forced to recognize them as acts of their agent; but of course can do so if they please. In this case they have done so as they have the right; and the Bank of Montreal is here in no position entitling them to object. Whether McGie's quality as agent of the City Bank (or even Ahern's for that matter) as to any particular step in these transactions results in point of logic from their previously intended authorization, or from their after

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adoption of what he has done, is here immaterial. They have here called what has been done in the matter of the taking of these acceptances from Sanderson, and the delivery of them to the Banque Nationale, their act; and this, under circumstances which, according to the pleadings and proof here in question, warranted their so doing.

I am satisfied accordingly that the judgment under review is right, and ought to be confirmed.

Judgment of S. C. confirmed.

Ross & Stuart, for plaintiff *en gar.*
Okill Stuart, Q. C., Counsel.
Holt, Irvine & Pemberton, for defendant *en gar.*
(S. B.)

COUR DE CIRCUIT, 1873.

MONTREAL, 12 MAI 1873.

Coram BEAUDRY, J.

No. 1531.

Calvin et al. vs. *Bertrand.*

JUGÉ :—1o. Qu'un demandeur non résidant en la province de Québec, est tenu de fournir au défendeur poursuivi en cette province, caution pour sûreté des frais pouvant lui résulter de telle poursuite.

2o. Qu'il est également tenu de produire au dossier la procuration requise par l'art. 129, No. 7, du C. P. C.

3o. Que faute par lui de ce faire, il est loisible au défendeur, de demander, au moyen d'une exception dilatoire, que tous procédés sur l'instance, soient suspendus, jusqu'à ce que telles caution et procuration, aient été fournies au désir de la loi. (1)

Les demandeurs en cette cause résident en la province d'Ontario. Le défendeur prétendant avoir d'excellents moyens de défense à l'encontre de leur action, produit une *exception dilatoire* par laquelle il demande la suspension des procédés, jusqu'à ce que les demandeurs lui aient fourni bonne et valable caution pour ses frais, ainsi que la procuration à laquelle il a droit en pareil cas.

Aussitôt après la production de la dite exception, les demandeurs s'empressent de fournir le cautionnement et la procuration demandés, mais refusent de payer les frais de l'exception ; de là la présente contestation.

La réponse des demandeurs à cette exception est qu'elle est mal fondée en loi et doit être déboutée pour les raisons suivantes :

"Parce que le défendeur ne pouvait, par telle exception demander ainsi qu'il l'a fait, la suspension des procédés en cette cause.

"Parce que le seul procédé au moyen duquel il pouvait obtenir ce qu'il demande par la dite exception, était une motion pour cautionnement de dépens, et non pas *l'exception dilatoire.*"

PER CURIAM :—Les demandeurs se sont soumis aux exigences de l'exception dilatoire en question ; ils ont fourni la procuration et le cautionnement requis par cette exception ; leur contestation me paraît mal fondée.

Pour ce qui est du procédé, employé par le défendeur, il est parfaitement

(1.) Un jugement en ce sens a été rendu dans la cause de Baltzar & al. *vs.* Grewing & al., rapportée au 13 L. C. J., p. 297 (Torrance, J.).

régulier et le seul dont le Code de Procédure fasse mention. La Cour ne prétend pas que la voie de la motion soit interdite, mais l'exception dilatoire est certainement permise en pareils cas, et celle du défendeur étant bien fondée est maintenue avec dépens.

Roy et al. vs. Gauthier.

Exception dilatoire maintenue.

Loranger & Loranger, pour les demandeurs.
D'Amour & Bertrand, pour le défendeur.
(J. G. D.)

COUR SUPERIEURE, 1873.

MONTREAL, 31 MARS 1873.

Coram MACKAY, J.

No. 373.

Roy et al. vs. *Gauthier.*

Jugé:—1o. Qu'une *défense au fond en droit* sera rejetée, *mais sans frais*, s'il appert que du consentement des parties, elle n'a pas été plaidée en temps utile; ayant au contraire été réservée pour être plaidée lors de l'audition au mérite.

2o. Que dans l'espèce, les parties devaient préalablement à l'audition finale au mérite, inscire et plaider la dite défense en droit, et n'avaient pas le droit de la réserver pour qu'il ne fut disposé que lors de l'argument finale au mérite.

Le défendeur avait produit avec ses plaidoyers au mérite, une défense au fond en droit, à l'encontre de l'action des demandeurs, laquelle fut réservée par les parties, pour n'être plaidée que lors de l'audition finale au mérite.

Lors de cette audition, l'Hon. Juge siégeant, fit remarquer que la coutume de réserver ainsi les défenses en droit, lui paraissait irrégulière et illégale, les parties devaient au contraire plaider ces défenses et obtenir jugement sur icelles avant que d'inscire au mérite. Il exprima l'opinion que l'inscription au mérite pouvait être rayée et la cause inscrite pour être plaidée sur la défense en droit mais consentit cependant, à entendre les parties sans réserves et à leurs risques et périls; ce à quoi elle se soumirent, en invoquant toutefois l'usage constant, de procéder ainsi qu'elle l'avait fait.

L'action des demandeurs étant bien fondée fut maintenue, et voici le motivé du jugement:—

"The Court having heard the parties by their Counsel, as well upon the *défense en droit* pleaded by defendant as on the merits of the cause, examined the proceedings, proof of record and evidence adduced, and maturely deliberated: Doth dismiss the said *défense en droit*, but without costs; inasmuch as the parties ought to have proceeded to argument upon it early, and had not right to reserve it for hearing till the final argument on the merits. Considering that plaintiff's allegations are proved, doth condemn the defendant to pay" &c., &c.

Défense en droit rejetée mais sans frais.

D'Amour & Bertrand, pour les demandeurs.
G. Mireault, pour le défendeur.
(J. G. D.)

COUR DE CIRCUIT, 1873.

MONTREAL, 13 MAI 1873.

Coram BEAUDRY, J.

No. 2532.

Brosseau vs. *Alves; et David*, mis en cause.

Jugé :—1o. Qu'en vertu de l'art. 159 du Code de Procédure Civile, tout rapport de signification, fait par un huissier sous son serment d'office peut être contesté par requête sommaire, sans inscription de faux, à moins que le Tribunal n'en ordonne autrement.

2o. Que par telle Requête, l'on peut conclure à ce que le rapport de l'huissier soit déclaré faux et mensonger et mis de côté comme nul et non avenu ; et à ce que l'action à laquelle il se rapporte, soit, en conséquence, déboutée avec dépens.

3o. Que contestation peut être liée sur telle Requête, sans qu'il soit besoin de recourir à "l'exception à la forme."

L'action en cette cause est une saisie-gagerie par droit de suite, et la défenderesse prétend n'avoir jamais reçu copie des procédés, bien qu'il paraisse par le rapport de l'huissier que l'exploit d'assignation et le procès-verbal de saisie, lui ont été signifiés en parlant *à une personne raisonnable de sa famille*, à son domicile.

La défenderesse prétend ce rapport faux et mensonger et soutient que lors de cette prétendue signification, ni elle ni aucune personne de sa famille, ne se trouvait à son domicile, et qu'ainsi, elle n'a eu aucune connaissance de la signification en question; de là sa requête à l'effet de contester la vérité du rapport de l'huissier exploitant.

Lors de la présentation de cette Requête à la Cour, l'avocat du demandeur s'opposa fortement à son admission, prétendant qu'elle devait être rejetée à l'instant, attendu qu'elle ne contenait que des moyens de forme et aurait dû être accompagnée *d'une exception à la forme*, ce qui n'avait pas été observé.

L'avocat de la défenderesse soutenait de son côté que le Code permet de *lier contestation* et procéder à jugement sur semblable requête, sans recourir à *l'exception à la forme*, et à l'appui de ses prétentions cita la cause de McMillan vs. Buchanan et al., jugée en Cour d'Appel, le 20 juin 1872, et rapportée dans le 17 L. C. J. p 13.

Voici le jugement qui fut rendu sur la question de l'admissibilité de cette requête.

"La Cour après avoir entendu les parties par leurs avocats sur l'opportunité de l'admission de la Requête de la défenderesse à l'effet d'attaquer la vérité du rapport d'huissier en cette cause ; considérant que telle requête est un procédé régulier et permis par la loi, admet la dite requête et ordonne preuve avant de faire de droit sur icelle, par enquête ordinaire, sans inscription de faux, ni *exception à la forme*."

Requête admise.

Duhamel, Rainville & Rinfret, pour le demandeur.
D'Amour, Bertrand & Denis, pour la défenderesse.
(J. G. D.)

COUR DU BANC DE LA REINE, 1870.

EN APPEL.

QUEBEC, 18 JUIN 1870.

Coram CARON, DRUMMOND, BADGLEY, MONK, J.J., et LORANGER, J., *ad hoc.*

No. 37.

DAME CLARICE DUVAL,

APPELANTE;

ET

NOEL HEBERT *et al.*,

INTIMÉS.

JUGÉ :—Que le bref de *prohibition* existe pour prohiber l'execution du jugement des juges de la paix, rendu en vertu du Chap. 6, des S. R., imposant une amende de $50 pour avoir vendu de la boisson enivrante sans licence.

Voici l'exposé de la cause par l'appelante :

Alphé Laroche, cultivateur, de la paroisse de St. Norbert d'Arthabaska, avait fait extraire à sa *pouliche*, dans le mois de *septembre ou novembre* 1867, une excroissance de chair, vulgairement appelée "les crapauds." Le chirurgien-vétérinaire lui avait recommandé de laver cette plaie avec du vitriol dissous dans l'alcohol ; non-seulement pour guérir la plaie, mais pour empêcher la gangrène de s'y former. Laroche s'adressa au magasin de l'appelante pour avoir du whisky, afin de faire dissoudre son vitriol ; après avoir expliqué qu'il ne voulait ce whisky que comme remède, qui devait sauver la vie à son animal, la personne qui se trouvait présente, consentit à lui en laisser avoir sur la provision de la famille, mais à la condition que le whisky serait mis sur le vitriol, avant de lui livrer. Laroche présenta alors une fiole dans laquelle était déjà le vitriol ; le whisky fut introduit dans la fiole, et le vitriol aussitôt dissous, fut remis à Laroche qui paya cinq à six sous pour ce trouble.

Pour ce fait, l'appelante fut poursuivie par le percepteur du Revenu de l'Intérieur pour le District d'Arthabaska, Théophile Côté, écuyer, sur l'information et délation de Messire Roy, Prêtre et Curé de la paroisse de St. Norbert d'Arthabaska, et fut condamnée, le 9 mars 1869, à payer une amende de $50 dont une part devait profiter au délateur. Cette poursuite fut faite en vertu du chap. 6 des Statuts Refondus B.C., quand cet acte n'avait plus force de loi, dans la paroisse de St. Norbert d'Arthabaska, pour la poursuite d'infraction aux lois du Revenu, puisqu'il était remplacé par l'acte de tempérance de 1864, en vertu d'un règlement du Conseil Municipal local, à compter du 1er mai 1867 au 30 avril 1868.

Lorsque le curé eût connaissance de l'affaire en question, il s'était écoulé au-delà de trois mois, c'est pour cela qu'il a poursuivi, en vertu du chap. 6, pour ne pas perdre sa part d'amende, comme délateur ; les quatre autres poursuites, qui sont produites au dossier, le 22 septembre 1868, par l'appelante, comme ses exhibits Nos. 1, 2, 3 et 4, ont toutes quatre été faites le même jour, 18 mars 1868, en vertu de l'acte de tempérance de 1864, et ont été, toutes les quatre, rapportées devant les mêmes Juges de la Paix, le 28 mars 1868. Or ces quatre poursuites, par la sect. 17 de l'acte de tempérance, devaient être réunies ensemble,

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et ne faire qu'une seule et même poursuite, dont l'amende ne devait pas excéder $100, mais Mr. le curé en a fait quatre poursuites séparées. Il était certain d'obtenir les condamnations qu'il sollicitait. Les Juges de la Paix et Alphé Larocbe lui étaient dévoués. Son influence perce dans toute la procédure; elle est même sensible dans le témoignage de l'Inspecteur du Revenu, intimé, et dans ses réponses sur faits et articles.

Pour démontrer combien il importait de résister à cette persécution, qui ne sera pas la dernière, l'appelante s'addressa à *Sir John A. Macdonald*, le Ministre de la Justice, pour être protégée contre ces persécutions qui tendent à compromettre le repos public et la dignité du gouvernement. *Sir John* fit tout ce qui dépendait de lui pour arrêter ces persécutions, mais comme ces poursuites n'intéressaient que le gouvernement local, il ne put rien faire.

1er. moyen: La plainte qui fut signifiée à l'appelante, pour comparaître devant les deux Juges de la Paix, est No. 1 produit par elle, le 22 mai 1868. Or cette prétendue plainte avait été d'abord faite, comme il est facile de le constater, contre Philippe Napoléon Pacaud, l'époux de l'appelante: on y a biffé son nom, pour ensuite le remplacer par celui de son époux: c'était un moyen de rendre la chose encore plus outrageante: et si on compare cette pièce avec l'original produit par le percepteur du Revenu, le 26 septembre 1868, on y trouvera les mêmes changements faits après coup. Or le chap. 6 des Statuts Refondus du B. C., sect 41, exige que la plainte soit signée par le percepteur du Revenu: Paley on Convictions, page 54. Or, ni l'original de la plainte ni la copie ne sont signés par T. Côté, le percepteur du Revenu. Ce fait est établi par William Hughes Felton, écuyer, avocat. Ainsi l'appelante n'était pas tenue de répondre à cette sommation.

La Cour Supérieure a émis, sur cette question, la doctrine que l'appelante aurait dû s'inscrire en faux contre cette plainte. L'inscription en faux n'existe pas dans le droit anglais pour ces sortes de procédures, qui sont nées du droit anglais. Ce sont des brefs de privilége connus de deux seuls peuples libres sur le globe; les anglais et les américains; ce sont des brefs, résultats nécessaires des libertés individuelles et publiques. Cette signature n'est pas celle du percepteur du Revenu, c'est ce que les anglais appellent "forgery." M. Côté dit bien, dans son examen comme témoin, que les plaintes annexées aux exhibits No. 1, 2, 3 et 4, produites par l'appelante, le 22 septembre 1868, sont signées par lui. Pourquoi n'a-t-il pas dit que la plainte, qui fait le sujet de la présente instance, était aussi signée par lui? Si on compare les signatures à la plainte exhibit No. 1, produit le 22 mai 1868, et les plaintes exhibits Nos., 1, 2, 3 et 4, et produits le 22 septembre 1868, le faux est hors de doute. M. T. Côté n'a pas voulu signer ce document; il savait que l'acte de tempérance de 1864 était en force; que cette poursuite devait être faite en vertu de cet acte, et il ne voulait pas consentir à ce qu'elle fut fait en vertu du chap. 6 des Statuts R. B. C., dans la crainte d'être censuré par ses supérieurs, mais le Curé insistait pour avoir son amende. M. T. Côté laissa faire; son nom fut signé par un tiers, et la poursuite eût lieu, suivie d'une condamnation. Comme ces faits étaient notoires, pourquoi répondre à une sommation qui n'était réellement pas faite par le percepteur du Revenu? Quand dans le fait, personne ne poursuivait? Il n'y avait donc pas nécessité de répon-

dre ; ainsi ce seul moyen était suffisant pour obtenir la *prohibition*.

2e moyen. L'acte de tempérance de 1864 décrète par la 11e sect. que " nulle " personne ne sera passible en raison de ce qu'elle n'aura pas de licence de cette " description à l'amende de $50, imposée par la 22e sect. du chap. 6 des Statuts " Ref. du B. C." Cette loi était donc une protection et une sauvegarde contre, la poursuite intentée en vertu du chap. 6. Or pourquoi l'appelante se serait-elle occupée de cette poursuite qui n'était plus faite en vertu d'un statut qui avait force de loi ? La Cour Supérieure dit que l'appelante aurait dû comparaître devant les Juges de Paix, et plaider l'acte de tempérance de 1864, mis en force de loi par le règlement du Conseil Municipal : étrange doctrine : voilà qu'il faut plaider, qu'une loi sur laquelle est appuyée une poursuite, n'a plus force de loi : mais, n'est-ce pas au poursuivant à le savoir ? Avant de poursuivre, n'était-il pas obligé de s'assurer si la loi existait ? Le percepteur du Revenu connaissait longtemps avant l'institution de cette poursuite, l'existence de ce règlement, dont il avait eu une copie en bonne et due forme. Les Juges de la Paix le savaient tous de même ; mais c'était, comme nous le démontrerons plus tard, un complot contre l'appelante, pour la flétrir dans l'opinion publique et la ruiner dans ses biens. Si une personne était poursuivie et condamnée, par défaut, en vertu du chap. 6, pour avoir vendu des boissons spiritueuses *depuis au delà de six mois, sans avec licence*, d'après la décision de la Cour Supérieure, cette condamnation, serait irrévocablement prononcée ; la personne condamnée ne pourrait plus se faire relever de ce jugement inique et illégal. Les brefs de prérogative ne sont-ils pas pour remédier à toutes ces erreurs et protéger les citoyens contre toutes ces injustices ? Ici nous avons le spectacle d'une double condamnation, en vertu de deux statuts qui se repoussent, se répudient et qui ne peuvent exister dans le même temps. L'appelante savait qu'en vertu de l'acte de tempérance de 1864, la prétendue offense était, au pis aller, prescrite et limitée ; pourquoi s'occuper alors de cette poursuite ? Résumé : L'exécution de cette condamnation devait donc être prohibée : parce qu'elle avait été faite en vertu du chap. 6, qui n'avait plus force de loi, et parce que *l'offense prétendue* était limitée, prescrite et mise au néant par l'acte de tempérance de 1864. Ce moyen était encore à lui seul suffisant pour obtenir la prohibition.

3e moyen. Le chap. 103 des Statuts Refondus du Canada, qui est le Code de Procédure des magistrats, exige, sect. 24, que la dénonciation soit fait *sous serment* ; elle n'est pas même signée, dans l'instance actuelle. A part cette nullité absolue, la preuve faite devant les Juges de Paix était insuffisante pour condamner l'appelante.

Il fallait faire prouver par le témoin pour quelle fin il avait acheté ce whisky, afin d'établir qu'il avait été vendu " contrairement à l'intention et au sens véri- " table de l'acte, sect. 22."

Les tribulations de la Cour Supérieure ont été provoquées par la sect. 49 chap. 6, qui, dit ; " Nul jugement ou conviction rendu sous l'autorité du présent acte, ou " nul jugement en appel ne pourra être évoqué par *certiorari* ou autrement de- " vant aucune Cour de record de Sa Majesté dans le Bas-Canada."

Les faits qui résultent de la preuve testimoniale faite par l'appelante, peuvent, suivant l'humble opinion de l'intimé se résumer à ceux-ci :

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1. Que la boisson vendue par l'appelante au témoin Laroche, le neuf septembre 1867, l'aurait été pour faire des remèdes au cheval du témoin.

2. Que la déclaration annexée à la sommation des Juges de Paix signifiée à l'appelante, n'était pas de la propre écriture et signature de l'intimé Côté.

3. Que le témoin Laroche, devant les Juges de Paix, comme date de l'offense, aurait d'abord dit, *neuf de novembre et ensuite neuf de septembre.*

C'est donc sur ces différentes procédures faite par l'appelante et l'intimé, en Cour Supérieure, qu'a été rendu le Jugement du 13 fevrier dernier dont se plaint l'appelante. La Cour Supérieure, par son jugement a maintenu les prétentions émises par l'intimé, savoir :

1. Que dans le cas actuel la loi défendant l'émanation du bref de prohibition de même que celui de *certiorari*, cette Cour ne pouvait intervenir pour casser la conviction, à moins que le Tribunal Inférieur ne fut illégalement constitué, ou que le jugement fut obtenu par fraude.

2. Que dans le cas actuel les Juges de Paix avaient jurisdiction sur la matière et sur la personne, qu'il n'y avait pas lieu alors à la requête en prohibition.

3. Que la preuve faite par l'appelante, sur sa requête, était illégale et inadmissible, l'appelante ne pouvant prouver contre, ou expliquer le dossier devant les Juges de Paix, pas plus que de faire une preuve qu'elle aurait dû faire devant eux.

4. Que cette preuve fut-elle légale ou admissible, elle ne suffirait pas pour maintenir les conclusions de la dite requête libellée de l'appelante, en autant qu'elle ne fait ressortir aucun excès ou manque de jurisdiction de la part des Juges de Paix siégeants.

L'intimé, Côté, prétend que dans le jugement dont est appel, il n'y a pas mal jugé, que ce jugement doit être confirmé ; l'intimé fonde son humble opinion sur les quelques raisons suivantes :

1. Parceque les Juges de Paix Hébert et Paradis qui ont prononcé la dite conviction contre l'appelante, avaient jurisdiction sur la matière.

2. Parce qu'ils avaient aussi jurisdiction sur la personne.

3. Parce qu'il appert à la face de leurs procédés, qu'en rendant leur dite conviction ils n'ont aucunement excédé cette jurisdiction.

4. Parce que le bref de prohibition de même que le bref de *certiorari* ne s'accorde que quand le tribunal inférieur a excédé sa jurisdiction, mais non pour corriger de simples erreurs commises dans l'exercise de ses pouvoirs.

5. Parce que le bref de prohibition de même que le bref de *certiorari*, est dénié par la loi dans de semblables cas.

6. Parce que la procédure des Juges de Paix est régulière, et la preuve faite devant eux suffisante pour baser une condamnation.

7. Parce que la prétendue preuve faite par l'appelante en cette cause est illégale et inadmissible et ne peut et ne pouvait être faite sur un Bref de Prohibition.

8. Parce qu'enfin l'appelante était coupable de l'offense à elle imputée, et qu'en la condamnant les Juges de Paix n'ont fait que leur strict devoir.

Le jugement de la Cour Supérieure, district d'Arthabaska, Polette J., est comme suit : La Cour après avoir entendu Dame Clarice Duval, demanderesse en prohi-

bition, et Théophile Côté, écuyer, l'un des défendeurs en prohibition, par leurs avocats, au mérite du bref de prohibition émané en cette cause, et de la déclaration ou requête libellée de la demanderesse, ainsi que des contestations élevées sur icceux par les défenses au fond en droit et en fait du dit Théophile Côté, Noël Hébert et Edouard Germain Paradis, écuyers, Juges de Paix, les deux autres défendeurs en prohibition n'ayant pas comparu, examiné la procédure, les pièces produites et la preuve, et en avoir délibéré :

Considérant, I. Que la demanderesse n'a pas prouvé les allégations essentielles de sa déclaration ou requête libellée, mais qu'au contraire il est établi qu'une déclaration portant le nom du dit Théophile Côté comme signature au bas d'icelle et soutenue par lui devant les Juges de Paix et devant cette Cour, a été faite et signée avec la sommation à la demanderesse, et qu'une preuve a été faite devant Juges de Paix touchant les faits énoncés en cette déclaration, preuve que les dits Juges de Paix ont seuls l'autorité d'apprécier. II. Que la demanderesse ne pouvait pas plaider ni apporter devant cette Cour, comme elle l'a fait, le règlement du Conseil de la Municipalité de la paroisse de St. Norbert d'Arthabaska parce qu'elle ne l'a pas plaidé ni produit devant les dits Juges de Paix, et qu'il ne paraît pas par la preuve faite devant ces derniers, qu'il ait même été question d'un tel règlement. III. Que la preuve faite devant cette Cour de la part de la demanderesse, tendant à établir l'existence de ce règlement, et à contredire et détruire la preuve faite devant les dits Juges de Paix, est illégale et inadmissible. IV. Que d'après les documents produits devant cette Cour, et nommément le jugement ou sentence rendu par les dits Juges de Paix, Noël Hébert et Edouard Germain Paradis, écuyers, et dont le dit bref de prohibition a pour but d'empêcher l'exécution, ces Juges de Paix avaient pleine juridiction sur la matière et sur les personnes y mentionnées, et qu'il ne paraît pas y avoir un excès de juridiction ; qu'ainsi la dite demanderesse ne peut pas obtenir les fins pour lesquelles le dit bref de prohibition a été décerné :

Considérant d'ailleurs, que la poursuite, sur laquelle a été rendu le jugement ou sentence dont le dit bref de prohibition a pour but d'empêcher l'exécution, a été faite sous l'autorisation de l'acte des Statuts Refondus pour le Bas-Canada, chapitre six, et que, par la section 49 de cet acte, le dit jugement ou sentence ne peut pas être apporté devant cette Cour pour y être examiné et revisé, par le bref de prohibition, pas plus que par celui de *certiorari ;* attendu qu'il ne paraît pas qu'il y ait un défaut ou excès de juridiction dans les dits Juges de Paix ni que leur tribunal ait été illégalement constitué, ni que leur jugement ou sentence ait été obtenu par fraude, sur les causes pour lesquelles un tel jugement ou sentence peut être examiné par cette Cour, lorsque ces brefs sont déniés par la loi ; et que ces brefs sont également déniés par l'acte 27-28 Victoria, chapitre 18, section 36, qui amende celui précité ; qu'ainsi le bref de prohibition émané en cette cause ne peut pas être maintenu ; déboute la dite demanderesse, Clarice Duval, de son action et de sa déclaration ou requête libellée en cette cause ; ordonne qu'il émane de cette Cour un bref de consultation (a writ of consultation), adressé aux dits Noël Hébert, Edouard Germain Paradis et Théophile Côté, les défendeurs en prohibition en cette cause, leur permettant de procéder sur le jugement ou sentence ainsi rendu par les dits Noël Hébert et Edouard Germain

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Paradis, Juges de Paix, en la paroisse de St. Norbert d'Arthabaska, le neuf de mars 1868, sur la plainte et poursuite du dit Théophile Côté contre la dite Clarice Duval, et de le mettre à exécution, nonobstant le dit bref de prohibition, émané en cette cause le seize de mars 1868, et la défense et prohibition faite par icelui; et condamne la dite Clarice Duval à tous les dépens en cette cause envers le dit Théophile Côté, lesquels dépens sont accordés par distraction à Messieurs Laurier et Crépeau, procureurs du dit Théophile Côté.

Ce jugement a été renversé par la Cour d'appel, 18 juin 1870. Le jugement est motivé comme suit;

The Court of Our Lady the Queen, now here, having heard the parties by their Counsel respectively, examined as well the record and proceedings in the Court below as the reasons of Appeal filed by the said appellants and the answers thereto, and mature deliberation on the whole being had;

Considering that the appellants by their petition in the nature of *requête libellée* for a writ of prohibition did allege and set forth facts which if proved were and are sufficient in law to obtain the conclusions of their said petition in so far as the same relate to the issuing of a writ of prohibition and the maintenance thereof;

Considering that in consequence of the filing of the *défense en droit* to the said petition the Superior Court for the District of Arthabaska did on the sixteenth day of May, one thousand eight hundred and sixty-eight, by interlocutory judgment order proof of the allegations of the said petition *avant faire droit* upon the conclusions of the said petition, and that the said interlocutory judgment was made and rendered in conformity to law and the practice of the said Superior Court;

Considering that the evidence adduced under the said interlocutory judgment of the sixteenth day of May, one thousand eight hundred and sixty-eight, is relevant and in all respects legal testimony in so far as the same tends to establish and prove that the condemnation by Messrs. the Magistrates Noel Hébert and Edouard Germain Paradis on the ninth day of March, one thousand eight hundred and sixty-eight, was obtained by fraud, and that the said magistrates had no cause inasmuch as no complaint had been made before them or any other magistrates either under oath or otherwise, and that the evidence adduced under the said interlocutory order by the Superior Court conclusively established the fact of the alleged fraud and the complete absence of jurisdiction in the said magistrates;

Considering therefore that in the judgment of the said Superior Court rendered on the thirteenth day of February, one thousand eight hundred and sixty-nine, dismissing the appellants' petition for the reasons therein assigned, and annulling the writ of prohibition issued, there is error, which said judgment this Court doth annul, set aside and make void, and proceeding to render the judgment which the said Superior Court should have rendered, doth grant the conclusions of the said petition for a writ of prohibition, and doth maintain the writ thereon issued as prayed for in said requête to all and every intent and purpose whatever of said writ; and the Court doth condemn the respondents to pay to the appellants the costs as well of this Court as those of the Court below, and it is further

ordered that the record be remitted to the said Superior Court at Arthabaska. Bureau vs. Moore.

Dissentientibus—The Hon. Mr. Justice Caron and The Hon. Mr. Justice Loranger.

Jugement renversé.

E. L. Pacaud, pour l'appelante.

L. P. E. Crépeau, pour les intimés.

(J. D.)

SUPERIOR COURT, 1872.

MONTREAL, 20TH SEPTEMBER, 1872.

Coram TORRANCE, J.

No. 2381.

Bureau vs. Moore.

HELD:—That it is not competent to a minor become major or his assignee to bring an action against his tutor for a specific sum of money which appeared by the tutor's account, pending his administration as tutor, to be a reliquat due by the tutor at a specified date during the administration.

2. That until the rendering of the account as tutor, the only action by the minor become major against his tutor arising out of the administration was the *actio tutelæ directæ*.

The plaintiff brought [illegible] action to recover £227.4.7 alleged to be due him by the defendant on account of a *reliquat de compte* due by the defendant as tutor to his son Terence Moore, junior, according to an account made by the defendant before J. O. Bureau, N.P., on the 27th May, 1867.

The defendant met the action by an exception to the effect that he did not on the 27th May, 1867, render a definitive account of his administration as tutor to his son Terence Moore who was then a minor and remained a minor until the 15th June, 1870, when only the administration ceased; that until a definitive account has been rendered to the said Terence Moore, junior, now become of age, and duly accepted by him or adjusted, it was impossible to establish the sum really due. That the only action therefore which lay against the defendant by reason of his administration as tutor to the said Terence Moore, junior, was one of account, and the present action was wrongly brought.

PER CURIAM:—The relation of the defendant to his son was that of mandataire to mandant. That relation existed until the majority of the son on the 16th June, 1870, and the action arising out of the relation was the *actio tutelæ directæ*. Pothier, Mandat No. 37. Le mandataire contracte par le contrat de mandat l'obligation, 1o. de faire l'affaire qui en est l'objet, et dont il s'est chargé; 2o. d'y apporter tout le soin qu'elle exige; 3o. d'en rendre compte.

No. 61. De l'obligation que contracte le mandataire par le contrat de mandat, naît l'action *mandati directa*, qu'a le mandant contre le mandataire.

4. Troplong, Exécuteur Testam. No. 2028. On sait que le mandat produit deux actions; l'une directe, qui compète au mandant pour lui faire rendre compte: l'autre contraire, qui compète au mandataire, pour se faire rembourser des dépenses qu'il a faites.

2 Pigeau, p. 27, Quand la tutelle finit, le tuteur doit un compte de l'adminis-

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tration des biens du mineur. Meslé, Minorité, p. 289. La tutelle ou la curatelle étant finies, le tuteur ou le curateur, ou leurs héritiers, doivent rendre compte le leur gestion au mineur ou à ses héritiers, et en payer le reliquat; &c .....le mineur après que la tutelle est finie, peut demander compte au tuteur ou curateur et se faire payer le reliquat, &c.

L'action de tutelle ou demande en reddition de compte contre le tuteur, ne peut être formée qu'après la tutelle finie, &c.

C. C. Canada, 308. Every tutor is accountable for his administration when it has terminated.

C. C. Can. 1713. The mandatory is bound to render an account of his administration, &c. (This is under head of obligations of mandatory.)

C. C. 309, also gives a right to periodical accounts. Ces comptes ne sont que pour instruire les parens de l'état de la tutelle et pour les assurer de la fidélité du tuteur; ils ne doivent être qu'un bref état de la recette et de la dépense. Meslé, Part 1. cap. 12, No. 2.

C. C. 311. "Every settlement between a minor become of age and his tutor, relating to the administration and account of the latter, is null, unless it is preceded by a detailed account and the delivery of vouchers in support thereof."

Ferrière, Dict. de droit. Reliquat de compte est le reste ou débit dont le rendant compte se trouve débiteur par la clôture et arrêté de son compte, toutes déductions faites. Ainsi par reliquat l'on entend ce que le comptable doit par l'arrêté et clôture de son compte, quand la mise doit à la recette, pour avoir été moins mis et dépensé que reçu.

The judgment of the Court was recorded as follows:

The Court, etc., considering that the defendant became tutor to his son Terence Moore, then aged nine years, by *acte* of appointment of date 4th April, 1859, and his administration as tutor continued until the 16th June, 1870, when the said Terence Moore, the son, attained his majority;

Considering that the *acte* of date the 27th May, 1867, J. O. Bureau, Notary Public, was not a final account between the defendant and his said son, being then still a minor, and was not accepted by his son or by any person on behalf of his son;

Considering that the said *acte* did not establish any indebtedness on the part of said defendant towards his said son at a later date or on the 28th April, 1871, date of the transfer by Terence Moore, the son, to the plaintiff;

Considering that the only action competent to the said son arising out of the defendant's said administration was an action for an account, *actio tutelæ directâe*, against the defendant; doth dismiss plaintiff's action with costs.

Action dismissed.

Dorion, Dorion & Geoffrion, for plaintiff.

J. S. C. Wurtele, for defendant.

(J. K.)

SUPERIOR COURT, 1873.

In Review.

MONTREAL, 28TH FEBRUARY, 1873.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 566.

Lafarge vs. *The Liverpool, London and Globe Insurance Co.*

HELD:—That the preliminary proofs under a fire policy made after the 15 days within which the conditions endorsed thereon required the same to be furnished are sufficient, and specially so when the conditions state—after the provision as to the 15 days—that "until" such proofs are made no right of action shall accrue.

MACKAY, J.—On the 17th June, 1871, plaintiff insured at defendants' office a house at Upton for $2,000 and a stable for $200. The policy was granted upon a written application, in which the cash value of the house was stated to be $3,000 and of the stable $300. On the 10th October, 1871, the house was destroyed by fire, and the plaintiff is suing for the insurance money. The defendants plead fraudulent over-valuation by the plaintiff of the subjects insured; fraudulent false representations of value in the application; that in September, 1871, plaintiff by deed bound himself to sell the buildings and land to one Boisvert for $2,000, and plaintiff was to disinterest the tenant by paying him $200; that shortly before the fire plaintiff made use of language indicating a fixed purpose to burn the property to realize the insurance money. Another plea sets up the tenth condition of policy requiring notice by the insured in writing forthwith after a fire, and delivery within fifteen days of a particular account of loss, verified by his oath, and in case of buildings and machinery, by certificates under oath of practical architects or builders, and says that plaintiff never complied with this condition, and the policy stipulated against any waivers, and none were. Another plea sets up the same condition No. 10, and its provisions against false swearing upon claims, and says that plaintiff did make fraudulent claim. There is also a plea of general issue.

The plaintiff answers by denying the imputations against himself and his claim, says that defendants knew all about the buildings before assuming risk, &c., that due notices were given of fire and loss, &c.

The case was tried before Mr. Justice Beaudry and a jury. Fifteen questions were put to the jury; these are not such as I would have settled had I had time allowed me; they were put before me at the last minute while I was on the Bench on judgment day, the parties declaring to have arranged them to their mutual satisfaction, and praying me to accept them, and fix then and there a day for the trial. I shall be more cautious in future. The questions now calling for attention, particularly, are the following:—3rd. At the date of the application what was the actual cash value of the several buildings mentioned in the application? The jury answered:—The testimony on this point is contradictory, but the jury are of opinion, upon what appeared to them the most reliable evidence, that a cash value is established of $3,000 for the house destroyed, and $300 for the stable; and this estimate was accepted by the insurers when issuing the policy as the cash value of the insured property, and the jury consider this

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conclusion as the correct cash value at the application. 6th. Did plaintiff, after the insurance, at any time before the fire, use expressions indicating an intention to destroy by fire the said premises, or to avoid the payment of the $200 meaning to the tenant? A.—No. 7th. Was notice of the fire given to defendants by plaintiff within the delay required by the policy, and when, and in what manner? A.—Yes. On 10th October, 1871, to the sub-agent Thurber as per document C, receipt of which was acknowledged by Mr. Smith, the manager, on 13th October, 1871; and also by document D transmitted by said sub-agent to Mr. Smith on or about the 19th October, 1871. 8. Did plaintiff deliver within fifteen days after the fire, to defendants or their secretary, an accurate and particular account of the loss caused by the fire, supported by vouchers and certificates of practical architects or builders and mechanics, verified by solemn oath or affirmation, and if not within 15 days, state in what manner and when? A.—Yes, as by document D. 9. Were the affidavits required by the policy furnished to, and received by the defendants, and state when and whose the affidavit? A.—The affidavits were in due form as per document D. 14. Were any of the conditions of the policy waived by defendants by any writing, &c? A.—No. 15. Amount of plaintiff's loss? A.—$3,000 (less $250 value of foundation) $2750. The defendants have moved for a new trial, and we will take up their material reasons in order: 1st. The cash values found by the jury are unsupported by the evidence, and in fact contrary to the evidence, and the jury, "without any evidence," found that plaintiff's estimates had been accepted by defendants.

All must admit that the question of value of the subjects insured is one of fact. In this case there was evidence on both sides, conflicting evidence, upon this question. The jury find, upon these contradictions, that it appears to them that the values were $3,000 for house and $300 for stable (*i.e.*, they support plaintiff). Courts and judges might differ as to this upon the same evidence. I have great difficulty, considering the sale to Boisvert, and plaintiff's obligation to disinterest the tenant by paying him $200, to see that the house burnt was worth $3,000, or over $2,000. I would probably have told the jury to reflect upon it with care. Yet the defendants must submit to the jury's finding about it. Were we to hold otherwise, we would violate the principles governing jury trials. (See Hilliard, on New Trials, pages 341, 340, 345.) We cannot say that the verdict upon the point of value is unsupported by evidence. The jury report that the evidence is contradictory, but that so and so appeared to them, from what they considered, the most reliable evidence, &c. Why did defendants take plaintiff's premium? Why did they not examine the buildings before taking the risk? It is said that they did, and it is proved that plaintiff had insured before with defendants these very buildings. After the loss, why did they not make option to rebuild? They had a right to do this by a condition of their policy. The second reason in the defendants' motion is that the jury ought to have answered the sixth question in the affirmative. That question was as to whether plaintiff before the fire used expressions indicating intention to destroy his house by fire. The jury have answered in the negative. Upon this point two witnesses have sworn that plaintiff did use the language attributed to him; but they will not say that he meant

it seriously, in the bad sense that defendants would have it. It is to be observed that the question referred to is not pertinent to any issue. There is no allegation that plaintiff set fire to his house, or that he gave defendants reason to suspect it. Supposing that speech proved, and that the jury were to find so; in the absence of the plea that the assured set fire to the house, or that defendants suspect so, what pertinence would the finding have? In the absence of an appropriate plea all presumptions are to be of plaintiff's innocence. The plea states among other things, bearing only upon the plaintiff's representations of value, that plaintiff said so and so, and it breaks off, leaving that allegation there, naked and alone. Under these circumstances we are against defendants upon this part of the case.

The third reason alleged for new trial is that the jury's finding as to the notice in writing by plaintiff of the fire was contrary to the evidence, document C relied upon by the plaintiff not being such notice, but only defendants' agent's letter to them. The plaintiff did not literally give notice in writing of the fire. He informed defendants' agent at Upton of it, and asked him to notify the head office, which he did. The resident secretary got the agent's letter of notification, acknowledged it, and directed the agent to get plaintiff's proofs; the letters show this. We unanimously consider this a waiver of the condition requiring notice of the fire to be given by the insured in writing. The policy authorizes us to hold this waiver—the waiver is in the form appointed by the last condition of the policy. So upon this point of the case we are against the defendants.

We pass to defendants' next three reasons, which are in substance connected, and charge that plaintiff did not make proof in writing and declarations under oath as to his loss within fifteen days after the fire; that no proof was made of document D; that the learned judge at the trial improperly admitted as evidence documents D and F without proof of the parties named in them having been sworn before the Justice of the Peace; and, that the judge misdirected the jury that the Justice's signature was complete proof of itself of his handwriting, and of the parties (deponents) having been sworn. Document D is composed of affidavits dated 19 Oct., 1871, of four persons, two are carpenters, one a blacksmith. These affidavits have *jurats* to them, purporting to be signed by the Mayor of Upton, who is *ex-officio* a Justice of the Peace. The affidavits reached defendants within fifteen days of the fire, but plaintiff made none within that time. Document F is made up of a notarial notification to defendants on the 6th February, 1872, at the request of plaintiff, accompanied by the affidavits of plaintiff himself, and of two other men, as to plaintiff's loss and the value of the house burned. These affidavits all bear date 29th January, 1872, and purport to be sworn before a Justice of the Peace commissioned for receiving affidavits. The judge allowed these documents D and F to be fyled at the trial, as evidence, and held as to the jurats to the affidavits, that they proved themselves without other proof having to be of the attesting officers' handwriting, or of the affidavit-makers having been sworn. We are of opinion that the judge was not wrong. There are things judicially taken notice of, for instance, our constitution, the division of the country, our political agents, public officers, &c. The signatures purporting to be of Justices of the Peace to *jurats*, such as in documents D and F, have

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always been admitted as genuine, upon trials of insurance cases, in the absence of proofs to the contrary. But there remains the question of whether, owing to plaintiff not having made any declaration under oath within the 15 days after the fire, he has not forfeited the right of action. Is the term of 15 days a fatal period, or can plaintiff, though having fyled his declaration under oath only 3 or 4 months after the 15 days, recover? This is a difficult part of the case. The clause requiring declaration under oath within 15 days may be held to look directory or comminatory only; it reads at first to be absolute, but a later paragraph of it says: "and until such particular account, &c., shall be produced, the amount of loss shall not be payable." If, instead of the word "until," the word "unless" had been used, the 15 days would have been *a terme de rigueur*. Why has this paragraph been added to what precedes it requiring the declaration under oath in 15 days? It seems a qualification of it, and as if what was meant to be *de rigueur*, before any money should be payable, was the particular account under oath rather than the account within the 15 days absolutely. By condition xi. no money is payable before 60 days after adjustment of loss. *A fortiori* no money could possibly be recoverable within the 15 days. During the 15 days, never mind what proofs or oaths the insured might make, he could not pretend that anything was payable. "Shall not be payable" cannot refer to any kind of payment *within* the 15 days. It refers to some payment *without*, or outside of them, outside of 60 even, to be made on proofs being furnished. This condition then is ambiguous, and likely to mislead; so it calls for interpretation. The policy, and the conditions upon it, involve the stipulations of the two parties. The contract is an express one, with conditions for the benefit of the insurers, introduced by them, and obligation by the insurers for the benefit of the insured. By many of the conditions the insurer obliges himself to do things. If such obligations be ambiguous, interpretation of them must be in favor of the insured who obliged himself to do something. 1,019 C. Civil L. Co.; Pothier, Obl.; and so in the U. S. they hold that conditions of that kind are to be construed against those for whose benefit they are introduced. Catlin vs. Springfield F. In. Co., 1 Summer's Rep. A clause of doubtful meaning is interpreted against him who got it put into the Act; he ought to have been more clear. He, for whose advantage or purpose a clause is put into an Act, is supposed to have put it in. Instr. fac. sur les couv., p. 72. Conditions about proofs to be made with certain formality, and in a time stated, are for the purposes of the insurers; so they must be clear. Upon these principles we think that plaintiff may be allowed to stand with his demand in Court, though his own declaration under oath was only delivered to defendants in February, 1872. We hold also that the jury's findings on the documents D and F ought not to be disturbed. The defendants' eighth reason reads in substance thus: Because the jury have found that no waiver in writing was by the defendants of any condition of the policy. This of itself or alone cannot be urged by defendants (in favor of whom the finding is) as substantive cause for new trial. This reason was meant perhaps to be considered with some other one, but is not. The tenth, eleventh and twelfth reasons involve substantially this: That plaintiff's representations in his application were warranties, and by reason of his gross exaggeration of values fraud is to be

presumed and the policy held null. Upon this it is necessary to say that the question of fraud has not been put to the jury; the question of values has been, and over-valuation is negatived; how can the Court, in the face of such things, hold the policy null as for fraudulent gross exaggeration? Insurers gain every day from over-valuations; there are over-valuations simple, and others fraudulent; provision is made against both in defendants' condition eleven. Here the jury find no over-valuation. Had there been one it would have been fitting under this policy to put to the jury a question: Was such over-valuation simple or fraudulent? but none such has been suggested. The Court has considered all the other lesser reasons assigned by defendants, and upon the whole sees no reason to allow a new trial.

Motion for new trial rejected.

Laflamme, Huntington & Laflamme, for plaintiff.

Edw. Carter, Q.C., for defendants.

(S. B.)

COURT OF REVIEW, 1873.

MONTREAL, 31st JANUARY, 1873.

Coram JOHNSON, J., MACKAY, J., BEAUDRY, J.

No. 1321.

Lapierre vs. *Gauvreau.*

HELD:—That when an order for goods has been given at Kamouraska to a travelling clerk, having commission to act from various houses in Montreal (including that of the vendor), and has been afterwards accepted by one of such houses, and the goods delivered at the depot in Montreal of the Grand Trunk Railway and forwarded by that route to the purchaser residing at Kamouraska, the right of action originated at Montreal.

This was a hearing in Review of a judgment rendered in the Superior Court, at Montreal, on the 30th November, 1872, (TORRANCE, J.;) maintaining an exception *déclinatoire* fyled by the defendant.

The action was brought to recover the price of goods alleged to have been sold and delivered by the plaintiff to the defendant at Montreal, and was instituted at Montreal and served on the defendant, at his domicile in Kamouraska.

The exception alleged that the sale and delivery really took place at Kamouraska, and that the right of action consequently originated there.

The parties signed written admissions to the effect that the sale took place, —"par l'entremise d'un commis voyageur, qui ayant une commission de différentes maisons de commerce et du demandeur pour les ventes de marchandises qu'il leur procurait, en prenant des ordres ou commandes à cet effet comme commissionaire, se serait présenté chez le dit défendeur, dans son district, et là et, alors aurait pris de ce dernier la commande ou l'ordre pour les marchandises dont le prix est reclamé en cette cause et qui furent ensuite, au retour du commis voyageur chez le demandeur, empaquetiés par ce dernier en son magasin, en la cité de Montréal, déposées ensuite à la compagnie du Grand Trone de chemin de fer du Canada, en la cité de Montréal et expédiées par cette voie, avec l'envoie ou bordereau (compte) au dit défendeur."

Starke vs. Massey.

The plaintiff relied on the decisions reported in the 14th Vol. of the L. C. Jurist, pp. 184, 186.

The reason assigned in the judgment complained of was as follows:—"Considering that the right of action set forth in plaintiff's declaration did not arise in the district of Montreal;"

The following was the judgment in Review:—"The Court * * * Considering that there is error in the said judgment of the 30th day of November, 1872, to wit, in this that the declinatory exception fyled by the defendant was maintained by the said judgment, whereas it should have been dismissed;

Doth, revising said judgment, reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises:

Considering that by the admissions of the parties it is proved that the order for the goods, wares and merchandise, for the price and value whereof the present action was instituted, though sent from Kamouraska, was only accepted and fulfilled at the City of Montreal, and that the right of action, therefore, originated at the last named place, where the contract of sale was completed;

Doth dismiss the said *exception déclinatoire*, with costs of both Courts."

Judgment of Superior Court reversed.

Jetté, Archambault & Christin, for plaintiff.

Dorion, Dorion & Geoffrion, for defendant.

(S. B.)

SUPERIOR COURT, 1873.

MONTREAL, 31st JANUARY, 1873.

Coram JOHNSON, J.

No. 1901.

Starke vs. *Massey*.

HELD:—That in an action *en séparation de corps et de biens* for adultery by the husband in the common household of himself and his wife, the admissions of the husband, made by him to third persons or resulting from his default to answer interrogatories *sur faits et articles*, will be considered by the Court, where the Court is of opinion that they are not the result of collusion between the plaintiff and the défendant.

This was an action by a wife, *en séparation de corps et de biens*, predicated on the alleged adultery of the husband in their common household.

At the final hearing, the plaintiff moved that certain interrogatories *sur faits et articles* which had been duly served on the defendant should be taken *pro confessis*, in consequence of the default of the defendant to answer the same, and the defendant, on the other hand, moved to reject them.

The following was the judgment of the Court:

"The Court having heard the parties by their Counsel as well upon the motion of the defendant made and fyled on the 26th November last, praying that the interrogatories *sur faits et articles* served upon him be rejected and set

aside for the causes and reasons therein set forth as on the motion of plaintiff of the same date, that said interrogatories be taken *pro confessis*, and also upon another motion of plaintiff that Rulings at Enquête be revised and set aside, and on the merits of this cause; having examined the proceedings, proofs of record and evidence adduced, and maturely deliberated; pronouncing first upon the motion of defendant doth dismiss and overrule the said motion; secondly, as to the motion by plaintiff to have the said interrogatories taken *pro confessis*, doth grant said motion; and thirdly, upon the motion by plaintiff for revision of Rulings at Enquête, it is ordered that said plaintiff do take nothing by said motion. And the Court adjudging upon the merits; considering that admissions by the defendant, whether made by him to third persons, or resulting, as a consequence of law, from his default to answer interrogatories *sur faits et articles*, can by law be made, and are to be considered and applied by the Court in the present case, subject to the rules and principles of law in that behalf, and that wherever it appears to the said Court that such admissions are not the result of collusion between the defendant and the plaintiff, the facts so admitted may be taken and held as proved where they concur with facts otherwise proved by legal evidence; considering further that the plaintiff has proved the material allegations of her declaration as well by the admissions and confessions of the defendant in so far as these can go to prove the said allegations, as by other evidence independent of the said admissions, and that the fact of adultery committed by the defendant with one Bridget Doolan in the common household of the defendant and his wife, the present plaintiff, at Ottawa, is established to the satisfaction of the Court; and considering therefore that the allegations of the plaintiff are sufficiently proved;

Doth order and adjudge that plaintiff be and remain from this day henceforth separated as to body, *séparée de corps*, from the defendant her husband, hereby enjoining the said defendant not to trouble the said plaintiff or live with her, *sous toutes peines que de droit*, nor to molest or interfere with the child, issue of the marriage of said parties, the Court hereby maintaining said plaintiff in the possession, custody and care of said child to the exclusion of the said defendant.

And the Court doth condemn the defendant to pay the costs of this action.

And as to that part of the conclusions of said plaintiff's declaration and *demande* respecting an alimentary allowance to her and said child, the Court doth hereby reserve to said plaintiff all such rights as she may have to obtain the said *pension alimentaire*.

Judgment for plaintiff.

A. & W. Robertson, for plaintiff.
Devlin & Power, for defendant.
(S. B.)

COURT OF REVIEW, 1873.

MONTREAL, 24TH JUNE, 1873.

Coram JOHNSON, J., MACKAY, J., TORRANCE, J.

No. 611.

Gibson et al. vs. *Lindsay.*

HELD:—That since the coming into force of the Prov. Stat. 36 Vic., ch. 12, no case shall be susceptible of being inscribed for review if, being a personal action, the amount demanded exceed $500, and that said Statute avails as an amendment of Art. 494 of the Code of Civil Procedure, notwithstanding that such Article is not expressly designated in said Statute, as required by the Prov. Act 31st Vic., ch. 7, s. 10.

This was a motion by defendant to reject the inscription in Review, on the ground that the action and demand of the plaintiff was a personal action and exceeded the sum of $500 cy., the inscription having been made and filed since the coming into force of the Prov. Stat. 36 Vic., ch. 12, s. 4.

Ritchie, Q. C., showing cause for the plaintiffs. The party inscribing argued that the clause of the Statute in question did not in any way legally affect Art. 494 of the Code of Civil Procedure, and was virtually null, inasmuch as it failed expressly to designate the Article as required by the Prov. Act 31st Vic., ch. 7, s. 10.

The Court, after taking time to consider, granted the defendant's motion.

Inscription in Review rejected.

M. Branchaud, for plaintiff.
T. W. Ritchie, Q. C., counsel.
Bethune & Bethune, for defendant.
(S. B.)

COURT OF REVIEW, 1873.

MONTREAL, 28TH FEBRUARY, 1873.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 900.

Desmarteau et al. vs. *Harvey.*

HELD:—That in the case of a sale of a given quantity of seed by sample where the bulk proves inferior to sample, the purchaser is not bound to accept the part which is equal to sample, but may repudiate the whole purchase.

This was a hearing in review of a judgment of the Superior Court at Montreal (JOHNSON, J.), rendered on the 30th Nov., 1872, dismissing the plaintiffs' action.

MACKAY, J.—The plaintiffs are merchants in Montreal, and sue Harvey, of Hamilton, Ont. They charge him as upon a sale made here in March, 1872, of about 450 minots of timothy seed at $2.85 the minot, of the same quality as a sample shown to the defendant's agent, Evans, present at the sale, who declined to go and see the bulk. The delivery was to be by sending the seed to Hamilton by the Grand Trunk Railway in bags to be furnished by the defendant. Plaintiffs say that 417 32-45 bushels were sent, and more could not be, for want of bags; that the seed fell in price, and afterwards defendant would only offer $2.35 per minot for what he had received. The conclusions are for $1091.53. The

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defendant's plea sets up the memorandum of the sale and denies that plaintiffs fulfilled their contract, or that defendant accepted the seed; it says that the seed was not up to the sample, but very inferior; that the defendant refused it, stored it for plaintiffs' account, notifying them of the facts. The judgment *a quo* has found that what was sent to defendant was inferior to the sample, and that no perfected sale has been; so the action has been dismissed. The plaintiffs appeal. At the argument before us one point insisted upon was that the seed certainly was not all bad, that defendant ought to have been condemned to pay for so much of it as was good, and that, at most, only 70 bags are proved inferior. Authorities were cited. Our Civil Code, it was contended, supported the proposition that deficiency of quality being only as regarded a small part of what had been sold, as the purchaser would, probably, have bought without this part, he ought not to be allowed to rescind the sale in totality. I notice that in the course of the proceedings the sale is sometimes called sale of 225 bags of timothy seed, and sometimes sale of about 450 mi[illegible] while the contract reads as sale of one car load, say 450 bushels. The decl[illegible]ation [illegible]s that defendant's agent declined, or did not think fit to examine the [illegible] but the proofs establish that the bulk was not possessed by plaintiffs at the [illegible] of contract; plaintiffs had to make it up afterwards by buying; they [illegible]ght in lots of two to twenty minots to complete it. In that March the seed was sent to Hamilton in one lot, 225 bags, 70 of which were very inferior to the sample. Is plaintiffs' proposition that defendant can be charged with so much of the seed as was not inferior to the sample, sound? Can seller of a large named quantity charge the purchaser upon a delivery of a lesser quantity, acceptation of what has been delivered having been refused? Suppose a contract for 1,000 bushels; seller sells 900, of which 200 are bad. The nine hundred are refused. Can the purchaser, nevertheless, be charged with the 700 admitted to be good? A car load of seed being sold, can the purchaser be held to accept a half or a quarter of a load? In the case in hand, defendant has right to say that his contract was one, and that entire performance of it had to be. See Champion vs. Short, 1 Camp. Story on Sales, sect. 376, says: "Where goods are sold by sample warranty is implied that the bulk corresponds to the sample." "The exhibition of a sample is equivalent to an affirmation that all the goods sold are similar to it, and if they b[illegible] the vendee may rescind the contract." Another argument of plaintiffs was [illegible] possibly, the sample had been tampered with by defendant. This we do not see. It was urged also that the proofs for plaintiffs are stronger than those for defendant. Plaintiffs' witnesses look somewhat interested; the strongest of them are those who bought the seed for plaintiffs to make up the bulk with. They do say that the seed is good, but others prove the contrary. There is evidence pro and con. That for defendant is strong. The Judge *a quo* has passed upon all, and not unreasonably; so his judgment is confirmed.

Judgment of S. C. confirmed.

Jetté, Archambault & Beïque, for plaintiffs.
Carter & Hatton, for defendant.
(S. B.)

SUPERIOR COURT, 1873.

MONTREAL, 28TH FEBRUARY, 1873.

Coram JOHNSON, J.

No. 39.

Walters vs. *Lyman et al.*

HELD:—That when faits et articles are served on the attorney of one of the parties who is absent, the simple indication by such attorney of the place of residence of his client is a sufficient compliance with the provisions of Art. 223 of the Code of C. P., and that he is not bound to take steps to have his client examined under a Commission.

PER CURIAM:—This was a point which arose at enquête under 223 C. P. A party was absent, and his attorney thought it sufficient to indicate where his client was, without taking steps to have him examined. The Court thought the meaning of the Code was that when an attorney has indicated where his client is, it is at the diligence of the other party to have him served with the *faits et articles*. If the locality indicated were in the midst of the ocean or other place not easily accessible, that would be a case in which delay might be granted by the judge for the service of interrogatories. *Acte* granted to defendant of his designation of residence of Elisha S. Lyman.

Dorion, Dorion & Geoffrion, for plaintiff. *Acte* granted.
John Dunlop, for defendants.
(S. B.)

COURT OF REVIEW, 1872.

MONTREAL, 30TH NOVEMBER, 1872.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 589.

Higgins et vir. vs. *The Corporation of the Village of Richmond.*

HELD:—That defendants were liable for damages suffered by the female plaintiff, by the upsetting of a sleigh on the highway under control of defendants, caused by a natural bank on such highway, notwithstanding that the roadway opposite the bank was wide enough for two teams to pass, and notwithstanding that the accident was more immediately caused by the horse taking fright at the sound of a railway whistle; the horse itself also being at the time driven by a female only 12 years of age.

This was a review of a judgment rendered by the Superior Court at Sherbrooke, condemning the defendants to pay the plaintiffs $120 currency, besides interest and costs.

The action was brought to recover the sum of $5,310 for damages alleged to have been incurred by the female plaintiff, in consequence of the upsetting of a sleigh, in which she was being driven by a girl only 12 years of age, on the public road under the defendants' control.

It was in evidence that where the accident occurred there was a natural

mound round which it was necessary to drive, and that the level roadway opposite this mound was about 23 feet wide, and wide enough for two teams to pass.

The upsetting was said to have been caused by the sleigh striking this mound, and that the horse was a skittish one, and had been frightened by the sound of a railway whistle.

The defendants contended that there was negligence on the part of the female plaintiff in suffering herself to be driven by a girl of only 12 years of age, the horse too being a skittish one, and that the immediate cause of the accident was the sounding of the railway whistle, which had frightened the horse, and that, under the circumstances, they were not liable. Reference was made to Sleigh, Personal Wrongs, p. 103. Moffete vs. The G.T.R., 16th L. C. Law Rep., p. 231. Hilliard on Torts, vol. 1, p. 140-142.

BEAUDRY, J., *dissentiens* :—The action is for the recovery of damages caused by the upsetting of a sleigh. It is stated that the road is not level, that a mound exists, which it was the duty of the Corporation to have removed. Had that been done the accident by which the female plaintiff and child were thrown from the vehicle would not have happened. As I read the evidence, the defendants are not to blame. The road has existed in its present state for forty or fifty years, and the accident appears to have been caused, not by any obstruction in the road, but by the proximity of the railway, the whistle of which frightened the horse. I have therefore to dissent from the judgment of the majority.

MACKAY, J. :—The suit was brought for special damages, alleged to have been suffered by Mrs. Higgins or Steers. Her husband also sued for damages, but he has waived that claim, and he now stands in the suit simply for the purpose of authorizing his wife who is *séparée de biens*. The damages are charged as having been caused to Mrs. Steers by an obstacle in the roadway, near the railway station, a mound being permitted to exist, which, it is charged, it was the duty of the Corporation to have removed. It was alleged further that the Corporation had been warned to abate this mound, but they had neglected to do so. The defendants plead that the road is a good natural road; that no negligence of theirs contributed to the accident; that there was no obstruction except a natural inequality of the road. There was a further plea imputing negligence to the person driving the vehicle. In February, 1872, judgment went against the defendants, finding that this imperfection in the roadway did exist, and awarding the sum of $120 damages. If the defendants are liable the condemnation must be considered very moderate, because the woman was seriously injured, and was confined to her house for a long time. The majority of the Court think the judgment is right in holding the defendants liable. We do not say that municipalities are obliged to reduce all their roads to levels, but we say this is a particular case. Other accidents had taken place at the same spot. There had been numerous upsets there, and notice had been given to the defendants to remove this mound out of the roadway. It is proved that the mound is a very peculiar feature in the roadway, and a manifest obstruction. The fright of the horse, caused by the whistle of the train, is said to have been the primary cause of the accident, but we do not find it so. Other accidents happened at the same place without the railway having anything to do with them: There was a slight upset

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there about a week after the accident to the plaintiff. Suppose the horse was a little skittish at the whistle of the railway, we do not think that was the primary cause of the accident, or that it can be considered there was fault or contribution by the plaintiff, so that she is to lose her damages. In many cases, even where there is contribution by the plaintiff to the accident, and the contribution is very small, plaintiff is not to lose his damages. Under the circumstances, therefore, the judgment ought to be confirmed.

Judgment of S. C. confirmed.

W. Brooke, for plaintiffs.

Hall & White, for defendants.

(S. B.)

COUR SUPERIEURE, 1873.

ST. HYACINTHE, 27 FEVRIER, 1873.

Coram SICOTTE, J.

Lavallée vs. *Tétreau*, et *Roy*, opposant et colloqué, et *Lavallée*, contestant.

JUGE :—1. Qu'avant le code, la subrogation légale, sans demande, était accordée à l'acquéreur qui employait son prix au paiement des créanciers auxquels cet héritage était hypothéqué, et qui était ensuite évincés pour cause non dérivant de lui, et ce, quand même il aurait été chargé par son acte d'acquisition de payer tels créanciers.

2. Que la revente volontaire par le premier acquéreur, après avoir ainsi payé les créanciers inscrits, l'éviction par vente judiciaire sur le second acquéreur, à la demande de créanciers hypothécaires antérieurs à l'acquisition du premier acheteur n'ont pas eu pour conséquence de nullifier la subrogation.

PER CURIAM :—Le jugement dépend de la solution des deux questions suivante :

1. Avant le code, la subrogation légale était-elle accordée à l'acquéreur qui employait son prix au paiement des créanciers auxquels cet héritage était hypothéqué, et qui pouvait lui avoir été indiquée par la vente ?

2. Toutefois telle subrogation admise, la revente volontaire par le premier acquéreur après avoir ainsi payé les créanciers inscrits, et l'éviction par vente judiciaire sur le second acquéreur à la demande des créanciers hypothécaires antérieurs à l'acquisition du premier acheteur, ont-ils eu pour conséquence de nullifier la subrogation ?

Les auteurs traitant de la subrogation légale, commencent invariablement par déclarer que c'est une question épineuse, et on est fort amusé de voir avec quelle superbe ils parlent parfois les uns des autres, grands ou minces jurisconsultes. Cela faite peine quand on compare leurs contradictions et le résultat de toutes ces discussions dans la pratique et même la jurisprudence.

Larombière, qui presque toujours évite ces écarts et ces éclats de dissidence, a rendu compte d'une manière exacte de l'opinion qui prévalait. " Les principes, " dit-il sur cette matière importante, n'étaient pas fermement arrêtés avant la " promulgation du code. Quelques textes combinés du droit romain, des " décisions d'arrêts en contradiction, des opinions d'auteurs en lutte avaient été " impuissants à fonder un corps de doctrine bien lié, une théorie logique et conséquente. Notre ancienne législation sur ce point méritait donc d'être acceptée " en quelque sorte sous bénéfice d'inventaire."

Guyot avait parfaitement analysé dans son Répertoire, ces textes du droit romain, ces arrêts en contradiction, et ces opinions d'auteurs en lutte. Merlin ne pouvant faire mieux, l'a copié textuellement dans son répertoire.

Voici cette analyse. (Citation de Guyot) La citation qu'on vient de faire constate que les jurisconsultes les plus estimés avant cette époque se prononçaient en faveur de la subrogation légale dans l'espèce que nous discutons. Le Président Fabvre qui la refusait en théorie, la concédait à tous les effets dans la pratique.

Domat déclarait qu'elle était acquise à l'acquéreur. Page 210, No 7. " L'acquéreur d'un héritage employant le prix de son acquisition au paiement des créanciers à qui cet héritage était hypothéqué, est subrogé à leurs droits jusqu'à concurrence de ce qu'il leur paie, car en les payant du prix de leur gage pour se l'assurer, il se le conserve jusqu'à la concurrence de ce qu'il leur paie, contre d'autres créanciers subséquents, quoique antérieurs à son acquisition. Bourjon s'exprime aussi dans le même sens (Page 741 et 742—dans le vol. 2.) Outre la subrogation conventionnelle il y a plusieurs cas dans lesquels la subrogation s'acquiert de plein droit, et par la seule disposition de la loi. Ces subrogations produisent le même effet que la conventionnelle. " L'acquéreur qui, pour conserver l'héritage par lui acquis, paie les créanciers qui ont hypothèque sur icelui, est de droit et indépendamment de toutes conventions subrogé à l'hypothèque des créanciers. Il est subrogé à plus forte raison, s'il paie au créancier délégué. No 200. Des deux propositions précédentes, il s'en suit que si par la suite l'acquéreur est forcé de déguerpir, il est, pour ce qu'il a payé à ces créanciers, tant délégués que simples hypothécaires, colloqué suivant l'hypothèque de ces mêmes créanciers. C'est pour se maintenir en possession qu'il a payé, il est donc juste que dans le cas, que nonobstant ces paiements, il se trouve forcé de déguerpir, de lui accorder la subrogation à l'hypothèque des créanciers qu'il n'a payés que par l'effet et la force de " l'hypothèque". Renusson, le seul qui ait fait un traité particulier sur la subrogation, est aussi emphatique que les auteurs qu'on vient d'indiquer, dans l'opinion qu'il émet en faveur de cette subrogation légale au profit de l'acquéreur qui paie son prix aux créanciers de son vendeur.

" Pareillement, quand un acquéreur est chargé par son contrat d'acquisition " de payer au créancier de son vendeur, et qu'il paie en exécution de son contrat " le créancier, il est subrogé de plein droit. Les lois romaines ont trouvé juste " que tel acquéreur succède de plein droit, et entre au lieu et place du créancier " qu'il a payé, et que comme subrogé, il puisse se défendre contre les créanciers " postérieurs qui voudraient le troubler, ou s'il est contraint de déguerpir l'héritage, " pour être vendu par décret, il doit être colloqué et mis en ordre suivant l'hy- " pothèque du créancier qu'il a payé, de même qu'aurait pu être le créancier " s'il n'avait pas été par lui payé."

Pothier se prononce contre cette subrogation comme découlant *de plano* de la loi civile, mais voici comment cet éminent légiste l'accorde toutefois au tiers acquéreur ; traité des obligations, No. 558, Par. 3, "à l'égard du tiers détenteur d'un héritage qui pour en éviter les délais, a payé la dette à laquelle son héritage était hypothéqué, si en payant, il a manqué de requérir la subrogation aux droits du créancier, il ne sera pas à la vente subrogé à tous les droits du créancier, mais il pourra, au moins selon nos usages, les exercer sur cet héritage dont il est détenteur, contre tous autres créanciers postérieurs à celui qu'il a payé, car en libérant l'héritage de cette hypothèque, *meliorem fecit in eo fundo ceterorum creditorum pignoris causam*, ce qui lui donne contre eux *exceptionem doli*, pour retenir ce qu'elle a payé, et

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pour libérer cette hypothèque la bonne foi ne permet qu'ils profitent à ses dépens de cette libération. *Dolum faciunt si voluit eum ejus damno locupletari.* Ce cas est semblable à celui auquel le détenteur d'un héritage sujet à des hypothèques, y a fait des améliorations." Pothier n'était pas satisfait de l'interprétation qu'on donnait à certains textes romains, mais basant son opinion sur la règle de toute justice et de toute loi, que nul ne peut s'enrichir du bien d'autrui, il assure à l'acquéreur, *exceptionem doli* à l'encontre des créanciers, pour lui permettre de reprendre sur l'héritage, ce qu'il a payé. La bonne foi ne permettant qu'ils profitent à ses dépens de la libération de dettes qui étaient privilégiées ou antérieures, "dolum faciunt," il y aurait dol de la part de ses créanciers, or cela ne peut être.

Ainsi d'après le président Fabvre et d'après Pothier, d'accord sur ce point, avec presque tous les jurisconsultes, la subrogation légale était accordée à l'acquéreur d'une manière efficace et constante, tant comme chose admise par le droit civil que comme chose découlant du droit naturel, et sanctionnée par la jurisprudence, et par les usages, comme le disait Pothier.

Telle était la constitution légale de la matière lors de la promulgation de notre code. S'il n'y avait pas d'incertitude sur le recours accordé à l'acquéreur dans la pratique et d'après les usages, pour le sauvegarder contre toute perte, il pouvait apparaître que la doctrine n'était pas admise avec la même unanimité d'opinion et la même certitude. Cela justifierait, peut-être, les codificateurs d'indiquer comme droit nouveau, la subrogation légale de l'acquéreur qui fixe son prix pour acquitter les hypothèques qui grèvent le fonds.

Comme il a été remarqué, il y avait plus de subtilité dans ces dissidences que de réalité. La subrogation s'exerçait au profit de l'acquéreur d'après l'usage sur l'héritage à l'encontre des créanciers postérieurs, qu'on déboutait de leur opposition comme entachée de dol. D'ailleurs il y a dans notre code une disposition, nullement énonciative de droit nouveau, qui accorde tout l'effet de la subrogation légale au profit du détenteur qui a acquitté des créances antérieures en lui accordant le droit d'exiger que le créancier poursuivant lui donne caution, avant de laisser, fera porter l'immeuble à si haut prix, que le détendeur sera payé intégralement de ses créances privilégiées ou antérieures. Art. 2073. C'est plus que la subrogation dont parle Fabvre, et mieux que le recours admis dans l'usage, tel que nous l'apprend Pothier. Il y a donc lieu de déclarer, que dans la jurisprudence qui prévalait avant le code, dans nos usages comme d'après le code qui déclare ces usages mêmes sont et ont toujours été notre loi et notre jurisprudence, la subrogation avait lieu par le seul effet de la loi, au profit de l'acquéreur d'un immeuble qui paie au créancier auquel cet immeuble est hypothéqué.

Maintenant il faut examiner si l'acquéreur est, dans l'espèce, déchu de son droit de subrogation.

Après avoir acquitté les hypothèques que lui avait dénoncées son vendeur, il a revendu l'héritage à Tétreau, et c'est sur ce dernier qu'un créancier de l'auteur de l'acquéreur qui réclame la subrogation, a fait saisir et vendre le même héritage.

Par cette éviction, Roy qui est cet acquéreur, perd le prix que lui devait Tétreau, ce prix représentant ce qu'il avait lui-même payé aux créanciers de son vendeur. La chose vendue est perdue pour lui, car prix, terre, c'est même

chose; si le vendeur perd son prix, sans pouvoir reprendre sa terre, il perd sa terre, comme l'acheteur perd sa terre, s'il paie deux fois, ou sans utilité pour lui.

Si Tétreau n'eût pas été évincé, Roy n'eût pas été, non plus, évincé de son prix. De fait Roy est évincé de la chose qui lui avait été vendue.

Quel est le principe de la subrogation? C'est de ne pas permettre à des créanciers de s'enrichir aux dépens d'autrui, par la libération d'une créance qui les aurait primés. Est-ce que les créanciers seront moins coupables du dol dont parle Pothier, s'ils attendent pour le commettre avec profit, que le mouvement de la propriété ait placé l'héritage dans les mains d'un autre? Est-ce qu'ils ne profiteront pas de la même manière du bien d'autrui pour s'enrichir?

Si Lavallée se fut présenté à l'ordre sur une demande en ratification de titre de la part de Roy, sa créance eût été primée par celle d'Evé, qui était bailleur de fonds.

Le droit de Lavallée lui permet de suivre son gage dans les mains des tiers détenteurs, et c'est dans l'exercice de ce droit de suite qu'il a fait vendre l'immeuble. Mais cette vente dépossède l'opposant de son gage. Tant qu'il n'est pas payé, la vente est imparfaite, et peut être résolue, quand elle est résolue, le vendeur reprend sa chose, tel qu'il l'avait avant la vente.

Si la résolution est l'effet de la loi, le vendeur est dans les mêmes conditions relativement à la chose vendue; l'éviction fait cesser la confusion des qualités de créancier hypothécaire ou privilégié et d'acquéreur de la chose affectée, si elle a lieu pour des causes indépendantes de l'acquéreur, et alors l'hypothèque ou le privilége reprend sa force, Art. 2081. C.C.

L'opposant est dans l'espèce évincé de l'immeuble qu'il avait acheté et revendu, et s'il est éconduit de l'ordre, il perdra son prix, qui aura été employé au profit et dans l'intérêt même de Lavallée.

La subrogation qui a son principe dans les circonstances favorables du paiement, ne doit être refusée que lorsqu'elle se présente comme moyen de prendre ce qui n'est pas juste ou plus qu'il n'est dû, ou cause préjudice aux autres créanciers du vendeur.

Si Roy n'eût pas fait opposition sur les deniers, Joseph Evé serait venu à l'ordre avant Lavallée, pour sa créance de bailleur de fonds. Lavallée n'eût pu s'écarter qu'en constatant son extinction par le paiement ou par la prescription: Elle n'est pas éteinte par la prescription, non plus que par le paiement; car par la subrogation qui s'est opérée quand Roy a payé Evé, les droits de ce dernier sont passés dans les mains de Roy. Ces droits ne pouvaient toutefois être exercés que dans l'éventualité prévue par la loi, viz: dans le cas où la chose pour laquelle tel paiement avait été fait serait soustraite du contrôle de celui qui faisait tel paiement. Il suffit, pour être dans la condition voulue, que la perte soit certaine, si la subrogation n'a pas son effet sur la chose vis-à-vis de laquelle elle doit être exercée. Un droit doit valoir et produire ses conséquences légitimes chaque fois qu'il y a danger et péril; autrement il serait sans valeur aucune.

La vente judiciaire n'est que le moyen légal d'arriver à l'éviction qui donne ouverture à la subrogation et à ses effets. Il n'y a donc aucune raison de s'opposer à l'exercice d'un droit qui ne commence et n'a d'existence que par l'éviction même.

Nous avons cherché à faire voir que l'éviction soit qu'elle se fasse sur l'acqué-

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reur qui a employé son prix au paiement d'un créancier hypothécaire, ou sur un détenteur qui possédait pour avoir acheté de lui, est l'éviction de la chose à propos de laquelle la subrogation s'était opérée et sur laquelle elle devait s'exercer. Cela réglé, il ne s'agit plus que d'examiner, si l'acquéreur perd la chose achetée. La vente judiciaire dépossède et termine l'éviction. Quelque soit l'acheteur, c'est pour lui nouvelle acquisition, second prix, qu'il doit acquitter, et si l'adjudicataire est le premier acquéreur qui a fait délais, il ne prend rien de son premier prix, et de sa première acquisition. Tout cela est perdu pour lui par l'éviction. Il ne peut se faire aucune confusion de droits à raison de telle adjudication. A l'ordre il exercera ses droits sur le second prix comme tout créancier, et suivant les droits d'aucun créancier auquel il est subrogé par la convention ou par la loi. Ce n'est pas le même prix dont il s'agit, comme dans l'espèce Gauthier qu'on a citée, ce n'est pas non plus pour obtenir collocation une seconde fois, de la même créance comme on voulait le faire dans cette espèce. Les motifs qu'on trouve dans cet arrêt ne repoussent pas la subrogation. Elle est au contraire admise, mais on décidait qu'ayant eu son effet utile une fois, on ne pouvait par plusieurs ventes réussir à réclamer utilement une créance déjà acquittée et éteinte par l'effet ordinaire, et l'exercice légal de la subrogation.

Il faut même dire, dans les principes des faits, que si la subrogation n'eût pas été exercée sur le prix de [illegible] Gauthier le premier acquéreur, elle eût pu l'être utilement dans [illegible] sur le prix du second acquéreur par la revente.

L'opposant doit donc [illegible] son opposition. La collocation de sa créance est conforme à [illegible] à la loi.

Le jugement est motivé comme suit :—

La cour, après avoir entendu l'opposant Roy, et Lavallée, contestant la collocation du premier, examiné les écritures, les papiers produits et la preuve;

Considérant que l'opposant Roy a constaté qu'il a payé à Joseph Evé, auquel l'immeuble saisi et vendu, dont il était devenu acquéreur par la vente du 7 mars 1861, était hypothéqué avec privilége du bailleur de fonds par la vente du 26 août 1859, la somme de cinq cent quatre-vingt-trois piastres et six centins, ainsi qu'il est allégué dans son opposition, et admis du reste par le contestant;

Considérant que la subrogation a eu lieu par le seul effet de la loi et sans demande au profit de l'opposant à raison de tel paiement, et qu'il est en droit de l'exercer utilement sur le prix d'adjudication provenant de l'éviction du même immeuble contre lui, ou contre celui auquel il l'a revendu, par lequel il perd l'immeuble et le gage, qui assurait le prix qui lui était dû.

Considérant que le paiement fait à Evé par l'opposant, était dans l'intérêt des créanciers hypothécaires, et que Lavallée ne peut profiter de cette libération aux dépens de celui qui l'a effectuée par son paiement. Considérant que l'opposant Roy a juste droit à la collocation de la somme de $425.14 faite à son profit par le jugement de distribution, préparé par le Protonôtaire, et que le contestant Lavallée n'a pas justifié sa contestation, maintient la dite collocation, et déboute Lavallée de sa contestation avec dépens.

Contestation re[illegible]

Chagnon & Sicotte, avocats de l'opposant Roy, colloqué.
Bourgeois, Bachand & Richer[illegible] avocats du contestant Lavallée.
(R. M. C.)

COURT OF QUEEN'S BENCH, 1871.

MONTREAL, 9TH SEPTEMBER, 1871.

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

WILLIAM BARLOW,

(*Respondent in the Court below,*)

APPELLANT;

AND

MICHAEL KENNEDY,

(*Petitioner for Writ of Habeas Corpus in the Court below,*)

RESPONDENT.*

APPEAL—MINOR—CUSTODY.

HELD:—1st. That a Judgment rendered upon an application for a Writ of *Habeas Corpus*, made in vacation before a Judge of the Superior Court and, on the return of the writ, transmitted to the Superior Court for further proceedings therein, is a Judgment of the *Court* and not of the *Judge*, and as such is susceptible of review and appeal.

2nd. That a father is by law entitled to the possession, custody and guardianship, and cannot be deprived of his minor child, except for insanity or gross misconduct: nor can he deprive himself of his paternal right; and that any contract to the contrary cannot bind him, as it is immoral in the eye of the law.

On the 10th day of November, 1868, the respondent applied to SHORT, J., at Sherbrooke, in vacation, for a Writ of *Habeas Corpus* on behalf of his minor child, Mary-Ann-Margaret Kennedy, upon the following petition:—

"That, at Hamilton, Ontario, in the course of the year 1853, the petitioner was married to Margaret Roarden, who died in June, 1864.

"That there is issue of the said marriage one minor child, to wit: the said Mary-Ann-Margaret Kennedy, born on the 27th day of November, 1862;

"That at the time of the death of his said wife, the petitioner being poor and needy did, in June, 1864, place his said child under the care of one Isidore Delisle, at South Quebec, until he should take her back with him, or provide another place for her;

"That a few days afterwards, the wife of said William Barlow (appellant) did, in the absence of the petitioner and without his permission or consent, and against his will, induce said Delisle to let her take the said child away, promising at the same time that she should take proper care of her and bring her back whenever requested so to do by said Delisle or by the petitioner;

"That the said William Barlow's wife then and there took the said child away to her own house, and she and her said husband have kept her ever since and always refused, and still do refuse, to restore her to the petitioner, although often duly requested so to do;

"That the said minor child has been christened in the Roman Catholic Church, and it has always been the desire of her late mother, and of the petitioner, that she should be brought up and educated in the Roman Catholic

* This case, so far as the proceedings and Judgment in the Superior Court at Sherbrooke are concerned, was reported in part in Vol. XIII. of the *L. C. Jurist*, p. 57.

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religion, and that she is now being brought up and educated in the Protestant religion, contrary to the wishes of the petitioner;

"That the said William Barlow and his wife have changed the name of the said child, and given her the name of 'Anna Barlow,' to the great regret and sorrow of the petitioner;

"That on the 14th day of September last, the petitioner has caused his attorneys to demand the said child from the said William Barlow, and that, instead of complying with his request, the said William Barlow has at once instituted an action in the Superior Court for this District, and is now trying to have the petitioner condemned to let the said child remain with him and under his control until she is of full age, or to pay him the sum of five hundred dollars for the care bestowed by him upon her, the whole to the great damage of the petitioner;

"That, in July, 1866, the petitioner contracted another marriage, and is now in a position to take care of, provide for, and bring up his said child, and that he and his present wife are anxious to have the said child in their family, as they have no other child, in order to enjoy her affection and society, and bring her up and educate her in their own faith;

"Wherefore the petitioner prays for a writ of *Habeas Corpus* to bring the said Mary-Ann-Margaret Kennedy before Your Honor and have her restored by the said William Barlow to the petitioner."

Upon the above petition a writ of *Habeas Corpus* issued, and William Barlow, the appellant, made the following return to the same:—

"I, William Barlow, etc., now have and produce the body of said Mary-Ann Margaret Kennedy. The causes of her detention by me are the following:—On or about the 11th day of June, 1864, the petitioner, having lost his wife by death and being in needy circumstances, desired me to receive the said Mary-Ann-Margaret Kennedy into my family, the child being then only eighteen months old, and to bring up said child in the same manner as one of my own family; to provide for her wants, board and clothe her and instruct her, until she was of sufficient age to repay expenses incurred for her by her labors and society, and that she should remain with me during her minority; and having consulted my wife as to taking the child, and she consenting, I then received the child into my family, and have kept her with the consent and approval of her father, from that time to the present time, the petitioner never intimating that he wished to depart from his agreement respecting said child, until the 14th day of September last, when he caused a letter to be sent to me demanding the restoration of said child;

"When said child was received into my family, the petitioner agreed to have reduced to writing the agreement under which I took said child into my family, and that the agreement should be made before a notary, and in pursuance of this promise I employed P. H. Laruc, Esq., N.P., at Somerset, in the year 1864, to draft said contract to be signed by me and the petitioner, in the terms I have already mentioned, which the petitioner promised, on three or four different occasions, to come and execute, the said notary having it ready for signature, and on one occasion I sent word to him by one Alexandre Gosselin, an engine

driver on the G. T. R. R., to ask the petitioner to come and sign the contract, to whom the petitioner, as Gosselin states and has deposed, answered that he would do so;

"That the petitioner came to my place on two different occasions, to see his child, the last of which on the 7th day of May last, and on neither of these occasions did he express any desire to take the child from me. On one occasion he took the child from my wife, at Pointe Lévis, and carried her to shew her to friends, and was absent some three hours and returned the child to me;

"That the child has been too young to be of any benefit to my family hitherto, and has been kept four years and five months, which, at a moderate estimation, would be worth one hundred dollars a year, and I have received nothing and been offered nothing by the petitioner;

"The child has been delicate and has been carefully cared for, and has become greatly attached to me and to my wife, and the child has endeared herself to us;

"I have instituted an action in the Superior Court here, on the 1st of October last, against the petitioner, to compel him to enforce the contract which he made with me about taking the child, and to have the judgment of the Court operate as such contract, unless the petitioner prefer to pay, and do pay me for the keeping of his child hitherto, and this cause is now pending in said Court, and two witnesses, Isidore Delisle and Alexandre Gosselin, have already, by their depositions therein, sustained the statements herein made; and unless I am permitted to retain the custody of said child till that suit is terminated, I shall lose all recourse against the petitioner, to secure the enforcement of his contract, and he will have practised upon me a gross fraud, cruel to me and to the child, which has the greatest reluctance to leave my family and home: these are my reasons for the present detention of the child; which I now produce before Your Honor, to abide Your Honor's order in the premises."

After reading the return, and a preliminary hearing thereon, the Hon. Judge made the following order, on the 21st of December, 1868:—"The Court orders that issues be raised:

1st. As to the paternity of the child;

2nd. The alleged contract between the petitioner and the respondent;

3rd. As to the habits, conduct and morals of the petitioner,—and that evidence be taken by witnesses to be sworn before the Court.

Issue was joined by the parties on the above points, according to their respective pretensions.

It is proper to remark that, before the petitioner applied for a Writ of *Habeas Corpus*, he had been sued by the respondent, Barlow, upon the same statement of facts as that contained in the above return.

In that suit in the Superior Court, the petitioner (defendant in the cause of Barlow vs. Kennedy) was examined on *Faits et Articles* at great length. But his answers failing to establish *un commencement de preuve par écrit*, the plaintiff, Barlow, withdrew his action.

The contestation between the petitioner and the respondent, under the *Habeas Corpus*, was continued.

1st. By consenting that the proceedings in the action of Barlow vs. Kennedy should be used as testimony on the issues under the *Habeas Corpus*.

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2nd. By the adduction of parole testimony.

The petitioner objected to the adduction of parole testimony, in the absence of any written contract, or *commencement de preuve par écrit.*

The Court, nevertheless, admitted the testimony subject to objections, and illegally, as petitioner conceived, [illegible] weight to this testimony, although no writing was produced [illegible] dent.

The parole testimony, illegally [illegible] did not establish that any contract had been made between the parties, and it was proved that the child had been taken by respondent's wife, in the absence and without the consent of the petitioner, and that, upon the petitioner ascertaining that the respondent and his wife, being Protestants, were bringing up the child in their own faith and different from that of its parents, he demanded that [illegible] return the child to him.

The Court, however, overruled all petitioner's objections to the evidence, and declared his pretensions insufficient, and rendered the following Judgment:

"The Court, having heard the parties by their respective counsel, examined the proceedings of record and deliberated, considering that it is satisfactorily proved that petitioner, some three or four years ago, placed Mary-Ann-Margaret Kennedy, his infant child, under the care and guardianship of the respondent, William Barlow, and delegated his, said petitioner's right, authority and control over her person, under the express understanding and agreement that said respondent should bring her up and educate her as his own child; considering that said respondent then accepted the guardianship of said Mary-Ann-Margaret Kennedy and has ever since, with great care and kindness and at great expense, brought her up, according to the said understanding and agreement, and desires to continue so to do; considering that it would be more conducive to the comfort, happiness and welfare of the said Mary-Ann-Margaret Kennedy to suffer her to remain under the care of said respondent, who and his wife have become much attached to her and to whom she has also become attached, than to consign her to the guardianship of the said petitioner, a poor day laborer, and a stepmother, to whom she is an entire stranger, doth dismiss the petition of said petitioner with costs, and remand said Mary-Ann-Margaret Kennedy to the guardianship and custody of the said respondent."

On the 5th day of March, 1869, the cause was inscribed for review before three Judges of the Superior Court, at Montreal, by the petitioner.

The respondent objected to the inscription for review, on the ground that this cause was not susceptible of appeal; but his motion to reject the inscription was dismissed with costs.

The cause was heard on the merits before Mondelet, J., Mackay, J., and Beaudry, J.

Belanger, (L. C.) for petitioner, submitted that the Judgment of the Hon. Mr. Justice Short was improper and illegal, for the following amongst other reasons:

1st. Because the claim of respondent that the petitioner had assigned for ever to the respondent, a perfect stranger, all his parental rights, and had also transferred all his parental obligations, and that such an assignment should be legal-

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ised and rendered effective by a Judgment, was contrary to law, both human and divine. The correlative duties and obligations of child and parent cannot be the object of any contract of sale or donation. The parent can by no act of his own and by no judgment of any tribunal be divested of his paternal rights or liberated from his obligation towards his child; nor can he transfer to strangers to his blood the honor, respect and obedience of the child. It is true he may, in the terms of the Code, delegate the right of moderate and reasonable correction to those to whom the education of his child has been entrusted, but he cannot substitute a stranger in his place as a parent, invest him with his rights over and impose upon him his obligations towards the child. A contract of this kind, to be binding, must be mutual. If it were admitted that the parent could divest himself of his obligations to his child, in favor of a stranger, how could that stranger be bound to fulfil those obligations? And if he failed to fulfil them, by what process could he be compelled to do so?

If the stranger, to whom a child were abandoned by an unnatural parent, failed to fulfil those obligations, would the law look to him in default of his fulfilling the duties which nature imposed upon the parent?

If the minor were called upon to perform any act that required the consent of the parent, such as marriage, should the consent of a stranger suffice for that purpose?

If a stranger abused the delegated authority, by what process could he be deprived of it, other than by an application made, as in the present instance, by the father to reclaim his child? Again, every obligation, to be valid, must have a consideration: what could be a legal consideration for a contract of this description? What sum of money, or amount of value, could be weighed in the same scale with the sacred duties and obligations created by God, between father and child? Could a parent sell to a stranger the right which he has over his minor child to require obedience to all his lawful commands; or could he sell the power and duty invested in him by law, to consent or object to the marriage of his minor child? Could he sell or assign to another, absolutely and without revocation, in case of abuse, any one of his rights or obligations?

If he cannot sell any one of these, how can it be pretended that he can, without consideration, and contrary to the rules of religion and of nature itself, cast away from him all the duties and affection which the child owes to him; abnegate all the obligations and duties imposed upon him towards his child, and substitute a stranger in his place as a parent?

2nd. Because, supposing such a strange and unnatural contract to be legal, can it be proved by any other rules of evidence than any other contract? If the law prohibits proof by *parole* testimony alone, in matters of $50, surely a contract of the character as that claimed by the respondent must be proved by testimony not less strict. In this case it is clear that there was no description of written proof to sustain the pretensions of the respondent.

3rd. Because, assuming such a contract to be legal, would not the parent still retain the right, and be subject to the obligation of seeing that his child was brought up in a moral and religious manner, and according to the tenets of the religion in which he believed? Suppose the case of a child in the hands of a

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Jew, or a Mahometan, or of a Hindoo, could a Christian parent divest himself of his obligation to see that his child was brought up according to his own religion? And would not the attempt to bring up a child in a manner inconsistent with the belief of the parent, be a sufficient ground for a parent to claim the resiliation of so unnatural a contract?

4th. Because the pretention of respondent that the petitioner, whilst pinched by poverty and for the moment unable to maintain his helpless offspring, allowed it to remain for a time a burthen upon the charity of respondent, thereby waived his rights, and took advantage of respondent's kind feelings, is not supported by reason or law. The respondent was bound by morality and the precepts of the Christian religion to be charitable to those afflicted by extreme poverty, and his fulfilling such a duty formed no cause or consideration for a contract by which the parent and child were to be for ever separated, and under which the parent was to be forced to submit to seeing the child of his bosom brought up a stranger to his home, and a heretic to his religion. Is there anything to show that the petitioner deceived the respondent by pretending to be poor? It was as a pauper that the petitioner received respondent's charity, and now respondent claims that his charity must be paid for either by the permanent retention of petitioner's child, or by the hard cash claimed in his action.

The petitioner submits that, looked at in any light, the claim of respondent to retain possession of the child Mary-Ann-Margaret Kennedy is unsupported by evidence or law, and therefore respectfully prays that the Judgment of the Superior Court, at Sherbrooke, be reversed, and that the respondent be ordered to restore her to petitioner.

Dorman, representing Messrs. Sanborn & Brooks, for respondent, declared he had nothing to say on the merits of the case.

On the 28th day of June, 1870, the Court of Review rendered the following Judgment:

"The Court, etc., considering that the petitioner hath proved the material allegations of his petition, and, namely, that he hath a right to claim and obtain the possession of his child; considering that the respondent hath failed to prove the allegations of his answer to the writ of *Habeas Corpus* issued in this cause, and namely, that he hath a right to keep possession of the child of petitioner now in question; considering, therefore, that there is error in the Judgment appealed from, to wit: the Judgment of the said Superior Court for the District of Saint Francis:—this Court doth reverse, annul and set aside the said Judgment, and proceeding to render the Judgment which should have been rendered, it is ordered and adjudged that the respondent do, within three days from service of this Judgment, give up and restore the infant child, Mary-Ann-Margaret Kennedy, to her father, the said petitioner; the whole with costs, both of the Superior Court and of this Court of Review, against the respondent, etc."

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

The Hon. J. S. Sanborn, Q.C., argued the case in appeal for the appellant, and W. L. Felton, Q.C., for the respondent.

BADGLEY, J., (dissenting). The respondent petitioned the provincial Judge for the District of St. Francis, for the issue of a Writ of *Habeas Corpus ad*

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subjiciendum, and which was issued forthwith, to obtain the custody and possession of his minor child. The facts are, that four years previous to the application, the mother of the child having died, the petitioner, the child's father, being very needy and personally unable to care for and have charge of the infant, agreed that she should be given over to Barlow, and brought up by him and his wife, who were very respectable and in good circumstances. Kennedy was to have executed a contract to that effect, but had failed or neglected to do so, but allowed the child to remain as agreed upon with the appellant's family, where it has been kindly cared for as their own child. Kennedy had lately re-married, and being in circumstances to take care of his child, made this application to recover her, although it is manifest that neither his means nor position as a common laborer, will allow or enable him to bring up the child with the comfort and welfare afforded by Barlow and his wife; and in consequence, guided by these very charitable motives for the child's comfort and advantage, the petition was dismissed by the Judge to whom the application was originally made. It is unnecessary to enter into detail of the right of a father to have the custody of his infant child: as a matter of justice and of law, the father requires no provision of law to secure to him that right, which no one can disturb nor force from him, nor deprive him of except on account of his own bad conduct or by his own consent. Except in the case of insanity, or some deliberate course of immorality or criminal act of his own, no father can forfeit or lose his paternal right, and even a contract by him to part with his child is so unnatural, that the law does not recognize a man's right to violate his most sacred duty, least of all to bind himself by a contract to do that which is inherently immoral and *ab initio* illegal, and in the eye of the law null and void. Even, therefore, if a father had signed such a contract, it would not be binding, and he could still demand and have the custody of his child. See *Chitty's Practice*. Of course the exception against the father is his own misconduct or crime. These principles of paternal right have been mentioned as leading rules regulating such cases generally, but they form no part of this contention, which is solely one of jurisdiction. The provincial Judge to whom the petition for the Habeas Corpus was presented, having refused to grant it, his decision was brought up before the Court of Review for revision, and was overruled by three Judges of the Superior Court sitting as a Court of Review, and the only question is, had they power and authority to sit in review upon the original decision, and to attribute to themselves a jurisdiction over the original petition and the subject matter of it? In other words, could these Judges, sitting as a Court of Review, under special power and authority only, have received such a petition originally and decided finally upon it, because their action is an assumption of original jurisdiction, their judgment being declared by law to be the judgment in the cause. The powers and jurisdiction of the Court of Review are by the 2nd Section of Chap. 1 of the 2 tit. of the Code de Procedure, as follows, Art. 494: A review may be had upon every final judgment, &c., upon which an appeal lies, &c., and 5, upon every judgment or order rendered by a Judge "in summary matters, under the provisions contained in the third part of *this Code*." It is quite clear that this 5th article has no application here, the third part of the C. P. having

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reference to non-contentious proceedings, commencing with the first title, of Registers and their authentication, and ending with the 9th title, Division of Lower Canada. Reverting then to the first article of the 494 Section, it is plain that the final judgment from which an appeal lies is connected with civil suits at law, as explained by the 497 article, which enacts that no review can be obtained until the demanding party has deposited in the Prothonotary's office of the Court which rendered the judgment, $20 if the *amount of the suit* does not exceed $400, and $40 if the *amount of the suit* exceeds $400, or if *it be a real action.* This reference to suits for sums of money, plainly personal and mixed actions, and to real actions, expressly restricts the powers of the Judges sitting in review to such proceedings, and probably led them to believe that everything not so expressly restricted was within their revision power. This is the more probable because it is well known that where any restrictive clause is introduced into a law, Judges are in the habit generally of interpreting the intention of the lawgiver by that clause, so that all the cases which are not expressly excepted are presumed to have been intended to be admitted. This probably led to the mistake of the Judges in review. Now, the 12th Chap. of the 3rd Book of the Code de Procedure, taken from the 95th Chap. of the C. S. L. C., regulates the proceedings upon the writ of Habeas Corpus ad subjiciendum, the writ applied for in this cause, and provides for its application to a Judge of the Court of Queen's Bench or to a Judge of the Superior Court, with power to return it into term if it cannot be executed without delay before term, or if in term to vacation. The application was made to the Judge on the 8th of October, 1868, and the writ thereupon issued. On the 18th of November following, Barlow made his return, whereupon on the 21st of December following, the Judge ordered that issues be raised, which were taken, and after evidence heard and considered and the parties heard, judgment was rendered on the 26th of February, 1869, whereby the petition of the petitioner was dismissed with costs and the child remanded to the guardianship of the appellant. This judgment, as in a civil suit for a specific value, was submitted to three Judges of the Superior Court sitting in review, and set aside, the petition being granted and the child ordered to be remitted to her father's custody. Now, by the 1051 art. of the Code de Procedure, it is provided *that whenever a writ of Habeas Corpus,* generally and therefore including the writ *ad subjiciendum* above, *has been once refused by any Judge,* (or as by the 28th Sec. of C. S. L. C., Chap. 95, p. 886, *any one Judge*) *the "application for it cannot be renewed before him or before "any other Judge unless new facts are alleged; but the application may be "renewed before the Court of Queen's Bench at its next sitting in Appeal at "the place where appeals are brought from the District in which the appli-"cation was made.*" The 28th Section is, "but application may in any such case "be made *anew* to the Court of Queen's Bench, which is hereby authorized to "entertain, hear and determine such application at its next sitting in appeal," etc." It cannot but be manifest that the power granted to the Court of Queen's Bench to entertain, hear and determine the application anew, of the 28th Section, or the renewal application of the Code de Procedure, has reference to an original jurisdiction authorized for that Court, and not as an appellate jurisdiction,

because though no renewal application can be made to the refusing or any other Judge, except with the allegation of new facts, the same application may be made anew to the Court of Queen's Bench, generally, and this is in conformity with the meaning of the terms, the privilege of the writ of Habeas Corpus and the rights and jurisdiction deducible therefrom: these are well explained by Judge Story and by Hilliard on New Trials, p. 566. Judge Story observes "It will be necessary to have recourse to the Common Law, for in no other way can we arrive at the true definition of the Writ of Habeas Corpus. At the Common Law there there were various writs called Writs of Habeas Corpus, but the particular one here spoken of is that great and celebrated writ *used in all cases of illegal confinement*, known by the name of Habeas Corpus ad subjiciendum, directed to the person detaining another, and commanding him to produce the body with the day and cause of his caption and detention." The writ in its nature and the procedure thereon is the same in the United States as it is here or in England. Hilliard on New Trials, p. 566, says: "The question of appeal is often raised in connection with Habeas Corpus, when, as is usual, the jurisdiction of a Court of Appeals only extends to the final orders and judgments of Superior Courts and not to those which judicial officers are authorized to make out of Court; an order on a writ of Habeas Corpus is not an order of Court, and cannot be appealed from, *even though heard and decided in Court.* So an appeal does not lie from a decision of the Court below remanding a prisoner, brought up on a Habeas Corpus to the Superior Court, where the jurisdiction of the two Courts is concurrent in all criminal matters, and because the decision is not a final judgment; nor on the refusal of a judge in the Court below to discharge a prisoner on a writ of Habeas Corpus, and the appellate power conferred on a Court to revise the judgments of the Justices of the Peace does not authorize that Court to do so on a Habeas Corpus, nor does an appeal lie from a judgment in the Court below, overruling a motion for a discharge from custody upon the return of a Habeas Corpus, this not being a judgment or determination of that Court *in a civil suit or action.*"

This brings us back to the fact that the writ of Habeas Corpus is *sui generis* and is not a suit within the cognizance of the civil tribunals as such suit; that the Court of Appeals is officially authorized to entertain anew an application for the issue of a writ, not for reviving the former writ which has been discharged, and, consequently, that the jurisdiction in such new application is original-not appellate; that no renewal application is authorized to be made to three judges more than to one, except under certain conditions which do not exist here, and that, therefore, the power assumed by the Court in review is not supported by law, and therefore it should be declared that the Judges sitting in review had no jurisdiction in the matter, and that their judgment must be set aside with costs, leaving to the petitioner his immediate recourse, if so advised, to make a new application to this Court.

MONK, J.:—The other members of the Court all think there is appeal from every judgment of the Superior Court, and that this was a judgment of the Court and not of the judge. The judgment of the first instance was an extraordinary one; it is monstrous to think that a father can divest himself of his right to his child.

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The Judgment is in the following terms:—"The Court, etc., etc., considering that the judgment by the Superior Court sitting at Sherbrooke, dated the 26th day of February, 1869, is a judgment rendered by the Hon. Judge Short in the Superior Court, and not a judgment by a judge sitting in chambers;

Considering that the judgment of the Court of Review, sitting at Montreal, dated the 28th day of June, 1870, is the judgment of a Court from which there is, in this case, an appeal to this Court;

Considering that, under the circumstances of this case, an appeal did and does lie to this Court from the Judgment of the Court of Review in this cause;

Considering that by law, the respondent in this Court (Kennedy) is entitled to the possession, custody and guardianship of his child, and seeing that there is no fact established, by the evidence adduced in this cause, to prove that the respondent is or was in law deprived of the custody of the said child;

Considering, therefore, that in the said judgment of the Court of Review there is no error—doth confirm the said judgment, and doth further order that the appellant do, within three days from the service of this Judgment, give up and restore the said infant child of the respondent to her father, the said respondent: the whole with costs of the Superior Court, the Court of Review, and this Court, etc."

Judgment of the Court of Review confirmed. Judge BADGLEY dissenting as to the jurisdiction.

Cabana & Belanger, for petitioner and respondent in appeal.

W. L. Felton, Q.C., counsel.

Sanborn & Brooks, for respondent below and appellant.

(L. C. R.)

Authorities cited by petitioner:—

1°. As to right of Appeal:—Code of Civil Procedure, Art. 494, p. 131; Arts. 1046, 1047, 1048, 1049, pp. 289–291; Art. 1115, p. 311.

2°. As to nature and extent of the paternal authority: 10 Merlin, Sec. V, p. 400; Dict. Droit Civil, Rolland de Villargues, p. 378; Toullier, 1046; Prudhon, de l'Usuf., 248.

3°. As to the consideration for the supposed contract: Civil Code Lower Canada, Arts. 1059–1062–1257–1258–14; Marcadé, Expl. du Code Napoléon, p. 68, Vol. I.; 1 Vol. Rep. of Com. on Civil Code L. C., p. 202.

The English authorities are very strong. See *Regina* vs. *Smith*; *In re* Boreham, Eng. Law and Equity Rep., p. 221, Vol. 16; 1852–1853. The cases submitted in that case were:

The *King* vs. *Greenhill*, 4 Ad. & E. 624.

Ex parte Skinner, 9 J. B. Moore, 278.

The *King* vs. *de Manneville*, 5 East, 221.

The American cases also support those decisions:

The *People* vs. *Mercein*, 3 Hill, 399 (1842) 16 Pick. R. 203.

State vs. *Smith*, 6 Greenleaf, R. (Bennett's Ed.) 462.

Mayne vs. *Bredwin*, 1 Halsted, Ch. R. 455 (1846).

Pool vs. *Gott*, 14 Law. Rep. 269, Moss.

The authorities cited by respondent (Barlow) will be found in Vol. XIII of the *Jurist*, p. 57.

COUR SUPERIEURE, 1872.

ST. HYACINTHE, 2 DECEMBRE 1872.

Coram SICOTTE, J.

No. 1322.

Michel Girard vs. *Louis Bélanger et al.*

Le 5 mai 1863, le nommé Hilaire Théberge obtint de la Législature par statut spécial [26 Vict. ch. 32] le droit de percevoir des péages sur un pont par lui construit sur la rivière Yamaska, au village de St. Foy, et entre autres prohibitions l'acte d'octroi défend [section 10] d'ériger aucun pont pour le transport de personnes, bestiaux ou voitures pour lucre et gain à un mille au-dessus et une demie lieue au-dessous du pont de Théberge à peine d'une amende de 40 chelins pourvu, ajoute-t-il, que rien dans le présent acte n'aura l'effet de priver le public de passer la rivière dans les limites susdites à *gué*, en *canot* ou *autrement* sans lucre ou gain."

JUGE :—1o. Que la propriété et la possession du Demandeur [qui est aux droits du concessionaire Théberge] consistent uniquement dans le droit de perception des péages, les constructions constituant le pont même.

2o. Qu'aux termes de l'octroi, il est permis de construire un pont dans les limites du privilége du Demandeur, pourvu que ce ne soit pas dans un but de gain.

3o. Que les Défendeurs, en commençant à construire dans les limites du privilége du Demandeur un pont, destiné à servir de voie de passage libre à eux-mêmes, et à 400 autres co-propriétaires, sans exiger de péages, n'ont pas érigé un pont dans un but de lucre ou gain, n'ont pas violé le privilege du Demandeur et ne l'ont aucunement troublé dans sa possession.

4o. Que le gain ou lucre mentionné en l'acte d'octroi n'est pas autre chose que le profit représenté par le péage exigé pour le passage.

5o. Que le profit que retireront les Demandeurs de l'usage de leur pont n'est pas le lucre ou profit mentionné en l'acte d'octroi.

6o. Que la prohibition contenue en l'acte d'octroi ne constitue pas dans la personne du Demandeur un droit réel susceptible de lui donner droit à l'octroi ou complainte.

7o. Que tout ce à quoi se réduit le droit du demandeur dans le cas de construction d'un pont dans les limites de son privilége, dans un but de gain, est la poursuite pour l'amende imposée par l'acte d'octroi.

PER CURIAM :—Le demandeur est propriétaire d'un pont, et d'après la charte octroyée par le statut, il a droit d'exiger des péages. Il se plaint que les défendeurs ont commencé des travaux dans la rivière, dans le but de construire un pont dans l'étendue des limites assignées pour ses droits de traverse et de péage, demande qu'il leur soit enjoint de démolir ces travaux, et de plus qu'ils soient condamnés à payer trois cent dollars pour ses dommages-intérêts.

Il n'est pas sans importance de bien apprécier quelle est l'espèce d'action exercée par le demandeur. Car quoique dans nos tribunaux, on ne s'arrête guère aux différences que le droit Romain avait établies entre les actions, et qu'il ne soit pas nécessaire de les désigner par un nom quelconque, il n'en est pas moins vrai et juste de dire, que l'exercice des actions découle de la nature des droits.

Il y a des actions possessoires, des actions pétitoires, des actions ordinaires fondées sur des engagements et des obligations découlant ou de la loi, ou des conventions.

Le droit précède toujours l'action. La nature du droit règle donc ses conséquences et l'exercice des actions utiles à sa protection.

Le demandeur qualifie son action de complainte en dénonciation de nouvel œuvre. Les conclusions qu'il a prises sont précises, distinctes, et on peut sans hésitation, affirmer qu'il exerce l'action possessoire, qui dans notre jurisprudence, est la complainte en dénonciation de nouvel œuvre.

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Dans quelles circonstances l'action possessoire peut-elle être employée ?—Notre article 946 indique "Le possesseur d'un héritage, ou d'un droit réel, à titre autre que celui de fermier ou de précaire, qui est troublé dans sa possession, a l'action en complainte contre celui qui l'empêche de jouir, afin de faire cesser le trouble et être maintenu dans sa possession."

Il faut être possesseur d'un héritage ou d'un droit réel, à titre de propriétaire, c'est à dire, *animo sibi habendi*, et qu'on soit empêché de jouir.

Dans toute action possessoire, un point essentiel est donc la possession, la première chose à examiner est si l'on est troublé dans une possession réunissant les caractères exigés par la loi. Car la possession a ses règles et ses effets particuliers. La possession requise est nécessairement celle accompagnée de l'intention *animo sibi habendi*. On peut donc affirmer qu'elle doit être telle, qu'elle fasse présumer la propriété. C'est de la propriété présumée par la possession que découle l'action possessoire.

Bonjean, (vol. 2.) définit ainsi la possession. "Posséder, c'est détenir une chose avec intention de la considérer comme sienne, "*animo domini* ou *animo sibi habendi*," c'est alors la possession civile."

La possession est inséparable de l'idée de la propriété. L'action possessoire n'est accordée que pour protéger la propriété. Il n'y a que la possession civile, qui donne les droits de la possession, ces droits découlent du droit de posséder.

Partant de ces règles et de ces principes, il suit directement qu'il y a des choses qui ne peuvent faire l'objet d'une possession.

Toute chose, hors du commerce, ne peut être l'objet de la possession civile. Car dans ce cas, l'*animus domini* est illégale, non seulement à l'égard de ces choses, mais de plus tout rapport à l'acquisition de la propriété par la détention, et aux interdits possessoires, capable de produire le droit de la possession, manque. On ne suppose pas que la volonté d'avoir la chose *animo sibi habendi* puisse exister.

Il faut, dit Bonjean, "que celui qui a recours à la complainte *retinendo possessionis*, ait la possession juridique proprement dite." De cette nécessité, il suit que l'action possessoire, soit d'une chose qui n'est pas dans la catégorie des choses publiques et communes.

Examinons la possession du demandeur tel qu'il l'a qualifié et tel qu'il l'a réellement d'après les faits et la loi. Il se déclare propriétaire du pont désigné dans le statut, qui lui a octroyé le droit de prendre des péages, et qu'il est en possession à titre de propriétaire, de ce pont et du droit d'exiger des péages. La possession est du pont et du droit de péage. Voici comme la demande qualifie et désigne sa propriété: "Un pont bâti et construit sur la rivière Yamaska, qui est navigable et flottable et qui a toujours été une voie publique, de 180 pieds de longueur sur 18 de largeur, et le droit d'exiger des péages." On ne prétend qu'à la possession d'une construction faite sur une rivière navigable avec la permission de l'autorité. Cette possession découle du titre qu'on invoque. Ce titre doit, dans la circonstance, qualifier la possession, comme la nature même de la propriété, et par conséquent les effets du droit de posséder.

Le concessionnaire est déclaré par le titre propriétaire du pont, des maisons de péages, des montées et abords, ainsi que des péages.

La propriété comme la possession sont limitées au pont et aux péages: Ainsi nulle propriété, nulle possession de la rivière, mais seulement le droit de l'obstruer par la construction d'un pont, et le droit d'exiger péages de ceux qui passeront sur le pont.

Pour exercer l'action possessoire, il faut justifier d'un trouble dans la possession du pont et des péages.

Quel est le fait allégué comme constituant le trouble? c'est que les défendeurs, prétendant avoir droit de construire un pont dans les limites de la concession, ont commencé à faire des travaux dans la rivière dans le but de se procurer un passage. Il n'y a pas dans ce fait un trouble dans la possession.

Il n'y a là aucune intervention quant au pont même, aucun acte qui prive le demandeur de sa jouissance ou qui l'expose à la perdre.

Les travaux que les défendeurs ont fait dans la rivière, n'étant pas autorisés par l'Etat, peuvent les exposer à des accusations, à des indictements, pour obstruer la voie publique, mais non à des poursuites privées de la part de toutes personnes qui prétendent intéressées à faire enlever ces obstructions, comme l'enseigne Blackstone, "*The law gives no private remedy for anything but a private wrong*". "*No action lies for a public or common nuisance, but an indictment only.*"

Telle action ne compète à des particuliers que lorsqu'ils souffrent un tort considérable, personnel et actuel; or il est évident dans l'espèce que le pont même, ou les péages, qui sont l'héritage du demandeur, n'ont pas souffert un dommage actuel, que le pont n'est point exposé à destruction quelconque par le nouvel œuvre.

La question des profits futurs est chose essentiellement distincte et séparée de celle de la possession.

On jouit, comme on le faisait auparavant en recevant péage de ceux qui traversent. La diminution possible des péages, par le fait que plus tard quelques personnes pourront faire usage du nouveau pont, n'affecte pas plus la possession que la diminution à craindre du fait de l'établissement d'un grand centre d'affaires qui appellerait dans une direction toute opposée, les personnes qui étaient dans l'habitude de circuler sur le pont du demandeur.

Faisons l'application des règles qui viennent d'être exposées au litige, comme action possessoire.

Le trouble dont on se plaint est à raison d'entreprise sur une rivière navigable, sur chose publique et commune. La règle est que ces choses ne peuvent être possédées; que les voies de fait sur ces choses ne donnent pas lieu entre les particuliers aux actions possessoires, parcequ'ils n'ont ni propriété, ni possession de ces choses.

Le fait représenté comme trouble n'a enlevé au Demandeur aucune portion de possession de sa propriété. Il n'y a pas plainte que le nouvel-œuvre est de nature à rendre le pont moins sûr, plus exposé à souffrir par la crue des eaux, à gêner l'exploitation qu'avait le Demandeur. Nullement, tous ses droits de posséder, comme sa possession, sont restés ce qu'ils étaient.

Ainsi tous les éléments de la complainte manquent.

En vain, dira-t-on: mais outre cette possession matérielle du pont, la défense que contient la concession, de ne pas construire de pont dans telles limites, constitue un droit qui accorde l'exercice de l'action possessoire, contre les personnes qui feront cette construction—Section 10 chap: 32—26 Victoria.

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Cette défense n'ajoute rien à la propriété du Demandeur, qui n'est saisi que du pont. Le droit à des péages est corollaire de la propriété du pont. Péages et pont, c'est même propriété, même possession. Il n'y a pas deux droits, deux propriétés, deux possessions.

Tout fait qui n'affecte nullement la propriété et la possession du pont, si toutefois il est susceptible de pouvoir ultérieurement diminuer les profits, ne peut être atteint par l'action possessoire, mais il est soumis, comme tout fait de l'homme pouvant causer un tort, aux actions ordinaires et aux conséquences de la loi, chaque fois qu'il s'agit de condamnations découlant d'obligations de faire ou de ne pas faire.

Cette défense n'a pas créé de servitude au profit de la propriété du Demandeur, sur le domaine public—Car la règle qui fait les rivières et les eaux, choses publiques et communes, fait également qu'elles ne sont pas plus susceptibles de propriété privée que de servitude, qui est une propriété par l'adhérence du droit de servitude à la propriété.

On peut comprendre que de simples particuliers exercent des actions confessoires ou négatoires, les unes entre les autres, à raison de délits et de voies de fait sur le domaine public. Or la dénonciation de nouvel-œuvre est, suivant les cas, ou une action confessoire, ou une action négatoire.

J'ai voulu par cette discussion démontrer que l'action possessoire a un caractère tout particulier et des effets également spéciaux et partant que les faits de son caractère particulier manquant, les effets ne pouvaient en découler.

Les concessionnaires de privilége exclusif ne possèdent pas d'après la loi commune, mais d'après un titre aussi spécial qu'il est exclusif. C'est de là qu'il faut partir pour s'assurer quand les actions ordinaires leur compètent avec leurs avantages et leur conséquences générales.

Il est donc jugé, que le Demandeur n'avait pas dans l'espèce, l'action possessoire pour sauvegarder les droits qu'il réclame.

C'est ainsi que nos tribunaux ont jugé dans les décisions qu'on trouve dans les rapports. L'action de Leprohon vs. Globenski, était une action personnelle fondée sur obligation en maléfice pour réparation du tort causé—Celle de Lachapelle, citée incidemment, était de même nature. Dans Jones *vs.* La compagnie du chemin de fer de Stanstead, Shefford et Chambly, la complainte fut refusée pour des raisons analogues à celles qu'on vient d'exposer, et aussi pour d'autres raisons qu'il est inutile de rapporter.

L'autorité de Blackstone, qu'on a invoquée, pour justifier la présente demande, est plutôt corroborative de l'ordre des choses que je cherche à faire prévaloir —(le Juge cite plusieurs passages de l'auteur—Vol 3—Page 218, &c.)

On verra plus tard que la doctrine de Blackstone est la doctrine de notre droit, et son enseignement celui de nos jurisconsultes.

En décidant comme il vient d'être fait sur la possession du Demandeur et sur son droit d'exercer la complainte, il n'est réellement adjugé que sur une des phases de son action—Mais si toutefois, il n'a pas l'action possessoire, il a toujours une action en réparation du tort qu'il prétend avoir souffert par les faits des Défendeurs, et comme il demande condamnation à raison des dommages qu'il prétend que ces derniers lui ont causés, il reste à examiner, si le tort a été commis, et quelle indemnité alors doit être accordée.

" Toute action, dit Bonjean, suppose un droit, et la violation ou le refus du droit : " de cette injure au droit d'autrui découlent toutes les actions. Cette injure peut " blesser tout à la fois, l'intérêt public et l'intérêt privé, ou seulement l'un de " ces intérêts. Quand un fait illicite nuit en même temps à la société et à un par- " ticulier, l'auteur est assujetti à une double satisfaction, satisfaction envers la " société, dont l'ordre a été troublé, satisfaction envers le particulier, qui a éprou- " vé quelques dommages. La satisfaction envers la société consiste en châtiments ; " celle envers le particulier, en une indemnité pécuniaire. "

Voilà bien ce qu'enseigne Blackstone.

" Pour déterminer s'il y a une injure au droit d'autrui, et si indemnité est due, il faut examiner le droit de chaque partie, les conditions de leurs titres, de leur situation respective d'après la loi particulière qu'on invoque, comme d'après le droit commun.

Quelle est la condition du Demandeur et son droit, d'après son titre ? droit de maintenir un pont et d'exiger des péages; c'est là sa propriété. Elle a trois garanties spéciales octroyées par la concession.

1° L'amende contre ceux qui passeront sur le pont sans payer, ou qui pourront l'empêcher de le reconstruire ou de le réparer. 2° Défense de construire aucun pont ou de maintenir aucune voie de passage pour gain dans les limites de la charte, sous peine d'amende. 3° Punition comme d'une félonie, la destruction malicieuse du pont ou de ses dépendances.

La concession prévoit le cas, que des personnes puissent construire un pont, dans un but de gain, et statue de suite sur la punition de ce fait, par l'imposition d'une amende.

Il importe de ne pas perdre de vue, que le législateur n'accorde pas au concessionnaire le droit de faire démolir le pont, et qu'il ne prononce l'imposition de l'amende que si le pont est exploité dans un but de gain.

Pas de but de lucre, *no hire* ; pas d'amende. Il n'y aura à punir que l'offense publique que constitue la voie de fait sur la rivière navigable.

Le législateur a présumé que personne ne trouverait assez d'avantages indirects dans la construction d'un pont sans péages, pour faire la chose ; et du consentement du concessionnaire, qui était partie au contrat statutaire, il a vu dans la défense sous peine d'amende une protection suffisante. Le concessionnaire l'a aussi jugée suffisante et l'a acceptée. Il était la partie stipulante, et les charges s'interprètent contre lui, et au profit de la libération.

La défense ne frappe que celui qui construit et exploite pour faire gain, *for hire*. Et pour ne permettre aucun doute sur les intentions des contractants, et les droits du public, on déclare dans la cause même relative à cette défense, que nonobstant, rien dans l'acte ne sera interprété de manière à priver le public du droit de passage sur la rivière dans les limites de la concession à gué, en canots ou autrement sans payer.

Le concessionnaire n'a que les droits de son titre, qui est exclusif, et doit recevoir une interprétation vigoureuse. Les droits découlant de la loi commune et de la propriété ordinaire, ne lui compètent que s'ils sont octroyés par la concession, et ils sont toujours soumis aux limitations, aux remèdes indiqués dans le titre même.

Girard, vs. Bélanger et al.

Le concessionnaire d'un privilége exclusif ne peut augmenter, agrandir ses droits, qui sont des restrictions contre le public, par des garanties accordées à la société dans chaque individu et dans tout propriétaire, d'après le mouvement ordinaire de la propriété. Ses droits sont exclusifs, ses garanties seront également exclusives et spéciales, d'après la lettre et l'intention du contrat. C'est justice, et de plus c'est la condition qu'il a acceptée. Il changerait sa condition, son contrat, en plaçant sa propriété restreinte, son droit exclusif, dans la catégorie des droits communs à tous et dans la condition des propriétés ordinaires, en diminuant les droits du public, par des obligations qui sont opposées au texte du contrat comme à son esprit.

Nul doute que toute personne peut traverser ou fournir le moyen de traverser, dans les limites de la concession, en canot ou par d'autres voies, pourvu que paiement ne soit pas exigé pour le passage. Nul doute que le moyen qui pourra être employé est indéfini. Quand la loi a déclaré que le passage pourrait se faire, de n'importe quelle manière, est-ce pour qu'il soit restreint dans le sens du privilége et de l'exclusion? alors pourquoi parler d'une manière si large, si on voulait limiter les moyens d'effectuer le passage? Pourquoi décréter le législateur d'imbécillité, au profit de Thébergo et de ses ayants cause?

Quand le législateur a tout prévu, tout réglé, de quel droit le concessionnaire ou les tribunaux interviendraient-ils pour tout changer, pour faire une autre législation, un autre contrat, accorder d'autres priviléges, en donnant des interprétations contre la lettre du contrat, sous prétexte que telles expressions sont sans valeur, ou n'ont pas été comprises par le législateur?

Cependant le langage est clair, précis, deux fois répété dans le même sens.

Tout habitant de St Pie peut avoir son canot ou son bac pour traverser la rivière et il peut en permettre l'usage à toute personne. S'ils peuvent avoir chacun ce canot, ou ce bac, ou autre moyen de passage, et le prêter; qui peut leur enlever le droit de s'unir par vingt ou cent, dans le but de construire tel moyen de passage pour leur convenance personnelle, et sans paiement: la somme fournie pour ces constructions n'est pas le gain dont parle le statut, et qu'il prohibe. Il est superflu de discuter pour établir cette proposition.

Que cette voie de passage soit un pont, les deniers payés pour la construction ne seront pas plus que le paiement prohibé par le statut. Mais voyant dans la permanence de la voie de passage par la construction d'un pont, une chose plus susceptible de faire tort, le législateur, du consentement du concessionnaire, a infligé une amende de quarante chelins, mais seulement dans le cas où la construction aurait été faite dans un but de gain, en faisant payer ceux qui traverseraient sur le pont. Tant qu'on ne fait pas payer, pas d'amende.

Les Défendeurs ne sont passibles d'aucune amende, ne sont coupables d'aucune injure au droit du Demandeur, en maintenant un moyen de communication à travers la rivière, pourvu qu'ils n'exigent aucun paiement, pour permettre le passage, pourvu que péage ne soit pas exigé.

Il y aura violation du droit du Demandeur, quand on fera traverser, ou passer la rivière dans l'étendue de sa concession, moyennant gain, c'est-à-dire, paiement pour le passage même. Jusqu'à telle éventualité, le Demandeur ne souffre que comme tous les autres citoyens de l'obstruction et de cette nuisance sur la voie

publique. Il peut requérir l'action publique, dans l'intérêt général, par les voies et moyens que la loi met à sa disposition. D'après son titre, il a un remède spécial, exclusif, contre le fait dont il se plaint. Il est limité à ces deux moyens pour sauvegarder sa propriété. Girard vs. Belanger et al.

Le droit exorbitant qui est reclamé, pourrait, s'il est justifié par le titre, s'exercer contre la construction d'un canot, fait dans le but avoué de le mettre au service de tous ceux qui voudront traverser la rivière, des interdits prohibitoires pourront être lancés contre la construction de tout canot ou bac. Cela fait voir l'exagération des prétentions de la demande.

Le commencement des travaux, dans le but de pratiquer une voie de communication, sur la rivière, n'a pu causer des dommages, car il n'y a encore ni voie de communication, ni paiement, ni gain possible. Quand il s'agit de condamnation pour tort et dommages, il faut que le fait querellé ait été réalisé, et qu'il y ait preuve d'un dommage actuel. Dans l'espèce, ce dommage est encore à venir, il y aura peut-être dommages plus tard, mais aucun dommage actuel n'a été causé, et n'a pu être causé—Partant pas d'injure au droit d'autrui.

L'intention de violer le droit du Demandeur, si toutefois elle existe, est chose que la loi ne peut atteindre par des condamnations pécuniaires.

L'examen de la cause, au point de vue de l'indemnité, démontre, d'une manière évidente, que l'action pour dommages ne peut être exercée, et qu'il ne peut avoir causé tort au Demandeur, parceque, lors de l'institution, il n'y avait pas eu de voie de communication pratiquée à l'encontre de la franchise, et mise à l'usage du public.

Le Demandeur est déclaré non recevable dans sa complainte, et mal fondé dans sa demande d'indemnité pécuniaire avec dépens.

Ci-suit le jugement: La cour considérant que le Demandeur comme étant aux droits du concessionnaire d'un droit de péage sur un pont construit sur la rivière Yamaska navigable et flottable, reclame par la complainte en dénonciation de nouvel œuvre contre les Défendeurs parceque ces derniers ont commencé des travaux dans le but de construire un pont dans l'étendue des limites de la concession du Demandeur, concluant à la destruction des travaux commencés et à une condamnation pour dommages-intérêts;

Considérant que la propriété et la possession du Demandeur consistent seulement dans le droit de péages et les ouvrages qui constituent le pont même;

Considérant que ces droits sont exclusifs et doivent être strictement limités dans les termes de l'octroi;

Considérant qu'aux termes de l'octroi la construction d'un autre pont est prévue et n'est toutefois réprimée que par l'amende et seulement dans le cas où cette construction aurait été faite dans un but de gain, considérant que la construction commencée ne l'était pas dans un tel but, mais pour obtenir une voie de communication libre de péages;

Considérant que le gain dont parle l'octroi est celui représenté par le péage exigé pour le passage;

Considérant que le Demandeur n'a aucune propriété ni possession d'aucun droit réel dans et sur la rivière et que dans les circonstances il n'avait pas droit d'exercer la complainte et dénonciation du nouvel œuvre;

Brossard vs. Marsouin.

Considérant que les travaux commencés par les défendeurs n'ont établi aucune voie de communication, qu'ils n'ont pas [illegible] et n'ont même pu demander et recevoir des péages et faire gain à raison d'aucune voie de communication et que le D[illegible]deur ne peut réclamer condamnation que pour dommages résultant d'un tort actuel et non d'un tort futur ou possible ;

Considérant qu'il n'a pas été constaté de tort et d'injure actuel et consommé par et contre les Défendeurs, a débouté le Demandeur de son action avec dépens.

Action déboutée.

Pyineau & Morrison, avocats du demandeur.
Chagnon & Sicotte, Bourgouis & Bachand, avocats des défendeurs.
(H. W. C.)

COUR SUPERIEURE, 1873.

MONTREAL, 21 OCTOBRE, 1873.

Coram BEAUDRY, J.

No 2163.

Brossard vs. *Marsouin* et *Vilbon, Syndic, Requérant*,

JUGE :—Qu'une police d'assurance effectuée sur la vie d'un homme pour le bénéfice de sa femme, ne peut être réclamé par les créanciers de cette dernière en cas de faillite.

La défenderesse, Marchande publique, et séparée de biens de son mari, effectua une assurance sur la vie [illegible] dernier pour la somme de $1500 pour son seul profit et avantage, laquelle fut stipulée dans la police payable à elle même au décès de son mari.

Le mari étant décédé, la défenderesse se trouva en déconfiture et le demandeur, un de ses principaux créanciers, la mit sous la loi de faillite au moyen de procédés en liquidation forcée.

La défenderesse laissa le syndic prendre possession de tous ses biens mais refusa de lui remettre la police d'assurance faite en son nom sur la vie de son époux défunt.

De là Requête du syndic pour contraindre la défenderesse à lui livrer la police d'assurance comme étant partie des biens de la faillite et appartenant aux créanciers.

La défenderesse répond à cela que l'acte 29 Vict. ch. 17 qui autorise de semblables assurances, pourvoit à ce que le montant en sera payé de la manière indiquée dans la police et ne pourra être réclamé par aucun créancier ou créancières que ce soit.

Le syndic prétendait que les créanciers dont parle cet acte, n'étaient que les créanciers du mari et non ceux de la femme elle même.

La Cour a donné au statut la même interprétation que celle que lui donnait la défenderesse.

Requête renvoyée avec dépens.

Archambault & de Salaberry, avocats du Requérant.
Dorion, Dorion & Geoffrion, avocats de la défenderesse.
(V.P.W.D.)

COURT OF QUEEN'S BENCH, 1872.

MONTREAL, 20TH DECEMBER, 1872.

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

No. 95.

Gadbois, Appellant, and *Trudeau et al.*, Respond[illegible]

HELD:—That a plaintiff has no right to fyle, even by permission of the C[illegible] tional reasons in support of his demand, when they are based on [illegible] tion was brought.

Rainville, for appellant:—

L'appelant se plaint d'un jugement interlocutoire rendû par la [illegible] rieure siégeant à Montréal, le 30 octobre 1869: M. le Juge Torrance [illegible]ant.

Voici ce jugement:

"The Court having heard the parties by their counsel upon the motion of the "Plaintiffs of the 26th October instant to be permitted to produce and fyle certain "*moyens supplémentaires et additionnels* annexed to the said motion, having exa- "mined the Record and proceedings and deliberated, doth grant the said motion "and doth permit to the said Plaintiffs to fyle the said *moyens supplémentaires* "*et additionnels*, reserving to adjudge hereafter upon the costs, and doth grant "to the said Defendant a delay of eight days to plead in answer to said *moyens* "*supplémentaires et additionnels*.

Par son testament, feu Joseph Beaudry nomma l'Appelant conjointement avec l'Hble. J. L. Beaudry et M. Jean-Bte. Beaudry, ses exécuteurs testamentaires. Après son décès, son épouse, Marie Anne Trudeau, fut nommée tutrice à ses enfants mineurs.

C'est en cette qualité qu'elle institua contre l'Appelant, conjointement avec MM. Jean Louis et Jean-Baptiste Beaudry, une action en destitution d'exécution testamentaire.

Cette action est basé principalement sur le fait que l'Appelant avait des intérêts opposé à ceux de la succession et qu'il s'était conduit de manière à entraver la gestion et administration des autres exécuteurs.

L'Appelant plaida à cette action le 18 février 1869: les Intimés ne répondirent pas, et la procédure en resta là jusqu'au 23 octobre suivant.

Le 23 octobre, l'Appelant reçut un avis de motion par cette motion, les Intimés demandaient la permission de produire et ajouter à leur demande, des *moyens supplémentaires et additionnels*, vu que depuis l'institution de leur action il *était survenu des faits nouveaux*. Ces faits nouveaux, ainsi qu'allégué, étaient que l'Appelant avait établi avec M. Lafrenaie, un magasin dans le même genre que celui de la ci-devant société Joseph Beaudry & Cie., dont ils étaient les seuls membres survivants, et qu'ils avaient pris le titre de successeurs de "Jos. Beaudry & Cie.", et en outre que l'Appelant avait eu une querelle avec l'Hble. J. L. Beaudry, pendant laquelle ils étaient venu sur le point d'en venir aux mains. L'Appelant s'opposa à l'introduction dans la procédure de ces moyens additionnels, sur le principe qu'un Demandeur ne peut rien ajouter à sa demande, si ce n'est

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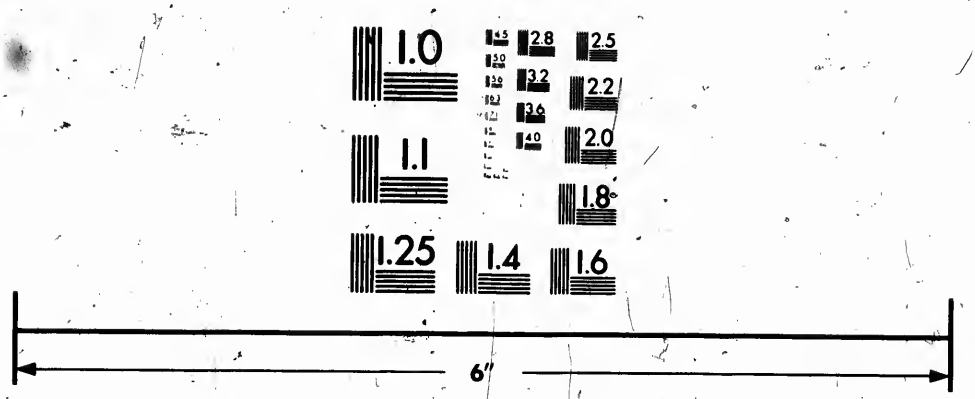

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Gadbois, and Trudeau et al.

par demande incidente, et non ajouter des moyens nouveaux basés sur des faits postérieurs à l'action pour étayer et peut-être établir un droit qu'il n'avait pas.

La Cour Supérieure a accordé la motion des Intimés et leur a permis de produire leurs moyens *supplémentaires*. C'est ce jugement que l'Appelant soumet à la révision de ce Tribunal.

L'Appelant ne connait jusqu'à présent que deux moyens de changer une action: soit par demande incidente, soit par amendement. Il n'y a pas d'autre moyen connu ou indiqué par le Code de procédure, non plus que par les auteurs. Les Intimés ne peuvent ranger leur procédure, que dans la catégorie des demandes incidentes: ils ne prétendent pas, et ils ne sauraient le faire, que leurs moyens tombent dans celle des amendements.

Or une demande incidente n'est admissible que pour demander un droit échu depuis l'instance et non pour étayer ou établir un droit que l'on réclamait; si les Intimés avait un droit lors de l'institution de leur action, ils doivent rester avec leurs premiers moyens, et si ces moyens ne sont pas suffisants, leur action doit être déboutée. Si les moyens nouveaux qu'ils invoquent leur donnent un droit, ils en feront le sujet d'une action nouvelle.

Cette question a été jugée dans le sens de l'Appelant, par un jugement rendu par les Honorables Juges Day, Smith et Mondelet et rapporté au L. C. J., vol. 1 p. 42. "*Per curiam.*—Le Défendeur a bien droit de plaider un fait nouveau et la "Cour en lui accordant la permission de fournir des défenses nouvelles n'a fait "que suivre la pratique invariable de la Cour et qui est fondée en principe. Mais "il n'en est pas ainsi par rapport au Demandeur. Il n'a aucun droit de changer "son droit d'action ou de le dénaturer. Il ne peut pas refaire sa demande et "alléguer des faits nouveaux qui n'existaient pas lors de son introduction et qui "ne pouvaient donc pas lui donner un droit d'action. Si l'on accordait cette "motion, l'on permettrait du Demandeur de faire dans sa déclaration l'allégation "d'un fait qui n'existait pas lorsqu'elle fut datée et signifiée."

L'Appelant soumet donc que le jugement de la Cour Inférieure est erroné et en demande la réformation.

Roy, Q. C., for Respondents:—L'action était dirigée, en Cour Inférieure, contre l'Appelant, en destitution d'exécution testamentaire, sous les circonstances suivantes:

Par son testament passé devant Mtre. J. Belle et confrère, Notaires, le 26 Janvier 1866, et par codicile rédigé devant les mêmes notaires, le 12 Juillet 1868, Joseph Beaudry, écuier, nomma comme ses exécuteurs testamentaires, Jean Louis Beaudry, Jean Baptiste Beaudry et Olivier Gadbois, écuiers, de la Cité de Montréal; ce dernier est l'Appelant.

Au décès du dit Joseph Beaudry, survenu le 13 Juillet 1868, les exécuteurs testamentaires entreprirent l'administration des affaires de la succession; mais l'Appelant ayant formé le dessein d'acquérir à vil prix, la part échue à la succession dans les affaires de la ci-devant société "Jos. Beaudry et Cie.", et voyant qu'il ne pouvait réussir à faire accepter ses propositions à ses co-exécuteurs, il fit fermer le magasin de la ci-devant société, au grand préjudice de la succession et prenant dès lors une attitude hostile vis-à-vis de ses co-exécuteurs, il refusa sys-

tématiquement de leur donner aucune information sur les affaires de la société, et les menaça même plusieurs fois d'actes de violence, dans l'espoir sans doute qu'ils préféreraient résigner leur charge plutôt que de se soumettre à ses injures.

Après l'institution de cette action, l'Appelant, confiant dans la doctrine qu'il va soutenir devant ce tribunal, que les intimés ne peuvent porter à la connaissance de la cour ce qui peut s'être passé depuis et en violation flagrante des devoirs de sa charge, lança dans le public, et auprès des chalands de la maison Beaudry, une circulaire où il s'annonçait faussement comme successeur de la dite maison, tandis qu'au contraire le commerce de cette maison était continué par les autres exécuteurs. Cette manœuvre eut nécessairement pour effet de tromper plusieurs personnes et de causer du dommage à la dite maison Beaudry. De plus, l'Appelant se porta à de tels actes de violence vis-à-vis de celui de ses co-exécuteurs qui administrait plus activement les affaires de la succession, et aussi vis-à-vis des commis de cette succession, qu'il fallut le menacer de la police pour le calmer et le rappeler à la raison.

Les Intimés s'addressèrent à la Cour Supérieure pour obtenir la permission d'invoquer ces nouveaux moyens et donner ainsi plus de force à leurs prétentions; ces moyens furent énoncés d'une manière précise et circonstancié, et la Cour obtempéra à cette demande.

L'Appelant soumet respectueusement que ce jugement est bien fondé.

Il ne s'agit en effet que d'une question de procédure, et pareilles matières sont laissées, dans la pratique, à la discrétion de la cour; les amendements (et les *moyens supplémentaires* en l'espèce tombent dans la catégorie des amendements) sont permis en toute état de cause, pourvu toutefois qu'ils ne changent point la nature de la demande.

Rodier, quest. sur l'ord. p. 17.

Code proc. B. C. Art. 53.

Ici, la demande restait si bien la même, après l'introduction de ces *moyens supplémentaires*, que les conclusions n'étaient nullement modifiées. Les nouveaux faits avaient le même caractère que ceux libellés dans la demande.

L'Appelant se trouve-t-il lésé par le jugement dont il se plaint? Certainement non; un délai raisonnable lui est accordé pour fournir réponses à ces *moyens*, les dépens sont réservés; ainsi les fins de la justice seront plus sûrement atteintes; si les Intimés ne peuvent prouver amplement leurs allégations ils seront renvoyés de leur demande, tandis que s'ils démontrent l'existence des manœuvres et des violences de l'Appelant et la continuation de ces manœuvres et de ces violences depuis l'institution de l'action, ils se débarrasseront d'un *exécuteur testamentaire* qui a méconnu ses devoirs et qui peut compromettre l'avenir de la succession.

Les Intimés croient donc humblement que ce tribunal n'hésitera pas à confirmer la sentence dont est appel.

The following was the judgment of the Court.—La Cour considérant que bien-qu'il soit permis au Demandeur dans une action de produire une demande incidente supplétoire dans les cas prévus par les articles 18 et 149 du Code de Procédure Civile, il ne lui est pas permis par la loi de faire une demande supplétoire ou additionelle fondée sur des faits nouveaux qui n'existaient pas lors de l'introduction de son action;

Higgins, vs. Bell.

Considérant que les moyens supplétoires et additionnels produits en cette cause sont fondés sur des faits nouveaux et n'entrent pas dans la catégorie des cas prévus par les articles ci-dessus cités ;

Considérant partant que dans le jugement dont est appel, savoir le jugement Interlocutoire rendu par la Cour Supérieure siégeant à Montréal le trentième jour d'Octobre mil huit cent soixante neuf il y a erreur ;

Cette Cour infirme, casse et annule le dit jugement, et procédant à prononcer le jugement que la Cour de première instance eut dû rendre, cette Cour rejette la motion faite par les Demandeurs, (Intimés) le vingt sixième jour d'Octobre mil huit cent soixante neuf demandant à produire les moyens supplémentaires et additionnels y annexés, avec dépens dans les deux cours.

Dissentientibus—L'Honorable M. le juge en chef Duval et M. le juge Caron.

Judgment of S. C. reversed.

Duhamel & Rainville for appellant.
Rouer Roy, Q. C., for respondent.
(S. B.)

SUPERIOR COURT, 1873.

MONTREAL, 26th MAY, 1873.

Coram JOHNSON, J.

No. 3.

Higgins vs. *Bell.*

HELD : That su[illegible]on for *contrainte par corps* cannot be granted, on a simple motion therefor, after notice.

This was a motion for *contrainte par corps* against the prothonotary and the plaintiff's attorneys to compel production of a paper.

PER CURIAM :—It is impossible to grant the present application. The proper procedure is by rule of Court, calling on the parties to show cause. Here a simple motion for *contrainte* has been made, and although notice of the motion has been duly served, the Court cannot deviate from the actual requirements of the law, which exact that a rule of Court shall issue. The defendant should have moved for a rule and not for the *contrainte* itself. Take nothing by motion.

Motion for *contrainte* refused.

Kelly & Dorion, for plaintiff.
Judah & Wurtele, for defendant.

(S.B.)

PRIVY COUNCIL, 1873.

LONDON, 29th JULY, 1873.

Coram SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE SMITH, and SIR ROBERT P. COLLIER.

THE CHAUDIERE GOLD MINING COMPANY,

APPELLANTS;

AND

GEORGE DESBARATS ET AL.

RESPONDENTS.

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

The case in its earlier stages will be found reported at 13 L. C. Jurist, p. 132, and at 15 L. C. Jurist, p. 44.

PER CURIAM :—This is an appeal from a judgment of the Court of Queen's Bench for Lower Canada, affirming a judgment of the Superior Court of the Province, which dismissed the Appellants' action.

The action was brought by them, as vendees of mining property in Lower Canada, on an alleged warranty of title, not against Foley, their immediate vendor, but against the Respondents as the representatives of Foley's vendor, George Desbarats, who was, as they allege, liable as arrière-garant (remote warrantor), by virtue of Article 126 of the Code of Civil Procedure.

The case was decided upon a demurrer to the declaration, and consequently upon the facts disclosed in it.

The Appellants are there described as "The Chaudière Gold Mining Company, of Boston, in the State of Massachusetts, one of the United States of America, a body politic and corporate, duly incorporated under the laws of the said State of Massachusetts, for the purpose of and now actually carrying on the business of a mining company there, and at the township of Watford, in the county of Dorchester, and elsewhere, in the Province of Quebec."

The declaration sets out a deed of sale of the 24th November, 1863, whereby, for the price of 20,000 dollars, Desbarats sold to Foley some lots of land which are stated to have been assigned to him by several persons described as "original grantees of the Crown," but the deed at the same time discloses that patents from the Crown had not then been obtained. The declaration sets out a deed of sale, of the 25th November, 1863, from Foley to the Appellants, whereby, for the price of 200,000 dollars, Foley sold to the Appellants the same lots of land, but by a description which not only does not state that the patents had not been issued, but from which it might be implied that they had been granted.

Desbarats' deed of sale contains an express warranty of a limited kind. Foley's deed has a warranty in different terms. It is proposed to refer more particularly to these warranties hereafter.

The declaration then alleges that the lands were Crown lands, which had not

The Chaudière Gold Mining Company, and Desbarats et al.

been granted to any person at the date of the deeds, and that neither Desbarats nor Foley had ever got "the titles or patents to the lands," and avers that the lots were afterwards granted by Letters Patent of the Queen to McGreevy, by whom the Appellants were evicted.

It was contended, on behalf of the Respondents, that, by the law of Lower Canada, corporations could not acquire land or an interest in it without the license of the Crown, and, as a consequence, were not competent to maintain an action on a real warranty against a remote warrantor. It was further contended that if this were not so Desbarats had given an express warranty, which excluded the implied general warranty against eviction, and that this limited obligation gave no title to Foley, or to the Appellants as his vendees, to maintain this action.

For the Appellants it was answered that the disabling law did not apply to trading corporations, whether foreign or domestic; and, further, that if it did embrace them, such corporations were not incapacitated from acquiring, but only from holding lands, and that in either view their action was maintainable, and it was denied on their part that the ordinary legal warranty against eviction arising upon contracts of sale was excluded by the terms of Desbarats' deeds.

In the view their Lordships take of this case, it will not be necessary for them to determine the status and rights of foreign corporations in Lower Canada, or to what extent, if at all, they differ from corporations established in the Colony.

The law of the province deals liberally with foreigners. By the Civil Code, Article 25, aliens have the right to acquire and transmit moveable and immoveable property in the same manner as British-born or naturalized subjects; and by the Code of Civil Procedure, Article 14, foreign corporations may appear in all judicial proceedings in the Colony.

Whatever may be the effect of these Articles, it is sufficient to say that the Appellants cannot be in a higher or better position than a Colonial Corporation would be; and their Lordships, therefore, without further reference to the above distinction, will proceed to consider the principal question discussed by the Judges in the Courts below, viz., the capacity of mining or trading corporations to acquire lands in the Colony.

By the old law of France and her Colony, before the Edicts of Louis XV issued in 1743 in the Colony, and in 1749 in France, corporations might acquire lands, but could not hold them without license from the Crown, if required to give them up. But these Edicts, which appear to be substantially to the same effect, incapacitated corporate bodies from acquiring as well as holding lands.

This distinction is very clearly stated by Pothier, "Traité des Personnes," Tit. 7, Art. 1.

He says: "Dès avant l'Edit de 1749, les communautés n'étaient pas à la vérité incapables d'acquérir des héritages; mais si elles pouvaient les acquérir elles n'étaient pas en droit de les retenir toujours. Elles pouvaient être obligés de vuider leurs mains de ces héritages, soit par les seigneurs, de qui les héritages acquis par elles relevaient, soit par le Procureur du Roi, à moins qu'elles n'eussent obtenu du Roi des lettres des amortissements, qui les rendissent capables de posséder et retenir ces héritages, en indemnisant les seigneurs."

He then explains that the right of the King to oblige Corporations "à vuider

leurs mains de ces héritages" was founded on reasons of public policy, and that of the seigneurs on their title to receive profits upon mutation of the lands on death and otherwise. Pothier further says: "L'Edit de 1749 a rendu les communautés absolument incapables d'acquérir aucuns héritages, comme fonds de terre, ... Les choses qu'il est défendu par cette loi d'acquérir, ne peuvent être acquises à quelque titre que ce soit, soit à titre gratuit, soit à titre de commerce." . . . . .

The prohibitory force which the learned author ascribes to the Edict seems to be amply justified by the terms of it.

It was not denied by the counsel for the Appellants that Pothier had properly declared the effect of the Edict upon the Corporations with which it dealt; but they contended that these were religious and eleemosynary bodies only, and that modern trading corporations were not within its scope. There can be little doubt that the main object of the Edicts was to discourage the excessive endowment of religious houses, but the Edict of 1743 has words large enough to include secular bodies also. Article 1, after enumerating particular Corporations, has the general description, "autres corps et communautés ecclésiastiques ou laïques." And the prohibition to acquire lands contained in Clause 10 is directed against "autres gens de mortmain" as well as religious bodies.

It was argued that trading corporations could not be deemed "gens de mortmain," because their lands were not withdrawn from commerce, and were alienable. But the withdrawal of lands from commerce was only one, and not the main, reason of the law of mortmain, which was founded, as plainly appears from Pothier, not only on considerations of public policy, but on the loss to the Lords of their seignorial rights.

Their Lordships, however, cannot consider it to be their duty, at this day, to construe the language of the Edict as alone containing the law of Canada on the subject of mortmain, because a legislative declaration of that law is, in their opinion, contained in the Code, which is free from ambiguity.

Tit. XI of the First Book of the Code, which treats of "Corporations," in terms includes every kind.

Art. 364 states: "Corporations are subject to particular disabilities, which either restrain or prevent them from exercising certain rights, powers, privileges, and functions, which natural persons may enjoy and exercise; these disabilities arise either from their corporate character or they are imposed by law."

The disabilities arising from the law are stated in Art. 366, as follows:—

"1. Those which are imposed on each Corporation by its title, or by any law applicable to the class to which such Corporation belongs.

"2. Those comprised in the general laws of the country respecting mortmains and bodies corporate, prohibiting them from acquiring immoveable property, or property so reputed, without the permission of the Crown, except for certain purposes only, and to a fixed amount and value.

The Article refers, not to the Edict, but "to the general laws of the country respecting mortmain;" and their Lordships think that it declares the disabilities which attach by the general law of mortmain to all Corporations without distinction.

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It may be here observed that this view of the Code is affirmed by the majority of the Judges in the Court of Queen's Bench in the present case, and is not denied by the two dissenting Judges. Mr. Justice Badgley refers to the Code in his judgment as follows:—

"Whatever doubts might have existed heretofore as to the prohibitive application of the old law with reference to merely trading Corporations, they have disappeared since the promulgation of the Code, which has declared those old law prohibitions to be and to have been our provincial law. The terms of the Code Article are too plain for a doubtful construction, and in their generality embrace all corporations (secular, lay, or trading), and subject them all to the same disqualifications to acquire real property, without the Royal or legislative permission first had and obtained."

These observations on the declaratory force of the Code are entitled to great weight, from the fact that Mr. Justice Badgley was one of the Judges who, in a case relied on by the appellants (Kierzkowski *v.* Grand Junction Railway Company, 4 Lower Canada Jurist 86), expressed an opinion that trading corporations were not "gens de mortmain.' In that case, however, the Railway Company had legislative powers to purchase lands, and the question arose incidentally in an action for seigniorial dues. Whatever may be the worth of the opinions expressed in that case, the higher authority of the Code must now prevail.

Their Lordships, for these reasons, think the Court of Queen's Bench was right in holding that the Appellants were incapable, without the license of the Crown, which it is not averred they possessed, to acquire any title to the lands sold to them by Foley. But before considering the effect of this disability on their right to maintain the present action, it will be convenient to advert to the nature and extent of the warranty upon the sale by Desbarats to Foley, of which the appellants are seeking to avail themselves.

By the law of France prevailing in the Colony a warranty against eviction is implied in contracts of sale, but it is permitted to derogate from it by contract. Pothier says:—"Le droit commun des contrats de vente qui oblige le vendeur envers l'acheteur à la garantie de la chose vendue, ne concernant qu'un intérêt particulier des acheteurs, il est permis aux parties de déroger à ce droit par conventions particulières." ("Traité du Contrat de Vente," Part II, chap. 1, sect. 2, Art. 7.)

The author then gives instances of Conventions having this effect; one of them being: "Celle par laquelle le vendeur stipule qu'il ne sera garant que de ses faits."

The Code of Lower Canada, in effect, embodies this law.

Article 1506 declares that the warranty to which the seller is obliged in favour of the buyer, is either legal or conventional.

Legal warranty is defined in Article 1508, and includes warranty against eviction by reason of any right existing at the time of sale.

Articles 1507, 1509, and 1510, declare the manner in which this warranty may be excluded or diminished, as follows:—

Art. 1507. "Legal warranty is implied by law in the contracts of sale without stipulation. Nevertheless, parties may, by special agreement, add to the obligations of legal warranty, or diminish its effect, or exclude it altogether."

Art. 1509. "Although it be stipulated that the seller is not obliged to any warranty, he is, nevertheless, obliged to a warranty against his personal acts. Any agreement to the contrary is null."

Art. 1510. "In like manner when there is a stipulation excluding warranty, the seller in case of eviction is obliged to return the price of the thing sold, unless the buyer knew at the time of the sale the danger of eviction, or had bought at his own risk."

By the deed of sale Desbarats expressly bound himself and his heirs to warrant and guarantee Foley against all mortgages, debts, and dowers whatever. There is no other express warranty. The terms of transfer are limited to the rights and interests Desbarats had, or could demand in the subject-matter of the sale.

It is evident that the eviction by the Crown is not a breach of the express warranty given by Desbarats. His liability for this eviction must, therefore, be founded, if it exists at all, on legal warranty.

It was insisted on the part of the respondents that the legal warranty was excluded by the conventional warranty, upon the ordinary rule of construction, *expressum facit cessare tacitum*.

It is true that the conventional warranty of Desbarats does not contain the word "only," or other equivalent expression; but it seems to be a reasonable, if not a necessary, implication from the insertion of a limited conventional warranty, that it was the intention of the parties to exclude the larger legal one, and this implication is strengthened by the peculiar form of the conveyance, and by the disclosure in the deed of the fact that patents had not then been granted by the Crown; a disclosure which was not made in the conveyance, by Foley on his sale to the appellants, for a price which was an enormous increase on that he had paid to Desbarats.

There appears, then, to their Lordships to be strong ground for holding that the legal warranty was excluded on Desbarats' sale; and that no action could have been maintained by Foley against Desbarats upon an eviction by the Crown; and if this is so, none can be maintainable against him by the appellants for such eviction, even if they had been under no disability; because, in suing Desbarats as a remote warrantor, they can have no greater remedy against him than their immediate warrantor, Foley, to whose rights they are in effect subrogated by the operation of Article 126 of the Code of Civil Procedure.

It is not, however, necessary to rest the decision on this ground, because, assuming the legal warranty not to have been excluded on the sale by Desbarats to Foley, their Lordships think that the legal disability to purchase lands under which the appellants are placed prevented them from acquiring the right to resort to it. Such a right can only spring from a valid sale, and the sale from Foley to them being invalid, by reason of their incapacity to purchase, the consequential right to sue Desbarats on a legal warranty could never arise. Whatever may be the case, as between Foley and the appellants, it is evident that Desbarats, who was not a party to that sale, is not estopped from asserting its invalidity.

The Chief Justice of the Court of Queen's Bench was of opinion that, although the appellants might be under a legal disability to purchase, the action was

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maintainable against Desbarats for the price as upon a failure of consideration. But this opinion appears to have been given upon the erroneous assumption that Desbarats had received the price paid on the sale by Foley, viz., 200,000 dollars, from the appellants.

The right to restitution of the price is independent of warranty, and can be enforced, as it appears to their Lordships, only between the immediate parties to a sale.

Art. 1510 of the Code declares this right:—"In like manner, when there is a stipulation excluding warranty, the seller in the case of eviction is obliged to return the price of the thing sold, unless the buyer knew at the time of the sale the danger of eviction, or had bought at his own risk."

By the terms of this Article it is only when warranty is excluded that this obligation to return the purchase-money as between the immediate parties to the sale arises; and it cannot, therefore, be within Article 126, C.P.C., which is confined to the case of warranties.

Their Lordships in deciding this Appeal are dealing only with the action brought under this Article against Desbarats, and not with the rights (if any) which the appellants may have against their immediate vendor Foley, either on his express engagements or for restitution of the price paid to him.

One other point remains to be noticed, viz., the contention on the part of the appellants that although it is not averred in the Declaration that the license of the Crown had been obtained, the grant ought, upon demurrer, to be assumed until the contrary was shown by plea. Their Lordships cannot agree in this view. On the face of the declaration the appellants were incorporated by the law of a foreign State, and were, according to what has been already decided, under a legal disability by the general law to acquire lands in Canada. Assuming that this disability might have been removed by a license from the Crown, it appears to their Lordships that it was for the appellants to show it, since this license was essential to confer on them the legal capacity to purchase and to maintain the action. The grant also, if obtained, would be a fact peculiarly within their own knowledge, and ought, according to a reasonable rule of pleading, to have been averred by them.

This pleading point, it may be observed, is entirely beside the substance of the case; for there can be no doubt that, if a license had been really granted, the appellants would have applied and been allowed to amend their Declaration and aver its existence.

In the result, their Lordships will humbly advise Her Majesty to affirm the judgment of the Court of Queen's Bench, and to dismiss this Appeal with costs.

Judgment confirmed.

A. F. Eddis & F. W. Gibbs, Counsel for the Appellant.
J. P. Benjamin, Q. C., Counsel for the Respondent.
(J.K.)

COURT OF QUEEN'S BENCH, 1872.

MONTREAL, 20TH DECEMBER, 1872.

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

No. 99.

OLIVER W. STANTON,
(*Plaintiff in the Court below,*)
APPELLANT;

AND

THE ÆTNA INSURANCE COMPANY,
(*Defendant in the Court below,*)
RESPONDENT.

HELD:—That a fire policy in favour of appellant, on coal oil, "his own, in trust, or on consignment," covered his loss on oil destroyed by fire in Middleton's sheds, warehouse receipts for which granted by Middleton in favor of Thomas Ruston had been transferred by Ruston to appellant, and on which receipts appellant had made advances to Ruston, who obtained such advances really for Middleton, without appellant however being aware of the fact.

This was an appeal from a judgment of the Superior Court at Montreal, setting aside a verdict rendered by a jury upon the issues as settled by the judge, and granting a new trial. And also rejecting the motion of the appellant for judgment upon the said verdict.

The action was instituted by the appellant in the Court below, upon a policy of Insurance issued by the defendants on the 5th day of June, 1867.

The declaration alleged that on the 20th May 1867, one Thomas Ruston, broker, or some person or persons unknown to the appellant, acting by Thomas Ruston, broker, owned and possessed 180 barrels of 40 gallons each of refined coal oil, of the brand known as the Atlantic brand, then in the warehouse of William Middleton & Co., at Montreal, known as store No. 1, and that the said warehousemen then and there made and gave to Ruston, a warehouse receipt for the same.

That on the 27th of May, Ruston or some person acting by him as broker, also owned and possessed 120 barrels of 40 gallons each of coal oil, of the brand known as the Improved Illuminator Brand, which were also in the warehouse of Middleton & Co., and for which also on the last mentioned day the said warehousemen gave Ruston a warehouse receipt. The warehouse receipts are as follows:—

MONTREAL, 20th of May, 1867.

Received into store on account of Thomas Ruston, Esq. and deliverable only on production of this receipt duly endorsed by him, one hundred and twenty barrels refined coal oil, "Improved Illuminator Brand," average quantity guaranteed forty gallons per barrel. Insured by owner. Stored in No. 1 store.

(Signed,) W. MIDDLETON & Co.

MONTREAL, 27th May, 1867.

Received into store on account of Thomas Ruston, Esq., and deliverable only on production of this receipt, duly endorsed by him, one hundred and eighty,

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barrels refined coal oil, Atlantic Brand, average quantity guaranteed forty gallons per barrel. Insured by owner, stored in store No. 1.

(Signed,) W. MIDDLETON & Co.

The declaration proceeds to allege that by virtue of these warehouse receipts, Ruston came to have the entire control and power of disposal over the said oil, as the owner thereof, or as regards the appellant, to the same extent as if he had been the owner thereof.

That on the 4th of June 1867, Ruston assigned and transferred to the plaintiff and appellant the said 300 barrels of refined coal oil, then still in the said warehouse, by endorsing and delivering to the appellant the two warehouse receipts already referred to, as security for Ruston's promissory note for $1,800 due on the 7th of October, 1867, payable to the order of the appellant: the appellant agreeing that on payment of such note he would reconvey and return the oil to Ruston.

That the condition of payment was not fulfilled, that the plaintiff was still the holder of the warehouse receipts, and by virtue thereof was the owner and possessor of the said oil.

That on the 5th June, the defendants and respondents issued a policy of Insurance in favor of the appellant, in consideration of forty dollars premium, in which they agreed to insure the appellant against fire for one year from that date, to the extent of $2,000 on "refined coal oil, his own, on trust, or on "consignment, contained in a vault covered with earth situated on the north side "of the Grand Trunk Railway at Point St. Charles near Montreal, C. E.; "isolated;" which vault the appellant alleged was the same place indicated in the warehouse receipts as store No. 1 of Middleton & Co..

That on the morning of the 18th day of August, 1867, while the policy was in force, the said vault or store No. 1 was burned, and the oil totally destroyed, the oil then being of the cash value of $2,400 cy.; and that the appellant thereby suffered damage to the extent of $1,800 cy.; being the amount of his claim upon Ruston on the promissory note already mentioned.

The declaration then proceeded to set forth the conditions of the policy, as to giving notice of the fire, and as to giving a particular account of the loss and damage, supported by affidavit, &c., the whole of which conditions the appellant alleged he had performed.

That appellant suffered damage by the fire to the extent of the said sum of $1,800, being the amount of his interest in the said coal oil; and that the respondents became bound and obliged to indemnify him to that extent, which they had failed to do.

And in support of this declaration the appellant produced the warehouse receipts, Ruston's note for $1,800, his acknowledgment of the pledge of the 300 barrels of oil, being No. 6 of the *dossier*, and the Policy, being No. 8 of the *dossier*.

The respondents filed several pleas to the appellant's action, namely;

1st. That the appellant was not the owner or proprietor of the oil, either in trust or otherwise, as represented by him to the respondents at the time he effected the insurance. And that no risk ever attached under the said insurance

inasmuch as there never was, and there was not at the time of the fire, any oil whatever in the vault or store referred to in the declaration, the property of the said plaintiff, or any in trust or on commission.

That, moreover, the appellant never acquired any right or title to the oil mentioned in his declaration, under the transfer of the warehouse receipts; inasmuch as Ruston did not own or possess, either in his own right or as acting for any other person, the oil mentioned in the warehouse receipts.

That in fact Ruston, neither as owner nor as broker, had ever placed in store with Middleton & Co., the oil mentioned in the pretended warehouse receipts, as they falsely represented; and that neither Middleton & Co., nor Ruston, ever owned or possessed the whole or any part thereof.

That William Middleton, carrying on business under the name of William Middleton & Co., made the warehouse receipts, falsely representing Ruston to have the oil in his sheds, for the purpose of obtaining advances thereon for his (Middleton's) benefit; whereas neither Ruston nor Middleton had any such oil in the premises at the time.

That the warehouse receipts had been fraudulently issued and delivered to Ruston for the aforesaid purpose. That appellant obtained them from Ruston with a full knowledge of the facts and especially that Ruston was negotiating the said warehouse receipts as agent and broker of Middleton; and also with the knowledge that the said oil was not actually in store in any of the sheds of Middleton.

That it was agreed, by a condition of the policy, that the respondents should not be held liable if there should be any other or prior insurance upon the property insured, without the written consent of the Respondents; and that there were other insurances upon the coal oil represented by the warehouse receipts, which had not been notified to the respondents.

The respondents also filed a general denegation.

The appellant answered generally.

Thereupon, the appellant having declared his option of a trial by jury, suggestions were submitted by both parties, and the Court finally adjusted the questions to be submitted to the jury as follows, to which questions are added the findings of the jury at the trial before his Honor Mr. Justice Torrance, on the 9, 10, 11 and 12th days of March, 1869.

1st. Were the defendants, on the fifth day of June, 1867, a body corporate in the State of Connecticut, one of the United States of America, with the power to carry on the business of Fire Insurance, and were they carrying on the business of Fire Insurance at the city of Montreal at the said date?

Answer.—Yes.

2nd. Was Thomas Ruston, of the city of Montreal, broker, mentioned in the declaration on the 20th day of May, 1867—date of receipt, plaintiff's exhibit, No. 1,—owner of 180 barrels of refined oil, of the brand known as "Atlantic Brand," mentioned in said receipt. If not the owner, was he the holder of said oil, and for whom; and what was his interest therein?

Answer.—Thomas Ruston was the holder of the said oil, for the purpose of obtaining advances thereon, in his capacity of broker, for Wm. Middleton.

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3rd. Did the said Thomas Ruston, on the 20th day of May, 1867, actually place in store with the said William Middleton the quantity of oil last mentioned as owner thereof, as the said receipt purports to certify, or as representing some other person, and state who?

Answer.—No, the oil being previously in said store.

4th. Was the oil referred to in the above-mentioned receipt actually in store at the date of said receipt, and if so, in which of the sheds of the said William Middleton was it stored?

Answer.—The said oil was in store at said date in shed No. I.

5th. Was the said Thomas Ruston, on the 27th day of May, 1867, the owner of a further quantity of 120 barrels of refined coal oil, of the brand known as "Improved Illuminator" brand, mentioned in the receipt, Plaintiff's Exhibit, No. 2? If not, was he the holder of said oil, and for whom and what was his interest therein?

Answer.—Thomas Ruston was the helder of the said oil, for the purpose of obtaining advances thereon, in his capacity of Broker, for Mr. Wm. Middleton.

6th.—Did the said Thomas Ruston, on the said 27th day of May, 1867, date of said receipt, plaintiff's exhibit, No. 2, actually place in store with the said William Middleton the quantity of oil mentioned as the owner thereof, as the said receipt purports to certify, or as representing some other person, and state whom?

Answer.—No, the said oil being previously in said store.

7th. Was the oil referred to in the above-mentioned receipt, actually in store at the date of said receipt, and if so, in which of the sheds of the said William Middleton was it stored?

Answer.—The said oil was in store at said date in shed No. 1.

8th. Did the said William Middleton sign and deliver to the said Thomas Ruston, on the 20th and 27th days of May, 1867, the receipts, plaintiff's exhibits, No. 1 and 2?

Answer.—Yes.

9th. Were such receipts so made and delivered by the said William Middleton to the said Thomas Ruston for the purpose of enabling him to obtain advances thereon, for the benefit of the said William Middleton?

Answer.—Yes.

10th. Did the said Thomas Ruston transfer said receipts to plaintiff as security for an advance thereon, and if so, when and for whose benefit?

Answer.—Yes, he did transfer said receipts to plaintiff on 4th June, 1867, for advances made thereon for the benefit of William Middleton.

11th. What was the amount of said advance?

Answer.—$1,800.

12th. Was the plaintiff aware when he made said advances, in what capacity and for whom, said Ruston was then acting; and if so, in what capacity and for whom did he believe him to be so acting?

Answer.—We have no evidence to show that the plaintiff was aware when he made the advance, in what capacity and for whom, said Ruston was acting.

13th. Did William Middleton, in the month of May, one thousand eight

hundred and sixty-seven, issue and deliver to said Thomas Ruston, warehouse receipts in his favor for coal oil, without having in store the oil mentioned in such receipts, for the purpose of obtaining advances thereon, and were the plaintiff's exhibits, numbers one and two, of the number of such receipts so issued?

Answer.—He did issue and deliver said receipts, and the said oil was in store at that time.

14th. Did the plaintiff effect an insurance with defendants on or about the fifth day of June, one thousand eight hundred and sixty-seven, on the oil mentioned in the said receipts, plaintiff's exhibits, Nos. 1 and 2, and according to the purport of the policy of Insurance, plaintiff's exhibit No. 5, and subject to the conditions thereon endorsed, and did the defendants thereupon issue and deliver the said policy to him?

Answer.—Yes.

15th. Did the plaintiff effect the said insurance as the owner of the oil mentioned in the said policy? And if not, in what manner did he effect the same?

Answer.—He effected said insurance in the usual way to secure the advance made by him on said oil.

16th. Had the plaintiff any and what interest in the said oil at the time of effecting said insurance?

Answer.—He was interested in said oil, to the amount of eighteen hundred dollars, being his advance thereon.

17th. Were the defendants through their agents or otherwise made aware at the time of said insurance, of the nature of the interest which the plaintiff had in the coal oil mentioned in the said policy; if so state in what manner they acquired such information and in what did it consist?

Answer.—The policy of insurance issued by defendants, leads us to infer that they had been made aware of the nature of the transaction.

18th. Had any other, and if so, what insurance been effected upon the said oil or any part thereof either by plaintiff or any person on his behalf, prior to said insurance thereof by the defendants, and if so did the plaintiff make known such prior insurance to the defendants, and cause the same to be entered on the policy?

Answer.—We have no evidence to show that any other insurance had been effected on said oil.

19th. Was the coal oil shed of William Middleton known as shed number one destroyed by fire on or about the 18th day of August, eighteen hundred and sixty-seven?

Answer.—Yes.

20th. Was the quantity of oil mentioned in the receipts, plaintiff's Exhibits Numbers one and two, or any part thereof, in shed number one at the time of the fire, and was the same destroyed by the said fire?

Answer.—Yes; the said oil was in shed number one, and was destroyed by said fire.

21st. Did the plaintiff sustain any loss by the destruction by fire of the coal

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oil mentioned in plaintiffs' exhibits numbers one and two, or any part thereof, and if so, state at what sum you estimate such loss?

Answer.—He sustained the loss of his advance of eighteen hundred dollars.

After this verdict was rendered the respondents moved that the verdict and findings of the jury be set aside as being contrary to the evidence adduced, and contrary to law, and that judgment be rendered in favor of the respondents, and the action dismissed with costs; and also moved, that in the event of the Court not granting the said motion, the verdict and findings of the jury be set aside and rejected, and a new trial granted. Thereupon the appellant moved for judgment upon the verdict. The first and last of these three motions were dismissed by the Court, but the second motion made by the defendants, namely the motion for a new trial, was granted. And the present appeal was from that judgment.

This motion was supported by nineteen reasons, which may be condensed into seven, as follows:

1st. Because the plaintiff failed to establish in evidence that Ruston ever was the holder or owner of the oil, in which proposition was embodied the following:

That the evidence of the ownership was conflicting.

That there was no evidence that the Warehouse receipt was made out and delivered to Ruston with the authority of the owner of the oil.

That the Warehouse receipts were null and void, because they declared that the goods were placed by Ruston in Middleton's possession, which was false.

That there was no oil in the shed No. 1 of the description mentioned in the Warehouse receipts, the property of either Middleton or Ruston.

That Middleton, a warehouseman, could not sell or pledge oil the property of other parties stored in his warehouse.

2nd. Because the plaintiff failed to establish the value of the oil.

3rd. Because the evidence showed that both prior and subsequent insurances had been effected upon a large quantity of oil, of which the oil mentioned in the plaintiff's declaration formed part, which insurance was not endorsed on the policy sued upon. But that the judge erroneously charged the jury that there was none.

4th. Because the judge erroneously charged the jury that the Warehouse receipts were valid without Middleton's endorsement.

5th. Because the Judge erroneously charged the jury that Middleton could validly sell or pledge the oil of other parties, which he had in his warehouse, without the authority of his principals.

6th. Because the judge erroneously charged the jury that if there was evidence that the oil was in the warehouse at the date of the receipts, the presumption was that it was there at the time of the fire.

Lastly, because the judge erroneously charged the jury that the evidence of Ruston was to be considered, and that of Middleton disregarded, instead of holding that in consequence of their evidence being conflicting the plaintiff had failed to establish his case.

The following was the judgment of the Court of Appeal:—

The Court * * * considering that it is established in evidence that the oil,

the subject of this contention, insured by the policy of insurance issued therefor by the respondents, defendants below, in favour of the appellant, plaintiff below, was destroyed by the fire which occurred in the oil shed in which it was stored at the time of the occurrence of the said fire, and that the said appellant had an insurable interest in the said oil at the time of its destruction aforesaid to the amount of eighteen hundred dollars.

Considering that at the trial of the issues in this cause by a special jury a verdict was found in favour of the said appellant, and that in the judgment rendered by the Superior Court at Montreal, on the twenty-first day of May, one thousand eight hundred and sixty-nine, whereby the said verdict and findings of the said jury were set aside and a new trial was granted upon the motion of the said respondents, there is error, doth set aside the said judgment, and proceeding to render such judgment as the said Superior Court should have rendered, doth set aside and reject the said motion of the said respondents for a new trial upon the said issues, and doth maintain the verdict and findings of the said jury, and doth grant the motion of the said appellant for judgment in his favour upon the verdict and findings aforesaid, and finally doth condemn the said respondents, etc.

Judgment of S. C. reversed.

Hon. J. J. C. Abbott, Q.C., for appellant.
Carter & Hatton, for Respondent.
(S. B.)

SUPERIOR COURT, 1873.

MONTREAL, 31st MARCH, 1873.

Coram MACKAY, J.

No. 2586.

Payette vs. *Cousineau.*

HELD :—That the testimony of a witness in *sur-rebuttal* may be attacked by counter evidence to show that such witness was inimical to plaintiff, and was not to be believed under oath.

PER CURIAM :—The plaintiff desires to examine witnesses to show that a witness examined in sur-rebuttal was actuated by spite in giving his testimony. It is irregular to produce evidence after sur-rebuttal but this is an exceptional case, and the motion is granted. The evidence, however, must be restricted to prove *inimitié* alleged of Rocheleau, the witness, and that he is not to be believed under oath.

Plaintiff's motion granted.

Moreau, Ouimet & St. Pierre, for plaintiff.
Emery Robidoux, for defendant.

(S.B.)

SUPERIOR COURT, 1872.

MONTREAL, 17TH DECEMBER, 1872.

Coram MACKAY, J.

No. 2699.

Barnes vs. *Mostyn.*

HELD:—1. That the Commanding Officer of a British Regiment, who is sued by a retired Corporal of the Regiment for damages, alleged to have been caused by his arrest and imprisonment by the Colonel, whilst in the Regiment, illegally, maliciously, and without probable cause, cannot invoke the want of one month's notice of action, provided for in Article 22 of the Code of Civil Procedure, even when it is proved that he acted, in reality, legally, without malice, and with reasonable or probable cause.

2. That, under the facts proved, the defendant was fully justified in all that he did with regard to the plaintiff, and that he acted legally, without malice and with reasonable or probable cause.

This was an action of damages, accompanied by *Capias ad respondendum*, by a retired Corporal of the 23rd Royal Welsh Fusileers, against his Commanding Officer, for alleged illegal arrest and imprisonment, during the time he was in the Regiment, and the declaration alleged that the defendant acted maliciously and without reasonable or probable cause.

Besides the plea of not guilty the defendant pleaded the want of one month's previous notice of action, provided for by Article 22 of the Code of Civil Procedure.

To this latter plea the plaintiff fyled a demurrer, which was ordered to stand over until the final hearing on the merits.

MACKAY, J.—This suit was instituted about five years ago for $10,000 damages for illegal imprisonment of plaintiff by the defendant. The plaintiff was an enlisted soldier in the 23rd Regiment, and master shoemaker to the Regiment. Defendant commanded the Regiment at dates mentioned in plaintiff's declaration, but had to govern according to the Queen's regulations and orders for the Army, and to the Mutiny Act. On the 18th May, 1867, at Montreal, plaintiff was sent for, and attending in the Orderly Room, was questioned by (among others) the defendant respecting boots made by plaintiff in 1865, there having been discovered an alleged deficiency (says plaintiff's declaration) three months before that; deficiency of 60 pairs of boots in the Quarter-Master's store, but of which plaintiff was ignorant, and for which he was not responsible. That that day, 18th May, plaintiff was placed under arrest by defendant's order, and forthwith plaintiff's private property and tools were taken possession of by defendant. Twelve nights and twelve days plaintiff was so kept in arrest and *close confinement*, and could only be set at liberty by order of defendant. That no charge was made known to plaintiff, nor did defendant appoint plaintiff to be tried or to be heard at any time during said twelve days, contrary to the articles of war; that on 22nd of May plaintiff was in confinement, and the half-yearly inspection of the regiment was made by General Russell, and at that inspection all prisoners were brought before General Russell to make any complaint, but plaintiff was deprived of that privilege, contrary to the orders for the army, as defendant well knew; that on 30th May defendant ordered plaintiff to be brought before him, and without any charge being brought against plaintiff, and in the absence of the officer commanding plaintiff's company, severely censured the plaintiff, deprived him of his place of master shoemaker, and ordered him to be disgraced

and sent back to the ranks, contrary to the orders for the army; that subsequently plaintiff was three times arrested upon various pretences in connection with said deficiency of 60 pairs of boots—9th and 10th June at Montreal, and 11th July at Point Levis—and each time was discharged after hours of imprisonment, without anything wrong being proved against plaintiff. During all these imprisonments plaintiff was kept out of possession of his property, and personal effects, which were held by defendant; and tools and boots were taken out of plaintiff's boxes, to his great loss; three letters of grievances written by plaintiff for General Russell, and which defendant ought to have forwarded, defendant refused to forward, contrarily to the rules of the army, etc. All complained of acts of defendant were *done maliciously and without just, reasonable, or probable cause*, and without observance of the formalities required, and for the object of ruining the plaintiff. Plaintiff has been obliged to spend over $40 for legal advice; that plaintiff has been driven to take his discharge, and has by doing so lost the right to pension and a medal; plaintiff has lost property abstracted during his imprisonment, and which he has been unable to recover, and so has been injured in his trade $200 and mentally and otherwise, and in his character has lost $10,000 value of damages; conclusion accordingly for $10,000. *Capias* allowed for $2,000.

The pleas are: 1st, no notice of action: this is demurred to. 2nd, general denial and not guilty.

Now, as to the demurrer, I must maintain it, as I do not consider the article of the Code invoked, which is based on the Cons. Stat. of L. C., ch. 101, secs. 1 and 2, applies to the case of the Commanding Officer of a Regiment. Then on the merits, I may say, that the evidence is almost entirely confined to the arrest of May, 1867, and to what passed upon it; the 9th and 10th June ones and that of July at Point Levis being not much gone into. As to the arrest in May it seems to have arisen out of a discovery of a deficiency of boots in the stores of the regiment. Plaintiff had been paid for making 78 pairs 1st April, 1866, at Gibraltar. A deficiency of some 46 pairs at least was plain to be seen at Montreal, Februsry, 1867, and Lieut. Liddell enquiring about it, plaintiff stated to him that to the best of his belief he had made 31 or 32 pairs. Liddell at this time was acting Quarter-Master. This statement by plaintiff while there was his receipt of 1st April, 1866, for the money of 78 pairs, aroused some suspicions. Had there been money taken upon an account presented that was false? Had there been boots embezzled? This arrest, says plaintiff's declaration, was close confinement. It was really only confinement to barrack room, not confinement to guard room. Any soldier who shall give in any false statement of clothing, stores, &c., or who shall by any false document be concerned in any embezzlement of stores, or who shall by producing any false accounts misapply the public money for purposes other than those for which it was intended, is liable to punishment under Art. of War, 88. Commanding officers are responsible, among other things, for the maintenance of a proper system of economy in their regiments. P. 31, Pipon's Manual of Military Law. The custom of the service has established the right of every officer in command of troops to assemble, at his will, courts of enquiry for the

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investigation of any matter connected with the service, on which he may feel a difficulty, from imperfect information or otherwise, in arriving at a conclusion. P. 170, Pipon. The Exchequer Chamber has recognized (says Pipon) the legality of such courts, and see further the Queen's regulations; Section 785 of edition of 1st January, 1868. The officers of courts of enquiry are not sworn, nor are the witnesses before them; and a soldier whose conduct is being investigated, may decline to take any part in the proceedings, or to make any statements, but he may be present if he please. P. 171, Pipon, and see "Tytler," also Queen's regulations. No soldier is to be kept in confinement for more than 48 hours without having his case disposed of, unless it be preparatory to his being tried by court martial. P. 34 of Pipon's Manual of Military Law of 1863 (citing the Queen's regulations). All offences for which a punishment exceeding seven days' confinement to barracks has been awarded are to be entered in the Regimental Defaulters' book. P. 35, Pipon. The defendant ordered a court of enquiry in consequence of the missing of the boots referred to, and the report of the acting quartermaster, and a charge made by him against plaintiff, and plaintiff was put under arrest. The Court of Enquiry set to work, and finally reported that plaintiff's explanations (he having appeared before them) were unsatisfactory, and that the deficiency of boots was plain, &c. The Court was not a judicial body, and ordered nothing against plaintiff. On the 30th May the Court was dissolved, and with it the plaintiff's arrest. The Major-General, having had the proceedings of the Court of Enquiry put before him by the defendant, ordered plaintiff's discharge, not seeing enough to warrant a court-martial against him. The defendant did not order plaintiff to be disgraced and sent back to the ranks, if by this be meant his being reduced in rank in the regiment, for he was *not*. Plaintiff has brought up, amongst other witnesses, a former Quarter-Master, Mr. Burden, whose evidence would exonerate plaintiff from liability for the missing boots. Mr. Burden I would not say a word against, nor would I against plaintiff, needlessly. Plaintiff's reputation stood good, and his character good, and it is to be lamented that the question of these missing boots arose. Mr. Burden has interest to prove that the 78 pairs paid for had really been made, and put into store. He has since had to pay for them, through deductions that he has had to suffer from his half-pay. The case we have before us does not involve the question of plaintiff's guilt or innocence in respect of the missing boots;—the real question is as to defendant's liability towards plaintiff in the manner and form charged by plaintiff for the causes stated in the plaintiff's declaration. Captain O'Connor's evidence is important. He says:—There was a discovery first of a deficiency of boots in the Quarter-Master's store, and plaintiff could not account for how many pairs he had made. The arrest was after a report by the acting Quarter-Master. The Court of Enquiry found the deficiency of boots plain, and that plaintiff's explanations were most unsatisfactory. Plaintiff was *not* reduced to the ranks, though put out of the shoemakership. As to his tools and private property plaintiff expressed to Capt. O'Connor satisfaction with an allowance made him (plaintiff) for them. Defendant might well have brought plaintiff to a court-martial that May, says O'Connor. Much is made by plaintiff of his not having been shown

to General Russell, but Captain O'Connor explains this away, and upon plaintiff's name not having been carried into the defaulters' lists, but Captain O'Connor explains that only in cases of crimes or punishments are such entries made in said lists. On 30th May only was the Court of Enquiry dissolved, and of course the plaintiff's arrest lasted while it lasted. The 48 hours rule relied upon by plaintiff's counsel I do not interpret as he does for this case, seeing that the Court of Enquiry was a proceeding preliminary and having in view a court-martial. (See page 34, Pipon.) Defendant then, simply, discharged plaintiff from arrest, says O'Connor. Finally, O'Connor says plaintiff was generally a well conducted man.

Upon the whole, I have come to the conclusion that plaintiff's case is not made out. I have read of injustice by officers in the army towards subordinates; I have sorrowed over narratives such as Somerville's, and of the Robertson court-martial, and in my present office I would not fail to pronounce for damages against any military officer guilty of mere wanton abuse of power. But we must not allow mere passion to prevail against right. It is most important that the discipline of the army be kept up, and that commanding officers working to that end be not hampered by fears of actions of damages in the civil courts against them. I find the defendant not guilty of the charges laid against him. He had to move as he did, or be guilty of dereliction of duty. I hold, that upon any charge against an officer or soldier being brought to the knowledge of a Commanding Officer he ought to investigate it, and that he may cause a Court of Enquiry to assemble to ascertain the circumstances of the case. The defendant in ordering the Court of Enquiry and arrest of plaintiff did no more than he was bound to, and the arrest was not maintained unduly. The defendant was not moved by malice. It is clear that boots have gone astray. Plaintiff asked and got pay for 78 pairs; yet asked by Lieut. Liddell as to how many pairs he had made, he says 31 or 32. The Court of Enquiry and the arrest I cannot find to have been (under the circumstances) without any reasonable cause. Plaintiff has himself to blame in part for them, and it cannot help him that at the Court of Enquiry he says that "when he made the statement to Lieut. Liddell he did not recollect." It is certain that he made the statement. We may allow that the plaintiff did not make away with the missing boots, and that he really made all that he got paid for, 78 pairs; yet *non sequitur* that his present action is to be maintained. It is dismissed with costs.

The following was the judgment recorded by the Court:—"The Court * * * doth maintain said Demurrer of plaintiff and dismiss said *Exception Peremptoire en Droit*, with costs.

"Then adjudging upon the merits,—

"Considering that plaintiff has failed to prove his allegations material, among other things, that the acts of defendant complained of, and particularly, in and about the putting of plaintiff *under arrest*, to wit, on the 18th May, 1867, were without probable cause, and done maliciously;

"Considering that before and after, and at the times of the acts and doings of defendant complained of, in and about the arrest and alleged imprisonment of plaintiff, he (the plaintiff) was an enlisted soldier in Her Majesty's army;

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that he was, therefore, subject to military law and jurisdiction; that the defendant was his commanding officer, and in doing what he did, (all that is proved against him in those matters) was acting under military law and within his jurisdiction, and *bond fide*, not moved by malice, nor without probable cause; that this may be held, although true it be, that the enquiry that was upon or after plaintiff's first arrest resulted in plaintiff being discharged;

"Considering that unless clear excess or wanton abuse of power be, by a military officer like defendant, (such excess or abuse of power not shown in this case), Civil Court ought not to interfere as in this cause plaintiff would have it;

"Considering that defendant is not guilty of the trespasses and injuries against plaintiff complained of, and is not liable in damages whatever towards plaintiff, under the facts proved, and the circumstances of this case; that as to plaintiff's tools and personal effects, alleged taken by defendant, plaintiff is proved to be without grievance against defendant;

"Doth dismiss said plaintiff's action with costs, and doth order that said defendant be freed and liberated from the *Capias ad respondendum* against him issued, and that he be discharged therefrom and set at liberty."

Action dismissed.

C. P. Davidson, for plaintiff.
S. Bethune, Q.C., for defendant.
(S. B.)

COURT OF REVIEW, 1873.

MONTREAL, 31ST MAY, 1873.

Coram MACKAY, J., TORRANCE, J., BEAUDRY, J.

No. 98.

Warner et al. vs. *Rolf.*

HELD:—That in a case of damages for personal wrongs, in which the Court has awarded only $5 for the damages, no greater amount than $5 for costs can be allowed.

This was a review of a judgment rendered in the Circuit Court, at Sherbrooke, district of St. Francis, (SANBORN, J.) on the 3rd of April, 1873, awarding $5 damages for personal wrongs, and costs as in an action over $60 and under $80.

PER CURIAM:—The Court is of opinion to confirm the judgment, except as to costs; the 478th article of the Code of Procedure not allowing of a condemnation for a greater amount of costs than $5. As the point was not raised by the party inscribing, he will not be allowed any costs in this Court.

The following was the *considérant* of the judgment:—

"Considering that the only error in the judgment *à quo* is in its adjudication of costs beyond what was or is lawful (478 Code of Civil Procedure), doth reduce the condemnation made by the said Court as to costs, and doth by the present judgment allow costs only to the extent of $5, and doth confirm said judgment of the said Circuit Court in all other respects; each party in revision to pay his own costs."

Judgment of Circuit Court reformed.

Ives & Brown, for plaintiffs.
Borlase & Panneton, for defendants.
(S. B.)

SUPERIOR COURT, 1873.

MONTREAL, 31st MARCH, 1873.

Coram MACKAY, J.

No. 282.

Willett vs. DeGrosbois.

HELD:—That "The Corrupt Practices Prevention Act, 1860," of the late Province of Canada, is in force and applies to elections of members for the House of Commons of the Dominion, and therefore, that a note given for the payment of even lawful expenses connected with any such election is void in law.

PER CURIAM:—Note and costs of protest are sued for, $263.03. Defendant pleads that at an election at Chambly for the House of Commons of the Dominion he was a candidate on the 13th August, 1872. That before that defendant placed with plaintiff $60 to pay legal expenses (*dépenses légitimes*) of that election. That after the election plaintiff informed the defendant that the legal expenses [*autorisées par la loi*] had run up to $310 and promised a detailed account; that on the 27th September plaintiff asked payment, and defendant, relying on the integrity of plaintiff and the truthfulness of his statements, gave him the note sued upon; that in dating the note 14th August, 1872, instead of 27th September, the plaintiff deceived defendant, "*a surpris sa bonne foi*;" never did plaintiff make the legal expenses for which note was caused; by *dol et fraude* has plaintiff gotten the note; that the defendant has received no value for the note. It is not pleaded that the note is tainted with illegality, but defendant swears to his plea as true in all particulars. Willett, examined as a witness, explains that the debt was contracted on the 14th of August, and the note sent for signature in September was therefore dated August, and he says: "I called defendant's attention to it in a letter that I wrote to him when I sent him the note for signature. The note was caused for money election expenses paid out by my son for defendant; on the 14th August the election was; I paid out so much for carters, my son paid expenses of bringing voters from the townships, and for furnishing the voters with bread and cheese after the votation Aug. 14." It appears that in August last Dr. deGrosbois intending to present himself as a candidate for the House of Commons asked the plaintiff to support him; which plaintiff said he would, provided defendant would pay his own expenses. The election proceeded; plaintiff was faithful and spent hundreds of dollars in the service of defendant. The defendant pleads that he never authorized plaintiff to do more than spend money in "lawful expenses." Is it natural to suppose that plaintiff would have embarked in the work for defendant had the latter used such an expression as "lawful expenses? The expression would indicate caution by the speaker, would be indicative of limitations and put the person addressed upon caution, too, if possessed of common sense; such words are not commonly used by candidates at elections, seeking the support of friends. In less than two weeks after the election the plaintiff writes to the defendant; defendant fyles copy of the letter and gets plaintiff's admission of it: "You

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would much oblige if you would come and settle your election matters at once. I am tormented *by the carters calling every day for a settlement;* it will take about two hundred dollars; it may be a little more, and it may be a little less; but I want it settled." Yours, S. T. Willett, August 27th. Is this letter the information, about only lawful expenses, that defendant's plea refers to? Is it calculated to surprise the *bonne foi* of defendant? It gives defendant positive information of illegal expenses, and defendant during a whole month makes no protest, but on Sept. 27th, telegraphs to plaintiff: "Will my note at three months be all right? Plaintiff replies that he "will accept it, adding the interest." Sept. 28, the note sued upon is received by defendant, in a letter from plaintiff. Defendant signs the note and sends it to plaintiff. It is pleaded by defendant that this note was a surprise upon him, dated August, as it is, instead of Sept. 28th. Here (says the plea) the plaintiff deceived the defendant, "*a surprise sa bonne foi.*" Upon this ground, says the plea, the action is to be dismissed. But the Court is bound to do justice, and to consider everything, and not allow weight to arguments addressed to its weakness or stupidity. The defendant admits having received the note in a letter from plaintiff. Asked to produce the letter, he gives a poor apology for not being able to do so, he has lost it. This allows of plaintiff making secondary evidence of it, and he does so; he produces copy of it dated September 28th. It reads: "I beg to enclose you note to sign at three months from the day the amount was contracted, with interest added, &c. Please sign and return by mail." The defendant opened the letter, signed the note, and returned it, by mail; examined about the letter he says that he did not read it; but can't swear that this is not copy of it. Is the plaintiff now seen to have deceived defendant into signing a note dated August, instead of September? We presume some things against those who lose letters that they have interest to lose. It interests justice that cases should come up unmutilated. The charge of deceit and fraud against plaintiff is proved unfounded; defendant's plea is untrue. As to good faith, I see none at all on the side of defendant. Another point is forced upon us and is to be disposed of. It has been contended at the final argument beyond what has been pleaded, that a note like the one sued upon is void for illegality, whether the cause of it was legal expenses or illegal, of or about an election; and the 23 Vic. c. 17 of 1860, [of the late Province of Canada] is relied upon by defendant. It is entitled "an Act for the more effectual prevention of corrupt practices at elections." Its section three makes it illegal to hire carters or to promise to pay carters to bring or convey voters to or from the poll at any election. Section six makes "void in law every executory contract, or promise, in any way referring to, or arising out of, *any Parliamentary election, even for the payment of lawful expenses.* The B. N. America Act keeps this to be law in the territory of the late Province of Canada, says the defendant. The plaintiff contends that this law of 1860 was only made to have force in or about elections for the Union of Canada, that is, *Quebec* and *Ontario;* that that union being dissolved the law cannot work now, and nothing in it can affect anything connected with a Dominion election. Besides (says plaintiff) the Dominion Parliament has legislated upon the subject by the 34th Vic., c. 20. The defendant relies upon sec. 129 of the British

North America Act: "Except as otherwise provided by this Act, *all laws* in force in Canada at the Union shall continue as if the Union had not been made." That B. N. A. Act orders, in sec. 41, a continuance of the then existing election laws in the several provinces relative to the following matters, viz., qualifications of candidates and of voters, the proceedings at elections, etc., until the Parliament of Canada otherwise provides. Has sec. 129 left still to have force the 23rd Vic., cap 17? I think it has; and we must hold that, though doing so it be that we have this much law in Quebec and Ontario more than they have in Manitoba or Nova Scotia. The 34th Vic. is a law made for the Dominion, but even after it there was left in Quebec and Ontario the 23 Vic., c. 17, sec. 6. There is no incompatibility. The section 6 referred to, is a law on the subject of certain executory contracts or promises, declaring them void in law. It is in force, and is fatal to plaintiff, seeing what has been proved. The fact of the Dominion Legislature having enacted the 34 Vic., c. 20, cannot help the plaintiff. This was enacted for the whole Dominion, but in Quebec and Ontario there was left the 23 Vic., c. 17, sec. 6, in full force. Nothing is in the 34 Vic., c. 20, resembling what is enacted by sec. 6 of c. 17 of 23 Vic., against the executory contracts and promises referred to in it. I believe that the substance of this sec. 6 (supposing it never to have been enacted before) could be at any time made law in any Province by the Local Legislature, and it would not be *ultra vires* of such legislature under the British North America Act. So the action is dismissed, and plaintiff can get no sympathy, for he was bound to know that going into expenditures as he did for defendant he could not claim upon them in a Court of law, but would only have to rely upon the honour of his adverse party.

Under the circumstances, however, I shall not allow costs against the plaintiff. The action is, therefore simply dismissed, and without costs.

Action dismissed.

Bethune & Bethune, for plaintiff.

Cassidy & Lacoste, for defendant.

[REPORTER'S NOTE—*Vide* also Johnson *& vir vs.* Drummond, 17 L. C. Jur., p. 176.]

(S.B.)

SUPERIOR COURT, 1873.

MONTREAL, 30th APRIL, 1873.

Coram MACKAY, J.

No. 1424.

Graham vs. *Gervais.*

HELD:—That an application for security for costs may be legally made by *exception dilatoire.*

This was a motion by plaintiff to reject an *exception dilatoire*, which prayed that all proceedings in the case be stayed until security for costs be given; the plaintiff contending, that according to law and the practice of the Court application for security for costs should be made by motion.

After taking time to consider, the Court rejected the motion.

Motion to reject exception dismissed.

L. N. Benjamin, for plaintiff.

A. Houle, for defendant.

(S.B.)

SUPERIOR COURT, 1873.

MONTREAL, 31st MAY, 1873.

Coram JOHNSON, J.

No. 273.

L'Institut Canadien vs. Le Nouveau Monde.

HELD:—That an action for libel may be brought by one corporation against another corporation.

PER CURIAM:—In taking up this case, I confess I was being struck by the fact that it is an action for slander by one Corporation against another Corporation. Nobody doubts that a Corporation may be sued for libel; but this is the first case within my experience where a Corporation has brought an action for libel. I do not mean to throw out any doubt about the right to do so, or to express myself one way or the other on the point, for it is not specifically before me by this record; I merely notice that it is the first case of the kind that I have ever seen.

Assuming as a general proposition what is laid down in the books, viz., that a Corporation may sue and be sued just as any individual may be; or at all events assuming that, as far as the objects of the corporate existence are concerned, they are not to be injured without means of redress, and that therefore banks being authorised to deal in money, are not to be called insolvent, without any reason, and yet to have no action of damages; and that, in like manner, a literary institute is not to be falsely and maliciously charged with having perverted the objects of its constitution to infamous and immoral objects, I now address myself directly to the issue in the present case.

The plaintiffs by their declaration, apart from much that is irrelevant, charge the defendants with having, in their newspaper, "without cause, reason or provocation whatsoever; but with premeditated malice, and with the single and malevolent design to do grievous wrong to the plaintiffs, and to disseminate publicly a false impression as to the contents of the printed catalogue of books in the library of the plaintiffs," printed and published the following article, which, as the words themselves are important, I will give as it appeared in the French language:

"LA BIBLIOTHEQUE DE L'INSTITUT.

"Nous ac[illegible]ption du t[illegible]ameux catalogue des livres de la Bibliothèque de [illegible]dien. Nos remerciments à qui de droit. Nous soupçonnions bien quelque petite reticence, quelque léger mensonge quand M. Dessaulles criait à tous les échos du public que la bibliothèque de l'Institut ne renfermait point de livres vraiment mauvais; mais nous ne le pensions pas capable, ayant la liste en question sous les yeux, de nier comme il l'a fait cent fois, qu'il y ait dans ce catalogue un seul livre obscène; à l'entendre, il n'y avait là d'autres livres que ceux qui se rencontrent dans toutes les bibliothèques tant soit peu dignes de ce nom: certains traités de sciences abstraites; certains systèmes de philosophie naturelle, et quelques dictionnaires savants dont personne, ajoute-t-il, ne saurait se passer, bien qu'ils soient à l'index. Eh! bien, cela même est aujourd'hui prouvé faux: et au dire public de M. Boisseau, ce qui fait le fond de la bibliothèque de l'Institut, et lui donne son vrai caractère, ce ne sont pas les

ouvrages de la science incrédule, mais celle du *roman obscène*. Nous le répétons, c'est avant et par-dessus tout, une bibliothèque de mauvais romans que l'Evêque de Montréal a condamné en condamnant l'Institut, et une source d'impurs poisons qu'il a fermée à ses ouailles. Nous avons fait un relévé du catalogue de M. Boisseau : or il ressort de sa liste que pour 291 volumes de religion, philosophie et économie politique, que compte l'Institut, le nombre de ses romans s'élève au chiffre comparativement exorbitant de 1,049 volumes, dont 129 d'un caractère tel que nous ne voulons pas salir cette feuille blanche de leur titres, ni les nommer aux lecteurs chrétiens : Alexandre Dumas, Alphonse Karr, Eugène Scribe, Emile Souvestre, Paul de Kock ne sont rien, tout mauvais qu'ils soient parfois, comparés aux impures, obscènes et infames productions auxquelles nous ne pouvons que faire allusion. Il y a là des livres qui feront l'éternelle honte des lettres ; des romans qu'au dire de Chateaubriand, un homme ne lit qu'en tremblant, ou, comme s'exprimait le cynique, Jean Jacques Rousseau, qu'une jeune fille ne peut parcourir sans perdre sa pudeur ; et qui suffiraient à eux seuls pour corrompre une ville entière. Voilà donc, d'après M. Boisseau, le vrai caractère, et le fond de la bibliothèque de ce platonique Institut, où l'esprit, dit M. Dessaulles, plane toujours si haut qu'on croirait qu'il échappe aux sens. Et l'on voudrait que l'Eglise se tut sur ce danger ; que l'Evêque de Montréal permit à la jeunesse l'école morale de l'Institut en laissant pénétrer le poison au sein de nos familles, en un mot, qu'il se réconciliat et communiat de sa main d'Evêque les acheteurs, les retenteurs et les lecteurs excommuniés de ces livres ? Allons donc !"

This is the article incriminated by the present action ; and the fact of its publication by the defendants, as well as the unlawful motives imputed, must be established before the plaintiff can be entitled to judgment. The plea of not guilty would have put in issue in a perfectly sufficient manner everything that the parties have a right to contend for ; but instead of logical and concise pleading, both parties have resorted to argumentative and voluminous written pretensions upon every point that they conceived likely to throw light on the conduct or the meaning of either of them. In this mass of confusion no legal mind can fail to see that there are but two points to be considered ; the fact of publication being admitted, as it is by the defendants' plea, we have only to enquire whether they have intentionally done the wrong imputed ; and, if they have, whether their conduct has the effect of damaging the plaintiff. It is to be regretted that a certain class of journalists seem to think that they have other privileges than those enjoyed by the rest of the public, so that, while for mankind in general one rule would seem to be sufficient, those who deem themselves clothed with some special mission or authority appear very often to expect a degree of toleration which they are extremely loth to accord to others. The *odium theologicum* has long been of proverbial bitterness, but in these days every phase or craze of opinion that can find an advocate, as well as every remnant of authority that can speak with power, seems to act, provided they have sincerely at heart the success of their views, as if it had some special immunity from the operation of laws regulating all civilized intercourse among men ; and to imagine that no assertion can be too strong ; no manners or expressions too coarse, if only they serve to make its

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notions prevail. Thus we daily see the most useful reforms kept back by the intemperance of their advocacy; and human liberty retarded, and even religion itself discredited and wounded by the recoil of the coarse and brutal weapons that more deservedly wound the hand that wields them than the heart at which they are aimed. It is not enough if a man should differ from some ascendant notion that he should be told that he differs, or that it should be shown that he differs without reason; but upon the principle that orthodoxy is my doxy, and heterodoxy is another man's doxy, he is to be reviled and called a fool, or a drunkard, or an atheist, as the case may be, for presuming to have an opinion at all, or for refusing to incur the responsibility of stifling his conscience and his reason. So, in the present case, we find, that a catalogue of books having been sent in the ordinary course of business to a reviewer, he reviews it indeed; but his newspaper or review being of what is called the religious order, he cannot bring himself to review it as any one else would do. He is not content with disapproving one thing, pointing out the dangerous character of another, or even insisting on the general pernicious tendency of the whole, or of great part of the collection; but he must revile somebody, and say something personal, hard and insulting to him. In the present instance it was Mr. Dessaulles, whose name had long been connected with the Institut Canadien, who was selected for insult and opprobrium. He is told that he is a liar; and that the writer would have been surprised if he had turned out anything else, and other things of the same sort. It is impossible for a Court of Justice, laying down plain and honest rules, to say that such language as this can be permitted, consistently with public order, to proceed from any source whatsoever, without severe censure; and most assuredly, if Mr. Dessaulles had been the plaintiff here, neither the clerical order of journalism, nor the reverend name of the Roman Catholic Bishop of Montreal, which the writer so often uses, would have shielded the defendant from punishment; but Mr. Dessaulles is not the plaintiff, and the case of the *Institut Canadien* alone has to be considered. It lies within a very narrow compass. The occasion of the publication complained of was the reception by the journalist of the catalogue of the Institut library. Mr. Boisseau, in his evidence, says it was sent in the ordinary course, the journalist thought, naturally enough, to be noticed, and he notices it; but if he noticed it fairly as regards the character of its contents, though he should needlessly have abused Mr. Dessaulles who does not complain, he will not be liable to pay damages to the Institut, unless his criticism on the whole can be shown to be as in the declaration it is said to be, not a critique, but a cloak for malice. Most assuredly this writer had a grave duty to do. He had to give and publish the opinion of an influential journal upon the character and tendency of some of the books in a large public collection. How was he to do this duty? Was he to prostitute his pen to please and to applaud, if his conscience and his judgment told him he ought to censure and to condemn? Let us take one instance of what was before him, in order that we may appreciate what he ought to have done. It is proved in this case that Voltaire's works are in this catalogue—the edition in 70 volumes. Mr. Boisseau says, as a matter of fact, that ten volumes of this edition are missing, and, to use his own words; "J'ai cru pouvoir supposer qu'ils

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se retrouveraient ; mais il n'en est jamais rentré un seul." At page 25 of the catalogue that was reviewed, this edition of Voltaire in 70 volumes (but without the information that ten of them were missing) is mentioned as being in the library. Was the reviewer to presume that the catalogue was incorrect, or to take for granted that it was all right? He surely cannot be reproached for taking the latter course, and if he was led into error, the plaintiffs, at all even who are the cause of that error, cannot complain. Taking, then, the instance Voltaire's works, which the editor assumed were there, as the catalogue informed him they were, is it unfair criticism, and evidently a mere cloak for malice on his part, for him to say, as he did, that Dumas, Karr, Scribe, Souvestre and De Kock were nothing compared with the impure, obscene and infamous productions to which he could only make allusion, and that he would not soil the page he wrote on by naming some of these books? Of course this Court is not called upon to know or to verify the real character of all Voltaire's works; but there are sources of information open to all educated men, which I am not supposed any more than my fellow men to neglect; and if we want decisive information on this point, we have only to turn to the foremost organ of free thought published in the English tongue (*Westminster Review*, April, 1861) and we shall find that though Voltaire, like a good many of his betters, was ridiculously enough, by those who had no better answer to give him, called an atheist, when he was only a satirist of abuses, some of his works, "La Pucelle d'Orleans," for example, and others, are infamous and abominable. Had this reviewer no right to say this? Supposing, even, he was mistaken, which he assuredly was not, are not taste and morals things of sufficient importance to call upon us to protect them by protecting free and even mistaken criticism, where there is no dishonest motive behind?

I could extend my observations, already too long perhaps, to show that not only in the instances selected, but in others complained of, this criticism, though severe, is not unjust or uncalled for. "Romans obscènes" is certainly a strong expression to characterize some of the works of Dumas or Karr, and of others not necessary to mention; it is more than this; is not only severe criticism, but in the true sense of the word, it is not criticism at all; it is denunciation and censure, which, however, rest upon the same foundation of right, if they proceed from just and proper motives, as criticism itself in its more general sense. It must be remembered, moreover, that the writer was noticing this catalogue, of which he justly assumed the correctness, from the point of view of the fitness of the library as the resort of a portion of the youth of our country. If that is his opinion, is he to be mulcted in damages for expressing it fearlessly and honestly? I think not; and if the case rested here, I should say that the *Nouveau Monde* had a fair occasion for offering its opinion, and that its opinion was unsparingly and honestly given in the interest of public taste and morals, and, with the exception of the personal attack on Mr. Dessaulles, which is quite indefensible, I should, so far, see nothing in this article which the Institut Canadien, or any other liberal institution or person, would not regret to see visited with legal condemnation. I can understand that others may even maintain this criticism to be wrong; but the press is open

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to them as it was to the critic, and they might review the reviewer. But that is not the question. A writer may be conceived to be mistaken in his opinion, or at fault in his taste; but if he is not dishonest in his motives, of which, as far as this part of the case is concerned, I can see no evidence here, he is not to be condemned. But a perusal of the article complained of, and of the declaration of the plaintiff, shows that this vehement condemnation of certain books, of which I have instanced some of the works of Voltaire as examples, is not all that is complained of; and that besides using the strong figure that the mention of their name would soil his paper, the writer is charged with saying more. He is charged with saying in substance that what made the foundation and staple of this library was obscene fiction, and that the Bishop was right in closing this source of foul poison to his flock.

Now I shall not enter upon any consideration of the quarrel between the Bishop and the Institute. It throws no light on the question before the Court, except as to the incidental point of His Lordship's approval of the catalogue; and I think it is clear from the evidence, that it was not intended by the Bishop to express on that occasion any opinion, one way or the other, upon the contents of the library; but merely to signify that his authority not being acknowledged by the Institute, he declined to have anything further to do with the matter. There is enough and more than enough to show a deplorable state of dissension, not only between the Institute and the Bishop but between itself and its own members. Let those whom it may concern fight this battle. I must proceed to consider the accusation against the defendant under this second head, namely, that to bring this institution into contempt, it was further represented in the article complained of, not only that the catalogue, and therefore presumably the library, contained evil books; but that such were really the very stock and staple of it. The words are: "Son caractère est celle du roman obscène." Now, from the evidence of record and from the catalogue before me, I am bound to give my verdict upon this issue of fact, and I do not hesitate to say that the imputation appears to me unjust and unfounded. Notwithstanding the presence of many works of light fiction and pernicious tendency in the hands of the young, I do not think it is right or true to say of this library that its predominating character is that of obscene literature. Upon such a subject as the tendency or character of a book, or of several books in a library, there may be more or less divergence of opinion; and none are better entitled to take a severe and lofty stand in considering or pronouncing upon such subjects than those who, like journalists, should feel a high, or like ecclesiastics, a still higher responsibility; but upon the general character of a library which contains thousands of volumes on history, philosophy, science, mechanism, poetry and art, though we may regret to see even one book that is immoral, or even hundreds that a high and pure taste would deprecate, we ought not to allow ourselves to speak otherwise than justly and truly. This general and sweeping censure of the entire character of the library is not sustained by the evidence of record. It is in my judgment untrue, and therefore unlawful, and the defendants according to the circumstances of the case are to be held responsible for it. If a public writer is moved by specially malicious

motives, his responsibility will be heavy. If he is mistaken and honest, and does not far overstep the bounds of fairness and moderation, he will, in some cases, not be responsible at all: if, zealous and anxious for what he deems right, he nevertheless inflicts injury by publishing what with greater caution and enquiry he might have altered or avoided, he will still be held liable for any injury he may have done to others. How far zeal, enthusiasm and intolerance are liable to be mistaken for truly honest motives, under the golden rule of doing to others as we would they should do to us, is a question painful for the educated to think of, and probably hopeless for humanity to solve; but in the practical affairs of life there must be one rule of right for all, and the limits of men's rights, as of those of journals or of parties whose organs they are, end at the point where they conflict with, and wound the rights of others. What this writer has published, he is accountable for; but let us be careful and sure to see what he has published, and to distinguish it from what he has not published. He has condemned some books in this library, in which he was perfectly right. He has further condemned the general character of the library, in which I think he was as plainly wrong. Has he done this from malicious motives, or from mistaken zeal not incompatible with honesty of purpose? I think from mistaken zeal surely, and as far as honesty of purpose is concerned, I think he was bound to be more circumspect, and not to publish what was untrue for any purpose whatever. What he has written is in its nature necessarily injurious to the plaintiff. No specific damage is proved; and, indeed, the amount of damages asked seems to say that it is to establish a right and not to obtain pecuniary compensation, that the action is brought. These damages then will be of nominal amount. Judgment for plaintiff. Damages $20, with costs as in an action for the amount sought in the present case.

Judgment for Plaintiff.

Lanctôt & Lanctôt, for plaintiff.
E. Barnard, for defendant.
(S. B.)

SUPERIOR COURT, 1873.
MONTREAL, 30TH APRIL, 1873.
Coram MACKAY, J.

No. 1436.

Ross et vir vs. *Esdaile* et al.

HELD:—That the usufructuary of shares of stock in the Bank of Montreal is entitled to the share or proportion of profits applicable to such shares, realized by the Bank on the sale of all such shares of the increased capital stock as were unsubscribed for by those entitled to do so.

This was an action by the female plaintiff, as the usufructuary of 40 shares of the capital stock of the Bank of Montreal, under the will of the late Catherine Ross mentioned in the plaintiffs' declaration, against the defendants as executors of that will to recover $2,607.60 as a *bonus* or profit made and declared payable on these shares by the Bank, and collected and received by the defendants from the Bank.

One of the defendants, Mr. Esdaile, (the other being the female plaintiff's husband) refused to pay over the amount so received from the Bank, on the

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ground that it formed part of the capital of the estate, and was not, in reality, revenue, interest, dividend or profit on the shares.

Mr. Esdaile did not plead to the action, but submitted himself to the judgment of the Court.

The parties admitted, that the amount claimed was "composed of the share or proportion of profits, applicable to the 40 shares of stock in said declaration mentioned, which was realized by the Bank of Montreal, on the sale of all such shares of the increased capital stock of the Bank, as were unsubscribed for by those entitled to do so (including the estate of the late Catherine Ross in said declaration mentioned;) such profits being composed of the difference between the estimated value of the new or increased stock and the amount for which such unsubscribed shares really sold for."

The Court took time to consider, and, after deliberation, gave judgment in favour of plaintiffs.

Judgment for plaintiffs.

Bethune & Bethune, for plaintiffs.

Cross, Lunn, Davidson & Fisher, for defendant Esdaile.

(S. B.)

COURT OF QUEEN'S BENCH, 1873.

CROWN SIDE.

SHERBROOKE, 12th OCTOBER, 1873.

Coram SANBORN, J.

WARREN PAGE, Petitioner,

AND

JOHN GRIFFITH, Collector of Inland Revenue, Respondent.

HELD:—That there is no right of appeal from the conviction of justices of the peace under the Quebec License Act, and that the Provincial Legislature has jurisdiction to provide procedure for enforcement of penal statutes enacted with reference to subjects comprised within its powers, and that such penal statutes are not part of the Criminal Law as contemplated by the British North America Act, which gives exclusive power to the Parliament of Canada to determine the procedure in criminal matters.

This was a petition in appeal from Summary Conviction of justices of the peace, to this Court as exercising appellate jurisdiction where appeals are given to the Quarter Sessions, there being no Court of Quarter Sessions in the District of St. Francis.

W. L. Felton, Q.C., for petitioner, submitted that the violation of any law to which a penalty is attached is a misdemeanor. 1 Russell on Crime, p. 49. Archbold, Small Edition, p. 2. That the Quebec License Act 34 Vic. c. 2, section 195, refers to appeals and assumes the existence of the right. Section 150 makes the Act c. 103 of Consolidated Statutes of Canada applicable to the License Act, and both should be construed together, and the right of appeal,

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given under chapter 99 of the Consolidated Statutes of Canada, was general and applied to convictions made under chapter 103, and it was never intended that this right should be taken away. The right of appeal is given by 32 & 33 Victoria, c. 31 (Dominion statutes), and it should apply to cases of this kind, as part of the body of the Criminal Law of Canada.

E. T. Brooks, for respondent, suggested that no right of appeal had been provided by law for a case like this, and cited the decision in the case of Pope and Griffith, 16 L. C. Jurist, p. 169.

That chapter 103 of Consolidated Statutes of Canada contained no provision for appeal, and that chapter 99 was not made part of the License Act. That these Acts had been repealed by Dominion Act 32 & 33 Vic., c. 36, and that the Act 32 & 33 Vic., c. 31, gives only right of appeal from summary convictions in matters over which the Parliament of Canada has exclusive jurisdiction, as it is expressly declared by the first section of the Act that the provisions of that statute so apply.

SANBORN, J.:—This is a petition in appeal from a conviction made by justices of the peace against the petitioner, adjudging him to pay two penalties of $50 each for two separate violations of the License Act 34 Vic., c. 2, passed by the Provincial Parliament of Quebec, for illicit sale of spirituous liquors.

The respondent, who was complainant before the justices, in his quality of Collector of Inland Revenue, submits that no right of appeal exists. Only two questions arise here. Had the Provincial Legislature power to provide the procedure for enforcing the penalties incurred under the License Act 34 Vic. c. 2? If it had, has a right of appeal been granted by said Act? As respects the first question; I think the Local Legislature had such power. When the power is given by the British North America Act to the Parliament of the Dominion to provide procedure in criminal matters, I understand reference to be had to the general public Criminal Law, comprised in the Criminal Statutes of the Dominion and in the Common Law. This view is confirmed by the Criminal Procedure Act, which has no reference whatever to local penal laws but to laws in force throughout the Dominion.

The same distinction obtained under the Statutes of Old Canada. Under 4 & 5 Vic., c. 25, which is a consolidation of the Criminal Acts relating to larceny, a right of appeal was given from summary convictions. Under 4 & 5 Vic., c. 26, which is a consolidation of the Acts relating to malicious injuries to property, a right of appeal is given from summary convictions. Under 4 & 5 Vic., c. 27, which is a consolidation of Acts relating to offences against the person, a right of appeal is given from summary convictions. Each Act made provision for appeal from convictions for offences created by such Act. The Act, chapter 99 of the Consolidated Statutes of Canada, gives a right of appeal from summary convictions "under the foregoing Criminal Acts," which include the provisions contained in all these three Acts before cited. When a right of appeal was intended to be given from summary convictions under local penal acts, such, for instance, as the Tavern License Act and Hawkers and Pedlars' Act, Con. Stat. L. C., chapters 6 and 7, it was provided by the Acts themselves when and in what manner such appeal could be exercised. In this particular, I differ from Judge Ramsay,

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although, in the main, adopting the reasoning used by him in the case of Pope and Griffith cited. I do not think there was any dislocation of the subjects of appeal in the consolidation. There never was any general right of appeal given under any of those statutes, only an appeal from convictions, made under the statute, where the right was conferred. This is further evinced, by the fact that the right of appeal under Act of Dominion 32 & 33 Vic., c. 31, is secured only for summary convictions for offences over which the Parliament of Canada has exclusive jurisdiction, as will appear on reference to the first section of said Act.

The British North America Act gives the Legislatures of the several Provinces power over shop, saloon and tavern licenses, and to impose fine, penalty or imprisonment for enforcing any law of the Province, made in relation to any matter coming within any of the classes of subjects enumerated among their powers. Where power is given by statute to impose a penalty, it implies power to enforce it, Dwarris on Statutes, p. 23.

The British North America Act must be understood to have given this power to the several Provinces. Any other view would give the Legislature of a Province less power than a municipality, which such Legislature can create. It would be contrary to the manifest intention of the Imperial Parliament in allocating the respective powers which each Legislature should possess.

Coming to the second question, has a right of appeal been given by the License Act? It has not been given in terms. It implies the existence of a right of appeal, but has not given it; nor has it provided means for exercising it, nor declared to what Court such appeal lies. It has made the Act Con. Stat. Canada, c. 103, so much thereof as was in force at the date when the License Act was enacted, a part of said Act. This last cited Act was the Act of the late Province of Canada, providing procedure generally for justices of the peace in all summary convictions. Although this Act has since been repealed by the Parliament of Canada, it is still applicable to the License Act, and as respects that Act is in force, as a procedure for summary trials for offences created by it by virtue of the 150th section of the License Act. This answers the objection made by petitioner's counsel that unless the Summary Conviction Procedure Act of the Parliament of Canada is in force for cases under the License Act, there is no procedure to govern such cases.

The License Act, as I have observed, gives no right of appeal. This right cannot be given by implication. It must be given in positive and express terms. Paley on convictions, pp. 249, 50, 51.

There is, then, according to my understanding of the law, no right of appeal given for a case like this, and the petition cannot be received.

Petition rejected.

W. L. Felton, Q.C., for petitioner.
E. T. Brooks, for respondent.

(E.T.B.)

COURT OF REVIEW, 1873.

MONTREAL, 31st MAY, 1873.

Coram JOHNSON, J., TORRANCE, J., BEAUDRY, J.

No. 836.

Tough et al. vs. *The Provincial Insurance Company of Canada.*

HELD:—In the case of an interim insurance by an agent in the following words:—"Received from Messrs. Tough & Wallace, Coaticooke, [Post office] Coaticooke, the sum of twenty dollars, being the premium for an Insurance to the extent of $2,500 on the property described in the application of this date, numbered—, subject, however, to the approval of the Board of Directors in Toronto, who shall have power to cancel this contract, at any time within thirty days from this date, by causing a notice to that effect to be mailed to the applicant at the above Post office,"—that a notice by the company cancelling the contract, mailed to the applicants, at the Post office, Toronto, within the 30 days, had the effect of cancelling the insurance, although such notice was not received in time for delivery by the post office at Coaticooke until after the fire.

This case was in Review of a judgment rendered by the Superior Court for the district of St Francis, SANBORN, J., on the 10th of December, 1872, awarding the plaintiffs the $2,500 mentioned in the interim insurance receipt above referred to.

The date of the interim receipt was the 16th of March, 1872 and the property therein referred to was burnt between midnight of the 25th and one o'clock in the morning of the 26th of the same month.

A notice, cancelling the contract, was mailed by the company at Toronto, addressed to the applicants, on the 23rd of March 1872, which, in ordinary course, should have been ready for delivery in the Coaticooke Post office before the occurrence of the fire, but, in reality, only reached that office about the time of the fire, and too late for delivery before the fire; the office hours being from 7 A. M. to 9 P. M.

The Court of Review reversed the judgment and dismissed the plaintiffs' action, assigning the following reasons:—"Considering that by the interim receipt of the 19th March 1872, the defendants contracted with the plaintiffs to insure the property therein mentioned, subject to the approval of the Board of Directors in Toronto, who had power at any time within 30 days from the said 19th March 1872, to cancel the said contract, by causing a notice to that effect to be mailed to the plaintiffs, and considering that the defendants did within the said 30 days so stipulated, to wit, on the 23rd March 1872, cause a notice to be mailed at the Toronto Post office, addressed to the plaintiffs, as agreed upon in the said receipt, and informing them that their proposal for insurance was disapproved and declined, and in all things, as far as was in their power, conformed to the said agreement, respecting the disapproval of the said risk, and the notice thereof, and that, therefore, the said contract for insurance was, on the said 23rd March 1872, determined."

"Considering further, that in the ordinary course of the mail service the said notice of rejection to the plaintiffs ought to have been received by them at 8. 45

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P. M. on the 25th March, but was delayed by storms, for which the defendants cannot be held responsible."

"Considering further, that no policy of insurance was ever issued by the defendants to the plaintiffs upon their application of the 19th March aforesaid."

Judgment of S. C. reversed.

Doak & Fiske, for Plaintiffs.
G. H. Borlase, for Defendants.
(s.n.)

SUPERIOR COURT, 1873.

MONTREAL, 26TH SEPTEMBER, 1873.

Coram BEAUDRY, J.

No. 2493.

Woodruff vs. *Moseley et al.*

HELD: That the mere importer of an invention, which has been patented for many years previously in the U. S. by some other party is not the inventor or discoverer thereof within the meaning of "the Patent Act of 1869"; and a patent obtained by him under the said Act, on the ground that he was the inventor or discoverer, is null and void.

This was an action of damages, for an alleged infringement of a patent for invention issued under "The Patent Act of 1869," and called and known as "the racking and vacuum art of tanning and apparatus therefor," and of which the plaintiff claimed to be the assignee.

The defendant, specially denying that the pretended patentee was the true inventor or discoverer, as alleged in the plaintiff's declaration, and putting that fact distinctly in issue, pleaded amongst other things that the process or art pretended to be protected by the patent had been in use for years, previous to the issuing of such patent, in the U. S., and had been patented there as far back as the year 1865, by a party other than the person named in the Canadian patent, and that the apparatus used by defendants was borrowed from one in use in Peabody in the U. S. and not in any way from that pretended to have been patented by the person named in the Canadian patent.

The plaintiff admitted, that the person named in the Canadian patent was not the "inventor," but pretended that he was the "discoverer," because he had discovered it as being in use and patented in the U. S.

The Court dismissed the action with costs, assigning the following reasons:—"Considering that the defendants have established the material facts alleged in their plea, and namely that George Scanlar, whose rights have been assigned to plaintiff, was not the inventor or discoverer of the improvement in said plaintiff's declaration mentioned, but that the same was long before the issuing of the Letters Patent of the 13th January, 1871, in use and patented in the U. S., and that the defendants copied, as near as possible, said improvement used and patented in the U. S."

Action dismissed.

Ritchie, Borlase & Rose, for plaintiff.
Bethune & Bethune, for defendants.
(s.n.)

COURT OF QUEEN'S BENCH, 1872.

MONTREAL, 19th SEPTEMBER, 1872.

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

No. 11,

JAMES DOYLE,
(*Defendant in the Circuit Court,*)
APPELLANT;

AND

AMABLE PREVOST, *et al.*,
(*Plaintiffs in the Circuit Court,*)
RESPONDENTS.

HELD:—That a note of a third party, given by an insolvent to a creditor, to obtain the creditor's consent to the discharge of the insolvent, is null and void.

The Court of Appeals by its judgment reversed the judgment of the Circuit Court appealed from.

MONK, J., remarked that the same point arose in this case as in the case of Prevost and Pickel decided by this Court in March last. He, Mr. Justice Monk, dissented in that case, but seeing the decision in that case, and that the Court was of the same mind still, he would not enter any dissent in the present case.

The judgment of the Court is as follows:—

The Court etc. Considering that the Appellant, Defendant below, hath established the material averments of his plea in this cause filed to the action and demand of the Respondents against him upon his promissory note in their favour in this cause fyled;

Considering that the said promissory note was received from him by the said respondents without any consideration therefor to him by the said Respondents;

Considering further that the said respondents were proved creditors against Michael Martin, an insolvent, and against his insolvent estate in the pleadings in this cause mentioned, and that the said promissory note was given to and received by the said respondents as such proved creditors of the said insolvent as an inducement by them to consent to receive the composition offered by the said insolvent to his creditors generally, including the said respondents, and for his discharge thereby by his said creditors, as offered by his deed of composition and discharge in that behalf under the provisions of the Insolvent laws in force in this Province;

Considering that the said respondents did accept the said inducement and did in fact assent to the said deed of composition, accepting the said composition and assenting to the discharge of the said insolvent in consideration of the said promissory note so received by them as such inducement therefor;

Considering that the said promissory note was a void contract between the said appellant and respondents, and constituted a fraud upon the said insolvent laws, and was therefore prohibited under the penalty of forfeiture by the said laws provided;

Lenoir vs. Desmarais.

And considering that in the judgment of the Circuit Court sitting at Montreal on the 31st of October, 1871, in this case rendered, there was error, doth set aside and reverse the same, and proceeding to render such judgment as the said Circuit Court should have rendered doth dismiss the action, etc., with costs.

Judgment reversed.

Perkins, Monk & Foran, for appellant.
Duhamel & Rainville, for respondents.

(J.K.)

COURT OF REVIEW, 1873.

MONTREAL, 30th APRIL, 1873.

Coram JOHNSON, J., MACKAY, J., BEAUDRY, J.

No. 2209.

Lenoir vs. *Desmarais* et vir.

HELD :—That a clause in a deed of sale of an immoveable, to the effect, that such of the vendors as sign bind themselves to obtain the ratification of the deed by an absentee, is a condition precedent, and no action can be brought to recover any portion of the purchase money until such ratification has been effected.

This was a review of a judgment of the S. C., at Montreal (TORRANCE, J.,) rendered 30th November, 1872, in favor of the plaintiff, who had sued for a balance of her share of the purchase money, payable under a deed of sale of an immoveable from her and others to the defendant, in which she and such of the vendors who signed the deed undertook that the deed should be ratified by one Louis Lenoir, an absentee.

The Court of Review reversed the judgment and dismissed the action, assigning the following reasons :—

Considérant que par le contrat de vente du 8 Mai 1862 fait et consenti par la Demanderesse et ses auteurs à la Défenderesse, il a été stipulé que cette dernière ne serait pas troublé par Louis Lenoir dit Rolland, autrefois de Montréal et maintenant absent de cette Province, et que la Demanderesse et ses auteurs se sont faits forts dans et par le dit acte de faire ratifier la dite vente, par le dit absent, pour la portion dont il est propriétaire dans l'immeuble vendu, et considérant que jusqu'à ce que telle condition soit remplie, la dite Demanderesse n'a aucun droit d'action contre la dite Défenderesse telle que portée en la présente instance.

Judgment of S. C. reversed.

Girouard & Dugas, for plaintiffs.
Trudel & Taillon, for defendants.

(S.B.)

SUPERIOR COURT, 1873.

MONTREAL, 6TH NOVEMBER, 1873.

ENQUETE SITTINGS.

Coram TORRANCE, J.

No. 1668.

The Pacific Mutual Insurance Company of New York vs. *Butters.*

HELD:—That communications between principal and agent will be protected if they formed part of the preparation or preliminary investigation which the party made with reference to the cause.

TORRANCE, J.—The action was to recover premiums of insurance.

Plea, that the only sum for which defendants were indebted to plaintiffs for the causes alleged in plaintiffs' declaration, was $4,496.32, as shewn by plaintiffs' accounts rendered to defendants, from which defendants were entitled to deduct 15 per cent. on the amount of all the premiums chargeable; and defendants further said that plaintiffs were indebted to defendants in $3,693.97 for loss incurred by defendants on divers insurances against loss made by defendants with plaintiffs upon divers cargoes of grain, which risks were accepted by plaintiffs who received the premiums therefor, and which losses were fixed and ascertained and recognized and accepted by plaintiffs, who acknowledged their liability and promised to pay the same, and the defendants therefore pleaded compensation as to this amount.

At Enquête, John Popham, agent at Montreal of plaintiffs, was sworn as a witness for defendants, and was asked respecting letters, papers, or correspondence under his control relating to insurance upon the cargo of the steamer "St. Patrick," and the following question among others was put:

"You are now asked to produce the said letters and copies of letters referred to by you in your preceding answers, and any papers or documents you have in your possession, referring to the said loss, for communication, will you do so?"

Answer. "All the letters, papers, and correspondence, which have passed between me and the plaintiffs relating to the alleged claim on the "St. Patrick," took place, as already stated by me in my preceding answers, subsequent to the claim made by the defendants on the plaintiffs, and to my refusal to recognize the claim, and are all of a strictly confidential nature, having reference to the plaintiffs' grounds and evidence for resisting the said claim, and the plaintiffs' instructions how he was to act in the matter."

Question. "Will you produce the said papers, or do you refuse to do so?"

Answer. "I refuse to produce them, as they are privileged."

The question here is whether communications between principal and agent in relation to the loss out of which this claim has arisen and produced by the loss are privileged. As a general rule communications to a legal adviser or priest are privileged, and those to a medical adviser and ordinary agent are not privileged in the witness box. But it appears to me that communications like those under consideration should be protected. Taylor on Ev. §839, says: "With respect to the production of title-deeds, the protection has been held applicable

Regina vs. David.

to the case of *trustees* and mortgagees, who cannot be compelled either to produce the deeds of the *cestui que trust*, or mortgagors, or to give parol evidence of their contents." In Ross *vs.* Gibbs, 8 Equity c. 524, Sir John Stuart, V. C., says: "It is contended that, unless the agent's communications are with a solicitor, they are not privileged; but that notion is not countenanced by any principle or by any authority except a dictum of Lord Brougham in the case of Greenhough *vs.* Gaskell. The privilege is that of the client, and information procured through an agent relative to litigation, and with a view to it, is as much protected on principle as if it were procured through a solicitor. . . . Communications with a professional, or even an unprofessional, agent in anticipation of the litigation, and with a view to the prosecution of a claim to the matter in dispute, being confidential, are privileged." In Baker *vs.* The London and South Western Railway Co., 3 Q.B. Law R. 92, Cockburn, C.J., said: "I adhere to the decision in Chartered Bank of India, &c., *vs.* Rich; but the present case is clearly distinguishable, because in that case the documents in question were letters from the one party's own private and confidential agents who had never placed themselves in communication with the other party; and I quite agree that, when confidential communications have taken place between you and your agent who has been sent to inquire and report about the subject matter of the litigation, you are not in general to be compelled to tell your adversary what the result of the inquiries may be." See also Dickson on Evidence §§ 1855, 1864, case of Grant *vs.* The Ætna Insurance Co., 11 L.C.R. p. 128. If the information sought from the witness had reference to the *res gestæ* between the principal and the claimant, and to the contract upon which the action or claim has arisen, the agent should answer. In the present case, I do not think I would be justified in ordering him to produce the papers in question, and the order is refused.

Order refused.

W. H. Kerr, Q. C., for plaintiff.
W. W. Robertson, for defendant.
(J.K.)

COURT OF QUEEN'S BENCH, 1873.

MONTREAL, 14TH OCTOBER, 1873.

Coram MONK, J.

No. 49.

REGINA vs. *David.*

HELD:—1. That the Registrar and Treasurer of the late Trinity House of Montreal was a person "employed in the public service of Her Majesty."

2. That an embezzlement by such Registrar and Treasurer of a portion of the fund known as "The Montreal Decayed Pilots' Fund," which, by the Trinity House Act, was declared to be "vested in" the Master, Deputy Master and Wardens of the Trinity House of Montreal," and to be under their management, was an embezzlement of moneys, "the property of Our Lady the Queen."

The prisoner was indicted for embezzlement.

The indictment contained four counts. In the first the charge was laid as an embezzlement of money received and had in possession by and entrusted to

the prisoner, as an *employé* in the public service of the Queen, such money being "the property of Our Lady the Queen." In the second, it was charged that the prisoner, as such *employé* aforesaid, fraudulently and feloniously did apply to his own use and benefit a sum of money, "the property of Our Lady the Queen, for and on account of the public service of Our Lady the Queen." In the third, the prisoner was charged with stealing a sum of money, "the property of Our Lady the Queen." And in the fourth, the charge was that of stealing a sum of money, "the property of the Trinity House of Montreal."

The prisoner pleaded, not guilty. And, at the trial, it was proved, that the money in question formed part of the fund known as "The Montreal Decayed Pilots' Fund,"—that the prisoner had charge of that fund, in his official capacity of Registrar and Treasurer of "The Trinity House of Montreal," a corporation created under and by virtue of the statute of the late Province of Canada, 12 Vic., ch. 117,—and that the prisoner had been appointed by the Crown and received his salary from the Crown.

On the case for the Crown being closed the prisoner's counsel submitted that they were not bound to go on their defence, and, in doing so, assigned the following, amongst other, reasons:—

The fund in question was originally under the control of the Trinity House of Quebec, and by the Ordinance 2 and 3 Vic., ch. 19, sec. 20, was "transferred" to the then Trinity House of Montreal. Whatever remained of the fund thus transferred, and the new fund, created by the 12 Vic., ch. 117, were, by section 24 of that Act, declared to be "*vested*" in and "under the management of," "the Master, Deputy Master and Wardens of The Trinity House of Montreal," —viz., in the *persons* composing that corporation and *not* in the corporation itself, the French version of the statute stating, that such vesting was "dans la *personne* des dits Maitre," &c. It was clear, therefore, that any embezzlement by the prisoner of a portion of this fund was neither an embezzlement of moneys the *property* of Her Majesty, nor an embezzlement of moneys the *property* of "The Trinity House of Montreal;" the property being really, at the time laid in the indictment, "*vested*" in the individual members of the Trinity House, as Trustees for "distressed and decayed Pilots and the widows and children of such Pilots."

The Court held, however, that the prisoner, as such Registrar and Treasurer of the Trinity House, was employed in the public service of Her Majesty, and that the fund in question was public money intrusted to the prisoner as an *employé* in such public service, and was, therefore, properly laid in the indictment as the *property* of Her Majesty. The application of the prisoner's counsel was consequently refused.

Prisoner's application refused.

T. W. Ritchie, Q.C., Pro Regina.
Wm. H. Kerr, Q.C., & B. Devlin, for the prisoner.
Strachan Bethune, Q.C., assisting.
(S. B.)

CIRCUIT COURT, 1873.

STANSTEAD, 13TH NOVEMBER, 1873.

Coram SANBORN, J.

No. 2478.

BALL ET AL., APPELLANTS;

vs.

THE CORPORATION OF THE COUNTY OF STANSTEAD, RESPONDENTS.

HELD:—1. That the Council of a County cannot by law establish a road, part of which is in one, and a part in another, local municipality in the County, without first declaring by resolution or by procès verbal, such road to be a County road.

2. That any road established by a County must be maintained under the control of such County, and in the Counties of Stanstead, Compton, Brome, Missisquoi, Huntingdon, and Richmond, with the exception of certain municipalities mentioned under Art. 1080 of the Municipal Code, must be built and kept up by general assessment upon all the local corporations in the County, in proportion to the total value of their taxable property, except in the case mentioned in Articles 190 and 191, and that an assessment for a County road only upon two, out of a larger number of local corporations in the County, not in accordance with the exception under said Articles 190 and 191, is illegal.

PER CURIAM.—This is an appeal from the decision of the Municipal Council of the County of Stanstead, homologating a report of their special Superintendent, establishing a certain road, from a place called Judd's Mills to a place called Rock Island, being partly in the local municipality of the township of Stanstead and partly in that of the Village of Stanstead Plain, both within said County of Stanstead. There are several other local municipalities in the County, and this proposed road does not run between local municipalities, but through a portion of each of the local municipalities named.

Certain persons resident in the village of Rock Island, and persons resident in the eastern part of the township of Stanstead and in Barnston, petitioned the Council of the County to open this road, to obtain a more easy and direct communication from the eastern part of the County to the village of Rock Island, than through the village of Stanstead Plain. It would seem that the road, if established, would be injurious to the village of Stanstead Plain, and would be no convenience to the majority of the inhabitants of the township of Stanstead. Upon this petition the Council of the County resolved to send the County Superintendent to report upon the propriety of establishing the road. After the accustomed notices, the special Superintendent reported in favor of opening the road, and made a procès verbal thereof. On the 6th of May last the municipal Council of the County by resolution homologated the report and procès verbal.

By the procès verbal, the cost of building and keeping in repair said road is imposed upon the local corporations of the Township of Stanstead and the village of Stanstead Plain, in proportion to the length of the road in each of said municipalities, to be established by *repartition*. Many objections are urged against this decision of the Council, and I am asked not only to consider the legality of the proceedings of the Council, but exercise discretionary power as to the pro-

priety and justice of establishing the road. It is true that the power given to this Court in appeal is unlimited, but as the Code refers to *decisions* of the Council, and the appeal is the same as that given from judgments rendered by Magistrates under the Municipal Code, I think the object of the appeal was mainly to determine whether the Council has acted within its powers and observed the essential formalities required by the Code. I cannot think the Legislature intended to place the Circuit Court above the Municipal Council, in the discretion to be exercised in Municipal legislation on the subjects, from which there is an appeal, but rather to determine when and to what extent their decisions in such subjects are in conformity with the powers conferred upon them. By Art. 755 of the Municipal Code, "every municipal road or every part thereof wholly situate in one local municipality, is a local road." "Every municipal road, or every part thereof *between* two local municipalities lying is a county road."

This proposed road coming within the first, and not within the second, definition, is not a County road. By Article 758, the Municipal Council of the County can, by resolution or procès verbal, declare a local to be a County road I consider that, before establishing this road, or by the procès verbal establishing it, the County Council should have declared this to be a County road, and, not having done so, it had no power to homologate the procès verbal ordering the road to be opened.

Again, under Article 1080 of said Municipal Code, all works in the County of Stanstead, as well as in several other counties therein mentioned on municipal roads, are executed, at the expense of the Corporation, in the same manner as if a by-law were passed under Art. 535. In such case no procès verbal is necessary, but the works are regulated and determined by the Council which orders the same. See Art. 529. By Articles 452, 757, and 785, it will appear that every Council, whether County or Local, is required to maintain the roads under its control. If this road were established as a County road, it would be incumbent upon the County Council to provide for its maintenance. By Articles 491, 760, and 938, it will appear that taxes imposed by a County Council must be levied on all the local corporations of the County, except in the case mentioned in Articles, 490 and 391. The exception referred to in these last-mentioned Articles, as respects a County, confers power to levy upon a part of the municipality on a petition by the majority of the rate-payers liable to such tax, and under the conditions set forth in such petitions. In this case there is no such petition answering the requirements of these sections, and, consequently, the procès verbal imposing the burden of making and maintaining the road upon two of the local municipalities, when the County comprises several others, is illegal. The law comes to the aid of these local corporations, and appears to me to prevent an injustice, for these two local municipalities, on which the whole burden is laid, are not the most interested in having the road. In fact, to one it is a disparagement, that is, the village of Stanstead Plain. For these reasons the decision of said County Council in homologating said procès-verbal is reversed and said procès verbal is declared void.

Terrill & Terrill, for appellants.
E. R. Johnson, counsel.
H. M. Hovey, for respondents.
(S. B.)

COURT OF QUEEN'S BENCH, 1872.

MONTREAL, 18TH MARCH, 1872.

No. 20.

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

AMABLE PREVOST ET AL.,
(*Plaintiffs in the Circuit Court,*)
APPELLANTS;

AND

DAME ELIZABETH ANN PICKEL,
(*Defendant in the Circuit Court.*)
RESPONDENT.

HELD:—That the note of a third party, given by an insolvent to a creditor, to obtain the creditor's consent to the discharge of the insolvent, is null and void. See Doyle and Prevost, *ante* p. 307.)

This was an appeal from the judgment of the Circuit Court, reported at 14 L.C. Jurist, p. 220, which dismissed the action of the appellants with costs.

The case for the appellants was submitted in their factum as follows:—

Les appelants, demandeurs en Cour Inférieure, réclamaient de la défenderesse la somme de $132 00 montant d'un billet qu'elle leur avait consenti et donné pour valeur reçue.

La défenderesse a plaidé:

1.—Défaut de considération:

2.—Considération illégale et nullité du billet en autant qu'il avait été consenti pour obtenir des demandeurs leur consentement à discontinuer une opposition à la décharge de Ste Marie et McDonald, faillis, qui demandaient leur décharge sous l'opération de l'acte de faillite de 1864 et ses amendements.

3.—Qu'en donnant son billet la défenderesse n'avait été que le prête-nom des faillis qui en réalité devaient ce billet, et ce, à la connaissance des demandeurs.

Les demandeurs ont répondu spécialement, mais nous croyons que ces réponses se réduisent à des réponses générales.

Les parties allèrent à la preuve: et jugement intervint qui débouta l'action des demandeurs. C'est ce jugement que les demandeurs soumettent à la révision de ce tribunal.

Les faits de cette cause sont peu nombreux et peu controversés; les voici en peu de mots:

Ste Marie et McDonald, faillis, firent une application pour décharge; les demandeurs qui étaient leurs créanciers produisirent, avec d'autres, une contestation à cette demande. L'un des faillis, McDonald, offrit alors aux demandeurs le billet de la dite défendresse pour leur faire retirer leur contestation, ce qu'ils acceptèrent. La défenderesse donna son billet qui fut remis aux demandeurs par l'un des faillis. Mais il est admis qu'alors la défenderesse n'était aucunement débitrice des faillis et qu'elle savait que ce billet était pour les demandeurs.

Prevost et al., and Pickel.

De ces faits peuvent résulter deux questions de droit :

1o.—En supposant que ce serait les faillis eux-mêmes qui auraient donné leur billet, ce billet serait-il nul ?

2o.—Si vis-à-vis les demandeurs, le billet de la défenderesse est nul ?

Sous le droit commun il y avait eu beaucoup de divergence d'opinion sur la question de savoir si un billet consenti par un failli, dans de semblables circonstances était ou non valable.

Voir Lainné Faill. et Banq,, p. 628 et seq.

Renouard, Fail. vol. 2, p. 566, et suiv. sur l'art. 598.

Levesque, Fail. et Banq. p. 215 No. 1556 et p. 426, No. 309 et suiv.

La raison qui faisait regarder comme nulle une semblable convention, c'est qu'elle avait l'effet de diminuer la masse du failli ; mais lorsque c'était une tierce personne qui s'obligeait, on regardait généralement la convention comme valide.

Levesque, loc. cit.

Il nous parait cependant inutile de recourir à l'ancien droit et aux arrêts contradictoires qui ont été rendu sur cette question : nous avons notre propre loi qui seule doit nous diriger dans la décision de ce point.

La sect. 28 de l'acte d'amendement de 1865 punit d'une amende tout créancier qui reçoit directement ou indirectement du *failli*, aucune considération ou valeur pour signer un acte de composition ou se désister d'une opposition à une décharge ; mais cette section ne prononce aucune nullité.

Or c'est un principe de droit qui est passé à l'état de maxime en jurisprudence que *nullité n'a pas lieu lorsque la loi établit une autre peine.*

Perrin, Nullités p. 193 et s. et p. 220.

Si en effet le législateur avait voulu frapper de nullité la convention en question pourquoi ne l'aurait-il pas fait : ce ne peut être un oubli. Il avait sous les yeux les Arts. 597 et 598 du Code de Commerce Français, la Sect. 166 de l'Acte de faillite Anglais et la Sect. 35 de l'Acte de faillite des Etats-Unis ! Il connaissait les controverses qui avaient eu lieu et la nécessité où l'on avait été en France pour faire cesser tout doute d'ajouter à l'art 597, qui punit d'amende et même d'emprisonement l'infraction à sa règle, l'Art. 598 qui frappe de nullité.

D'ailleurs notre loi ne contient aucune prohibition : elle ne défend même pas au créancier de recevoir, elle se contente de le punir de l'amende s'il reçoit.

Les lois Françaises, Anglaises et Américaines déclarent nulles toutes les transactions de la nature de celle en question en cette cause ; mais cela a lieu par suite de dispositions spéciales et formelles de ces différentes lois.

Si l'on considère que c'est la défenderesse qui seule est responsable du paiement du billet en question, comme elle l'est vis-à-vis les demandeurs qui ont reçu son billet de bonne foi et croyant que la défenderesse donnait son billet dans le but de venir en aide aux faillis, il est évident que ce billet est parfaitement valide ; car qui pouvait empêcher la défenderesse d'acheter la créance des demandeurs à raison de 20 chelins dans le [£] louis et ensuite retirer la contestation de la demande de décharge ? rien, absolument rien. Les demandeurs ne sont donc coupables que d'une chose, d'avoir fait directment ce que la loi leur permettait de faire indirectement. Mais le résultat aurait été évidemment le même : et la loi ne serait ni plus ni moins qu'absurde, si elle défendait de faire directement ce qu'elle permet de faire indirectement.

Prévost et al. and Pickel.

Pour ces raisons nous demandons la cassation du jugement de la Cour Inférieure.

MONK, J. dissented, remarking that there was no proof that the other creditors were injured by the act complained of.

BADGLEY, J.—St. Marie and McDonald, traders, went into insolvency under the Insolvent Act of 1864 and amendments, and when the time came for obtaining their discharge, the appellants here and another creditor to a certain amount were opposed to the relief sought by them. In order to overcome the objection, arrangements were made between the opposing creditors and McDonald, one of the insolvents, the son of the respondent, who was perfectly solvent, by which in consideration of her promissory note for the full amount of their respective debt, made by her in their favor, these opposing creditors agreed to waive their objections against the grant of the certificate of discharge and to consent to the same, and did in fact thereby subscribe their consent as required by law, and thereupon the insolvents were discharged, the creditors remaining still on the list of proved claimants. The respondent refused payment of her note to the appellants, pleading want of consideration for the note as well as the illegality of the transaction. There is no conflict about the facts of the case: the note is dated on the 2nd July, 1869, it was to her own order and endorsed by her, and by McDonald delivered to appellants, and was without consideration from the appellants to the respondent, and was, moreover, given to and received by them under an express agreement between the creditor and the insolvent, for the purchase of the creditor's consent to forbear opposing and to consent to the certificate of discharge under the Insolvent Act of 1864 and its amendment of 1865. The contention in this case rests upon the general policy of the insolvent law, and specially upon a section of the Act of 1865, which is in the following terms: "If any creditor of an insolvent, directly or indirectly, takes or receives from such insolvent any payment, gift, gratuity, or preference, or any promise of, &c., as a consideration or inducement to consent to the discharge of such insolvent, or to execute a deed of composition and discharge with him, such creditor *encourrera une amende shall forfeit* and pay a sum equal to treble the value of the payment, &c., so taken, received or promised, and the same shall be recoverable by the assignee, &c., and distributed as a part of the ordinary assets of the estate." This was plainly an amendment to sub-sec. 13 sec. 9 of the Act of 1864, which provides that every discharge or composition of any such discharge which has been obtained by fraud or fraudulent preference, or by means of the consent of any creditor procured by the payment of such creditor of any valuable consideration for such consent, shall be null and void. The provision of 1864 operates upon the insolvent, whilst that of the amending act operates upon the contracting creditor. Now the argument of the appellants is that the contract is not an illegality as regards the respondent, because the estate of the insolvent has not been lessened or interfered with, and the only consequence is the appellants being liable and subjected to pay to the estate of the insolvent three times the amount of the debt so secured. In other words, that the distinction avails in their favor here, between an act directly prohibited by a statute and one the doing of which merely subjects the party to a penalty. In the former

case the note would be vitiated, in the latter not. Now it is quite true that parties as a general rule make what contracts they please, and become subject to their fulfilment unless the Legislature, from motives of public policy or revenue, or other public grounds, shall interdict them. The insolvent law has been specially enacted, not for the benefit of the insolvent alone, but upon grounds of public good faith and mercantile honesty to protect all his creditors, to prevent frauds, preference of some to the detriment of others, and to keep the insolvent himself, as well as his creditors, in the same relative position towards each other as his insolvency has fixed him. Amongst the privileges of the insolvent law is the important one of the insolvent's discharge by the consent of his creditors or of a certain proportion in number and value, which necessarily presupposes consenting creditors uninfluenced by mercenary or immoral motives as regards their co-creditors upon the estate otherwise one or two influential creditors, by compelling the friends of the insolvent to yield to their extortions, might control the certificate altogether to the disadvantage of the remaining creditors. Such acts convert the Insolvent law from its fair and honest beneficial object into a means of commercial immorality, and a contravention of public policy, by securing preferences for the payment of debts in full. The agreement was here entered into for the purpose of enabling a party to infringe a law made for the protection of commercial morality and the exclusion of enforced and extorted preferences in commercial insolvencies. It is the infraction of a law made for the protection of public morals and prevents the appellants from having a *locus standi* in a court of law to enforce such an agreement. This has always been the principle in the law of Bankruptcy and Insolvency. As, *e. g.*, to induce a petitioning creditor not to prosecute a fiat in bankruptcy. Davis and Holding, 1 M. & W. 155, and Goodrut & Armour, 12 L. J. 56, 17 Eng. Com. L. R. 21; or to induce a creditor to sign a bankrupt certificate, 6 G. 4, ch. 16, s. 125,—or to sign a composition deed, Knight & Hunt, 5 Bing. 432. The infliction of the penalty contemplates the prohibitory intent against such contract by the Legislature, and no action will lie for an act done prohibited by a penalty. See 14 M. and W. 452; 10 Bing. 110, and 5 Bing. N. C. 85. In the case of Ritchie v. Smith, 6 C. B. 462, these questions were discussed at length, and it was held by Maule, J., that although in terms in that case the agreement was only enabling a party to contravene a law of public morals and policy, and the act contemplated to be done was not expressly and in terms prohibited by the statute, there could be no doubt that it was an illegal act, and that the agreement was void. The cases as to matters contrary to public policy directly apply. If two parties enter into an agreement whereby it is stipulated that one of them shall be enabled to commit an act that is contrary to public policy, and contrary to the provisions of an Act of Parliament though not expressly prohibited except by the imposition of a penalty, the agreement is clearly illegal and void. Williams, J., is of the same opinion. Now here the action is between the parties to the note, given without consideration, and for the illegal purpose of enabling or inducing the same thing, the appellants to contravene and evade the statute by doing an act subject to a penalty imposed upon them for contravening the provisions of the insolvent laws. *Ex dolo malo or ex turpi causa non oritur actio.* The general principle is if an act be pro-

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hibited under a penalty a contract to do it is made void. There can be no doubt of the contract in this act, inasmuch as one of the appellants under oath admits that the note was received by them through McDonald for the discharge in question, and consented to it. The judgment dismissing the action was therefore correct, and must be confirmed.

Judgment confirmed.

Duhamel & Rainville, for the appellants.
Robidoux, for the respondent.
(J.K.)

SUPERIOR COURT, 1873.

MONTREAL 29TH NOVEMBER, 1873.

Coram TORRANCE, J.

No. 255.

Mulholland et al. v. Halpin et al.

HELD :—That heirs at law against whom it is sought to make a judgment executory must pay costs up to the date of renunciation.

PER CURIAM :—This is an action against John Halpin and William Halpin to have declared executory against them a judgment obtained by the plaintiffs against the deceased father of defendants.

The defendants pleaded that their father, at his death on the 26th June, 1872, was completely insolvent; that the defendants did not deem it advisable formally to renounce his succession, inasmuch as he left no property, but it is untrue that they accepted his succession expressly or tacitly; that they never put themselves in possession of any of the property of the said succession and never took the quality of heirs, and never did any act which could induce the supposition that they intended to take the quality of heirs.

Issue was joined on this plea, and after the adduction of evidence, the cause was placed on the role for hearing on the merits on the 18th October last. On that day the defendants fyled in Court a declaration that they renounced the succession of their father.

The Court on the examination of the record does not find that there is proof of a meddling with the estate of the deceased, which, in view of the renunciation produced, would fasten upon the defendants a liability to pay the debts of the deceased. They may always renounce *rebus integris*, so long as they have not "fait acte d'héritier." The action against the defendants must, therefore, be dismissed; but a question remains to be settled as to the payment of the costs of this action. Guyot; Repertoire verbo Renonciation, p. 136, 2nd col., says, "les dépens faits jusqu'au jour où la renonciation est représentée doivent être supportés par l'héritier attendu qu'il les a occasionnés par son retard à remplir l'obligation où il était de prendre qualité." This principle was recognized in the Montreal City and District Building Society vs. Kerfut et al, 4 L. C. J., 54. While, therefore, the Court dismisses the action, the costs will be paid by the defendants.

M. Tait, for plaintiffs.
Archambault, for defendants.
(J.K.)

SUPERIOR COURT, 1873.

MONTREAL, 27TH MARCH, 1873.

Coram JOHNSON, J.

No. 1498.

Content vs. Lamontagne et al.

HELD:—1. That in the case of an *inscription en faux* of a notarial deed and of the copy thereof produced, the party availing himself of such deed or copy is bound to produce the original deed or adduce reasonable evidence of its loss or destruction, his mere assertion that it has been lost being wholly insufficient.

2. That in the present instance the copy produced was forged.

3. That where the Judge is of opinion, as in this case, that forgery and perjury have been committed, he will, as a matter of duty, order the offenders to be prosecuted for these crimes.

PER CURIAM:—This cause comes up on an *inscription en faux incident.* The plaintiff brought his petitory action founded on a deed of sale made to him by the defendant on the 6th of April, 1863, and alleges that the defendant thereby sold to him the usufruct of certain real estate in this city, but that he, the plaintiff, soon afterwards verbally agreed with the defendant that the latter might continue in the occupation of it for a time. To meet this demand the defendant pleads a deed of reconveyance from the plaintiff to the defendant's wife, dated the 15th of May, 1864. It is against this deed produced by the defendant that the plaintiff has inscribed *en faux.* According to the practice in such cases, the party producing the instrument impugned was called upon to declare whether he availed himself of it or not, and, if he did avail himself of it, to produce the original, in order that the forgery alleged might be investigated. The defendant met this by a motion praying *acte* of the declaration he made that he could not produce the minute, inasmuch as it had been accidentally lost, and could not be found; and produces what he calls a copy of it, which he says he got from the Registry office. Our law does not fix the practice to be followed in case of the non-production of the minute. The French Code de Procedure assimilates the consequences of non-production of the original or minute to those of the refusal of the party to declare whether he intends to avail himself of it. The Art. 166 of our Code merely says: "If the defendant in improbation fails, within the delay prescribed "to make such declaration, or declares that he does not intend to make use of "the document, it is rejected from the record, and, if the conclusions demand it, "is also declared null." In the present cases, the defendant *did not* fail to make his declaration, and *did not* declare that he did not intend to make use of it. On the contrary he declared in good time that he intended to make use of the copy, because the original minute was lost. The plaintiff thereupon moved that, inasmuch as the defendant had not produced the minute, the pretended copy which he did produce, might be rejected from the record. This last motion was by an interlocutory judgment of 31st May, 1871, dismissed, on the ground that there are only two cases under our law in which such motion could be granted. They are those already mentioned in Art. 166. Neither of them occurs here; but the right of the defendant to produce and make use of secondary evidence does not depend merely upon this article of the Code. Art. 1217 of the Civil Code enacts that when the original of any notarial

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instrument has been lost by unforeseen accident, a copy of an authentic copy thereof makes proof of the contents of the original, provided that such copy be attested by the notary or other public officer with whom the authentic copy has been deposited *by judicial authority, for the purpose of granting copies thereof.* Art. 1218 also makes copies of *actes* enregistered as full evidence—when the originals are lost. There is nothing in these articles to authorize the production of any copy at all where, as in the present case, the minute as well as the copy have been inscribed against as *faux, except when the original has been lost by accident.* This places the production of the copy precisely upon the same ground as that of any secondary evidence, unless it can be successfully contended that the simple assertion of loss, without proof or search, or presumption either of the loss, or even of the existence of the thing said to be lost, is to suffice. I am of opinion that the defendant was bound to produce the original, or to show that it had existed, and could not be found after due search, failing which the conclusions of the *moyens de faux* ought to be granted. It is perfectly evident that the utmost danger to the most important rights of property would ensue if a party could be allowed to forge his own title, and, when its genuineness is put in question, to content himself with saying merely that the original cannot be found, when the very gist of the contest is, as in the present case, whether any original ever existed at all. Under no system of law of which I have ever heard has secondary evidence ever been admitted except upon reasonable presumption or proof of the loss or destruction of the first or best evidence of which the case was susceptible. Nothing is more common, for instance, than actions upon lost promissory notes; but it never was heard of that the form or tenor of the note should be proved by copy, or by memory, without proof of the loss or destruction of the original. So, too in the case of deeds of sale or other things, the same practice is of everyday occurrence, when the originals executed before witnesses are not forthcoming, but the mere averment in the declaration of the party that the best evidence is lost was never, as far as I know, allowed to prevail without proof or presumption of the fact averred. What reason can be found in the difference between the form of executing deeds in England and in this country that can dispense with the application of these fundamental rules? I can see none. In the present case the notary is dead. What is to prevent any scoundrel from forging his signature, and saying that the original is lost, if saying so merely is to suffice. Upon this point, therefore, without going any further, I should have been of opinion to dispose of the case; but it will doubtless be more satisfactory to the parties that I should proceed to consider it on the merits. The question of fact is a very narrow one—Is this pretended deed of May, 1864, a forgery or not? Reverting for an instant to the fact that no evidence is adduced whatever to show that the minute ever had any existence; or, in other words, that such a deed was ever executed, I can of course have no hesitation whatever in saying that the so-called copy is false and forged, and, not only so, but false and forged upon the preconceived plan of proving it to be genuine by the most barefaced perjury. The interlocutory judgment which has been brought in question was probably, and I am not prepared to say unjustly in that respect, based upon this very ground: that if the defendant produced a copy

to take the place of the original, the first step in his proof would necessarily be to show that the original had had an existence, and had, since its execution, been lost. No such proof is attempted except, first, that which relates to the so-called admission of the plaintiff that such an *acte* had been passed; evidence doubly worthless, inasmuch as no such admission can fairly be said to have been ever made at all, and the conduct of the plaintiff in this respect, whatever it may have been, was actuated by a desire to free himself from liability to the corporation who were pressing him for the payment of taxes which he wanted to avoid; and secondly that of the witnesses St. Amant, and Agnew (sister-in-law of the defendant), who both swear that from 1864 to 1871, they frequently saw the copy of the deed which is produced, in the hands of Lamontagne, the defendant, along with the deed of April, 1863, which all parties admit to be genuine. Now it is incontestibly proved that the deed last-mentioned never for an instant left the Registry office from November, 1864, to July, 1871. I do not mean to say that even if this deed which is impugned, or rather the so-called copy which is produced, had really been in Lamontagne's possession from 1864 to 1871, as these two witnesses assert, that fact would clearly prove the existence of the minute, for it would at most, in any case, only raise the lightest presumption of it—but here in the case of an *inscription en faux*—an issue of forgery—(for it is nothing else) all that such a fact would establish would be the possession by defendant of the forged instrument, and even that is positively negatived by the possession by the registrar during the whole time alleged, of the other deed, together with which this one is pretended to have been seen in the hands of Lamontagne. So much, then, for the existence of a minute. There is no evidence—there is no presumption of it—the possession of the forged document which it was supposed would tend to establish that fact, is only attempted to be proved by the plainest perjury. Now for the vital fact itself. Was such a deed ever executed, apart from the consideration whether the person producing the copy is bound to account for the disappearance of the original? Upon this point, I am bound to find the fact, as a jury would do, and I find it, so to speak, without leaving the box. The signature is essentially different. There is an omission of the two points or stops that no witness can affirm are wanting in any of the two or three thousand signatures of Martin that have been looked at. It is incontestibly proved that Contant, who is said to have signed the deed at the notary's office, was sick in bed on the 15th May, 1864, and it is also verified as a fact by reference to the almanacs of the year, that the day unfortunately selected for the date of this document fell in that year on a Sunday. I should add that the fact, which is quite possible, that the plaintiff may at one time for fraudulent purposes, have pretended, in order to avoid payment to the Corporation, that he had reconveyed this estate, would not prevent his inscribing *en faux* against this deed. The judgment of the Court will therefore be that upon both grounds, viz., that of the irregularity of procedure in proceeding upon the copy, without accounting for the absence of the original, and upon the fact of forgery proved, the *moyens de faux* be maintained, and the defendant's plea dismissed. I also direct that the names of the parties and the number of the case be by the Prothonotary communicated to the Attorney General of the Province, in order that the defend-

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ant be prosecuted for forgery and uttering a forged instrument, and his two witnesses, St. Amant and Agnew, for perjury. This course I deem to be incumbent upon me. It is not right that I should publicly express my opinion that forgery and perjury have been committed, without also directing that these charges may be publicly enquired into. It is my bounden duty to do so. As I take leave to say also, it will be the bounden duty of the proper officer of justice to see that the direction is obeyed.

Inscription *en faux* maintained.

Doutre & Doutre, for plaintiff.
A. D. Bondy, for defendant.
(S. B.)

SUPERIOR COURT, 1873.

QUEBEC, 27TH JUNE, 1873.

Coram STUART, J.

The Moisic Iron Company vs. Olsen et al.

HELD:—That a defendant need not present a petition under Art. 819 C. C. P. in order to have a writ of *capias* returned immediately, but that a judge may order such return upon simple motion to that effect.

These were seventeen cases instituted by the Company for damages occasioned by an alleged breach of contract.

The suits were begun by writs of capias returnable on the first of September then next, under which the defendants were arrested and lodged in the common gaol.

W. Cook and *J. Blanchet* moved in their behalf for an order upon the plaintiffs to return the writs *instanter*, to enable the defendants to contest the proceedings without delay.

Pemberton, contra. The defendants are bound, before obtaining the present order, to present a petition under the terms of Art. 819 of the Code of Civil Procedure, when the Court or Judge may, under Art. 820 C. C. P., order the immediate return of the writ of Capias. They have not chosen to do this, and therefore the present motion can only be made with a view of taking advantage of informalities in the writ or service, if any can be found, which can only be done by exception to the form or motion to quash after the return of the writ in the ordinary course. The defendants also had a right to enter the writ themselves.

Cook, in reply, cited Macke & Cox, decided in the Superior Court, Montreal, and Kelly and Harmand, 1 L. C. Reports.

Judgment:—motions absolute.

Holt, Irvine & Pemberton, for the plaintiffs.
W. Cook & J. Blanchet, for the defendants.
(H. I. & P.)

SUPERIOR COURT, 1873.

MONTREAL, 27TH MAY, 1873.

Coram JOHNSON, J.

No. 910.

Thos. S. Brown ès qualité vs. The Imperial Fire Insurance Company.

HELD:—1. That an *Exception à la forme* can be fyled to an *amended* declaration.
2. That such *Exception* was not waived by subsequent pleas to merits of amended declaration.

The action in this case was on two policies of insurance. Defendants in the first instance pleaded to the merits. After fyling of plea, plaintiff moved to amend his declaration, which was granted by the Court (Mackay, J.) with liberty to defendants within eight days to amend their pleas or plead *de novo* if they thought fit. Within the four days from the amendment, defendants fyled an *exception à la forme* to the amended declaration, on the ground that it was ambiguous and unintelligible, and within eight days fyled supplementary pleas to the merits with special reserve of the *exception à la forme*.

Robertson W., thereupon moved, on behalf of the plaintiff, to reject the *exception à la forme*, because: 1st. no such *exception* lay to the amended declaration, the same not being fyled within the four days from the return of the action, and the interlocutory judgment permitting the amendment only allowing defendants to plead *de novo* pleas of a similar nature to those already fyled by them, *i. e.*, pleas to the merits. 2ndly (and this he chiefly insisted upon) because the defendants, by fyling supplementary pleas to the merits of amended declaration, had waived their preliminary pleas, and cited a decision under the Lessor and Lessees Act, holding that pleading to the merits waived preliminary pleas.

Cramp, G. B., for defendants, argued that in the present instance there was no waiver of the *exception* because defendants were under compulsion, by the terms of the judgment allowing the amendment, to fyle all their pleas within eight days: and that defendants have specially reserved their *exception* and could not be held to have waived it.—He cited Attorney General *vs.* Hon. J. H. Gray *et al.*, 15 L. C. Jurist, p. 255, and same case in appeal, *Revue Critique*, vol. I., p. 476, Pigeau, Procedure, vol. I., p. 201.

PER CURIAM:— It is not necessarry to enter into any details in this case. It is enough to state that the *exception à la forme* is pleaded altogether to the *amended* declaration, and is founded upon the vagueness and insufficiency of its allegations. This takes the matter out of the ordinary rule, and the motion must be dismissed.

Motion dismissed with costs.

A. & W. Robertson, for plaintiff.
G. B. Cramp, for defendants.

(G.B.C.)

NOTE.—The plaintiff thereupon answered the exception, and the case afterwards came on for hearing on the merits of the *exception à la forme* before Beaudry, J., when it was still urged by plaintiff that the *exception* was waived by the pleas to the merits. But by the judgment of 30th June the exception was maintained.

COUR PROVINCIALE D'APPEL, 1843.

QUEBEC, 15 JANVIER 1843.

Coram SIR JAMES STUART, J. C., BOWEN, J., STEWART, J., HENEY, J., et BEDARD, J.

MARIE HELENE DORION,

APPELLANTE ;

et

ALBERT LAURENT,

INTIME.

CASSATION DE MARIAGE, POUR IMPUISSANCE.

JUGE :—Que si la preuve de l'impuissance est incomplète, l'époux poursuivi devra se soumettre à l'examen de médecins experts et qu'à son refus de le faire les causes invoquées dans l'action seront considérées *pro confessis* et le mariage cassé. *

La déclaration, après avoir allégué qu'à l'époque du contrat et de la célébration du mariage intervenu entre la demanderesse et le défendeur, le 13 octobre, 1841, le dit défendeur était et est encore dans une état complet d'impuissance conclut "à ce que le contrat de mariage n'étant qu'un fait sans exister en droit, soit déclaré et adjudgé par la sentence de cette Cour (savoir la Cour du Banc du Roi) nul et d'aucun effet civil et ne pouvant lier ou obliger en aucune manière quelconque la dite Marie H. Dorion, laquelle se réserve son recours pour tous autres droits, actions et prétentions qu'elle justifiera en temps et lieu lui appartenir, le tout avec dépens.

Le défendeur ayant fait défaut, la demanderesse fit sa preuve *ex parte* et inscrivit sa cause pour jugement.

Le 20 avril 1842, la Cour du Banc du Roi (Pyke, Rolland et Gale, JJ. siégeant) débouta l'action sans assigner aucun motif, mais évidemment pour la raison que la preuve était insuffisante.

La cause ayant été porté devant la Cour Provinciale d'Appel, le jugement suivant intervint le 17 janvier 1843,

"It is considered and adjudged by the said Court now here, that the judgment appealed from in this cause, namely the judgment of the Court of King's Bench for the District of Montréal, in this cause rendered on the 20th day of April, 1842, be and the same is hereby reversed, with costs. And this Court, proceeding to give such judgment in the premises as by the Court below ought to have been rendered, it is further considered and adjudged by the said Court now here, that before final adjudication, the said Albert Laurent, the respondent, do submit to the inspection of two surgeons, to be named by the parties respectively, and in default of such nomination, to be appointed by the Court below, and to be duly sworn in this behalf, at such time and place as by the said surgeons may be

* Cette cause jugée par la plus haute Cour du pays établit une jurisprudence qui ne peut être affectée par une ou deux décisions de première instance où la Cour a déféré ces questions d'impuissance à l'autorité ecclésiastique pour faire prononcer pré-judiciellement l'annulation du lien sacramentel. J. D.

designated and fixed, for that purpose, in order to enable the said surgeons to ascertain, by the inspection of the person of the said Albert Laurent, and to report to the said Court below, whether the said Albert Laurent labour under any physical mal-conformation or defect, which has rendered him incompetent to consummate his marriage with the said Marie Hélène Dorion; and that the said surgeons, to be named and appointed as aforesaid, do report their opinion in the premises to the said Court below, without any unnecessary delay.

Le 20 février 1843, la Cour du Banc du Roi (Vallières de St Réal, J. C., Rolland, Gale et Day JJ. siégeant) émit un ordre enjoignant au défendeur dans les termes du jugement de la Cour d'appel "do submit to the inspection of two surgeons to be named, &c., "—Le défendeur, assigné à domicile et non en personne, fit défaut sur cette règle. Le six avril 1843 les Drs. Wolfred Nelson et B. H. Charlebois furent nommés Médecins-experts et le 12 du même mois, ils signifièrent avis au défendeur d'avoir à comparaitre devant eux à l'effet de subir l'examen en question. Le 1ed juin 1843, les médecins firent rapport que le défendeur ayant défailli à comparaitre devant eux, un avis fut publié dans la *Minerve* du 12 avril au 27 mai le sommant de comparaitre devant eux, ce qu'il n'avait pas fait.

Le 19 février 1844, la Cour du Banc du Roi (Vallières de St Réal, J. C., Rolland, Gale et Day JJ. siégeant), rendit le jugement final qui suit:

La Cour ayant entendu l'avocat de la demanderesse au mérite et vu les défauts obtenus par elle contre le défendeur, faute de comparution de sa part, vu aussi la procédure et les preuves et nommément le jugement de la Cour Provinciale d'Appel, rendu en cette cause entre les dites parties, le dix-sept de janvier, 1843, signifié au dit défendeur par Génand, huissier de cette Cour le trente et un de janvier dernier; vu aussi la sommation et avenir donnés au dit défendeur, en exécution du dit jugement par Wolfred Nelson et Basile H. Charlebois, médecins et chirurgiens dûment nommés aux fins du dit jugement, laquelle sommation et avenir a été signifiée au dit défendeur, par le dit Génand, huissier, le huit du présent mois de février, vu enfin le rapport fait à cette Cour le quatorze du présent mois de février, en obéissance au dit jugement de la Cour Provinciale d'Appel, et duquel rapport il résulte et appert que le dit défendeur ne s'est pas présenté et n'a pas comparu devant les dites Nelson et Charlebois en obéissance au dit jugement aux temps et lieu indiqués par les dits sommation et avenir à lui signifiés comme susdit, et après en avoir délibéré, Adjuge et déclare que le prétendu mariage entre la demanderesse Marie Hélène Dorion et le dit défendeur Albert Laurent est absolument nul à toutes fins que de droit, condamne le dit défendeur à payer à la demanderesse des dommages et intérêts suivant la liquidation qui en sera faite et de plus les dépens de la présente action.

Henry Stuart, avocat de la demanderesse.

(J.D.)

SUPERIOR COURT, 1873.

IN INSOLVENCY.

MONTREAL, 9TH JULY, 1873

Coram TORRANCE, J.

In re GRAVEL, *Insolvent*, and STEWART, *Assignee*, and VILBON, *Petitioner.*

HELD:—1. That under the Act of 1869 assignments in insolvency may be made only to an official assignee resident within the county where the insolvent has his domicile.

2. That an official assignee resident in the City of Montreal, who was under the Act of 1864 appointed such "for the judicial District of Montreal" and continued in the office under sect. 31 (last clause) of the Act of 1869, has not, in view of sect. 2 of the latter Act, the right to receive an assignment from an insolvent, having his domicile in a county, part of said District, when an official assignee has been appointed under the Act of 1869 for that county and is resident therein.

Under the Insolvent Act of 1864, A.B. Stewart, a resident of the City of Montreal, was appointed by the Board of Trade of Montreal an official asignee "for the Judicial District of Montreal."

By the Insolvent Act of 1869, sect. 31 (last clause) it was enacted, that "all "official assignees now holding that office shall continue to hold the same, but "subject to all the provisions of this Act with respect to official assignees." Subsequently and under the Act of 1869, C.A. Vilbon, a resident in the County of Hochelaga, was appointed official assignee for that county, which is part of the said District of Montreal.

On the 14th October, 1872, Gravel, the insolvent, whose domicile and place of business was in the County of Hochelaga, made his assignment in Montreal to Stewart.

Vilbon by this petition complains that this assignment is absolutely null under sect. 2. of the Act of 1869, which enacts that the insolvent "shall make an "assignment to any official assignee resident within the county or place wherein the "insolvent has his domicile; or if there be no official assignee therein then to "an official assignee in the county or place nearest to the domicile of the insol- "vent, wherein an official assignee has been appointed, &c., and that he, Vilbon, "as the proper official assignee, has an interest in demanding, as he does, that further proceedings by Stewart be prohibited."

Stewart relied on his original appointment in 1864 as an assignee *for the District*, and his continuance in office by the Act of 1869.

Vilbon, in reply, contended for the strict application of sect. 2, above cited, and urged that, though under sect. 31, the former assignees were continued in office, that section only rendered a *re*-appointment, new security, &c., unnecessary, but they were expressly made, by the concluding clause, "subject "to all the provisions of this Act, with respect to official assignees," and therefore to sect. 2 above.

PER CURIAM (after stating the case as above). I am of opinion that the plain meaning of the words is that the assignment should be made to an official resident in Hochelaga, as there is one there, not to an assignee resident

in Montreal. The prayer of the Petition is therefore granted so far as to give an order to Mr. Stewart to refrain from acting on this assignment, reserving to pronounce upon the other conclusions. Lantier et al and Les Héritiers De Beaujeu.

Petition granted *pro tanto*.

Giroux & Dugas, for Vilb[illegible].
Cassidy & Lacoste, for Gravel and Stewart.
(J.J.M.)

SUPERIOR COURT, 1873.

MONTREAL, 29th NOVEMBER, 1873.

Coram Torrance, J.

No. 80.

Lantier et al. vs. *McDonald*,

AND

Les Héritiers De Beaujeu, Collocated,

AND

Lantier et al., contesting.

HELD:—That the hypothecary rights of the seignior for arrears of his rent (cens et rentes) are limited to 5 years and the current year under C. C. 2012, subsequent to the deposit of the cadastre under Cons. St. L. Can. Cap. 41, and to 29 years for anterior arrears.

PER CURIAM.—The sheriff made a return of $283.45 levied of the defendant's lands. The prothonotary has prepared a report of distribution by which the heirs De Beaujeu are collocated in the following terms:

To the heirs De Beaujeu:—Seeing by the title deed of donation from Dame Flora Macdonald, widow of John Macdonald, and Helena Macdonald to the defendant, executed before G. H. Dumesnil, Notary, on the 11th January, 1862, and registered on the 17th of same month, and mentioned in the registrar's certificate, that the said gift or donation of said lot No. 17 (the proceeds whereof are now being distributed) was made at the express charge by the donee, 1. to pay, as well for the past as for the future, all seigniorial *cens et rentes*, and 3. to pay to the creditors of the donors and the said late John Macdonald on first demand all and every lawful claims they may have against the donors and the said late John Macdonald, part of their claim for arrears of seigniorial rights and interest accrued, and costs of suit incurred for the recovery thereof up to the 8th April, 1864, date of the deposit of the seigniorial cadastre, deducting therefrom the difference, to wit, $37.57, between costs and interest charged in the account and the divers sums paid on account, to wit..... ..... $102.61

Five years and the current year's interest on $35.74, (or ½ of item of £17 17 5 charged in the account) from 28 July to 8 April..... 17.98

5 years and the current year's *cens et rentes* from 8 April to 8 April. 10.68

$131.27

The plaintiffs contest the collocation, alleging that it is without foundation for more than £2 8s 0d, being at the rate of 8s 10d. per annum, from 11th Nov., 1867, to 8th April, 1873, date of the decret in this cause; that the judgment mentioned in the account of the heirs De Beaujeu is prescribed by more than 30

Clemoy et al. vs. McLaren.

years, and, if it were not prescribed, has never hypothecarily affected the immoveable sold in this cause; that by the Seigniorial Act, 1854, (18 Vic. C. 3) in the Consol. Stat. Lower Canada, Cap. 41; ss. 30, 33, it was enacted that from the publication in the Canada Gazette of the notice that the cadastre of a seigniory had been deposited in the office of the Prothonotary of the Superior Court, each censitaire of such seigniory should possess his land, en franc aleu roturier, free and clear of all seigniorial rights; and by s. 50 of the said Act, reproduced in C. C. 2012, it was enacted that the creditor of such rent could not recover more than 5 years of such rente constituée without the registration of a memorial of arrears as provided by C. C. 2125.

The creditors collocated answered that their claim was not prescribed—that the prescription had been often interrupted by payments, and by acknowledgments, particularly by a gift, 11th January, 1862, by which Dame Flora Macdonald gave the defendant the property in question at the charge of paying claimants all that might be due to them; that this *acte* was duly registered;

That subsidiarily they had a right to claim 29 years of arrears of *cens et rentes* before the deposit of the cadastre, less the number of years expired since the deposit of the cadastre, and adding 5 years since the deposit of the cadastre and the current year, which would make, in any case, $46.18, which the creditors collocated would have a right to claim, supposing [redacted] claim based upon the judgment and the donation were prescribed:

After an examination of the case the Court is of opinion that the judgment and donation do not help the creditors collocated. The judgment was not registered, and the donation does not specify the amount of arrears under consideration as being a debt payable by the donee. But Mr. Laflamme for the creditors De Beaujeu contends that until the deposit of the cadastre in the office of the prothonotary he had a right to 29 years of arrears; that at the date of the collocation, at least 20 years of these arrears were unprescribed, and that he had in addition a right since the deposit of the cadastre to 5 years and the current year. Mr. Doutre for the plaintiffs by his contestation would make the 5 years rule of the statute and of the C. C. 2012 retroactive. The Court is against this pretension. The Court is of opinion to grant the subsidiary conclusions of De Beaujeu's answer, which would maintain the collocation to the extent of $45.97. The collocation will be reformed accordingly.

J. Doutre, Q.C., for plaintiffs.
L. Laflamme, for De Beaujeu.

(J. K.)

SUPERIOR COURT, 1872.

MONTREAL, 17th DECEMBER, 1872.

Coram MACKAY, J.

No. 2176.

Clemow et al. vs. McLaren et al.

HELD:—That it is not competent to a plaintiff to move, at the final hearing on the merits of an *exception à la forme*, to amend his writ and declaration.

This was a motion to amend the plaintiff's writ and declaration, by striking

out the word "James" wherever it occurred in the name of the firm referred to therein, and substituting therefor the lettter "J."

The motion was rejected, the Court assigning the following reasons:—"It is ordered, that plaintiffs do take nothing by their said motion, as coming too late, at the end of the cause."

Motion to amend rejected.

Perkins & Monk, for plaintiffs.
Hon. J. J. C. Abbott, Q.C., for defendants.
(S.B.)

SUPERIOR COURT, 1873.

MONTREAL, 30TH APRIL, 1873.

Coram TORRANCE, J.

No. 2026.

McCarthon vs. *McCarthon*.

HELD:—That where the Court has ordered all the parties to purge themselves on oath regarding a missing document, all the members of a legal firm appearing as attorneys *ad litem* must so purge themselves, and this, notwithstanding that the document has been found in the interim.

PER CURIAM:—In this case a deposition disappeared from the record, and in consequence all parties in the case were ordered to purge themselves under oath. All have done so except one of the plaintiff's attorneys, and although the paper has since re-appeared in the record, I insist on the partner also purging

Order given to purge.

Kelly & Dorion, for plaintiff.
L. N. Benjamin, for defendant.
(S.B.)

SUPERIOR COURT, 1873.

MONTREAL, 9TH JULY, 1873.

Coram TORRANCE, J.

No. 75.

Lacroix vs. Jackson.

HELD:—That the prevalence of a disease among horses such as that of October, 1872, which rendered large numbers for the time unserviceable, is no defence to a claim by a vessel against the consignee for demurrage for delay in discharging the cargo.

PER CURIAM:—The action is one of damages against the consignee of a cargo of coal, for demurrage, for detention of plaintiff's barge. He claims $240 for 12 days. Defendant pleads that any delay was caused by plaintiff's own fault, and by the horse disease making it impossible to get horses to remove the coal. Plaintiff has not proved that he was detained 12 days, and he appears to have been guilty of neglect in not taking the place assigned him by the harbour master. The existence of the horse disease is proved, but I do not consider it a *cas fortuit* or *force majeure*. It may have been difficult to get horses, but there is no doubt they could be got if he would pay enough. On the whole, I think defendant is answerable for 5 days' delay, and judgment will go for $100 and costs.

T. & C. C. DeLorimier, for plaintiff.
J. A. Perkins, for defendant.
(J.J.M.)

COUR SUPERIEURE, 1873.

MONTREAL, 29 NOVEMBRE, 1873.

Coram BEAUDRY, J.

No. 110.

Le Séminaire de St. Sulpice vs. Louis B. Durocher.

JUGE :—Que le simple usufruitier d'un immeuble situé dans la censive de la seigneurie de Montreal a le droit de demander au Séminaire de Montréal la commutation des droits seigneuriaux.

Les demandeurs poursuivaient le défendeur pour le prix de la commutation des droits seigneuriaux sur deux lots de terre situés dans la cité de Montréal, et dont le défendeur est en partie propriétaire. La commutation avait été demandée et obtenue en en 1850, par feu Joseph Octave Alfred Turgeon, qui était à cette époque usufruitier des deux mêmes lots de terre.

Le défendeur plaida que feu Joseph Octave Alfred Turgeon n'était qu'usufruitier des dits terrains, ne pouvait pas demander au Séminaire d'en commuer les droits seigneuriaux, et que conséquemment l'acte de commutation de 1860 n'a pas été fait suivant la loi. Du reste, le défendeur ne se plaignit pas que la somme convenue pour prix de la commutation fut exorbitant.

A l'argument, *De Bellefeuille* pour les demandeurs cita les S. R. B. C., C. 42, J. 4; S. 8, S., et le C. 41, S. 8.

PER CURIAM :—Cette action est portée hypothécairement contre le défendeur pour recouvrement du prix de la commutation de tenure des deux immeubles dont le défendeur a acquis neuf-quarantièmes indivis, $666.50, avec intérêt du jour de l'assignation en les dépens.

Le défendeur a plaidé par défense en droit et par exception que la prétendue réclamation n'a pas été faite suivant la loi; qu'Alfred Turgeon, à qui la commutation a été accordée, n'étant qu'un usufruitier n'avait pas qualité pour démander la commutation des dits immeubles, non plus que les hypothéquer.

Le défendeur ajoutait de plus qu'il avait offert et offrait de payer ses arriérages de cens et rentes, dix centins d'intérêt sur icelle, et $4.85 pour frais,—somme qu'il a consignée. J'observe que le demandeur ne fait pas voir qu'il ait droit aux frais du renouvellement d'enregistrement, savoir, à la somme de $150, et sur ce point le défendeur parait bien fondé, mais la question de la validité de la commutation est plus importante.

Pour bien juger cette question, il est besoin de se reporter en arrière et d'étudier la législation sur la commutation. Pour peu qu'on connaisse ce qui s'est passe, on ne saurait ignorer que depuis longtemps le gouvernemont avait fait des efforts pour faire disparaître la tenure féodale et la tenure seigneuriale, et le grand obstacles était l'indemnité à accorder aux seigneurs. Pour ce qui regarde les seigneuries du Séminaire de St. Sulpice, on profita de la demande qu'il faisait d'un acte législatifreconnaissant et son établissement, et son existence et ses droits, pour lui imposer des condition onereuses, pour dire le moins. Parmi ces conditions, on introduisit l'obligation d'accorder sur la demande " d'aucun

"qui ont maintenant (dit l'ord. 3 et 4 Vic, chap. 30, sec 4) ou qui pourront à "l'avenir posséder aucun bien-immeuble à titre de cens ou en roture, une com- "mutation, décharge et estimation de lods et ventes, cens et rentes, et de toutes "autres charges féodales et seigneuriales quelconques, auxquels tel censitaire "personne ou corporation *qui possédent* tels immeubles .....sont sujets."

La section neuvième autorise le censitaire, ou autre personne qui a droit à la commutation de poursuivre en justice pour obtenir du Séminaires l'acte de commutation requis. La commutation n'était ainsi que facultative pour le censitaire par cette ordonnance; mais par le statut 22 Viet., chap. 48., sect. 12, il fut délaré que "dans les parties des seigneuries appartenant au dit Séminaire, qui "se trouvent dans les limites de la cité et paroisse de Montréal, les lods et ventes "et autres droits casuels seront censés avoir été abolis le quatre mai 1849, et "en lieu d'iceux, un droit de commutation a être calculé et constaté en la "manière prescrite par l'ordonnance sera payable au Séminaire à la première "mutation de propriétaire d'un immeuble quelconque—et ce droit de commuta- "tion sera garanti et payé sous les mêmes privilèges et recouvrable de la même "manière que le sont actuellement les lods et ventes et autres droits casuels "auxquels il est substitué; mais dans le cas de succession ou de legs, ce droit "de commutation ne sera exigible par le Séminaire qu'à l'expiration de dix "années après le décès de la personne de laquelle procède l'immeuble."

En 1860, date de la commutation accordée au dit Joseph Octave Alfred Turgeon, cette commutation était donc acquise de plein droit: il ne restait qu'à fixer l'indemnité payable au seigneur et d'après les termes de l'ordonnance, toute personne en possession de l'immeuble pouvait exiger la commutation et un acte pour la constater. L'usufruitier était bien en possession: il avait aussi bien que le nu-propriétaire intérêt à obtenir la commutation, surtout lorsque cette commutation était virtuellement et expressément décrétée et déclarée opérée par la loi.

La seule formalité à remplir était l'évaluation de l'immeuble et la fixation de l'indemnité. Cette évaluation a été faite avec la *personne en possession* aux termes de l'ordonnance, et le défendeur se garde bien d'alléguer que cette évaluation est excessive, ou entachée de dol ou de fraude. La commutation me parait conséquemment parfaitement régulière.

Mais en supposant pour un instant que le nu-propriétaire, aurait dû être appelé, et que l'acte en question ne serait pas valable, ce que repousse l'argumentation qui précède, le défendeur ne pourrait certainement pas prétendre que la commutation n'a pas eu lieu: l'indemnité en était certainement due dès le quatre de mai 1859 et cette indemnité était réglée par l'ordonnance suivant la valeur de l'immeuble. L'acte produit en cette cause constate que cette valeur était de $6,000.00, c'est là un fait que le défendeur était tenu de contester: c'est ce qu'il n'a pas fait, et je ne vois pas lieu de le révoquer en doute.

Jugement devra donc être rendu contre le défendeur Durocher.

Le jugement est motivé comme suit:

La Cour, après avoir entendu les parties par leurs avocats, sur les mérites de cette cause, examiné la procédure, pièces produites et preuve au dossier, sur le tout murement délibéré: considérant que la présente action est une action

Le Séminaire de St. Sulpice vs. Durocher.

hypothécaire dans le but de recouvrer le montant du prix de la commutation de tenue des immeubbles ci après décrits et situés dans l'enclave de la seigneurie de Montréal, appartenant aux demandeurs et que les demandeurs ont accordée la dite commutation à Joseph Gustave Alfred Turgeon, écuier, en sa qualité d'usufruitier des dits immeubles, per acte reçu à Montréal, devant P. Lacombe, otaire, le dix de juillet 1860.

Considérant que le dit défendeur, détenteur actuel de neuf-quarantièmes des dits immeubles, a opposé à cette action que le dit Joseph Octave Alfred Turgeon, en sa qualité d'usufruitier n'aurait pas qualité pour obtenir la dite commutation et grever les dits immeubles du prix de telle commutation.

Considérant en droit, que l'abolition de la tenure seigneuriale a été décretée comme nature d'intérêt général, et que l'ordonnance des trois et quatre Victoria, chapitre trente qui reconnait les droits des demandeurs comme seigneurs de la Seigneurie de Montréal, leur impose l'obligation, chaque fois qu'il en seront requis par aucun des censitaires ou autre personne qui ont maintenant ou qui pourrait à l'avenir *posséder* à l'avenir aucun bien immeubles à titre de cens ou en rotûre, d'accorder à telles personnes une commutation de charge et extinction des droits de lods et ventes, cens et rentes, et de toutes autres charges féodales et seigneuriales quelconques dont tels immeubles peuvent être grevé, moyennant un certain prix et indemnité convenu et arrêté en la manière prescrite en la dite ordonnance.

Considérant de plus que par le Statut Provincial du Canada passé en la vingt-deuxième année du règne de Sa Majesté, chapitre quarante-huit, il est statué que dans les parties des seigneuries appartenant aux dits demandeurs, qui se trouvent dans les limites de la cité et paroisse de Montréal, les lods et ventes et autres droits casuels seront censés avoir été abolis le quatre mai 1859, et en lieu d'iceux un droit de commutation à être calculé et constaté en la manière prescrite par le chapitre quarante-doux des Statuts Refondus pour la Bas Canada, sera payable à la première mutation de propriétaire d'un immeuble quelconque, que cette mutation ait lieu par vente, charge, héritage ou legs ou de toute autre manière, et ce droit de commutation sera garantie et payé sous les mêmes privilèges et recouvrable de la même manière que les lods et ventes et autres droits auxquels il est substituée.

Considérant qu'à l'époque on le dit acte entre les demandeurs et le dit Joseph Octave Alfred Turgeon, a été passé l'abolition des droits seigneuriaux sur les dits immeubles était acquise et qu'il ne restait plus qu'à calculer et constater le droit de commutation payable sur les dits immeubles et que les demandeurs étaient tenus sur la demande du dit Joseph Octave Alfred Turgeon, de procéder à la dite contestation, et que les propriétaires de la nue-propriété ne sauraient contester ce droit de commutation à moins d'établir qu'il y avait eu erreur, dol ou lésion dans cette contestation et qu'en conséquence, l'exception ou moyen invoqué par le défendeur est mal fondée.

Considérant, en conséquence que les offres et consignation du défendeur, sont insuffisante :

Débouté le susdit plaidoyer du défendeur avec dépens et procédant à l'adjuger sur la demande des demandeurs, la Cour déclare les immeubles mentionnés en

la déclaration des demandeurs comme suit, savoir: "Un emplacement (No. "377 du Terrier) d'environ vingt-quatre pieds de front sur environ cinquante-"quatre pieds de profondeur, borné en front au Sud-Est par la rue St. Paul, "en profondeur par le lot qui suit immédiatement, d'un côté au Nord-Est "par Joseph Tiffin et d'autre côté par le lot désigné en troisième lieu à l'acte "du onze septembre mil huit cent soixante et huit."

"2me. Un emplacement (No. 375 du Terrier) d'environ cent pieds de front "sur environ cinquante pieds de profondeur, borné en front au Sud-Ouest par "la rue St. Claude, en profondeur au Nord-Est, par le dit Joseph Tiffin, d'un "côté au Sud-Est partie par l'emplacement en premier lieu désigné et partie par l'emplacement en troisième lieu désigné dans l'acte précité, et spécialement la part du dit défendeur dans iceux, savoir; les neuf-quarantièmes indivis affectés et hypothéqués au paiement de la somme de $380 montant de la commutation ci-dessus mentionnée et de celle de $258.80, montant des intérêts calculés jusqu'au huit septembre 1873 ainsi que de la somme de neuf piastres, pour cens et rentes dus sur les dits immeubles jusqu'au onze novembre 1859, formant un total de $647.80, avec intérêt sur icelui du onze septembre 1873 jour de l'assignation en cette cause et les dépens, condamne en conséquence le défendeur à délaisser en justice les dits neuf-quarantièmes des susdits immeubles, pour leur être vendus en justice suivant les formalités de la loi et sur le prix, les demandeurs être payés de leur créance susdite si mieux n'aime le dit défendeur payer aux dits demandeurs le montant de leur susdite créance, en principal, intérêt et dépens, ce que le défendeur sera tenu d'opter sous quinze jours de la signification du présent jugement et à défaut pour le dit défendeur, de faire cette option dans le susdit délai, sera le défendeur tenu personnellement au paiement de la dite somme de $647.80 avec intérêt tel que susdit et les dépens, dont distraction est par les présentes accordée à Messrs. DeBellefeuille & Turgeon, procureurs des dits demandeurs, la Cour renvoyant le surplus de la demande quant aux frais d'enregistrement.

De Bellefeuille et Turgeon, avocats du demandeur.
Jetté & Beique, avocats du défendeur.
(E. Lef. De B.)

COUR DE REVISION, 1873.

QUEBEC, 31 OCTOBRE 1873.

No. 157.

Coram Meredith, C. J., Stuart, J., et Casault, J.

Narcisse Traham vs. Charles Gagnon, et Ludger Gagnon, défendeurs, et Ludger Gagnon, opposant à jugement.

Juge:—Que les Protonotaires conjoints ont le droit de recevoir un affidavit pour faire preuve dans un autre district, de même que si cet affidavit avait été reçu devant un des Juges de la Cour Supérieure.

Ludger Gagnon avait formé une opposition au Jugement, rendu *Exparte* contre lui en cette cause le 14 décembre, 1872, par la Cour Supérieure, aux Trois-Rivières. Il demeurait dans la paroisse de Ste. Clotilde de Hertou, dans

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le district d'Arthabaska. Comme il était plus près des protonotaires du district d'Arthabaska que de celui des Trois-Rivières, il se présenta devant eux pour assermenter son affidavit au soutien de son opposition, et ils reçurent son serment. Le *jurat* est comme suit: "Assermenté devant moi, au village d'Arthabaskaville ce 24 mars 1873. Barwis et Théroux, P. C. S."

Le demandeur fit motion, fondée sur l'art. 486 du Code de Procédure pour faire rejeter l'opposition.

Le 18 juin 1873, l'Honorable M. le juge Loranger, qui présidait alors la Cour Supérieure aux Trois-Rivières, rendit le jugement suivant:

"Considérant que Messieurs Barwis et Théroux, en leur qualité de protonotaires conjoints de la Cour Supérieure n'ont pas de jurisdiction, pour faire prêter serment dans les causes pendantes devant la dite Cour au ressort de la dite Cour dans le district des Trois-Rivières, attendu qu'ils ne sont protonotaires conjoints que dans et pour le district d'Arthabaska, et que la déposition au bas de la dite opposition comporte avoir été assermenté devant Messieurs Barwis et Théroux, protonotaires de la dite Cour, dans le district d'Arthabaska, et que conséquemment le dite opposition n'est pas revêtue des formalités voulues par la loi en autant qu'elle n'est pas accompagnée de la déposition requise par l'article 486 du Code de Procédure Civile, déboute le dit Ludger Gagnon de son opposition à jugement enregistré contre lui par le protonotaire de cette Cour le 14 décembre 1872, lequel sera exécuté dans sa forme et teneur, et le condamne aux dépens de la dite opposition."

La Cour Supérieure en Révision infirma ce jugement pour les raisons suivantes;

"Considering that the power of Messrs. Barwis and Théroux as Prothonotary of the District of Arthabaska to receive affidavits is not derived from their commission, but is exercised by them under the article 30 of the Code of Procedure, which sets forth that "Every judge, prothonotary and clerk, and every commissioner "authorized for that purpose, as hereinafter mentioned, has a right to administer "and receive the oath, whenever it is required by law, by Rules of Practice, or "by order of a Court of Judge, or the affirmation in the cases which admit-"of it, unless such right be restricted by some provision of law."

And considering that the power so given to the several Prothonotaries of this Court is not restricted by any provision of law to the receiving of affidavits in cases pending in the different branches of the said Court for which the said Prothonotaries are respectively appointed, and on the contrary that every Prothonotary of the said Court has under the said article the same powers as a judge or a commissioner, in so far as regards the receiving of affidavits to be used in the Superior Court or the Circuit Court; and considering that as the judgment of which the said Ludger Gagnon (defendant and opposant) complains was rendered by the Prothonotary in vacation, the defendant under article 484 of the Code of Procedure has, if the allegations contained in his opposition be true, properly sought to be relieved from the said judgment by means of an opposition: doth for the reasons aforesaid set asidee he judgment rendered in this cause on the 18th June, 1773, with costs against the plaintiff as well in the Superior Court

at Three Rivers as here in review and in favor of the defendant and opposant, Ludger Gagnon, and doth order that the said parties do take such further proceedings upon said opposition as to law and justice may appertain. The City Bank of Montreal and White.

P. A. Boudreault, plaintiff's attorney.

E. L. Pacaud, opposant's attorney.

(E.L.P.)

COURT OF QUEEN'S BENCH, 1873.

MONTREAL, 23RD JUNE, 1873.

Coram DUVAL, C.J., DRUMMOND, J., BADGLEY, J., MONK, J., AND TASCHEREAU, J.

No. 17.

THE CITY BANK OF MONTREAL,
(*Plaintiffs in Court below,*)
APPELLANTS;

AND

THOMAS WHITE *et al.*,
(*Defendants in Court below,*)
RESPONDENTS.

HELD:—1. That a memorandum *sous seing privé* by which a Printing Corporation authorized W (its President) to collect a debt due to the Corporation, the memorandum stating that such account had been transferred to him for value received, could not be considered a transfer to a banking Corporation of which W. was also President, though the course of dealing indicated that such was the intention of the parties.

2. That even if such memorandum could be considered a transfer to the Banking Corporation the latter, not having used diligence to collect the debt, and there having been no signification upon the debtor, had no claim against a subsequent transferee buying in ignorance of such alleged previous transfer, by notarial deed duly signified, and acted upon by the debtor by payment of the debt to such subsequent transferee.

This was an appeal from the judgment of the Superior Court, MACKAY, J., reported at page 141 of this volume.

MONK, J., dissented from the majority of the Court on questions of fact. His Honor considered that the transfer to the City Bank from the Printing and Publishing Company, though of the most informal nature it was possible to imagine, was, nevertheless, good and valid; and the respondents, by their subsequent purchase of the debts *en bloc*, acquired no right whatever to the particular sum so transferred to the City Bank. In receiving this sum from the Grand Trunk Company, though in good faith, they were receiving money belonging to the City Bank, and were bound to account for it.

BADGLEY, J. The matters of fact upon which the action is founded are simple and few. It seems that Mr. William Workman was president of the Printing Corporation, and from the course of business between that Corporation and the Grand Trunk Railway Company, the printing account for work done by them for the Grand Trunk was made up monthly and sent in to the Grand Trunk, and for each account an order was officially made by the Corporation in

The City Bank of Montreal, vs. White.

favor of their president, Mr. William Workman, as such, to receive the amount of the account. Several of these orders, with the corresponding official receipts of the president upon them, are filed of record, which, so far, only show that monthly settlements and payments were made by the Grand Trunk with the Corporation acting by its authorized president. This was plainly a matter between the debtor and the creditor alone, and in itself shows no connection between the appellant and the Grand Trunk, who paid to the person authorized to receive the amount, and who had, therefore, no concern or interest in the manner in which the receiver applied it. Moreover, these orders were not transfers beyond the Corporation itself; they were mere authorities to their chief recognized officer, as such president, to receive the debt without any authority to transfer it beyond himself by order to that effect. Up to this stage of the proceedings there is nothing to connect the respondents with the matter. But it seems that the Printing Corporation had an account at the City Bank, of which institution Mr. Workman was also president, as well as of the Printing Corporation, and his practice was to have these orders deposited to the credit of the Printing Corporation and to have the amount collected from the Grand Trunk Company. Even in this Bank account there is nothing to connect either the Grand Trunk or the respondents with it, so that the banking connection between the appellant and any of the parties mentioned must be limited especially to the Printing Corporation alone. The Grand Trunk, in the course of their business with the respondents, paid their debt to the respondents, authorized to receive it when presented, and that was the extent of their privity, whilst, as between the respondents and the appellants, there was no privity whatever. The appellants were unknown to the respondents who collected the debt transferred to them, and which was not excepted out of the general mass of debts transferred under the deed of purchase, and who, under the deed of sale by the Corporation, of which Mr. Workman was president, were therefore entitled to receive it, no steps having been taken by Mr. Workman or the appellants to have it secured for or paid by the Grand Trunk either to the President of the Corporation or to the appellants who could have no direct claim on respondents under the order and no authority to receive it. All the other receipts and orders showing the President of the Company alone to be authorized and actually receiving as by his official receipts, his deposit in the Bank of the amount received, did not make the Bank a privy to the debt as between the Grand Trunk and the Corporation, and could not affect the respondents. Of the two alleged claimants, the appellants, had a merely inchoate right which could only be perfected by payment, whilst the respondents under an absolute right over the unpaid and unclaimed debt transferred to them, used due diligence and therefore have a right to be protected. The appellants have shown no legal obligation by the respondents to repay the amount claimed of them, and the judgement should be confirmed.

Judgment confirmed.

Trenholme & McLaren, for the appellants.
Abbott, Tait & Wotherspoon, for the respondents.
(J.K.)

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COMPILED BY

STRACHAN BETHUNE, Q.C.

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" A conviction before a J. P., for having disturbed the public peace by gravely insulting a party, and by committing an assault on him, and by crying out and threatening to beat him, is bad and will be quashed. (Exp. Rouleau, *for certiorari*, S. C.)..... .....

CHECK :—When a bank discounts for A. a draft by him on B., and accepts a check for the proceeds and delivers it to A., for transmission to B., to enable B. therewith to retire a draft for a similar amount drawn by A., and accepted by

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B. for A.'s accommodation, and about to fall due at the branch of the Bank where B. resides, on the faith of A.'s representation, assurance and undertaking (without authority however from B.) that B. will accept the new draft, and B. receives the check, and, before using it, has knowledge of the new transaction as between A. and the bank, B. cannot legally use the check to retire his acceptance on the old draft, without accepting the new one. (Torrance et al., appellants, and the Bank of B. N. America, respondents, P. C.)..... 185

CHECK :—A, fraudulently initialed as accepted by the manager of a Bank, and for which the drawer has given in exchange to the manager certain securities which the Bank retains, cannot be repudiated by the Bank when the check is held by a *bond fide* holder for value. (La Banque Nationale *vs.* The City Bank, and the City Bank, pffs. *en gar.*, *vs.* The Bank of Montreal)..... 197

CIRCUIT COURT :—The writ of summons need not be addressed similar to a sheriff or a bailiff, even when the defendant resides in a district different to that in which the writ issues, and in the latter case any bailiff of the S. C. may lawfully serve it, (Laurence *vs* Chaudière, C. C.)..... 83

" :—The, has no jurisdiction to determine the validity of a valuation roll. (Laurent, Petr., and The Corporation of the Village of St. Jean Baptiste, respondent, C. C.)..... 192

" :—In cases in the, under $60, a deposit is required with preliminary pleas, and in such cases copies must be served on the plaintiff's attorney. (Lusher *vs.* Parsons, C. C.)..... 196

COMPOSITION :—When a creditor agrees to a, with one of two members of an insolvent firm (without discharging the other) and obtains security for such composition, and afterwards releases the compounding debtor (without the consent of the other debtor) for a less amount than the composition, and surrenders the security, the other member of the firm, in an action against him by such creditor to recover the balance of his claim, may successfully resist the action by an *exceptio cedendarum actionum*. (The Molsons Bank *vs.* Connolly, S. C.)..... 189

CONDITION PRECEDENT :—*Vide* SALE.

CONTRAINTE PAR CORPS:—*Vide* PRACTICE.

CONTRIBUTORY NEGLIGENCE :—*Vide* NEGLIGENCE.

Defts. *en gar.*, C. of R.)..... 197

CORPORATION :—A, is responsible in damages for libel. (Brown *vs.* The Mayor, &c., of Montreal, S. C.)..... 46

" :—A, municipal, in an action against them *en réintégrande*, with a conclusion demanding damages, cannot plead the want of one month's notice, under Art 23 of the Code of C. P. (Doyon, appellant, and the Corporation of the Parish of St. Joseph, respondent, Q. B.)..... 197

" :—A municipal, is responsible in damages for the illegal acts of its officers, ordered by them or which they attempt to justify. (Do)..... 193

" :—A, is liable for damage suffered by the upsetting of a sleigh on the highway under the control of the Corporation, caused by a natural bank on such highway, notwithstanding that the roadway opposite the bank was wide enough for two teams to pass, and notwithstanding that the accident was more immediately caused by the horse taking fright at the sound of a railway whistle, the horse itself also being at the time driven by a female only 12 years of age. (Higgins *et vir vs.* The Corporation of the Village of Richmond, C. of R.)..... 248

" :—A, cannot acquire land without the permission of the crown or authority of the Legislature, and therefore a foreign Corporation, not having such permission or authority, has no right of action by way of damages against the vendor of lands in the P. of Q. sold to such Corporation, by reason of eviction from such lands. The Chaudière Gold Mining Co., appellant, and Desbarats et al., respondents, P. C.)..... 275

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CORPORATION:—An action for libel may be brought by one Corporation against another Corporation. (L'Institut Canadien *vs.* Le Nouveau Monde, S. C.)..... 296

COSTS:—*Vide* PRACTICE.

" :—In a demand by way of petition to set aside a municipal By-Law the costs will be taxed as in a case of the first class of the C. C. (Ex parte Bourbonnais, petr. and The Corporation of Soulanges, respondent, C. C.) 69

" :—The affidavit to obtain judgment in a default case in vacation is equivalent to an *Enquête*, and entitles the plaintiff's attorney to costs accordingly. (D'Amour & al. *vs.* Bourdon, C. C.) 85

" :—Security for, is properly demanded by *exception dilatoire*. (Calvin & al. *vs.* Bertrand, C. C. 236

" :—In a case of damages for personal wrongs, in which the Court has awarded only $5 for the damages, no greater amount than $5 for costs can be awarded. (Warner & al. *vs.* Rolf, C. of R.)..... 192

" :—An application for security for, may be legally made by *exception dilatoire*. (Graham *vs* Gervais, S. C.) 295

" :—*Vide* RENUNCIATION.

CROWN:—*Vide* REGISTRATION.

" :—The Attorney General for L. C. can legally claim payment of monies due to the Crown under a bond by the Prothonotaries to pay over all moneys levied or received by them and payable to any person or persons lawfully entitled to the same. (The Trust and Loan Co. of U. C. *vs.* Monk *es qual.*, and divers opposants, S. C.)..... 57

DAMAGES:—*Vide* NEGLIGENCE.

" :—*Vide* CORPORATION.

" :—*Vide* NOTICE OF ACTION.

" :—*Vide* COSTS.

DEFENCE EN DROIT:—*Vide* PRACTICE.

DEMURRAGE:—The prevalence of a disease among horses, such as that of October, 1872, which rendered large numbers for the time unserviceable, is no defence to a claim by vessel against the consignees for demurrage in discharging the cargo. (Lacroix *vs.* Jackson, S. C.) 329

DONATION:—A, by donation *inter vivos*, gave his property to his son B., to be enjoyed by him *à titre de constitut et précaire sa vie durante*, and to his said son's children in property after his death. And the donation declared that, in default of such issue, the property should belong to the other heirs of the donor, who should enjoy and dispose of it in such a manner as the donor should direct by his will.

The donor made his will before making the donation, by which he gave all his property in usufruct to his said son B., and the property thereof to B.'s children, and gave B. power by his own will to dispose of and to apportion said property as he pleased among the testator's grandchildren. And, by a codicil executed after the donation, confirmed the will.

B. survived A. and died without issue, leaving a will by which he bequeathed the particular property in question in the cause to the respondents, two of A.'s grandchildren.

Held: 1.—That the donation did not create a substitution, in default of lawful issue of B., in favor of "the other heirs of the donor."

2—That the conditional reversion of the property provided by the donation was perfectly legal.

3—That, under the circumstances, B. had a legal right to bequeath the property as he did. (Herse & al., appellants, and Dufaux & al., respondents, P. C.)..... 147

DRAFT:—*Vide* CHECK.

DRUNKENNESS, *Interdiction for* :—*Vide* PRACTICE.

ELECTION EXPENSES:—The value of refreshments supplied to a gang of men, during an election in the Province of Quebec, to the Commons of Canada, can-

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not be recovered in an action at law. The Election Act of 1860 being still in force *quoad* such Election. (Johnson and *vir vs.* Drummond, C. C.) 176

" :—" The Corrupt Practices Prevention Act of 1860," of the late Province of Canada, is in force, and applies to elections of members for the House of Commons of the Dominion, and, therefore, a note given for the payment of even lawful expenses connected with any such election is void in law. (Willett *vs.* De Grosbois, S. C.) 292

EMBEZZLEMENT :—The Registrar and Treasurer of the Late Trinity House of Montreal was a person "employed in the public service of Her Majesty." And an embezzlement by such Registrar and Treasurer of a portion of the fund known as "The Montreal Decayed Pilots Fund," which, by The Trinity House Act, was declared to be "vested in The Master, Deputy Master and Wardens of the Trinity House of Montreal," and to be under their management, was an embezzlement of moneys, "the property of Our Lady the Queen." (REGINA *vs.* David, Q. B.) 310

ENQUETE *and final hearing :—Vide* INSCRIPTION.

EXCEPTION *à la forme :—Vide* PRACTICE.

" " " :—" ACTION.

" *Cedendarum Actionum :—Vide* COMPOSITION.

" *Déclinatoire :*—Where an order for goods has been given at Kamouraska to a travelling clerk, having commission to act from various houses in Montreal (including that of the vendor), and has been accepted afterwards by one of such houses, and the goods delivered at the *depot* in Montreal of the G.T.R., and forwarded by that route to the purchaser residing at Kamouraska, the right of action originated at Montreal. (Lapierre *vs.* Gauvreau, C. of R.) 241

EXECUTION, *Writ of :—Vide* PRACTICE.

EXECUTOR :—*Vide* WILL.

EXPERT :—An, cannot recover the amount of his fees, when his report has been set aside, in consequence of his failure to give the requisite notice to the parties before proceeding. (Beaudry *vs.* Tamalty & al., C. C.) 175

EVIDENCE :—*Vide* PRACTICE.

" :— " SALE.

" :—A witness cannot be contradicted as to collateral matters. (Courtney *vs.* Bowie *es qual*, S. C.) 47

" :—In a case *en séparation de corps et de biens* the contents of a letter alleged to have been written by the defendant, and the destruction of which has been sworn to, may be established by parol evidence. (Starke *vs.* Massey, S. C.) 56

" :—The Court will not entertain a motion to revise a ruling at *Enquête* sittings, where the ruling admits the evidence objected to. (Mousseau & al. *vs.* Picard & al., S.C.) 67

" :—*Vide* ASSUMPSIT.

" :— " PROMISSORY NOTE.

" :—The Quebec Act 35 Vic., ch. 6, s. 9, authorizing the examination of one of the consorts in a suit as a witness, cannot be invoked in support of an application by one of such consorts to examine the other as a witness in his or her favor. (Brush *vs.* Stephens & *vir*, S. C.) 140

" :—The testimony of a witness in sur-rebuttal may be attacked by counter evidence to show that such witness was inimical to plaintiff, and was not to be believed on oath. (Payette *vs.* Cousineau, S. C.) 287

" :—Communications between principal and agent will be protected, if they form part of the preparation or preliminary investigation prior to suit. (The Pacific Mutual Ins. Co. of N. Y. *vs.* Butters, S. C.) 309

EVOCATION :—In a non-appealable case returnable out of term, a defendant may evoke at any time before plaintiff has obtained an *acte* of foreclosure. (DeBeaujeu & *vir vs.* McNamee, S. C.) 50

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FAITS ET ARTICLES:—A rule for, against the husband of one of the parties, who is only a party in that capacity to authorize his wife, can produce no legal result. (Mathison & *vir vs.* Whitlock, S. C.)..... 67

" :—In an action *en séparation de corps et de bien*, for adultery by the husband in the common household of himself and his wife, the admissions of the husband, made by him to third persons, or resulting from his default to answer interrogatories *sur faits et articles*, will be considered by the Court, where the Court is of opinion that they are not the result of collusion between the plaintiff and the defendant. (Starke *vs.* Massey, S. C.) 242

" :—When, are served on the attorney of one of the parties who is absent, the simple indication by such attorney of the place of residence of his client is a sufficient compliance with the provisions of Art. 223 of the Code of C. P., and he is not bound to take steps to have his client examined under a Commission. (Walters *vs.* Lyman & al, S. C.)..... 246

GAS:—*Vide* NEGLIGENCE.

GUARDIAN:—A voluntary, cannot claim fees. (Miller *vs.* Bourgeois, & Holland & al., *mis en cause*, S. C.)..... 158

HABEAS CORPUS:—A judgment of the S. C., on an application for a writ of, made originally before a judge, and sent up by him to the Court for adjudication, is susceptible of a Review and Appeal. (Barlow, appellant, & Kennedy, respondent, Q. B.)..... 253

INDICATION DE PAIEMENT:—A stipulation, in a deed of sale, that the purchaser will pay the amount of a certain hypothecary claim therein indicated, will not give rise to a personal obligation so to pay in favor of the mortgagee who notarially accepts the *indication de paiement*, when the same deed contains an express reservation by the purchaser to "*deguerpir et delaisser*" the property. (The Permanent Building Society of the District of Montreal *vs.* Larose, C. of R.)..... 87

INSANITY:—*Vide* WILL.

INSOLVENT ACT OF 1869:—A petition by an insolvent to stay proceedings under the Act, made after the expiration of five days from the demand of an assignment, on the ground that the insolvent has executed a deed of assignment to an official assignee, is too late. (Thomas *dit* Tranchemontagne, appellant, and Martin, respondent, Q. B.)..... 11

" :—A petition calling in question the validity of an assignment under the Act, must be served upon the insolvent as well as upon the assignee. (*In re* Gravel, insolvent, and Stewart, assignee, and Vilbon, Petr., S. C.) 23

" :—An action *en Revendication*, claiming property from an assignee under the Act will be dismissed on demurrer. (Larocque *vs.* Pagnuelo, S. C.) 41

" An order for the examination of witnesses made on the day of a voluntary assignment under the Act of a partnership Estate by two only, out of three partners, is irregular, and a petition for examination should, moreover, state satisfactory reasons for the order. (*Re* Lusk & al., insolvents, and Foote, Petr., S C.)..... 47

" :—When an assignee improperly refuses a bid for real property offered by him for sale under the Act, and adjudges the property to the previous bidder, the judge will set aside the adjudication, and order the property to be adjudged to the party whose bid was rejected. (In the matter of Leger *dit* Parisien, insolvent, and Stewart, assignee, and Reither, Petr., S. C.)..... 84

" :—On a petition by a claimant, alleging facts which he claims to be legal grounds of recusation of an assignee, and claiming to be allowed to recuse the assignee, the judge will order the assignee to suspend all further proceedings, and order proof of the facts alleged in the petition. (In the matter of Worthington, an insolvent, and the Mechanics Bank, clmt., and Bell and al., contesting, S. C.)..... 163

" :—A note of a third party, given by an insolvent to a creditor, to obtain

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the creditor's consent to a discharge of the insolvent, is null and void. (Doyle, appellant, and Prévost & al., respondents, Q. B.)..... 307

" Do do (Prévost & al., appellants, and Pickel, respondent, Q. B.)..... 314

" :—An assignment, by an insolvent residing in the county of Hochelaga to an official assignee residing in the City of Montreal is illegal, and an official assignee resident in the county has an interest sufficient to enable him legally to petition for a prohibition against the interim assignee under such assignment. (In the matter of Gravel, insolvent, and Stewart, assignee, and Vilbon, Petr., S. C.)..... 326

INSCRIPTION:—An, for *Enquête* and final hearing, requires 8 days previous notice. (Tremblay *vs.* Bigault d'Aubreville, and d'Aubreville, opposant, S. C.) 75

" :—An, for *Enquête* and final hearing, must be preceded by previous notice of 8 days, and a simple receipt of copy of an Inscription for the 27th, dated the 21st, is not a waiver of the right to object thereafter to the shortness of the notice. (Allaire *vs.* Mortimer, C. of R.)..... 158

INSCRIPTION *en faux*:—*Vide* PRACTICE.

" " " :— " PRATICIENS.

" " " " :— " TRANSFER.

" " " :—In the case of an, of a notarial deed and of the copy thereof produced, the party availing himself of such deed or copy is bound to produce the original deed or adduce reasonable evidence of its loss or destruction, his mere assertion that it has been so lost being wholly insufficient. And where the judge is of opinion (as in present case) that forgery and perjury have been committed, he will, as a matter of duty, order the offenders to be prosecuted for their crimes. (Content *vs.* Lamontagne et al., S. C.)..... 319

INSURANCE:—The preliminary proofs under a fire policy made after the 15 days, within which the conditions endorsed thereon required the same to be furnished, are sufficient, and specially so when the conditions state,—after the provisions as to the 15 days,—that "until" such proofs are made no right of action shall accrue. (Lafarge *vs.* The Liverpool, London, and Globe Ins. Co., S. C.)..... 237

" :—A fire policy in favor of a party, on coal oil "his own, in trust, or on consignment," covered his loss on oil destroyed by fire in Middleton's sheds, warehouse receipts for which granted by Middleton in favor of Thomas Ruston had been transferred by Ruston to such party, and on which receipts such party had made advances to Ruston, who obtained such advances really for Middleton, without the party advancing, however, being aware of the fact. (Stanton, appellant, and the Ætna Ins. Co., respondent, Q. B.)..... 23

" :—In the case of an interim, by an agent of an Insurance Co., in the following words:—Received from Messrs. Tough & Wallace (Coaticooke Post Office), Coaticooke, the sum of twenty dollars, being the premium for an insurance to the extent of $2,500 on the property described in the application of this date, numbered—, subject, however, to the approval of the Board of Directors in Toronto, who shall have power to cancel this contract, at any time within thirty days from this date, by causing a notice to that effect to be mailed to the applicant, at the above Post Office;"—A notice by the Company cancelling the contract mailed to the applicants at the Post Office, Toronto, within the thirty days, had the effect of cancelling the Insurance, although such notice was not received in time for delivery by the Post Office at Coaticooke until after the fire. (Tough et al. *vs.* The Provincial Ins. Co. of Canada, C. of R.)..... 305

INTERVENTION:—*Vide* PRACTICE.

JURISDICTION:—*Vide* PRACTICE.

JUSTICE OF THE PEACE:—The summary jurisdiction of a, cannot be questioned by a defendant, by setting up a *jus tertii* in the property involved in the case.

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(Exp. Cayen, for *certiorari*, and the Mayor et al., Pros., and Sexton, Recorder, S. C.)..... 74

" :—*Vide* CERTIORARI.

MARRIAGE:—A, which is voidable is good so long as it is not declared null, and therefore a second marriage cannot be validly contracted by either of the parties before the legal dissolution of the marriage. (Burn et al. *vs.* Fontaine, S. C.)..... 40

" :—In an action to set aside a marriage, on the ground of *impuissance*, the husband is bound to submit to a medical examination when ordered by the Court, and in default of his so doing, the charge of *impuissance* will be held as confessed and the marriage annulled accordingly. (Dorion, appellant, and Laurent, respondent, Q. B.)..... 324

MINOR:—A father is by law entitled to the possession, custody and guardianship of his minor child, and cannot be deprived thereof except for insanity or gross misconduct; nor can he legally deprive himself of his paternal right by contract. (Barlow, appellant, and Kennedy, respondent, Q. B.)..... 233

MUNICIPAL COUNCILS:—The council of a county cannot by law establish a road, part of which is in one and part in another local municipality in the county, without first declaring by resolution or by *procès-verbal* such road to be a county road. And any road established by a county must be maintained under the control of such county. And in the counties of Stanstead, Compton, Brome, Missisquoi, Huntingdon and Richmond, with the exception of certain municipalities mentioned under Art. 1080 of the Municipal Code, must be built and kept up by general assessment upon all the local Corporations in the county, in proportion to the total value of their taxable property, except in the case mentioned in Articles 190 and 191. And an assessment for a county road only upon two, out of a larger number of local corporations in the county, not in accordance with the exception under said articles 190 and 191, is illegal. (Ball et al., appellants, and the Corporation of the County of Stanstead, respondent, C. C.)..... 312

LESSOR AND LESSEE:—*Vide* NEGLIGENCE.

" " :—In an action, instituted under the Lessor and Lessees Act (embodied in the Code of C. P.), articulations of facts cannot be fyled, and will be rejected (if fyled) on motion to that end. (Mitchell *vs.* Gaucher & al., S. C.) 66

LIBEL:—*Vide* COSPORATION.

LIFE INSURANCE:—A policy of, effected by a wife *séparée de biens* on the life of her husband, for her own benefit, cannot be attached by her own creditors. (Brossard *vs.* Marsoin, and Vilbon, assignee, S. C.)..... 270

MANDAMUS:—A writ of, directing the "Curé et Marguilliers de l'Œuvre et Fabrique de la Paroisse de Montréal," to Inter the body of one Guibord in the R. C. Cemetery, according to usage and law, and to insert in the register of burials the certificate of such interment, and the mandate on such writ, are "informal and irregular, and therefore liable to be quashed and set aside," and will be set aside accordingly. (Brown, appellant, and the Curé, &c., de la Fabrique de Montréal, respondents, Q. B.)..... 89

NEGLIGENCE:—A postmaster is responsible for a registered letter lost through his neglect or that of his minor son, employed by him as his assistant, in leaving it in an exposed place in his office, contrary to the regulations of the Post Office department. (Delaporte & al. *vs.* Madden, S. C.)..... 29

" :—In the case of a fire, negligence is presumed against the lessee. (Rapin *vs.* McKinnon, C. of R.)..... 54

" :—Where a Gas Company has introduced pipes into a house, and an escape of gas occurs at a point for which the Company is responsible, the widow of a person killed by an explosion of the gas cannot recover damages against the Company, if it appears that the deceased contributed to the accident by his negligence in going to the place with a light in his hand. (Vallée *vs.* The New City Gas Co., S. C.)..... 63

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NOTICE OF ACTION:—The Commanding Officer of a British Regiment, who is sued by a retired corporal of the Regiment for damages, alleged to have been caused by his arrest and imprisonment by the Colonel, whilst in the Regiment, illegally, maliciously, and without probable cause, cannot invoke the want of one month's notice of action, provided for in Article 22 of the Code of Civil Procedure, even when it is proved that he acted, in reality, legally, without malice, and with reasonable or probable cause. (Barnes *vs.* Mostyn, S. C.)..... 288

OPPOSITION:—An, by a defendant, under Art. 484 of the Code of Civil Procedure, which is in the nature of a preliminary plea, must be accompanied not only by the deposit required by Art. 486, but also by that required by Art. 112 and the 22nd Rule of Practice. (The Bank of British North America *vs.* Jubinville & al., and Jubinville & al., opposants, S. C.)..... 162

:—An, by a defendant under Art. 484, cannot be fyled when the judgment opposed has been rendered in term. (Pariseau *vs.* Grenier, and Grenier, opposant, C. C.)..... 177

PARTNERSHIP:—A contract by two parties to furnish Railway Ties constitutes a partnership, within the meaning of the Cons. Stat., ch. 65, and Art. 1834 of the Civil Code, but the registration required thereby need only be made in the Registry office of the County where their principal office or place of business is, and not in the various counties where they may happen to make isolated purchases of wood. (Larose *vs.* Patton, S. C.)..... 52

PATENT FOR INVENTION:—The mere importer of an invention, which has been patented previously in the U. S. by some other party, is not the inventor or discoverer thereof within the meaning of "The Patent Act of 1869"; and a patent obtained by him under the said Act, on the ground that he was the inventor or discoverer, is null and void. (Woodruff *vs.* Moseley & al., S. C.)..... 306

PEREMPTION:—*Vide* PRACTICE.

PHYSICIAN:—A medical man may prove the nature and length of his services, by his own oath, and may recover the value of such services, without establishing, by independent testimony, that such services were demanded or requested by the patient. (Barcelo *vs.* Lebeau, C. C.)..... 157

POSTMASTER:—*Vide* NEGLIGENCE.

PRACTICE:—The truth of a certificate of service of an *exception à la forme* may be attacked by motion, without improbation, unless the Court orders otherwise, and such exception will be held not to have been served if the copy left with the plaintiff's attorney bear a different number to that of the orginal, and be not otherwise an exact copy thereof. (McMillan, appellant, and Bo[illegible]man & al., respondents, Q. B.)..... 13

:—A [illegible] in Montreal has no jurisdiction in the case of an *avis de parents* taken in the district of Iberville for the appointment of a Tutor, &c., to minors, whose domicile is in Montreal, and such election must take place in Montreal. (Exparte Gauthier, S. C.)..... 17

:—A plaintiff who has produced a witness for examination, and has examined him a certain length when further examination was stopped, in order to take the opinion of the Court on the admissibility of question[illegible] be held to produce the witness for cross-examination and *clotûre* [illegible] deposition on the demand of defendant. (Cox *vs.* Patton, S. C.)... 18

:—*Vide* INSOLVENT ACT OF [illegible]

:—The plaintiff will not be allowed to amend his declaration by adding allegations having reference to matters occurring subsequent to the institution of the action. (Contant *vs.* La[illegible]tagne & al., S. C.)..... 24

:—A *défense en droit*, denying the allegations of the plaintiff's declaration, is irregular, and will be dismissed on motion. (Dubois & *vir vs.* Stoll, S. C.)..... 24

:—In the case of an *enquête*, on a petition to quash a *capias*, no allowance will be made for costs of *enquête*, if no articulation of facts be fyled.

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(Dugas & al. *vs.* Jones, S. C.)..... 25

PRACTICE:—A party is entitled to have the costs of printing in appeal taxed at the rate of 32 cts. per page, even although he may have paid a less sum per page to [illegible]. (Dugas & al. *vs.* [illegible] & al., S. C.)..... 25

—The option of a party to have the case shall be inscribed at the same time for proof and hearing on the merits, is sufficiently made by service on the opposite party of an inscription of the cause upon the Rôle de Droit for *enquête* and hearing on the merits at the same time. (Simpson & al. *vs.* Lowle & al., S. C.)..... 38

—A party claiming lands under seizure cannot do so by means of an intervention, during the pendency of proceedings on an opposition *afin de distraire* fyled by such party, and an intervention fyled under such circumstances, and a provisional order of a judge, will be rejected on a motion made to that effect. (Bethune *vs.* Chapleau & al., and Fraser, opposant, and Holmes, int. party, C. of R.)..... 33

—*Vide* ACTION.

— " ENQUÊTE CIVILE.

— " PROMISSORY NOTE.

— " EVIDENCE.

— " TUTOR.

— " REGISTERS.

— " EVOCATION.

— " PRACTICIENS.

— " REVIEW, COURT OF.

—An Interlocutory judgment awarding costs is executory before the final judgement. Trudel *vs.* Desautels, and David & al., Int., and Hubert & al., *mis en cause*, C. C.)..... 56

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— " FAITS ET ARTICLES.

— " ASSUMPSIT.

—A requisition by plaintiff to examine defendant *sur faits et articles*, fyled on the same day that service is made of the defendant's motion for *péremption* is a *procédure utile*, and will operate as an interruption of *péremption*. (Terrill, appellant, and Haldane & al., respondents, Q. B.)..... 69

—*Vide* COSTS.

— " JUSTICE OF THE PEACE.

— " INSCRIPTION.

—Though a real action can only be brought in the district where the immoveable is situate, yet an appearance, without plea or with a plea to the merits, is a waiver of all objection to the jurisdiction. (Whyte *vs.* Lynch & al., S. C.)..... 76

—An alteration of the return day of a writ of *Vend. Exp. de terris*, made after the sheriff has commenced the execution of the writ, by publishing his proceedings in a newspaper, is fatal, and all proceedings on such writ will be set aside, without the necessity of an inscription *en faux*. (Duchesnay & al. *vs.* Vienne, and Vienne, opposant, S. C.)..... 82

—*Vide* CIRCUIT COURT.

— " ATTORNEY.

— " ARBITRATOR.

—A plea which is only good in part will be rejected on demurrer, on the ground that it does not fully answer the pleading to which it is addressed. (Miller *vs.* Bourgeois, and Holland & al., *mis en cause*, S. C.)..... 158

—*Vide* GUARDIAN.

— " CAPIAS AD RESPONDENDUM.

— " OPPOSITION.

— " TIERS SAISI.

— " SAISIE REVENDICATION.

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PRACTICE:—An interdiction for habitual drunkenness, under Quebec Act 33 Vic., ch. 26, can only be pronounced by a judge; the prothonotary not having jurisdiction in the premises, even in the case of absence of the judge. (Exp. Thérien, and Lauzon, opposant, S. C.) 174

" :—The costs, on dismissal of a *défense en droit*, reserved for hearing until the final hearing on the merits, will not be allowed to the plaintiff. (Roy & al. *vs.* Gauthier, S. C.) 227

" :—*Vide* BAILIFF.

" :— " EXCEPTION *déclinatoire*.

" :— " SUPPLEMENTARY DEMAND.

" :—An application for *contrainte par corps* cannot be granted, on a simple motion therefor, after notice. (Higgins *vs.* Bell, S. C.) 274

" :—*Vide* QUEBEC LICENSE ACT.

" :—An exception *à la forme* may be fyled to an *amended* declaration, after the expiration of the four days from the return of the writ, and such exception will not be considered waived by the fyling of pleas to the merits, where such had to be done within a specified delay. (Brown *vs.* The Imperial Fire Insurance Co., S. C.) 323

" :—*Vide* AMENDMENT.

" :— " RECORD.

" :—AFFIDAVIT.

PRACTICIENS:—Where a party objects before them to the genuineness of a receipt, contending that it is forged, he may, in case they overrule his objection, contest the genuineness of such receipt afterwards before the Court. (Brunet *dit* Letang & al. *vs.* Brunet *dit* Letang, S. C.) 51

PRESCRIPTION:—*Vide* PROMISSORY NOTE.

PROHIBITION:—A writ of, will not be granted, in favor of the owner of a toll-bridge against parties building a rival bridge within his limits, whilst such rival bridge is being built. (Girard *vs.* Bélanger & al., S. C.) 36

" :—A writ of, may be granted to prohibit the execution of a judgment of Justices of the Peace, under Chapter 6 of the Consolidated Statutes, imposing a fine of $50, for having sold spirituous liquors without a license. (Duval, appellant, and Herbert & al., respondents, Q. B.) 229

PROMISSORY NOTE:—A, executed before a notary *en brevet* is not prescriptible by five years. (Pigeon, appellant, and Dagenais, respondent, Q. B.) 21

" :—A, not exceeding $50 in amount and payable to order, may be legally transferred without endorsement. (Dupuis *vs.* Marsan, C. C.) 42

" :—In an action on a, dated at Montreal, in which the defendant pleads that the note was really made at Sorel, such plea need not be sustained by an affidavit such as required by Art. 145 of the Code of Civil Procedure. (Hudon *vs.* Champagne, S. C.) 45

" :—Where a note is signed by procuration, the power so to sign must be proved, even in a default case. (Ethier, appellant, and Thomas, respondent, Q. B.) 79

QUEBEC LICENSE ACT:—There is no right of appeal from the convictions of Justices of the Peace under the, and the Provincial Legislature has jurisdiction to provide procedure for enforcement of penal statutes enacted with reference to subjects comprised within its powers, and penal statutes are not part of the criminal law as contemplated by the British North America Act, which gives exclusive power to the Parliament of Canada to determine the procedure in criminal matters. (Page, petitioner, and Griffith, respondent, Q. B.) 302

RECORD:—Where the Court has ordered all the parties to purge themselves on oath regarding a missing document in a, all the members of a legal firm appearing as attorneys *ad litem* must so purge themselves, and this notwithstanding that the document has been found in the interim. (McCarthon *vs.* McCarthon, S. C.) 329

RECUSATION :—*Vide* INSOLVENT ACT OF 1869. PAGE

REGISTERS :—In the case of an application to amend a Register of Births in a Parish, the Court, *avant faire droit*, may ordain that the limits of the Parish may be established by a surveyor, in accordance with the Civil erection of the Parish. (Exp. Dovoyan, petitioner, and The Rev. Félix Véniard, respondent, S. C.)..... 49

REGISTRATION :—*Vide* PARTNERSHIP.

" :—A bond to the Crown registered in 1845, without special description of property affected thereby, availed by privilege as well against all real property then owned by the debtor as against all his future property. (The Trust and Loan Co. of U. C. *vs.* Monk *es qual*, and divers opposants, S. C.) 57

RENUNCIATION :—Heirs at law, against whom it is sought to make a judgment executory, must pay costs up to the date of renunciation. (Mulholland & al. *vs.* Halpin et al., S. C.)..... 318

REQUETE CIVILE :—A party may be relieved by, against the effect of a judgment of distribution alleged to have been homologated by fraud. (Doutre & al. *vs.* Bradley & al., and divers opposants, and Allison & *vir*, petrs., and Dorion, respondent, C. of R.)..... 42

REVIEW, COURT OF :—In an inscription it is not necessary to state "by three judges of the S. C." (McLaren and The Corporation of the Township of Buckingham, C. of R.)..... 53

" " :—A judgment of the C. C., under Arts. 698 *et seq.* and of the Municipal Code, is appealable, and therefore subject to Revision. (Do.)..... 53

" " :—An inscription may be validly fyled on the 9th day after the judgment, when the 8th day falls on a Sunday. (Lenoir *dit* Rolland *vs.* Desmarais & *vir*, C. of R.)..... 81

" " :—An inscription which has been discharged, on the application of the opposing party in the absence of the inscribing party, may be replaced on the *rôle* during the same term and before the actual remission of the record, on sufficient cause shown. (Shepard *vs.* Buchanan, C. of R.)..... 191

" " :—Since the coming into force of the Provincial Stat. 36 Vic., ch. 12, no case shall be susceptible of being inscribed for Review, if, being a personal action, the amount demanded exceed $500, and that said Statute avails as an amendment of Art. 494 of the Code of Civil Procedure, notwithstanding that such Article is not expressly designated in said Statute, as required by the Provincial Act 31st Vic., ch. 7, s. 10. (Gibson & al. *vs.* Lindsay, C. of R.)..... 244

" " :—*Vide* HABEAS CORPUS.

SAISIE REVENDICATION :—*Vide* INSOLVENT ACT OF 1869.

" " :—In the case of a, of a waggon, by an assignee under the Insolvent Act of 1869, wherein defendant pleaded a *droit de retention* for repairs, the plaintiff cannot claim possession of the waggon, without prepayment of or security for such repairs. (Stewart *vs.* Ledoux, S. C.)..... 167

SALE :—The writing required by Art. 1235 of the Civil Code to be signed by the party sought to be bound, is held to be so signed in the case of bargain and sale of goods, evidenced by the bought and sold notes, signed by the broker who negotiates the sale. And the broker may prove, by parol evidence, his authority to act for the parties, and the retention by the parties of the contract notes so signed is evidence of the authority of the broker to bind them in the form therein stated. (Le[illegible] et al. *vs.* Hope & al., S. C.)..... 19

" :—The, of a horse by a party styled in the declaration as "merchant" to a party styled in the declaration as "Esquire," may be proved by parol evidence, where it is established that the alleged purchaser has had possession of the animal. (Cox, appellant, and Patton, respondent, Q. B.) 53

" :—The authority contained in a deed of donation, to sell the property therein described if *experts* should deem it advantageous to do so, could be legally

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acted on, on *experts* so reporting, without the necessity of any subsequent judicial proceedings. (Leclerc & al., appellants, and Beaudry, respondent, P. C.)..... 178

SALE:—In the case of a, of a given quantity of seed by sample, where the bulk proves inferior to sample, the purchaser is not bound to accept the part which is equal to sample but may repudiate the whole purchase. (Desmarteau & al. *vs.* Harvey, C. of R.)..... 244

" :—A clause in a deed of, of an immoveable, to the effect that such of the vendors as sign bind themselves to obtain the ratification of the deed by an absentee, is a condition precedent, and no action can be brought to recover any portion of the purchase money until such ratification has been effected. (Lenoir *vs.* Desmarais & *vir*, C. of R.)..... 308

SEPARATION DE CORPS:—*Vide* FAITS ET ARTICLES.

SERVANT:—In an action for wages, the oath of the master will be taken as evidence of the nature of the engagement, and when it is established by such oath that the servant has broken his engagement and left without leave, he will forfeit his wages for the period he actually served. (Cyr *vs.* Cadieux, C. C.)..... 173

SIGNIFICATION:—*Vide* TRANSFER.

SUBROGATION:—Before the Code, legal subrogation was acquired without demand in favor of a purchaser who (although bound to do so by his deed) pays the hypothecary claims on the property, and this right is not affected by his subsequently selling the property and its being sold judicially at the instance of a hypothecary creditor, whose claim was antecedent to the date of such purchaser's original title. (Lavallée *vs.* Tétreau, and Roy, opposant, S. C.)..... 248

SUPPLEMENTARY DEMAND:—A plaintiff has no right to fyle, even by permission of the Court, supplementary or additional reasons in support of his demand, when they are based on new facts arisen since the action was brought. (Gadbois, appellant, and T[illegible] & al., respondents, Q. B.)..... 271

TIERS SAISI:—A, who declares on oath that he has nothing in his possession belonging to the defendant, and afterwards, when examined as a witness, admits having a number of articles of value, but refuses to give any particular or detailed statement thereof, will be condemned as the personal debtor of the plaintiff for the value of such articles. (Grant et al. *vs.* Teasdale and McShane, jr., T. S.)..... 163

TOLL-BRIDGE:—*Vide* TRANSFER.

" " :—No action lies, on the part of the proprietor of a, to cause the demolition of a bridge in course of erection within his limits. (Girard *vs.* Bélanger et al., S. C.)..... 393

TRANSFER:—A transfer of a hypothecary claim, which has been registered and signified to the *tiers détenteur* of the property, but not to the debtor, is sufficient to enable the *cessionnaire* to sue *en declaration d'hypothèque*, and the want of signification to the debtor cannot be pleaded by him, as defendant *en garantie*, in the action, against the right of the *cessionnaire* so to sue. (Pacaud, appellant, and Beauchene et al., respondents, Q. B.)..... 70

" :—It is necessary to serve on the debtor a copy of the *acte* of signification as well as a copy of the transfer itself. (McLennan *vs.* Martin, and Martin, plaintiff *en faux*, C. C.)..... 78

" :—A memorandum *sous seing privé*, by which a printing company authorized its president to collect a debt due to the company, and which stated that such debt had been transferred to the president for value received, was not a transfer in favor of a Bank of which the *cessionnaire* was also president. And even if it were, it could not avail against a notarial *bonâ fide* transfer to another party for value, duly signified, acted on by the debtor; and specially so, when the memorandum was not even signified. (The City Bank *vs.* White et al., S. C.)..... 141

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TRANSFER:—A memorandum *sous seing privé*, by which a printing corporation authorised W. (the president) to collect a debt due to the corporation, the memorandum stating that such account had been transferred to him for value received, could not be considered a transfer to a banking corporation, of which W. was also president, though the course of dealing indicated that such was the intention of the parties. (The City Bank of Montreal, appellant, and White et al., respondents, Q. B.)..... 335

":—Even if such memorandum could be considered a transfer to the banking corporation, the latter not having used diligence to collect the debt, and there having been no signification upon the debtor, had no claim against a subsequent transferee, buying in ignorance of such alleged previous transfer by notarial deed duly signified, and acted upon by the debtor by payment of the debt to such subsequent transferee. (Do. Do.)..... 335

TUTOR, *appointment of*:—*Vide* PRACTICE.

":—The death of the mother appointed joint tutor with her second husband to her children by her first marriage, dissolves the joint appointment, and consequently the second husband ceases to be tutor. (Breault, *vs.* Barbeau & al., and Breault, Tut. *ad hoc*, Int., C. of R.)..... 48

":—It is not competent to a minor become major, or his assignee, to sue his former tutor for a specific sum of money alleged to be due, under an account made out by the tutor during his administration as tutor, and apparently due under such account; the only action which the minor has under the circumstances being the action to render account. (Bureau *vs.* Moore, S. C.)..... 235

USUFRUCTUARY:—*Vide* BANK OF MONTREAL.

":—A simple, of an immovable situate in the *censive* of the seigniory of Montreal, has the right to demand from the seminary of Montreal the commutation of the property from seigniorial dues. (Le Seminaire de St. Sulpice *vs.* Durocher, S. C.)..... 330

WAGES:—A servant whose month terminated on the 8th September, and who left on the 9th without leave or previous proper notice, cannot sue for any portion of the month's wages. (Berlinguette *vs.* Jacob, C. C.)..... 28

":—*Vide* SERVANT.

WILL.—An executor cannot be appointed by the Court in the place of one who has ceased to act, in the case of a will made previous to the Code. (Exparte Chalut et al., and Persillier dit Lachapelle, S. C.)..... 44

":—Where a testator is proved to have been insane, the existence of a lucid interval requires the most conclusive proof to establish it; and the validity of a will made during an alleged lucid interval will not be presumed in the absence of such testimony. (Close *vs.* Dixon et al., S. C.).. 59

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